

## Chapter 4

### **ALTERNATIVES TO JACKSON: THE EXAMPLE OF BEFORE-THE-EVENT INSURANCE**

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**4.1** - This chapter looks at the Jackson report through the lens of but one of its chapters in order to make wider points about the problems the report identifies and the solutions it proposes.<sup>1</sup> Although the focus is upon before-the-event insurance (BTE), the effect of reforming this particular means of obtaining legal representation could have wide repercussions upon the litigation of personal injury claims. Whether extending BTE could lead to an increase in access to justice is a question which may divide readers; whether changing BTE could provide a more workable solution than some of those put forward by Jackson may provoke a more favourable response.

#### **How costs have shifted**

**4.2** - Following the election of a new Government intent upon making substantial cuts in public expenditure, it would not be realistic to expect any increase in public funding to enable civil cases to be litigated. Legal aid for personal injury claims already seems to be a relic from the remote past, and there is no suggestion that it should be revived. Legal aid in personal injury may indeed have cost the Treasury little (partly because of the welfare benefits that were recovered from insurers), but the apparent exponential increase in expenditure made it an easy target. Even if legal aid had continued in place, there is good reason to believe that it would now be a vestige of its former self. The current prescribed rates for assistance do not meet expenses, and financial eligibility has collapsed to

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<sup>1</sup> For more general reviews see AS Zuckerman, 'The Jackson Final Report on Costs – Plastering the Cracks to Shore up a Dysfunctional System' (2010) 29 (3) Civil Justice Q 263; contrast M Lyons, 'Jackson – An Initial Response' [2010] J Personal Injury Law 74.

about 36% of the population.<sup>2</sup> A former President of the Association of Personal Injury Lawyers (APIL) notes:

In effect 'public funding' is now a 'no win, lower fee' conditional fee agreement for the socially excluded only, but without a success fee for taking the risk of losing.<sup>3</sup>

He suggests that by now, in an unreformed system, solicitors in high value cases would have been forced to fund litigation by using contingency fees with clients paying lawyers from the damages they were awarded. As for the mass of low value claims, solicitors would have abandoned the work and left it to unqualified claims assessors. We would have a very different tort system.

**4.3** - If, therefore, no increase in public expenditure is on any political agenda, we must turn to private funding if we seek to make it easier to obtain civil redress. The basic shifts in the economic burden of personal injury litigation in recent years are clear: the removal of legal aid transferred costs from the state to claimants; the introduction of conditional fee agreements (CFAs) with recoverability of success fees and after-the-event (ATE) insurance premiums, in effect, transferred the costs to insured defendants; and now if, as Jackson proposes, success fees and ATE are to be removed from the equation then both claimants and their lawyers will run increased risks. Claimants' fears of having to meet defendants' costs will be reduced by qualified one way cost shifting, and their fears of having to pay their own solicitors' success fees are supposed to be offset by an increase in general damages.<sup>4</sup> With these proposals in the background, how ought we to view the possibilities for BTE?

**4.4** - In his preliminary report Jackson was enthusiastic about BTE, tentatively concluding that promoting its substantial extension would be in the public interest. However, eight months later this support evaporated and his final report is largely non-committal. He makes no recommendation either for or against the use of BTE in personal injury cases, although as an add-on to household insurance he considers it a beneficial product which should be encouraged. He notes that, as with all other insurance, it would enable the many to pay for the few. However, overall he gives little space to BTE, devoting only nine of his 371 page report to the subject and making only one recommendation about it out of over a hundred made in total. Why did he not consider in more detail the

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<sup>2</sup> This is actually a 7% increase compared to two years previously, but this reflects only a downturn in the economy not an increase in eligibility rates. See Jackson chapter 7 para 3.1.

<sup>3</sup> D Marshall, 'A Short History of the Costs Wars' (2010) 20 (4) APIL Focus 24.

<sup>4</sup> But see the empirical analysis carried out by a leading London law firm of its cases exceeding £250,000 showing that claimants in these serious injury cases would lose on average £47,000. J Chamberlain, 'Stewart's Law Response to Jackson on Costs' <http://www.stewartslaw.com/stewarts-laws-response-to-final-report-by-lj-jackson.aspx>.

possible extension of BTE in relation to personal injury especially following his radical proposals to change existing sources of funding? Before answering this question, we shall look briefly at the remarkable growth of BTE and the type of personal injury cases that are presently being litigated.

## **The development of BTE in an expanding claims market**

**4.5** - Although BTE has been widely used in other countries for many years, it was first sold in the UK only in 1974.<sup>5</sup> There had been little demand for it partly because people were often unaware of the risk of incurring legal costs and, in any event, there was a competitor - the protection offered by legal aid. Insurers also faced difficulties in pricing the insurance when the cost of litigation was much less predictable in the UK than in other countries. Given the relatively few years during which BTE has been offered, it is remarkable that eligibility for its benefits has expanded so rapidly: almost 3 in 5 adults now have some form of this insurance.<sup>6</sup> Over 18 million drivers hold it as part of their motor insurance, and 14 million householders as part of their buildings and contents insurance. In total these number about 22 million people.<sup>7</sup>

**4.6** - In addition, about 7 million workers are entitled to benefits resulting from their trade union membership. This is not strictly a form of BTE but instead is a stand alone cover for personal injury utilising the ATE and success fee regime offered by CFAs. Although the number of people in trade unions has declined, unions have extended their personal injury services to the family of each member so as to cover accidents and diseases away from the workplace. This represents a substantial potential increase in access to the legal system. It can be argued that union members and their families do not need BTE in personal injury cases.

**4.7** - The wide penetration of the market by BTE has been achieved largely because it has been sold as an additional benefit to be included in existing motor liability or household insurance. In effect, there has been a great deal of inertia selling. Few people opt to take out stand alone BTE policies, but they commonly accept legal expenses cover as part of a wider package. A factor which may have led to the more recent growth of BTE has been the attempt by certain composite insurers to pre-empt the

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<sup>5</sup> AE Holdsworth, 'The Experience in England' in W Pfenningstorf and AM Schwartz (eds), *Legal Protection Insurance* (American Bar Foundation, Chicago, 1986) 14 and M Kilian, 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience' (2003) 30 (1) *J Law and Society* 31.

<sup>6</sup> FWD, 'The Market for "BTE" Insurance' (Ministry of Justice, 2007) para 3.3.

<sup>7</sup> Mintel, 'Legal Expenses Insurance' (Mintel, April 2008).

possibility of claimants seeking expensive assistance from solicitors operating on a CFA and ATE basis. For whatever reason, the growth of BTE coverage has been remarkable.

**4.8** - With the growth of BTE there has been an increase in the number of claims brought for personal injury, although this must not be taken to imply that there is a clear causal connection between the two. In fact the increase in claims has been very uneven over the years, and has been much misunderstood. There is a popular misperception that a 'compensation culture' attitude in the last ten years or so has led to a sustained increase in the number of claims. In fact, in 2008 claims were roughly at the same level as they were seven years earlier: the statistics deny any suggestion that the introduction of CFAs in 2000 led to a 'have a go' world and an increase in litigation.<sup>8</sup> The comprehensive figures from the Compensation Recovery Unit I discuss elsewhere show that there was no such increase in claims in the early years of this new millennium.<sup>9</sup>

**4.9** - However, it is true that claims have risen by ten per cent in the last two years. More importantly, it is also true that in the last forty years or so claims have increased substantially: they have more than tripled from an estimated 250,000 in 1973 to 861,000 in 2009-10,<sup>10</sup> and represent one claim each year for every 73 people in the country. Motor claims have increased at almost twice that overall rate rising from 102,000 to 674,000. They have increased by 22 per cent in the last two years. With the continuing decline in work accident claims, motor cases now constitute 78 per cent of all the claims made. BTE is thus operating in a much expanded litigation system from when it first began, and the number and proportion of motor claims has risen very considerably. If any reform were specifically directed at road traffic accidents it could have a major effect upon the system overall. Jackson should have concentrated his attention in this area.

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<sup>8</sup> Better Regulation Task Force, 'Better Routes to Redress' (Cabinet Office Publications, London, 2004); A Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *Modern Law Review* 349.

<sup>9</sup> R Lewis, A Morris and K Oliphant 'Tort Personal Injury Claim Statistics: Is there a Compensation Culture in the UK?' (2006) 14 *Torts Law Journal* 158 and [2006] *J Personal Injury Law* 87; J Hand, 'The Compensation Culture: Cliché or Cause for Concern?' (2010) 37 *J Law and Society* 569.

<sup>10</sup> The current figure is published by the Compensation Recovery Unit [www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/](http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/). The 1973 figure was estimated by the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (chairman: Lord Pearson, cmd 7054, 1978) vol 2 paras 59 and 63.

## The potential reform

**4.10** - The suggestion considered here is that there could be an extension of legal advice if, when forced to purchase insurance against liability in tort, every motorist were also required to take out BTE as an addition to the policy. The insurance would benefit not only the policyholder and the passengers, but also any pedestrians or other road-users injured by the insured vehicle. The mechanism for effecting the change – compulsory third party insurance against motor liability – already exists. As others have often noted,<sup>11</sup> it would be relatively easy to build upon it. By doing so access to justice could be secured for three out of four claims presently brought.

**4.11** - A proposal along these lines was included as part of wider reforms put forward by the Bar's Contingency Legal Aid Fund (CLAF) Group. However, the Group proposed that BTE be extended in a much more ambitious manner from that being discussed here. The CLAF scheme sought to include not only motorists but also employers and occupiers and others. These latter groups would each insure respectively for the benefit of those injured at work, or on premises, or elsewhere. Even those injured in hospital would be covered. In addition, the Group suggested that protection could be extended to include, for example, those suffering a loss as a result of the act of a person required to have professional liability insurance cover. According to the Group the overall result would be that

... access to justice for the general public would be increased at no cost to the taxpayer and with none of the disadvantages inherent in CFAs and many additional advantages.<sup>12</sup>

However, not only is this a very much broader and more complex scheme than that considered here but it is also based on mistaken assumptions. For example, it is not the case that occupiers must insure as a matter of law. Instead of supporting this broad scheme, the suggestion here is that consideration be given to a road traffic case scheme only, albeit with many of the same goals in mind.

**4.12** - The main advantage of a motor scheme would be that those injured will have ready access to legal advice and a fund to cover their costs should their case fail. (Union members and their families, being already protected, could be excluded from the compulsion to purchase BTE separately.) There would then be less need than at present to

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<sup>11</sup> P Bartrip, 'No-fault Compensation on the Roads in Twentieth Century Britain' (2010) 69 Cambridge LJ 263. Lord Neuberger MR recently has argued that no-fault should again be examined by policymakers if we fail to achieve proportionate costs in personal injury litigation: [www.judiciary.gov.uk/docs/speeches/mr-piba-conf-march-2010.pdf](http://www.judiciary.gov.uk/docs/speeches/mr-piba-conf-march-2010.pdf).

<sup>12</sup> [www.barcouncil.org.uk/assets/documents/CCF%20Paper%202%20April%202009.pdf](http://www.barcouncil.org.uk/assets/documents/CCF%20Paper%202%20April%202009.pdf) at para 123 ff.

arrange unsatisfactory or expensive funding such as loans to claimants to cover the cost of their disbursements. Nor would there be the same need to resort to what would be an excessively complicated post-Jackson CFA world. As an example of that complexity we are asked to accept that claimants will make reasoned choices between law firms based on their competitive marketing of success fee levels. This is hard to imagine. Indeed, in a key sentence in the report, Jackson admits that there would be difficulties in devising such advertising. Instead he sees the future as inevitably involving claims brought on a contingent fee basis:

Clients will no doubt find it easier to grasp the concept of a deduction of a percentage of their damages and solicitors will find it easier to advertise on that basis.<sup>13</sup>

The difficulties involved in Jackson's proposal for a regulated system of contingent fees are not discussed here. However, that proposal is a major alternative with which the possibilities for BTE should be compared.

**4.13** - Following an increase in ready access to legal advice, the second advantage claimed for the BTE proposal is that the system would be more efficient than at present because the costs of pursuing the case would be more closely monitored by the claimant's side. Unlike claimants at present, BTE insurers would be directly affected by the costs of bringing the case. They would be able to sift claims, using a merits test to weed out those which should not be pursued further. They would then be able to channel claimants to those who specialise in providing the representation needed. A good comparator, from this viewpoint, is the way in which trade unions at present enable injured workers to gain expert advice from the handful of specialist firms to which unions direct cases. What are the flaws in such a comparison and where might the difficulties with an extension of BTE lie?

## **The difficulties**

### *Choice of lawyer*

**4.14** - At present BTE limits the freedom to choose one's own lawyer because claimants are directed to use firms which are on its approved panel.<sup>14</sup> These firms may be located a considerable distance from the claimant's home. Firms are selected for the panel after a closed bidding process intended to ensure that insurers are exposed to the lowest

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<sup>13</sup> Chapter 17 para 2.5.

<sup>14</sup> . Blundell, 'Free to Choose? BTE Legal Expenses Insurance and Freedom of Choice' [2004] J Personal Injury Law 93.

possible risk. In return for limiting their costs and ensuring that the cases are dealt with efficiently, panel firms are guaranteed a flow of work from the BTE insurer. There are said to be strict service level agreements and audits of the work carried out. At present these firms also pay the insurer a referral fee for each case received. Many non-panel solicitors object to these features. However, one claimant lawyer has recently argued strongly that these criticisms are without foundation and merely reflect firms' own economic interests.<sup>15</sup> Here it is suggested that, for several reasons, too much weight should not be placed upon the argument that BTE unduly limits the claimant's freedom to choose his solicitor.

**4.15** - Firstly, it is doubtful whether many claimants in any event make informed choices when selecting their solicitor. In spite of extensive advertising, there is little useful information enabling them to discriminate between firms easily. Where guidance exists, in practice it is rarely used. Secondly, the freedom to choose is restricted in other situations and yet attracts little criticism. In particular, when workers take advantage of the legal assistance offered by trade unions they are similarly directed to specific firms. The restriction here is seen in a positive light because it enables the designated firms to establish particular expertise in the specialised cases referred to them. If (as is discussed below) BTE claimants were all to be represented as well as workers are by these trade union firms<sup>16</sup> there would be little objection to their lack of choice. Thirdly, there is some recent evidence that BTE insurers have changed their view and are now more prepared to accept a claimant's choice of lawyer provided the firm is experienced in such work.<sup>17</sup> Indeed this freedom is already supported in law, at least from when formal proceedings are issued.<sup>18</sup> In spite of this, it must be recognised that injured people in practice are still encouraged to accept a panel solicitor even though it may not always be convenient for them to do so.

**4.16** - Jackson is equivocal in his support of choice. On the one hand, he is prepared to support an amendment to the regulations to reinforce the right to choose from when a letter of claim is first sent rather than from when formal proceedings are issued. On the other hand, he qualifies this view by stating that this change is only to be made if its impact upon premiums would be modest. From what has been said above, the problem

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<sup>15</sup> . Harvey, 'Before the Event Legal Expenses Insurance - Why do so Many Seek to Close This Access to Justice Gate?' [2010] J Personal Injury Law 93. For an even more robust defence see P Smith, 'Panel Solicitors: the Legal Expense Insurer's Perspective' (2004) 14 (3) Apil PI Focus 15 - 16.

<sup>16</sup> For the success of such specialist firms see H Genn, *Hard Bargaining: Out of Court Settlements in Personal Injury Actions* (Clarendon Press, Oxford, 1987).

<sup>17</sup> J Rowley [2010] J Personal Injury Law C35. Contrast the evidence given to Jackson by the Law Society: Jackson Report chapter 8 para 6.2.

<sup>18</sup> The 1987 Legal Expenses Directive (87/344) is supported domestically by the Insurance Companies (Legal Expenses Insurance) Regulations 1990 SI No 1159.

of choice may not now be as significant as some may suppose, although the pressure to accept a panel solicitor remains.

### *Quality of Legal Work*

**4.17** - There are fears that BTE lawyers will not represent their clients as vigorously as those operating on a different fee basis. The TUC states that their quality of service is suspect. In part this is because of conflicts of interest that may arise. For example, in litigation in 2001 it was estimated that Norwich Union could be both representing the defendant driver and funding the claimant driver in just over six per cent of all its claims.<sup>19</sup> More generally, there is concern that BTE lawyers may be too ready to compromise a case at a low figure in order to avoid the possibility of defeat even though the case has a high chance of success. They thereby safeguard their own costs and ensure that there will be no call upon the resources of the BTE insurer. The result has been compared to third party capture whereby defendant liability insurers directly contact injured people and settle their claims at a low level, assisted by the claimants' lack of legal representation. This comparison may be unfair: an undue readiness to settle may affect firms litigating on fee bases other than BTE, including where a conditional fee is involved. Even within trade union firms, although under-settlement is not a feature, regular assessments are made of the merits of proceeding further with a case, and there is awareness of who is ultimately paying the bill. Contrary to these criticisms concerning the quality of service provided, one study concluded that overall there were distinct advantages in using panel solicitors as opposed to those arranged via claims referral companies.<sup>20</sup>

**4.18** - Although consumers value face to face contact with their lawyer,<sup>21</sup> the BTE panel solicitor may be far removed from the area where the claimant lives and contact may be confined to mail and telephone calls. The physical distance between the claimant and his lawyer has been said to affect the quality of the work done, or at least the claimant's perception of the how well he is being treated. In their defence, insurers argue that cases are more efficiently dealt with by a specialised team able to use e-mail and telephone contact albeit at some distance from the claimant. This may be especially the case when dealing with the mass of low value RTA claims. However, in the few cases which involve serious injury the potential loss of personal contact could be important. The claimant could ensure that contact is possible by insisting upon choosing a local lawyer.

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<sup>19</sup> *Sarwar v Alarm* [2001] EWCA Civ 1401; [2002] 1 WLR 125.

<sup>20</sup> P Abram, 'In Sure Hands?' (University of Westminster, 2002).

<sup>21</sup> J Robins, 'Shopping Around: What Consumers Want from the New Legal Services Market' (Jures, June 2010).

**4.19** - Finally, there is concern that the financial limits set by the BTE policy may be too low, and this restricts the work that can be done for the claimant and, in particular, hampers the ability to take matters to trial. Commonly a policy may confine the insurer's liability to a ceiling of £50,000, and also excludes cover for certain types of claim such as clinical negligence or disease. However, these limits are much less significant here because they are usually sufficient for the mass of fast track motor claims of concern in this chapter. In addition, the level of cover could be increased by the insurer if there is a high chance of success. However, this may be only a theoretical option because these are just the cases where a speedy low cost resolution might be expected. Overall, as yet, there is no empirical evidence to support these various fears about the quality of work done in BTE cases.

### *Cost of Insurance*

**4.20** - At present the premiums for add-on BTE are exceptionally low, being only about £20 for motor and slightly less for household policies. By contrast, the typical premium charged for ATE in a motor case is about £350, and it is almost double that amount for other types of claim. Premiums for industrial disease cases are even higher costing £1,000 each. If we look at premiums for BTE in Europe the cost is much higher than in the UK because the scope of the insurance cover provided is much wider and costs are not recoverable. The typical premium for a stand alone policy is over £200. These figures are sometimes cited to illustrate the fear that the cost of BTE insurance could rise significantly if the present regime were to change. Although he gave no detailed figures, Jackson was persuaded that this might happen. There are several reasons for his fears.

**4.21** - Firstly, if referral fees are abolished, as Jackson proposes, insurers would suffer a significant loss and this would have to be reflected in the premiums. The extent of the existing subsidy is unknown, although referral fees have been said to be the major source of BTE profit.<sup>22</sup> However, the fee debate is far from closed and opinion on all sides is divided. At present it is very much in doubt whether these fees will indeed be abolished.<sup>23</sup>

**4.22** - Secondly, it is said that premiums may rise because, at present, insurers are not exposed to the true risks involved in providing BTE insurance and this could change. The argument is that, having bought the insurance only as an add-on to another policy, people are unaware of its existence and do not claim upon it. Attitudes could change if BTE were to

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<sup>22</sup> FWD, 'The Market for "BTE" Insurance' (Ministry of Justice, 2007) at 4A II 4.

<sup>23</sup> N Rose, 'Crunch Time on Referral Fees' [2010] 67 *Litigation Funding* 3.

be emphasised more as it would if it were made compulsory, and if other funding mechanisms were made less attractive, as Jackson proposes. Although this argument may have some force in connection with household insurance, it is much weaker if only motor insurance is considered. Following a road rather than a home accident an insured is much more likely to visit a solicitor who, in turn, is legally required to inquire of the client whether BTE insurance exists before other forms of funding are considered. If there is doubt, it is now standard practice to search for and examine the relevant policies. Because of this Jackson does not believe that ignorance of the cover which has been purchased is an obstacle to the use of BTE. Contrary to the limited exposure argument, therefore, it is suggested here that the take-up of BTE policies in motor cases does not leave insurers benefitting significantly from policies where there might be liability for costs but where indemnities are not being sought.

**4.23** - There is second, stronger, argument supporting the claim that BTE insurers are not facing the true risks. This is that in many BTE cases the insurer merely passes on the claim to its panel solicitor, and thereafter it is dealt with on a CFA basis, with ATE being taken out. The risks of losing thus fall upon other than the BTE insurer. If it were otherwise it is said that BTE premiums would need to rise substantially. However, the extent to which CFAs and ATEs are being used when there is also BTE is uncertain although DAS, a leading BTE provider, is now said to require solicitors to act using a CFA. In theory it could be argued that there should be few such cases because the Court of Appeal considerably restricted the options in most cases where BTE was available, especially if the claim was for less than £5,000.<sup>24</sup> However, subsequent litigation resulting in a costs war over this decision has not clarified the position. If Jackson were implemented, success fees and ATE premiums would no longer be recoverable anyway, and recourse to BTE would then become more important.

**4.24** - To date there has been no detailed empirical investigation into how BTE operates in practice, and how it is in fact financed. This means that no estimate can be made of the extent that premiums would have to rise if BTE were to be used in all road accident claims. Would insurers really be exposing themselves to a much increased liability for the unsuccessful cases? Given the present very high success rate of motor claims, the prospect of insurers being liable for costs is confined to a very small percentage of all actions brought. Limiting the reform of BTE to road traffic cases means that insurers would not be exposed to problematic claims such as those for disease or for clinical errors. Nor could they be

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<sup>24</sup> *Sarwar v Alarm* [2001] EWCA Civ 1401; [2002] 1 WLR 125. However, the failure to inquire into BTE was ignored in relation to success fees, but not ATE, claimed under a CFA in a low value case in *Kilby v Gawith* [2008] EWCA Civ 812; [2009] 1 WLR 853. See J Rowley, 'Is it Too Soon to Reconsider Prematurity?' [2010] J Personal Injury Law 39.

sued for other than personal injury as happens in other European countries where claimants can even rely upon BTE to begin a class action in a commercial dispute.<sup>25</sup> Instead of an increase in costs, it could be argued that there would be savings and efficiencies produced by dealing with all RTA cases via compulsory BTE. Indeed at present Jackson notes that, in spite of the low premiums charged, BTE insurers in motor claims receive more money than they pay out. Their position would be further safeguarded by one way cost shifting. As a result, an affordable increase in the premiums collected from all drivers may be sufficient to fund the few failed claims that are brought. Overall, therefore, the rise in the premium required may be much lower than has been feared. Of course, because of the much larger group involved in paying these premiums, they would be substantially lower than those presently levied for ATE.

## Conclusion

**4.25** - As already noted, Jackson refused to make any recommendation either for or against BTE although initially he was attracted by the potential benefits arising from the wide ranging CLAF scheme. However, he specifically rejected the idea that BTE could be made a compulsory feature of motor insurance. The idea, he says, met with strong opposition.

**4.26** - However, these opponents may not have had in mind the radical changes to funding contained elsewhere in the Jackson report. For example, in spite of the many problems of ATE, it has been thought reckless to remove it for those do not have BTE.<sup>26</sup> In addition, Jackson noted that there was significant support for an extension of BTE. Both the Forum of Insurance Lawyers and the Council of Circuit Judges were in favour of compulsion, whilst the Association of Personal Injury Lawyers supported the use of BTE provided that the freedom to choose one's own lawyer was not curtailed. The Conservative party, whilst welcoming Jackson's proposals, said that it would work with the Bar to improve the CLAF scheme and that it would discuss with insurers the extension of BTE.<sup>27</sup> This approach was further endorsed in a report for the Prime Minister by Lord Young who commented that extending BTE might be a fair solution to the problem of extending access to justice.<sup>28</sup> The Government has said that it would welcome a change of culture so that

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<sup>25</sup> Case C-199/08 *Eschig v Uniqua Sachversicherung AG* [2009] ECR I-2085.

<sup>26</sup> N Kinsella, 'Evolution not Revolution' in J. Robins (ed), *Closing the Justice Gap* (Solicitors Journal, London, 2010).

<sup>27</sup> See the then Shadow Justice Minister's article, Henry Bellingham, 'Worth Fighting For' in J Robins op cit.

<sup>28</sup> Lord Young, 'Common Sense, Common Safety' (HM Government, 2010) p 22.

greater use is made of BTE but in its Consultation Paper on the reforms it does not mention the possibility of making such insurance compulsory.<sup>29</sup>

**4.27** - By confining the CLAF proposal to road traffic claims only, the provision of compulsory BTE for drivers would enable three quarters of all the tort claims made for personal injury to be litigated efficiently and with ready access to legal advice. In a post-Jackson world where success fees and ATE premiums are not recoverable, the provision of BTE to those who have no other form of cover offers an acceptable solution to what otherwise could be a very different (and perhaps contingent fee) world. The solution is not without its problems, but it merits a more detailed analysis than Jackson gave it.

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<sup>29</sup> Ministry of Justice, 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales' (Consultation Paper CP13/10, Cm 7947, 2010) section 3.5.