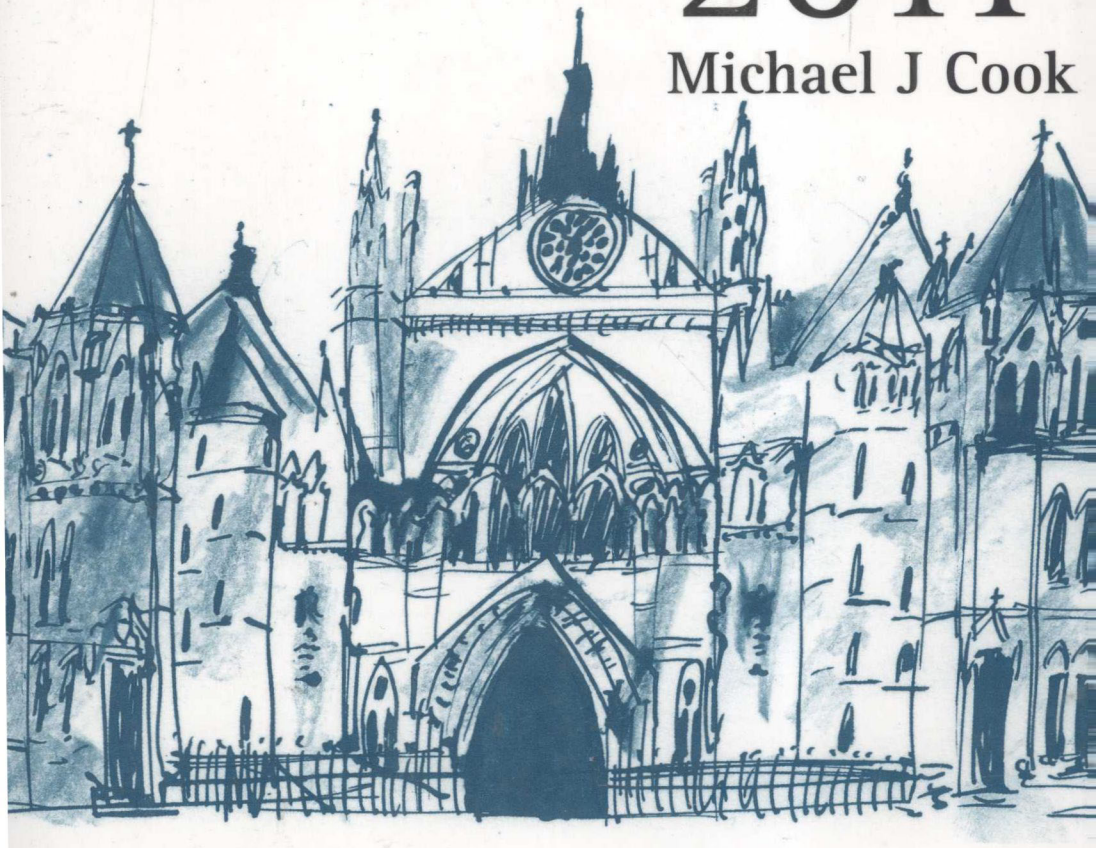
COOK *on* COSTS

'The seminal textbook on costs'
Lord Justice Ward in *Widlake v BAA Ltd*

2011

Michael J Cook



A guide to legal remuneration in civil contentious and non-contentious business

LexisNexis®

Cook on Costs 2011

A guide to legal remuneration in civil contentious and non-contentious business

Michael J Cook

LexisNexis®

Members of the LexisNexis Group worldwide

United Kingdom	LexisNexis Butterworths, a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, London, WC2A 1EL, and RSH, 1–3 Baxter's Place, Leith Walk Edinburgh EH1 3AF
Australia	LexisNexis Butterworths, Chatswood, New South Wales
Austria	LexisNexis Verlag ARD Orac GmbH & Co KG, Vienna
Benelux	LexisNexis Benelux, Amsterdam
Canada	LexisNexis Butterworths, Markham, Ontario
China	LexisNexis China, Beijing and Shanghai
France	LexisNexis SA, Paris
Germany	LexisNexis Deutschland GmbH, Munster
Hong Kong	LexisNexis Hong Kong, Hong Kong
India	LexisNexis India, New Delhi
Italy	Giuffrè Editore, Milan
Japan	LexisNexis Japan, Tokyo
Malaysia	Malayan Law Journal Sdn Bhd, Kuala Lumpur
New Zealand	LexisNexis NZ Ltd, Wellington
Poland	Wydawnictwo Prawnicze LexisNexis Sp, Warsaw
Singapore	LexisNexis Singapore, Singapore
South Africa	LexisNexis Butterworths, Durban
USA	LexisNexis, Dayton, Ohio

Published by LexisNexis Butterworths

A CIP Catalogue record for this book is available from the British Library.

First published 1991 ISBN: 978 1 4057 4989 3

Printed and bound in Great Britain by William Clowes Ltd, Beccles, Suffolk

Visit LexisNexis UK at www.lexisnexis.co.uk

Cook on Costs
2011

Preface

Welcome to the largest edition yet – I say that not with pride but regret. Like Topsy it just keeps growing. I hope it still fits in a brief case.

The publishers tell me the purpose of a Preface is to tell potential readers why they should buy the book. I shall risk incurring their wrath by giving you two reasons not to buy it this year. Do not purchase if you are expecting an exposition on Lord Justice Jackson's Review of Civil Litigation Costs or on Lord Young's report: *Common Sense: Common Safety* which deals with costs in the perceived compensation culture. I have summarised them both in two appendices, but this is a practical book about civil costs as they are – it is not about what costs law, practice and procedure might become, let alone what I think they ought to be. This time next year the Jackson/Young juggernaut may have changed the costs landscape, but in the meantime there have been more than enough developments to justify purchasing *Cook on Costs 2011*. That should keep the publishers happy.

I have always thought that a little of Mr Gradgrind goes a long way, and have tried to impart an understanding as well as a knowledge of costs. This book arose when after many years of speaking to the profession about costs I realised that my various talks amounted to half a book. Butterworths said if I would write the other half of the book they would be happy to publish it. So I did and they did nearly 20 years ago. I also took the view that in the same way that a speaker has a duty to his audience to keep them awake, an author has no less a duty to retain the interest of his readers and to apply sugar coating to the pill where needed.

This edition embraces two aspects of the changing costs scene. First, it is now increasingly difficult for any one person to have practical expertise in every aspect of civil costs. For example, I forget how many decades have passed since I last attended on a taxation of costs, as they then were, and Chapter 30 has for several years leant heavily on costs lawyer, as he now is, Harry Birks. I have now enlisted the help of five specialists in particular areas of costs. I acknowledge them on page xiii and thank them here.

The other sign of the times is that the chapter on conditional fees has now taken on a life of its own and become PART VII with no less than five user-friendly chapters thanks to David Chalk.

Through the wonders of modern publishing the law is as at I November 2010.

Michael Cook

Burwood Park

Guy Fawkes Night 2010

Foreword to the first annual edition

For litigation practitioners, the issue of costs used to be a relative afterthought. However, over the last decade the pendulum has swung to the point where the funding of litigation – whether the case can be funded and who pays what to whom at the end – has become a new and essential skill for litigators everywhere.

Fortunately *Cook on Costs* has been there in recent years to help the profession steer its way through the costs maze. But even Michael Cook, whose authorship on this complex subject has always kept us up-to-date, has appreciated that the current pace of change is so fast that an annual edition is now required. So that is what he has produced in the first annual edition of *Cook on Costs*. This is an indispensable text for every solicitor, whose own understanding of costs and the funding of litigation by conditional fees, the state or otherwise, is essential to the overriding need to ensure that costs issues are fully explained to and understood by the client.

Like my predecessor, Phillip Ely, who wrote the foreword to the excellent first edition, I am delighted to commend to all firms the timely arrival of *Cook on Costs 2000*.

Michael Napier

President

The Law Society

Foreword to the First Edition

It is my privilege as President of the Law Society to commend Michael Cook's very practical guide to all aspects of solicitors' costs (other than criminal costs).

He modestly suggests that the book does not contain any facts and figures that cannot be found elsewhere. Recognising the ultimate and total dependence of solicitors on the costs which they receive, he presents all those facts and figures with clarity borne of experience. This book adds to the major contribution which Michael Cook has already made to the profession on this vital topic.

It is also a clear response to the need for a definitive and manageable guide to an area which requires such practical and positive skills.

I hope that it will find a place in every solicitor's office.

October 1991

P T Ely

President

The Law Society

Preface to the First Edition

When the publishers asked me to write a preface I cavilled on the two grounds that no-one reads prefaces and they serve no useful purpose. I was told that the purpose is to explain the aims and intention of the work; in other words, why I have written the book and why you should read it. Fair enough. My late partner, Lionel Cranfield, at the end of some heavy litigation used to say, 'Now we come to the interesting part – the costs!'. In the quarter of a century since Lionel was killed in the hunting field, the profession has become increasingly aware that money is the life-blood of a solicitor's practice, but I continue to be perplexed that, in spite of this realisation, most solicitors and their clients lose out financially because of the profession's basic lack of understanding and interest in all aspects of costs. In a College of Law survey of the areas of skills on which solicitors wished the Law Society's new Legal Practice course to be based, costs did not even appear in the list.

And that is why I have written this book. It does not contain any facts and figures you cannot find elsewhere – apart from it being illustrated from my collection of unreported cases – but I have tried to write about costs in an interesting, coherent and digestible way. My aim in writing the book is therefore to impart to you the understanding of, and enthusiasm for, costs that Lionel Cranfield aroused in me all those years ago.

I much appreciate the kindness of Philip Ely in writing a foreword to the book in his year as President of the Law Society. I am seriously indebted to my old friend Master Michael Devonshire of the Supreme Court Taxing Office for reading the manuscript of the book and making many useful suggestions on the condition that I did not mention his name.

The law is stated as at 1 October 1991.

Michael Cook

Limpsfield
October 1991

Acknowledgments

I am grateful to the following for their contributions to this edition:

Assessment of costs

Harry Birks Costs Lawyer	Chapter 30 Detailed assessment

CPR Part 36

Dominic Regan of the City University	Chapter 14 Offers to Settle

Funding

Nicholas Bacon QC	Chapter 40 State-funded costs
Susan Dunn of Harbour Litigation Funding	Chapter 41 Third Party Funding
David Chalk of Winchester University	Part VII Conditional Fees

Many of the unreported cases first appeared in *The Litigation Letter* and are reproduced with the kind permission of the publishers, Informa plc

Extracts from the various Law Society publications and Legal Services Commission material are reproduced with the kind permission of the Law Society and Legal Services Commission.

Appendices

Appendix I
Summary of Lord Justice Jackson's Review of the Costs of Civil Litigation

The *Final Report* of the Review of the Costs of Civil Litigation published on 14 January 2010 consisted of 557 pages comprising 46 chapters, three annexes and ten appendices and incorporated the two volume Preliminary Report by means of cross-references.

A comprehensive package

The Report proposes a comprehensive coherent package of inter-dependent reforms designed to reduce litigation costs and to promote access to justice. Lord Justice Jackson is confident that if it is implemented in full it will improve access to justice, provide a more effective legal and court system, control excesses in litigation as well as costs and yield substantial savings in legal costs for both the litigant and the taxpayer. The proposals are contained in the following extracts from the executive summary.

Success fees and ATE insurance premiums should cease to be recoverable

I recommend that success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented, it will lead to significant costs savings, whilst still enabling those who need access to justice to obtain it. It will be open to clients to enter into 'no win, no fee' (or similar) agreements with their lawyers, but any success fee will be borne by the client, not the opponent. (2.2)

Increase in general damages

In order to ensure that claimants are properly compensated for personal injuries, and that the damages awarded to them (which may be intended to cover future medical care) are not substantially eaten into by legal fees, I recommend as a complementary measure that awards of general damages for pain, suffering and loss of amenity be increased by 10%, and that the maximum amount of damages that lawyers may deduct for success fees be capped at 25% of damages (excluding any damages referable to future care or future losses). In the majority of cases, this should leave successful claimants no worse off than they are under the current regime, whilst at the same time

ensuring that unsuccessful defendants only pay normal and proportionate legal costs to successful claimants. It will also ensure that claimants have an interest in the costs being incurred on their behalf. (2.4)

Referral fees

It is a regrettably common feature of civil litigation, in particular personal injuries litigation, that solicitors pay referral fees to claims management companies, before-the-event ('BTE') insurers and other organisations to 'buy' cases. Referral fees add to the costs of litigation, without adding any real value to it. I recommend that lawyers should not be permitted to pay referral fees in respect of personal injury cases. (2.5)

Qualified one way costs shifting

ATE insurance premiums add considerably to the costs of litigation. Litigation costs can be reduced by taking away the need for ATE insurance in the first place. This can occur if qualified one way costs shifting is introduced, at least for certain categories of litigation in which it is presently common for ATE insurance to be taken out. By 'qualified' one way costs shifting I mean that the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful. . . . I can certainly see the benefit of there being qualified one way costs shifting in personal injuries litigation.

It seems to me that a person who has a meritorious claim for damages for personal injuries should be able to bring that claim, without being deterred by the risk of adverse costs. The same could be said of clinical negligence, judicial review and defamation claims. There may be other categories of civil litigation where qualified one way costs shifting would be beneficial. (2.6–2.7)

Sir Rupert has explained he has in mind protecting vulnerable claimants by provisions similar to those afforded to state funded litigants by section 11 of the Access to Justice Act 1999.

Overall result

If the package of proposed reforms summarised above is introduced, there will be five consequences:

- Most personal injury claimants will recover more damages than they do at present, although some will recover less.
- Claimants will have a financial interest in the level of costs which are being incurred on their behalf.
- Claimant solicitors will still be able to make a reasonable profit.
- Costs payable to claimant solicitors by liability insurers will be significantly reduced.
- Costs will also become more proportionate, because defendants will no longer have to pay success fees and ATE insurance premiums. (2.8)

Fixed costs in fast track litigation

Cases in the fast track are those up to a value of £25,000, where the trial can be concluded within one day. A substantial proportion of civil litigation is conducted in the fast track. I recommend that the costs recoverable for fast

track personal injury cases be fixed. For other types of case I recommend that there be a dual system (at least for now), whereby costs are fixed for certain types of case, and in other cases there is a financial limit on costs recoverable (I propose that £12,000 be the limit for pre-trial costs). The ideal is for costs to be fixed in the fast track for all types of claim. (2.9)

Costs Council

If a fixed costs regime is adopted for the fast track, the costs recoverable for the various types of claim will need to be reviewed regularly to make sure that they are reasonable and realistic. I propose that a Costs Council be established to undertake the role of reviewing fast track fixed costs, as well as other matters. (2.11)

In announcing the creation of an Advisory Committee on Civil Costs the Ministry of Justice minister said it was 'in response to a recommendation from the Civil Justice Council [in its report Improved Access to Justice – Funding Options and Proportionate Costs in 2005], but the Committee's terms of reference were not what the CJC had in mind and Sir Rupert recommends that it is replaced.

BTE insurance

BTE insurance (or 'legal expenses insurance') is insurance cover for legal expenses taken out before an event which gives rise to civil litigation. It is under-used in England and Wales. If used more widely, it could produce benefits for small and medium enterprises ('SMEs') and individuals who may become embroiled in legal disputes. (3.1)

Contingency fees

It is my recommendation that lawyers should be able to enter into contingency fee agreements with clients for contentious business, provided that:

- the unsuccessful party in the proceedings, if ordered to pay the successful party's costs, is only required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party; and
- the terms on which contingency fee agreements may be entered into are regulated, to safeguard the interests of clients. (3.2)–(3.3)

Contingency Legal Aid Fund ('CLAF') and Supplementary Legal Aid Scheme ('SLAS') (chapter 13)

CLAFs and SLASs are self-funding and usually not-for-profit forms of litigation funding. The information I have reviewed during the Costs Review does not provide any strong indication of financial viability. I would, nevertheless, recommend that the use of CLAFs and SLASs as a form of legal funding for civil litigation be kept under review. (3.4)

Assessment of general damages for pain, suffering and loss of amenity for personal injury

During the Costs Review I explored the possibility of producing a transparent and 'neutral' calibration of existing software systems to assist in calculating general damages, which could encourage the early settlement of personal injury claims for acceptable amounts. I believe that this is indeed possible, and suggest that a working group be set up consisting of representatives of claimants, defendants, the judiciary and others to take this matter further (4.1)–(4.2)

Process and procedure

I recommend that the new process for handling personal injury claims arising out of road traffic accidents where the amount in dispute is up to £10,000 and liability is admitted be monitored, to see whether it leads to costs being kept proportionate, or whether costs in fact increase due to satellite litigation. I also encourage a productive engagement, under the aegis of the Civil Justice Council, between claimant and defendant representatives to see whether a similar procedure can be applied in other fast track personal injuries litigation. (4.3)

Hope triumphs over experience.

Clinical negligence

One of the principal complaints that was made during the Costs Review about clinical negligence actions was that pre-action costs were often being racked up to disproportionately high levels. There may be a number of reasons for this (which I mention in chapter 23). The recommendations I have made here include increasing the response time for defendants to pre-action letters from three months to four months (to give more time for a thorough investigation of the claim), and that where the defendant is proposing to deny liability it should obtain independent expert evidence on liability and causation within that period. I also recommend that case management directions for clinical negligence claims be harmonised across England and Wales and that costs management of clinical negligence cases be piloted. (4.4)

Intellectual property litigation

To reduce the costs of IP litigation, and particularly the cost to SMEs, I recommend that the Patents County Court (the 'PCC'), which deals with lower value IP disputes, be reformed to provide a cost-effective environment for IP disputes. These reforms include:

(i) allowing costs to be recovered from opponents according to cost scales; and

(ii) capping total recoverable costs to £50,000 in contested actions for patent infringement, and £25,000 for all other cases. I also recommend that there be a fast track and a small claims track in the PCC. (5.1)

Small business disputes

It is important that the litigation environment for such cases is streamlined, accessible to non-lawyers and cost-effective. (5.2

Large commercial claims

Much large commercial litigation is conducted in the Commercial Court. The feedback that I received during the Costs Review indicated that there was a strong general level of satisfaction amongst court users with the current workings of the Commercial Court, . . . though I have made certain recommendations in relation to disclosure, the use of lists of issues as a case management tool and docketing of cases to judges. (5.5)

Chancery litigation

I make a number of specific recommendations in relation to chancery litigation. One is that CPR Part 8 should be amended to enable actions to be assigned to the fast track at any time. This would enable smaller value chancery cases to be dealt with under the economical model that applies in the fast track. Another recommendation is that there should be developed a scheme of benchmark costs for routine bankruptcy and insolvency cases. (5.6)

Technology and Construction Court litigation

Litigation in the Technology and Construction Court (the 'TCC') is often conducted in a proportionate manner, and I make only modest recommendations concerning the operation of that court. I do, however, recommend that there be a fast track in the TCC.(5.7)

Defamation and related claims

I have recommended that lawyers' success fees and ATE insurance premiums should cease to be recoverable for all types of civil litigation. If this recommendation is adopted, it should go a substantial distance to ensuring that unsuccessful defendants in such proceedings are not faced with a disproportionate costs liability. However, such a measure could also reduce access to justice for claimants of slender means.

To overcome this potential problem, I recommend complementary measures for defamation and related proceedings, namely:

- increasing the general level of damages in defamation and breach of privacy proceedings by 10%; and
- introducing a regime of qualified one way costs shifting, under which the amount of costs that an unsuccessful claimant may be ordered to pay is a reasonable amount, reflective of the means of the parties and their conduct in the proceedings. (5.10)–(5.11)

At the launch of the Final Report, Sir Rupert gave the example an unsuccessful media defendant paying a fourfold increase of reasonable and proportionate costs: (1) their own costs (2) the claimant's costs (3) a 100% success fee and (4) an ATE insurance premium of up to 100%.

Collective actions

My recommendation is that costs shifting should remain for collective actions (with the exception of personal injury collective actions), but that the court should have a discretion to order otherwise if this will better facilitate access to justice. (5.12)

Pre-action protocols

I recommend that the ten pre-action protocols for specific types of litigation be retained, albeit with certain amendments to improve their operation (and to keep pre-action costs proportionate).

The Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation, is unsuitable as it adopts a 'one size fits all' approach, often leading to pre-action costs being incurred unnecessarily (and wastefully). I recommend that substantial parts of this practice direction be repealed. (6.1)–(6.2).

Alternative dispute resolution

There should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.

The public and small businesses who become embroiled in disputes are also made aware of the benefits of ADR.

Nevertheless ADR should not be mandatory for all proceedings. The circumstances in which it should be used (and when it should be used) will vary from case to case, and much will come down to the judgment of experienced practitioners and the court. (6.3)

Disclosure

Disclosure can be an expensive exercise (particularly in higher value, complex cases), and it is therefore necessary that measures be taken to ensure that the costs of disclosure in civil litigation do not become disproportionate.

E-disclosure in particular has emerged as a new and important facet of disclosure generally, and I recommend that solicitors, barristers and judges alike be given appropriate training on how to conduct e-disclosure efficiently.

I also recommend that there be a 'menu' of disclosure options available for large commercial and similar claims, where the costs of standard disclosure are likely to be disproportionate. I would, however, exclude large personal injury and clinical negligence claims from this 'menu' option, as standard disclosure usually works satisfactorily in those cases. (6.4), (6.5), (6.6)

Witness statements and expert evidence

There is nothing fundamentally wrong with the manner in which evidence is currently adduced in civil litigation, by way of witness statements and expert reports. The only substantial complaint which is made is that in some cases the cost of litigation is unnecessarily increased because witness statements and expert reports are unduly long. I recommend two measures (in appropriate cases) for curbing litigants' over-enthusiasm for prolixity, being (i) case management measures to place controls on the content or length of statements; and (ii) cost sanctions. (6.7)

Sir Rupert also recommends that volunteers should pilot the procedure of both experts giving oral evidence concurrently or, because the practice emanates from Australia, 'hot tubbing'.

Case management

Effective case management means:

- where practicable allocating cases to judges who have relevant expertise;
- ensuring that, so far as possible, a case remains with the same judge;
- standardising case management directions; and
- ensuring that case management conferences and other interim hearings are used as effective occasions for case management, and do not become formulaic hearings that generate unnecessary cost (eg where directions could easily have been given without a hearing). (6.8)–(6.9)

Costs management

Costs management is an adjunct to case management, whereby the court, with input from the parties, actively attempts to control the costs of cases before it. The primary means by which costs management is effected is for the parties to provide budgets of their own costs, with those budgets being updated from time to time and submitted for approval to the court. The court then formulates the directions and orders which it makes with a view to ensuring that costs do not become disproportionate. It may do this, for example, by limiting disclosure, or limiting the number of witnesses. (6.10)

Part 36 offers

In order to provide greater incentives for defendants to accept settlement offers, I recommend that where a defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%. (6.12)

Sensational! A 10% increase, not of the costs, but of the claim. He also recommends that the decision in *Carver v BAA* should be reversed, which would restore some sanity and certainty to the process.

Summary and detailed assessments

The procedure for the summary assessment of costs generally works well, and should be retained. I do, however, recommend a number of specific improvements to the process. For detailed assessments, I recommend that a new format for bills of costs be developed. I also recommend the streamlining of the procedure for detailed assessment through the use of IT. (6.14)

The government has issued a 100 page consultation paper on those proposals which require primary legislation to implement with responses due by St Valentine's Day 2011.

Appendix II
Common Sense: Common Safety

Lord Young of Graffham was appointed by the prime minister personally to advise on health and safety and in particular to review what he called 'the damaging compensation culture'. Lord Young's report, *Common Sense: Common Safety*, published on 15 October 2010 recommends:

- Introduce a simplified claims procedure for personal injury claims similar to that for road traffic accidents under £10,000 on a fixed costs basis. Explore the possibility of extending the framework of such a scheme to cover low value medical negligence claims which may greatly simplify the claims process, reduce the time taken to agree damages and result in reduced costs for all parties.
- Examine the option of extending the upper limit for road traffic accident personal injury claims to £25,000. Many millions of pounds would be diverted from legal costs to health delivery annually if we do this right. One of the incidental but important advantages of the adoption of this scheme will be the vastly reduced scope for advertising that a scale fee system will deliver.
- Introduce as soon as possible the recommendations in Lord Justice Jackson's review of civil litigation costs that CFA success fees and ATE insurance premiums should cease to be recoverable from the losing party in litigation; that lawyers should be able to enter into contingency fee agreements, also known as damages based agreements (DBAs) and extend BTE insurance. Lord Young recommends the practicability of a national scheme should be investigated. 'Extending BTE insurance might be a fair solution to the problem of access to justice. I propose consulting with the insurance industry on developing stand-alone BTE policies suitable for individuals, as well as on how to best develop policies for small businesses.'
- The claims management company regulations do not go far enough: they allow companies and personal injury lawyers to advertise in such a way that encourages individuals to believe that they can easily claim compensation for the most minor of incidents. The system needs to go further and do more to control both the volume of advertising that such companies produce and also the content of these adverts.
- Restrict the operation of referral agencies and personal injury lawyers and control the volume and type of advertising. It is not right that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions, that financial recompense can make good any injury, or that compensation should be a cash cow for lawyers and referral agencies.
- Clarify (through legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part. People who seek to do good in our society should not fear litigation as a result of their actions.