

**FINAL REPORT OF THE CLINICAL DISPUTES FORUM WORKING PARTY ON  
EXPEDITION VERSUS DELAY IN DISPUTE RESOLUTION:  
SPLITTING LIABILITY AND QUANTUM**

**A. BACKGROUND**

Splitting the resolution of liability and quantum raises the key issues of expedition and delay in dispute resolution, which have been brought into focus by recent decisions on Part 36 of the CPR. It was with this in mind that Lord Justice May requested the Clinical Disputes Forum to investigate the issues and to make recommendations to cater for situations where a Part 36 offer may be made early on in a claim which a claimant is not in a position to accept as quantum cannot be established within the Part 36 timescales.

Initial papers were produced by Mr Justice Jackson with Mr Adrian Whitfield QC, Mr David Foskett QC and Ms Sheila Bacha, by Mr Paul Docker and by Mr Robin Page. This led to a Pre-Scoping Paper by Mr Christian Dingwall. A Working Party was then set up. Its members are:

Christian Dingwall – Chairman (Bevan Ashford)  
Matthew Trinder – Secretary (Bevan Ashford)  
Mary Menjou (NHSLA)  
Michael Richards (LSC)  
Jill Stevens (MPS)  
John Pickering (APIL)  
Simon John (APIL)  
Arnold Simanowitz (AVMA)  
Margaret Dangoor (ALARM)  
Matthew McGrath (Beachcroft Wansbroughs)  
Kevin Bitmead (Barlow Lyde & Gilbert)  
Mr Justice Jackson  
Paul Docker (LCD)  
David Foskett QC  
Adrian Whitfield QC  
Dr Lewis Rosenbloom

The working party met on 5 March 2002 and 19 April 2002. Their conclusions are set out below. Attached to this document are the original Terms of Reference/Agenda (Appendix 1), the draft amendment to Practice Direction 36 produced following the meeting (Appendix 2) and the Pre-Scoping Paper (Appendix 3).

**B. CONCLUSIONS OF THE WORKING PARTY**

**1 The type of clinical dispute that justifies split resolution of the issues of liability and quantum.**

There is no general principle in favour of splitting liability and quantum issues, as one must look at the merits of the particular case. It was agreed that some cerebral palsy or other brain damaged baby cases, or cases involving significant neuro injury, may be suitable for split trial. Even so, the issues of liability (breach of duty and causation) and quantum are often not discrete issues. For example, assessment of causation invariably depends upon detailed and accurate assessment of condition and prognosis.

Members of the Working Party referred to many cases where there had been delay in resolution of claims. Mary Menjou commented that:

*The main issue is to progress the claim. We need a mechanism for bringing on the claim. There is no intention to deprive a claimant of the limitation period but there are hundreds of cases where solicitors have had the records for up to 10 years. That is the delay we are worried about. We are not worried about a delay where a claimant may not seek legal advice because they are unaware of their rights...The NHSLA have had regular meetings with the LSC since the NAO report about delays. We have supplied documents from Existing Liabilities Scheme cases (pre-April 1995). We are now moving forward to post-April 1995 claims under the Clinical Negligence Scheme for Trusts and still finding significant numbers of cases where there has been a delay of 5 or 6 years since disclosure of the records and there is still no Letter of Claim. The LSC cannot move on these claims because they cannot deal with the older cases. Things are not getting any measurably better...We are still looking at a potential problem stemming from only two cases [where the claimants' advisers felt that the claimants were unfairly disadvantaged by early Part 36 offers].*

Mary Menjou is researching data about both cases referred to but in the meantime has provided the following skeleton data:

*T v X HA. CP claim. Incident date April 1981. Potential claim notified to the HA 1993. Claim received February 1999. Settled 2001.*

*M v Y HA. Erbs palsy claim. Incident date January 1994. Potential claim notified to the HA 1995. Claim received March 1998. Settled October 2001.*

Arnold Simanowitz indicated that he would check AVMA's own database to review the issue of delay in resolving cases.

## **2 The impact of splitting liability and quantum on process and timetable.**

The defendants' advisers' view was that split trials inevitably lead to increased costs rather than a saving. The Working Party agreed that this would be so on a significant number of cases, but it was also felt that there was another significant number of cases where costs might be saved; either because quantum is subsequently agreed or because the case is dismissed at the trial of liability.

The claimants' advisers noted the defendants' advisers view that split trials inevitably lead to increased costs but they did not share it. Their experience has been to the contrary. The early resolution of liability has then led to a subsequent saving, because more often than not, quantum has then been the subject of compromise.

The Working Party (other than the claimants' advisers) agreed that split trials generally lengthen the resolution process. The claimants' advisers felt that split trials neither lengthen nor necessarily shorten the process, but what they aim to achieve, and frequently do, is a timely disposal of a particular issue. In that respect the claimant advisers' view is that they have been very successful.

## **3 Comparison between cases in which the claimant is under a disability and other claims.**

See above.

## **4 Comparison between high and low value claims.**

See above.

**5 The four possible solutions [to concerns about the relationship with CPR Part 36] outlined in the v.1 scoping paper.**

The Working Party (except the claimants' advisers) agreed that the various concerns might best be addressed in an amendment of the Practice Direction to Part 36 to provide a "trade-off" between the grievances of those with claimants' interests in mind and those with defendants' interests in mind, involving:-

- (i) a mechanism which can compel claimants to bring proceedings on liability in order to avoid delay; and*
- (ii) a more certain mechanism to protect claimants against "premature" offers to settle or payments into court under Part 36, made before quantum can be established.*

The Working Party was informed that the Rules Committee would not countenance any amendment to Part 36 itself unless it has been clearly demonstrated that there is some error, lacuna or shortcoming in the rules as drafted. In this case, it is believed that the existing rules under Part 3 are not always being interpreted correctly, as the Court has an existing discretion (except where otherwise provided for) to extend or shorten the time for compliance with any rule, practice direction or order.

A draft Practice Direction is appended to this report. There was no general agreement on whether an application for an extension of time for acceptance of a Part 36 offer could be made only after the issue of Part 7 proceedings or if such an application could also be made by way of Part 8 proceedings as a discrete issue.

The Working Party considered whether or not the Practice Direction would achieve the sought-after "trade-off". Sir Rupert Jackson commented as follows. The impetus for the working party was firstly the concerns of claimants' advisers that they should not be put on the spot by early Part 36 offers and secondly defendants' concerns that claimants are not beginning proceedings until a very late date when doctors cannot be traced. The draft practice direction does meet the claimants' concerns in principle but it does not meet the defendants' concerns. He had been thinking about the defendants' concerns since the last meeting and wished to throw open for consideration a procedure that would allow a defendant to commence proceedings seeking a declaration from the Court about whether its treatment had negligently caused a patient injury. This would still leave it open to the patient to apply for an assessment of quantum at any time within the prevailing limitation period, which would not be affected.

The Working Party (other than the claimants' advisers) considered that Sir Rupert Jackson's suggestion raised several complex issues, but nevertheless felt that it should be followed up. It would be beyond the scope of this Working Party but they recommend that a further Working Party should be commissioned to do so.

The claimants' advisers had reservations about any trade-off but indicated that the matter could probably best be considered by a separate Working Party.

The Working Party also considered amendment of the Pre-action Protocol for Clinical Negligence cases. Matthew McGrath suggested the following amendment to Paragraph 3.15 of the protocol:-

*If, following the receipt and analysis of the records, and the receipt of any further advice (including from experts if necessary – see Section 4), the patient/adviser decides that there are grounds for a claim, they should then send, as soon as practicable, to the healthcare provider/potential defendant a **letter of claim**. Such **letter of claim** shall in any event be sent to the healthcare provider/potential*

*defendant, no later than 2 years after disclosure as set out at paragraph 3.9 above. If, for good reason, the patient/adviser is unable to send a **letter of claim** within that time, an explanation for the delay in serving the letter shall be sent to the healthcare provider/potential defendant.*

Kevin Bitmead similarly suggested dealing with the point in an amendment to the pre-action protocol itself, to require service of a letter of claim in say two years after disclosure of the medical records, or at least a good reason why not.

The Working Party (other than the claimant's advisers) recommend that the CDF's Pre-action Protocol Working Party should consider amendment of the Protocol along the lines suggested by Matthew McGrath and Kevin Bitmead.

**6 The potential effect of such changes on claimants' attitudes to settlement, both pre-action and post-action.**

The claimants' advisers confirmed that it would make no difference at all.

**7 The potential effect of such changes on defendants' attitudes to settlement, both pre-action and post-action.**

The defendants' advisers agreed that it would have no profound effect on the attitude of defendants who seek early resolution of cases, but there was concern about any possible watering down of Part 36.

**8 The potential effect of such changes on structured settlements.**

Still under consideration (see separate Working Party on structured settlements).

**9 Generally, how to encourage resolution of clinical disputes in split resolution cases.**

It was the view of claimants' advisers that it is inappropriate to investigate quantum at all in split trial cases - and the opposite view of defendants' advisers that the concept of split trials does not mean there should be no quantum investigations. The importance of early and frank discussion between the parties' advisers was highlighted. This was an area marked for further consideration.

**10 What minimum quantum information should nevertheless be provided, both pre-action and post-action, in split resolution cases.**

The claimants' advisers felt strongly that it would be impossible to prescribe a minimum due to the potential cost implications. The defendants' advisers maintained that much information could still be provided (eg., current condition and prognosis, any care or rehabilitation package, changing accommodation requirements, or special education needs). They explained the importance for defendants to be able to make accurate financial reserves for claims.

The basis of the claimants' advisers' view was as follows. It would be impossible to prescribe a minimum amount of information because as soon as one opens the door to the provision of particular reports, then necessarily the level of costs expenditure is increased and in cases of the size that are contemplated here, that equation may be significant. If one knows that one is dealing with an allegation that clinical negligence caused cerebral palsy, then on any view the case will have a large quantum potential and they cannot see that it is necessary pre-resolution of liability, to incur costs in obtaining reports on rehabilitation etc., which may have no relevance whatsoever if the claimants' liability arguments fail. They do

understand the defendants' concern to have some idea about reserving, but believe that they have a huge wealth of knowledge from their own claims records to fall back on in any event.

Unfortunately neither David Keegan nor (on his behalf) Michael Richards of the LSC were able to attend either meeting of the Working Party. They have, however, helpfully provided comments as follows:-

*The advantages of split trials to the LSC are to limit expenditure by determining the core issues of breach of duty and causation first. This is their greatest concern, particularly where defendants are not prepared to make admissions of breach of duty and causation early on. The LSC are faced with investing substantial money on quantum without any clear certainty that it will not be wasted. At the point of delivery of funding there is usually a 50/50 chance that it will be wasted.*

*The LSC will support a system where claimant lawyers acting for publicly funded clients can undertake a reasonably detailed investigation of quantum even in split trial cases, sufficient to satisfy the expectations of the defendants to be in a position to make appropriate financial reserves. In practice, this means preliminary quantum reports in relation to the key heads of the quantum claim e.g. care. They do not support the practice of undertaking no investigations at all in split trial cases. The report stage is expensive, but it is not an unreasonably expensive procedure. The big waste of funding is supplementary reports, second or further conferences with counsel and experts, and attendances at trial of quantum witnesses where the case is dismissed on liability. The LSC would be open to funding enough initial reports on quantum to enable a claimant's solicitor to give a fairly realistic valuation of general and special damages. This is not intended to be a 100% accurate or definitive valuation, or a sophisticated and fully prepared schedule of special damages & future loss.*

*The LSC hope this would overcome defendants saying that they cannot value claims or make realistic Part 36 offers on the information provided. The LSC does not want to commit much more funding to quantum issues than this whilst liability and causation are still ostensibly in dispute. If a Part 36 offer is made in the meantime during this process, the LSC may be prepared to invest more money in quantum investigations. This is the trigger point. Investment will be comparatively modest until this trigger point is reached.*

In general, most claimants' advisers whether publicly or privately funded are risk adverse. They will be in for a fairly early resolution. The LSC support that. The LSC position on compelling commencement of proceedings (as suggested by one of the defendant advisers in the Working Party) must be neutral as the LSC does not have a legal power to compel an assisted person to commence litigation. The LSC would be in favour of using existing powers under the funding code to push cases forward and to start proceedings, if appropriate, by the use of case plans. The LSC run high cost cases through detailed case plans now, which should contain enough information to enable monitoring of how progress is going to be achieved and a timetable for achieving process (including the commencement of proceedings). If a case plan is not provided in this detail the LSC would reject it and consider suspension of funding. In other words, the LSC have procedures of their own on a different plane designed to achieve the same objective.

**11 How to encourage active progress in investigating quantum at the earliest reasonable opportunity, notwithstanding that the case may be appropriate for a split trial.**

.See 9 above.

**C. MEETING WITH LORD JUSTICE MAY**

Christian Dingwall (Chairman), Matthew Trinder (Secretary), John Pickering (APIL) and Paul Docker (LCD) then met with Lord Justice May on 30 July 2002 at the Royal Courts of Justice in order to report back on the Working Party's conclusions and to consider the next steps. May LJ noted the content of the Working Party's draft report including the draft Practice Direction. Speaking broadly, LJ May said that the Court:-

*“would give permission for the claimant to accept a Part 36 offer after the initial 21-day period if it was sensible and fair to do so. Where something radically adverse to the claimant had occurred and he looked like losing the case and so wished to accept an earlier offer, however, the Court would not normally give permission. Extending the time for acceptance of an offer to a date too close to the trial would give the claimant a potentially unfair advantage as it would give him a free ride on the costs of liability right up to the date to which the Court had extended time”.*

May LJ noted that the Lord Chancellor's Department had been consulting about damages for future loss with a separate Working Party chaired by Mr Brian Langstaff QC, including whether the Court should be able to order periodical payments instead of a lump sum. At a recent meeting with the Master of the Rolls and LCD officials there had been a general discussion about how this might fit in with Part 36 and (or in the alternative) with the general discretion on costs under Rule 44.3. If there were to be a power for the Court to order periodical payments (which may need primary legislation) there would have to be a criteria for determining those cases in which the Court would consider doing so and those criteria are likely to be similar to the criteria identified by this Working Party, or at least should not be considered in isolation.

The problem therefore needs to be addressed in both contexts and the solution will have to go down the same road for both. To achieve this, May LJ proposed a combined forum to consider both questions using this Working Party's final report and draft Practice Direction to go forward in the present form for further consideration. Paul Docker will discuss this proposal with Jane Howe at the LCD and report back. May LJ described the work of the Working Party as *“extremely helpful”* and thanked all the various contributors for producing a proposal with a degree of consensus.

**November 2002**

## **Appendix 1**

### **WORKING PARTY ON EXPEDITION AND DELAY IN DISPUTE RESOLUTION: SPLITTING LIABILITY AND QUANTUM**

#### **Agenda/Terms of Reference**

1. The type of clinical dispute that justifies split resolution of the issues of liability and quantum.
2. The impact of splitting liability and quantum on process and timetable.
3. Comparison between cases in which the claimant is under a disability and other claims.
4. Comparison between high and low value claims.
5. The four possible solutions [*to concerns about the relationship with CPR Part 36*] outlined in the v.1 scoping paper.
6. The potential effect of such changes on claimants' attitudes to settlement, both pre-action and post-action.
7. The potential effect of such changes on defendants' attitudes to settlement, both pre-action and post-action.
8. The potential effect of such changes on structured settlements.
9. Generally, how to encourage resolution of clinical disputes in split resolution cases;
10. What minimum quantum information should nevertheless be provided, both pre-action and post-action, in split resolution cases.
11. How to encourage active progress in investigating quantum at the earliest reasonable opportunity, notwithstanding that the case may be appropriate for a split trial.

**WORKING PARTY ON EXPEDITION AND DELAY IN DISPUTE RESOLUTION:  
SPLITTING LIABILITY AND QUANTUM**

**PROPOSED AMENDMENT OF PRACTICE DIRECTION 36**

**Extending time for acceptance of offers to settle and payments into court**

**36PD- 012**    **12.1** In the absence of agreement a party may apply to the Court for an extension of time for acceptance of a Part 36 payment or a Part 36 offer.

**12.2** Such an application:

- a) ought to be made within the 21 day period for acceptance after such an offer to settle or payment is notified in writing or as soon as reasonably practicable thereafter;
- b) can only be made following the commencement of proceedings under Part 7; and
- c) must be made on notice and supported by evidence.

**12.3** A claimant who wishes to apply to the Court for an order extending time for acceptance of such an offer to settle made before commencement of proceedings should start proceedings under Part 7 and apply for the extension together with appropriate directions for the further conduct of the case.

**12.4** The Court may make an order extending a party's time for acceptance of such an offer to settle or payment in the exceptional circumstance that the party has not assessed quantum and it was reasonable not to do so. In making any order the Court shall have regard to:

- a) the "primary" limitation period and any delay in starting proceedings;
- b) in personal injury cases, the claimant's age or physical or mental condition or a combination of these factors;
- c) having regard for (b) above, the reasons preventing quantification of the claim and how soon a claim might be capable of quantification using reasonable diligence;
- d) having regard for (b) above, whether or not the application is made within the 21 day period for acceptance after such an offer to settle or payment is notified in writing or as soon as reasonably practicable thereafter;

## Appendix 2

- e) compliance with a pre-action protocol;
- f) the conduct of the parties and the extent of disclosure made;
- g) any direction made by the Court for a split trial of liability and quantum and how soon the party's advisers might be capable of advising on acceptance or not of the offer to settle or payment using reasonable diligence;
- h) the minimum quantum information that should be provided by both parties whether or not an order has been made for a split trial;
- i) any other directions made by the Court;
- j) the overriding objectives set out under Part 1; and
- k) any other reasons properly considered.

**12.5** Where the Court makes an order extending the time for acceptance of an offer to settle or payment, the Court shall specify the last date for its acceptance without permission taking account of the matters described in 12.4.

### Suggested Editorial Guidance

This Practice Direction arose from a working party of the Clinical Disputes Forum commissioned by Lord Justice May to look at the key issues of expedition and delay in dispute resolution when trials of liability and quantum are split.

**36PD-012** provides that in exceptional circumstances a party may apply on notice to extend the 21 day period for acceptance of a Part 36 offer. Where proceedings have not yet been commenced at the time of the Part 36 offer, and in the absence of agreement, a claimant is required to start proceedings under Part 7 and to apply for the extension of time together with other appropriate directions for the future management of the action. The relevant case law is:-

*Findlay v Railway Executive [1950] 2 All ER 969*. The Court of Appeal confirmed as a general rule that a party which accepts a part 36 payment after the expiry of time for accepting such a payment becomes from that date the unsuccessful party when considering the issue of costs.

*Jones v Jones (1999) The Times, November 11*. The court may still take into account circumstances which have given rise to a change of mind (whether or not to accept the payment into court), such as where a defendant has withheld material and not allowed a claimant to make a proper appraisal of the case.

*Ford v GKR Construction Limited [2000] 1 WLR 1397*. The Court of Appeal reconfirmed this general rule in relation to Part 36, but held that the court retains the power to make orders other than that costs follow the event where it would be unjust to follow the general rule.

*Factortame Ltd & Ors v Secretary of State for Transport [2002] Court of Appeal transcript*. The Court of Appeal rejected an argument that a material change in the case of a defendant brought about by a mistake on their part, should entitle a claimant to re-assess a Part 36 payment and allow them to take the payment out of time with an order for costs right up to the date of the ultimate acceptance, unless the normal presumption is dislodged on the facts by special circumstances.

*Glanfield (deceased) v Plymouth & Torbay Health Authority [2002] Unreported*. The court held that so long as defendants give full disclosure of the notes there is no reason why the defendant should not make a payment into court and make the claimant prove its case. Not to so order would mean payments into court are blunt weapons in clinical negligence cases.

## **Appendix 3**

### PRE-SCOPING PAPER - SPLIT RESOLUTION OF LIABILITY AND QUANTUM

#### **ACKNOWLEDGMENT AND REQUEST**

In preparing this scoping paper I have borrowed thoughts and ideas from a number of sources. They include: from the judiciary Lord Justice May and Mr Justice Jackson; from counsel Mr Adrian Whitfield QC and Mr David Foskett; from solicitors Mr Adrian Parker; and from the Lord Chancellor's Department Ms Sheila Bacha and Mr Paul Docker.

Recipients of this paper are asked to respond with comments and suggestions to:-

Christian Dingwall  
Bevan Ashford  
1 Chancery Lane  
London WC2A 1LF

Email [christian.dingwall@bevanashford.co.uk](mailto:christian.dingwall@bevanashford.co.uk).

**The deadline for responses is 4 February 2002.** (Any responses by 28 January 2002 would be very helpful.)

#### **PROPOSED PROJECT**

May LJ has asked the Clinical Disputes Forum to prepare a preliminary report about problems with split resolution of liability and quantum. Mr Adrian Whitfield QC initially raised the matter with May LJ following a case in which an infant claimant was penalised on costs because of late acceptance of a Part 36 offer. The claimant's advisers had felt unable to assess quantum before or within 21 days of the offer and had therefore further felt unable to advise acceptance of it until later.

The matter is generally relevant to disputes (eg clinical, insurance and construction claims) but in particular to clinical claims for infants who have suffered serious injury (usually cerebral palsy) caused by obstetric or neonatal complications (CP cases).

The problem may arise in CP cases if there is uncertainty about life expectancy or a future care regime. In such cases the claimant's solicitors (it is said) may delay issuing proceedings for many years. Alternatively (it is said) they may issue proceedings promptly but then run up costs

### **Appendix 3**

prematurely investigating quantum just in case the defendant makes an early offer to settle (which offer may not be made until much later in the proceedings).

Mr Foskett points out that the problem may arise where the defendant believes it has an arguable case in defence of the claim on liability, but not so strong that it does not wish to make a “commercial offer”; or where an early acceptance of liability is coupled with an offer of a sum which the Defendant from past experience (but not detailed investigation of the particular case) thinks is a suitable amount.

May LJ therefore wishes to review the matter by obtaining a preliminary report from practitioners specialising in clinical claims. He has suggested that the CDF would be a suitable body to prepare the preliminary report because its constituent members represent the varied interests involved in such claims.

### **ISSUES**

May LJ has identified 3 issues:

- 1) where it is appropriate to have a split trial of liability and quantum and the effect this has on acceptance or otherwise of Part 36 offers and consequent costs
- 2) lack of action by claimants after liability has been admitted or found
- 3) where there is no limitation period and liability is disputed, a lack of action in bringing the liability dispute before the court - leading to problems of locating witnesses, loss of detailed evidence due to time lapse, reserving and making provisions for claims, etc.

May LJ sees a clear difference between

- post-action claims: where the action has started and the question is: what should the court's powers be?
- pre-action: where no action has been started and the question is: how to get the case before the court?

### **Appendix 3**

May LJ asks the CDF to give initial thought to the issues which may help inform further thinking and any necessary rule / practice changes.

#### **FURTHER ISSUE**

Subsequently Mr Andrew Parker has raised a related issue about such matters not being progressed effectively because of the absence of a limitation period and / or court timetable.

#### **CDF'S RESPONSE**

Subject to funding, the CDF has accepted May LJ's invitation. Its proposed process is set out later in this paper.

#### **LIMITATION**

The Limitation Act 1980 prescribes time limits for bringing personal injury claims. The text of relevant sections (11, 28 and 33) is set out in Appendix 1.

In summary:-

- in CP cases the three year time limit will not in any event start to run until a brain damaged claimant is 18 years
- therefore a brain-damaged baby will have at least until immediately before age 21 years to issue a claim
- if he or she continues to be under a disability (ie unable to manage his or her affairs and therefore a patient within the meaning of the Mental Health Act 1983) at age 18-21, then the time limit for bringing a claim will not start to run until he or she ceases to be under a disability (ie the limitation period is probably indefinite until the claimant dies)
- if he or she does not have requisite knowledge of the cause of action at age 18-21, then the 3 year time limit for making a claim will not run until he or she does have requisite knowledge
- the court in any event has equitable discretion to disapply the limitation period subject to considering relative prejudice to the claimant and defendant.

## **Appendix 3**

It would **NOT** be within the remit of the project to make any recommendation that would require or lead to amendment of the Limitation Act. Any recommendations would have to fit within the current law on limitation.

### **11 POSSIBLE SOLUTIONS**

Various possible solutions have been suggested.

Mr Whitfield has suggested a new rule along the following lines:

#### **1 Any person may apply to the Court for a direction extending the time for acceptance of**

- (a) *any offer to settle under Part 36.10*
- (b) *a Part 36 offer*
- (c) *a Part 36 payment*
- (d) *any payment into court or admissible offer under Part 44.3(4)(c)*

#### **2 Such an application**

- (a) *can only be made on the ground that at the time of the application it is not reasonably practicable to quantify the claim because of the claimant's age or physical or mental condition or a combination of those factors;*
- (b) *may be made before or after the commencement of proceedings;*
- (c) *may be made before any such offer or payment is made;*
- (d) *may be made within a period of 21 days after such offer or payment is made*

### **Appendix 3**

- 3 Where the Court directs a separate trial of any issue of quantum under Part 3.1(2)(i) the Court shall fix a time for acceptance of any such offer or payment which has been made or may be made.**
- 4 Where it appears on an application under paragraph 1 that the Court may, or where in giving directions under paragraph 3 the Court does, direct a separate trial of any issue of quantum, it shall, unless the interests of justice otherwise require [save in exceptional circumstances?] direct that time for acceptance shall not commence until after the determination of the issues of liability and causation.**
- 5 On hearing an application under paragraph 1 or on giving directions under paragraph 3 the Court may direct that time for acceptance shall not commence until a date either determined on fresh application to the Court or agreed between the parties**

Mr Justice Rupert Jackson, Mr Adrian Whitfield, Mr David Foskett and Ms Sheila Bacha have suggested four possible solutions:-

- 1 Amend Part 36, as suggested by Mr Whitfield (see above)
- 2 Amend Part 3 by adding a new rule 3.10:

*If the Court, pursuant to rule 3.1(2)(f), stays that part of any proceedings, which relates to the assessment of damages, then unless the court otherwise orders:*

- (a) no party is obliged to take any step directed to the quantification of the claim before the stay has been lifted;*
  - (b) no part 36 offer (except an offer under rule 36.5(4) or part 36 payment which has been made or which is made before the stay has been lifted is effective.*
- 3 Issue a practice direction encouraging courts to exercise their powers under the existing rules to extend time for accepting Part 36 offers and payments in cases of the kind mentioned in paragraphs 1 and 2 above.

### ***Appendix 3***

- 4 Create or modify protocols, to extend the time for accepting offers in cases of the kind mentioned in paragraphs 1 and 2 above.

Mr Andrew Parker has suggested that to deal with matters not being progressed effectively because of the absence of a limitation period and / or court timetable, then Part 8 of the CPR should apply and there should be some sort of timetable imposed by the courts to ensure progress.