

No win, no fee, no chance

CAB evidence on the challenges facing access to
injury compensation

This report was written by James Sandbach, Citizens Advice

December 2004

Contents

Summary and introduction	1
1. Background to the ‘no win no fee’ crisis	6
Conditional fee agreements	6
After-the-event insurance	7
The rise of claims management	8
The practices of CMCs	9
The regulatory gap	10
2. The consumer experience of ‘no win no fee’	11
Consumer entitlement	11
Sales practices and techniques	12
Poor claims advice	13
Poor quality of service from solicitors	14
Outcome for the client	16
The impact on the clients’ health	18
Conclusion	19
3. Options for regulation and market reform	21
The regulation gap	21
Simplifying CFAs and law society regulation	23
Voluntary regulation of the claims management industry	24
Compulsory regulation of the claims management industry	26
Regulation of insurance intermediaries and credit brokerage	27
Regulation of doorstep sales and cold-calling	27
Joining up regulation	28
4. Towards a better funding system	30
Reform of costs	31
Reform of compensation	33
Empowering and protecting consumers in the market	34
Options for creating a sustainable funding system for the future	37
Reviewing the indemnity principle	39
5. Towards a better process	41
Alternative dispute resolution mechanisms	41
A Personal Injury Tribunal	43
A ‘no-fault’ system	44
Rehabilitation and prevention	45
6. Conclusions and recommendations	48
The case for change	48

Recommendations for regulation	48
Recommendations for reform of costs and funding	50
Recommendations for reform of the compensation process	50
Bibliography	52
Appendix 1 Personal Injury Statistics	54
Appendix 2 International comparisons	55
Appendix 3 List of CABx submitting evidence	58

Summary and introduction

The challenge of access to compensation

1. Around 2.5 million people in the UK sustain accidental injuries every year.¹ As a result they may lose income or independence, and face lifestyle changes. Fault may rest with the driver of another car, a public authority such as a local authority or hospital, an employer or another individual whose action or inaction was the cause of the accident and the injury sustained. Under UK law the liable party must compensate the injured person for any loss (i.e. the polluter pays).
2. Far from there having been a recent boom in consumers claiming compensation for injuries, only 31 per cent of accident victims actually claim compensation using legal processes. Indeed the actual number of claims for injuries following accidents has reduced since the new method of funding legal actions in personal injury cases, the “conditional fee agreement”, was rolled out, as the table in Appendix 1 shows. Since the abolition of legal aid for personal injury cases in 2000, CABx have handled over 130,000 enquiries relating to personal injury claims.
3. Seeking compensation for injuries and harm is not a social problem or the sign of the emergence of a ‘compensation culture,’ but simply realising a civil and legal right. Where an individual has suffered injuries, a compensation award can help them to afford help and services to enable them to adjust and fully recover or make up for financial loss. People who have been injured may have lost pay, or even their jobs, as a result of being unwell. They may have experienced a dramatic change in lifestyle where social opportunities were closed off to them, they may have incurred costs to adapt their life and their homes to deal with the injury, whether during a period of recovery or permanently. They may also have experienced stress, depression and anxiety. Failure to address these problems can contribute to social exclusion.
4. A financial award of compensation (damages) from the person or body responsible can help to reduce public costs of services and benefits to the individual affected. Also lessons learnt from claims ought to benefit others and the public at large by putting right the problems that caused the injury in the first place. Whether as employers, service providers or citizens, we all have obligations to avoid causing harm to others, and to take all reasonable steps to prevent such harm arising.
5. The effectiveness of any system for compensation is whether the system:
 - ensures access to all who need to use the process;
 - is effective at providing fair compensation and redress to individuals;
 - is transparent;

¹ Royal Society for the Prevention of Accidents (ROSPA). The figure is a rough total drawn from public statistics which includes road and transport accidents, occupational injuries, accidents in schools, estimated accidents in home and leisure, and fire accidents

- involves proportionate processes which do not involve excessive costs or procedures for either side
- ensures quality of advice and representation for those people who need it;
- provides redress when legal advice is inadequate or things go wrong, and
- results in problems that caused the accident being solved.

Personal injury compensation is failing consumers

6. Citizens Advice's evidence is that these criteria are not currently being met by the system. For many thousands of people who have experienced accident or injuries through no fault of their own, often suffering disabling effects, the system is failing. It is extremely complex for an unrepresented individual to pursue a claim for compensation. They will need legal advice on their likely prospects of success and help collecting their evidence and putting their case, which may need to go to court. So pursuing a claim efficiently and effectively is likely to involve using legal services and incurring court costs at some stage.
7. Legal aid for these costs was withdrawn in 2000 and a new system of conditional fee agreements, colloquially known as "no win no fee", was extended. In the new system, the legal and other costs of taking the case are covered by the 'losing' side. The consumer takes out insurance to cover themselves against the risk of having to meet both sides' costs if they lose.
8. The complex financial and legal processes involved are often misunderstood by consumers, and consumers' needs can be misunderstood by the service providers. There is widespread mis-selling of legal and insurance products, and consumers are often induced into signing conditional fee agreements (CFAs) inappropriately. On this basis alone policy makers should be wary of extending conditional fee funding to other areas of civil law. CAB evidence is that the withdrawal of legal aid and the advent of conditional fees ('no win, no fee') has contributed to a system which involves relatively high legal costs and delays.
9. Problems with the present system include:
 - Consumers are subjected to **high-pressure sales tactics** by unqualified intermediaries introducing them to a legal process. **Inappropriate marketing and sales practices** are used – for example with salesmen approaching accident victims in hospital.
 - Few consumers seem to understand the **risks and liabilities** they are exposing themselves to as the risks of conditional fee agreements have not been clearly explained to them at the outset by salesmen. Consumers are misled into thinking the system will be genuinely 'no win no fee' but can often find that costs are hidden and unpredictable.
 - Loan financed insurance premiums, in addition to other legal costs, can often erode the value of claimants' compensation. In some cases consumers even owe money at the end of the process. This turns the whole claims process into a **zero-sum gain** for consumers and denies effective access to compensation.

- The system does not deliver anything effective to consumers on **rehabilitation**. International comparisons show that the UK trails behind other countries in getting injury victims back to work. The arduous legal processes and money only results of our current system of compensation often means that victims are not being sufficiently helped to resume a normal life in both society and the workplace. Over time this failure increases the overall cost both to society and the public purse and needs to be addressed.
 - Conditional fee agreements create perverse incentives for the legal profession and provide the conditions for **cherry-picking** of high value cases with high chances of success. This results in lawyers refusing to take on good small claims which may nevertheless be of enormous financial and personal significance to the client, thus denying access to justice.
 - There is no effective joined-up **system for regulating** conditional fee arrangements to ensure consumers are protected on both quality of advice and costs. In particular, the activities of claims management companies seem to fall largely outside the system of regulation yet they are increasingly the primary introducer of the consumer to the claims process as well as a complex package of financial services – consequently the information and advice they give is of critical significance to the consumer. A voluntary code is still in its infancy.
10. This report looks at the experience of CAB clients who have pursued personal injury compensation through CFAs. Typically the consumers we help are on low incomes and may often be vulnerable because they have suffered some level of personal physical injury for which compensation could be available if elements of fault liability and causation can be established.
11. The report proceeds to examine the evidence, the policy options for reform and alternative methods of redress in personal injury cases. Although the former system of funding personal injury claims only represented a net cost to the public of 4 per cent of legal aid annual expenditure,² **we do not advocate a simple return to public funding for personal injury cases based on current legal aid eligibility criteria**. Legal aid is very restricted and means tested, and by definition was not actually of assistance to many consumers.
12. However, there are significant problems in this market which need remedying so as to provide better protection and service to individual consumers, improve access to justice and outcomes and give the public a better system for dealing with personal injury compensation. Citizens Advice is also concerned about the emerging policy direction to extend the use of conditional fee agreements as a method of funding legal cases in other areas of law, for example with public law cases.

² *Legal Aid Board Annual report 1997/98*

13. Key messages for reform of funding for personal injury cases include:
- Claims managers, intermediaries and organisations introducing consumers to legal processes should be subject to independent regulation. Regulation should cover competence, quality and costs and secure a proper focus on protecting the consumer, who is after all funding the system. (para 3.27)
 - The Financial Services Authority and the Office of Fair Trading should produce a joint policy on how they will regulate sales of linked insurance and credit products designed to fund legal actions. (para 3.38)
 - The Financial Ombudsman Service and the Legal Services Ombudsman should co-ordinate complaints procedures about conditional fee agreements so that there is a “one stop shop” for any consumer complaints. (para 3.38)
 - There should be statutory regulation of the form and content of CFAs. (para 3.15)
 - The Office of Fair Trading should undertake a market study into the market for conditional fee agreements, to establish whether this market works effectively for consumers. (para 6.9)
 - The Department for Constitutional Affairs should undertake a feasibility study into whether a contingency legal aid fund³ could be a viable alternative for funding personal injury cases. (para.4.47)
 - The Department for Constitutional Affairs should review the legal costs system for personal injury in civil courts to examine whether there are any alternatives to frontloading most of the costs. (para 4.16)
 - The government should establish a task force on compensation to look at the viability of introducing ADR or no fault based systems to deal with personal injury cases, and review how to achieve fair rehabilitative compensation and proportionality between costs and damages. (para 5.4)
 - The Department for Constitutional Affairs should evaluate the impact of the introduction of conditional fee agreements on personal injury claims before proceeding to replace legal aid with CFA-funding for other types of cases. (para 6.3)

About this report

14. This report is based on 385 evidence reports from 224 Citizens Advice Bureaux over the period January 2002 to September 2004. Chapter 1 examines the policy background to the increase in conditional fee agreements for personal injury compensation. In Chapter 2 we look at CAB evidence about the failure of conditional fee agreements to pursue personal injury claims, including high

³ A contingency legal aid fund would provide funding for personal injury claims by taxing the compensation of successful claimants.

pressure selling techniques and the outcome for clients. In Chapters 3, 4 and 5 we examine policy options for regulation, claims financing and non-court based options for personal injury claims. In Chapter 6 we outline our major recommendations and conclusions.

1. Background to the 'no win, no fee crisis'

1.1 Citizens Advice believes that justice – the right to use the civil legal process - should be there for all of us, when we need it. It should not be just for the wealthy, but for those in all income ranges. Historically, access to justice for those of limited means has been supported by legal aid, which has been used to fund personal injury claims. However, in recent years the emphasis of policy has switched to private funding methods – most notably the conditional fee agreement.

Conditional fee agreements

- 1.2 Conditional fee agreements, whereby solicitors charge nothing if they lose a case and can charge an increase on their normal fee (or a “success fee”) if they win a case, were first made possible in personal injury cases by secondary legislation under the Courts and Legal Services Act 1990, introduced in 1995. At that time, legal aid was still available for personal injury cases. The intention of conditional fee agreements was to give people with incomes above legal aid eligibility limits, but finding it difficult to pay for a solicitor, a way to fund personal injury litigation. The scope of conditional fee agreements has since been widened to make CFAs available to fund most civil cases.
- 1.3 Conditional fee agreements are commonly called ‘no win, no fee’ agreements – which they are, in terms of the fee of the solicitor taking the case. However, because of the general principle in the jurisdiction of UK law of “costs follow events” – i.e. the loser pays the winner’s costs (as well as damages if the loser is the defendant) - there is still the risk of having to pay the other side’s costs if the case is lost. In addition, other costs, known as disbursements - e.g. medical reports, barristers’ fees etc. – are not generally covered by conditional fee agreements. Most claims though are settled out of court, so may not include any binding agreement over costs.
- 1.4 The Access to Justice Act 1999 abolished public funding (legal aid) for most personal injury cases on the basis that other methods of funding – i.e. conditional fee agreements – were available and better suited. Some legal aid is still available in complex personal injury cases where the preliminary costs of establishing if there is a claim are likely to be very high. This does not apply to the majority of personal injury cases however, and the Legal Services Commission is now proposing that residual funding for personal injury cases be removed altogether.⁴ Indeed, it is now being proposed that conditional fees could be rolled out across other areas of civil law to replace legal aid.⁵
- 1.5 Since 2000 over a million cases have been taken in personal injury claims using CFAs.⁶ The government has heralded the spread of conditional fee

⁴ *A New Focus for Civil Legal Aid*, Legal Services Commission July 2004

⁵ *ibid*

⁶ The most recent insurance data (last quarter 2002) showed that CFAs accounts for approximately 30 per cent for road traffic accident cases and 75 per cent for both employers’ liability and public liability cases. For clinical negligence there is still only a small proportion of cases funded CFAs, perhaps

agreements as a means of funding legal costs as widening access to justice, especially for those who would not have qualified for public funding. For example Lord Falconer recently declared, "Rather than promoting bad claims, conditional fee agreements ensure that justice is affordable to all. Making a claim is no longer the preserve of the wealthy. Without CFAs, many people would have been denied access to justice in all manner of cases. Because of them, these people have benefited and received the compensation they are entitled to."⁷

- 1.6 Many experts, however, have expressed doubts from the outset. In particular there is concern that the government has failed to provide any explanation as to how conditional fee funding can really assist those who are socially excluded. In the debate on the Access to Justice Bill 1999, Bob Marshall-Andrews MP exclaimed, "In all cases, legal aid for actions for personal injury will cease to exist. No matter how weak or disabled the plaintiff; no matter how serious the injury; no matter how powerful the wrongdoer; no matter how culpable or deliberate the wrong, there will be no legal aid for those people. The Bill will consign the weakest and most vulnerable in the land to a completely untried no win, no fee system."⁸

After-the-event insurance

- 1.7 The need for the consumer to be prepared to pay the costs of litigation in the event that they lost their case was a primary factor in the development of after-the-event (ATE) insurance policies. If the consumer does not have the funds to cover these costs at the outset the insurance policy acts as a guarantee of ability to pay. After-the-event insurance policies required the payment of an up-front premium (usually paid by the client, but occasionally by the solicitor), which provides insurance cover to pay out the costs of the other side and any disbursements if the case is lost.
- 1.8 If the case is won, normal costs could be recovered from the other side, but the cost of the insurance premium plus any success fee payable to the client's own solicitor were not initially recoverable from the other side. The "success fee" is the extra amount payable for the solicitor having taken the risk of a conditional fee agreement and intended to be proportionate to how that risk appeared at the outset of the case.
- 1.9 Regulations under the Access to Justice Act 1999 allowed for the costs of insurance premiums and success fees to be recovered from the other side. This was intended to make the funding of litigation easier particularly for those on low incomes, and to prevent compensation awards to be eaten into by funding these costs. However, it is still the claimant who bears the ultimate liability for their solicitors' charges and for meeting the liabilities of any funding agreement they may have entered into.

10%-20%. Applying those percentages would result in an approximate total of 1.42m for the period 2000/01 - 2003/04.

⁷ Lord Falconer of Thoroton Speech on compensation culture, Insurance Times Conference, Nov 2004

⁸ *Hansard* 22 Jun 1999: Column 1000

The rise of claims management

- 1.10 Claims management has been a growth industry with now over a thousand providers ranging from large claims handling operations to very small businesses (around half the companies employ less than three staff)⁹. Claims management companies (CMCs) usually act as intermediaries between consumers and legal services providers. They identify and obtain claims, which they pass onto solicitors for a fee. Such cases are gathered by advertising or direct marketing, before the cases are administered and then farmed out to solicitors.
- 1.11 CMCs obtain other income from conducting investigations into claims and claimants, and from commission received on the sale of services such as insurance and consumer credit loans designed to ensure that the claimant can cover the costs in the event of an unsuccessful claim. These sources of income can lead to claimants not having to pay directly for the services of a CMC. In some cases the companies are owned or operated directly by lawyers who in turn operate on a conditional fee basis.
- 1.12 Following the Access to Justice Act 1999 change to the rules on recoverability (which enabled lawyers to recover from the other side their success fee in addition to actual costs) some claims management companies introduced a new scheme to take cases forward. Rather than ask clients to pay the cost of an insurance premium up front, they asked clients to sign credit agreements for a loan to cover the insurance premium on the basis that if the case was won, the cost of the loan would be recovered from the other side, and if lost the insurance policy would cover payment of the loan. As most personal injury cases are won or settled this strategy represented a safe bet for the companies financing these arrangements, as it was unlikely that any claim would be made on the insurance policy.
- 1.13 As the majority of personal injury cases are settled before they ever reach the doors of the court insurance companies paying out on claims were being asked to settle not only claims for compensation, but also the cost of the loans to fund the insurance that the client had taken out to fund the case. They took exception to the level of these loan agreements – in the region of £1,300 - £1,500 – higher than some other premiums on the market. Claims management companies justified these on the basis of the cost of the claims management process – including administration, sales and overseeing the case. Insurers wanted the recoverability of these levels of premium, in what were largely open and shut cases, challenged in the courts.¹⁰

⁹ Claims Standards Council

¹⁰ In the leading 'test case' *Callery v Grey*, (Nos 1 and 2) MLC 0799 (HL:02) the House of Lords declined to cap conditional fees and their insurance premiums, observing that this should be a "matter for economic regulation." The law lords ruled that whilst judges have some discretion in the costs assessment process to adjust recovery of unreasonable insurance premiums, issues of 'reasonableness' in ATE premiums and abuses arising from insurers practices, should be matters for regulation or legislation, rather than intervention by the courts. They also expressed unease over "the workings of the entire CFA and litigation insurance system."

The practices of CMCs

- 1.14 Historically, CMCs have been characterised by hard-sell advertising and direct marketing, which encourage people to 'have a go' even if there is little chance of actually achieving the substantial damages dangled as an inducement. It has also been alleged that they had been inflating insurance premiums. As the Better Regulation Task Force concludes, CMCs appear to have "earned their money by non-transparent and complex systems of referral fees and charges" and the "losing side ultimately picks up their costs."¹¹
- 1.15 During the period 2001 to 2003, there has been a significant rise in reports from CABx expressing concerns about clients' experiences when trying to claim compensation for injuries. They reported many problems with marketing and sales practices, high insurance premiums, and complex agreements. Many of these were directly related to the business practices of the (now insolvent) two market leaders, Claims Direct and the Accident Group.
- 1.16 The profit levels gained from mass claims farming do not appear to have been sustainable as two larger claims management companies have gone bust amidst allegations of fraud. According to Datamonitor, "The collapse of the market leader, The Accident Group, will have dramatic repercussions for the ATE sector. The main impacts include: fragmentation of competition; doubts over the sustainability of accident intermediaries' business models; and the withdrawal of ATE insurers and banks from the market."¹² These events have brought the long-term sustainability of this market into question.
- 1.17 Some commentators have asserted that following the demise of both Claims Direct and the Accident Group, all is well with the personal injury market and that conditional fees are now working satisfactorily. Citizens Advice challenges this assertion. Our evidence continues to reveal that consumers experience numerous problems with the practices of claims managers, claims assessors and unregulated advisers.
- 1.18 In the wake of the excesses of their predecessors, the next generation of CMCs have shown more concern for public relations. Many contend that they are doing no more than what has traditionally been the 'outdoor clerking' work of the legal profession; initiating contact with clients and collecting evidence and statements. Like other paralegals such as barristers' clerks, they act as brokers to the legal professional and practitioner expertise of litigation specialists. Many CMCs operate with solicitor panels.
- 1.19 However, even accepting the long-term role of claims management as 'honest brokers' to the compensation process, there are still questions about the transparency of the process itself and its effectiveness at delivering real and valuable redress for consumers.

¹¹ *Better Routes to Redress*, Better Regulation Task Force, May 2004

¹² UK Personal Injury Litigation 2003, Datamonitor

The regulatory gap

- 1.20 There are significant differences in regulatory oversight of the different agents and steps in the legal process. Conditional fee agreements taken out directly with solicitors have to comply with regulations made under the Access to Justice Act 1999. Solicitors themselves are regulated by the Law Society who can take disciplinary action for breaches in professional conduct, set rules on advertising and marketing of lawyers' services and 'tax' or review complaints about solicitors' costs and charges. The work of the Law Society in setting standards is supported by an independent ombudsman service, which deals with complaints about inadequate professional services and customer care.
- 1.21 Insurers and, with effect from 14 January 2005, insurance intermediaries are regulated by the Financial Services Authority (FSA) and complaints about insurance products and sales can be taken to the independent Financial Ombudsman Service. Firms and intermediaries providing and selling consumer credit must hold licences. A Consumer Credit bill will be introduced in 2004/5 session of Parliament, which is expected to strengthen the powers available to the Office of Fair Trading (OFT) to tackle unfair practice by licence holders. The Bill will also introduce a new Alternative Dispute Resolution process for unfair credit transactions.
- 1.22 Claims management companies are not subject to any regulation over their practices as introducers to legal services. Their practices in selling insurance and credit products do, however, come within the remit of respectively the FSA and OFT. There are several regulatory issues of concern which are currently falling through the gap:
- standards of service CMCs offer to consumers;
 - standards of any advice given by CMCs to consumers about the likelihood of success of their case and the process, as well as financial products involved;
 - redress for consumers against CMCs on charges, costs and competence is non-existent, and
 - the priorities of claims management companies also raise a number of competition issues relating to the distribution of after the event policies and access to legal services. Claims management is a key part of insurance activity and can be a source of competitive advantage.
- 1.23 As Sir David Clementi's review identifies, CMCs have historically operated within a 'regulatory gap'.¹³ Legal professionals are required to undergo demanding courses of training, with strong components on professional ethics, prior to dealing with clients. By contrast, claims management firms can recruit without reference to professional qualifications, competence and training. With the existing legal professions there are also well established, albeit imperfect, consumer complaints procedures, a similar regime for CMCs has yet to come into effect.

¹³ *The Review of the Regulatory Framework for Legal Services in England and Wales* ('Clementi Review'), Sir David Clementi, March 2004

2. The consumer experience of 'no win no fee'

- 2.1 This chapter describes CAB evidence on the problems individuals face in pursuing personal injury claims by means of conditional fee agreements. Our clients experience particular problems because they are often vulnerable to high-pressure sales techniques and the value of the claims they are pursuing is often small, nevertheless representing a significant amount for an individual on low income. Moreover, as consumers of legal services, CAB clients tend to understand 'no win no fee' literally and so are unaware of their liabilities; this accords with findings from the limited available research into consumers' perspectives on CFAs.¹⁴
- 2.2 CAB evidence on conditional fee agreements for personal injury claims falls into five main areas. On each we have selected just a handful of examples to illustrate the problems in this report:
- Sales practices, including advertising, high pressure sales and mis-selling of conditional fee agreements by intermediaries and solicitors;
 - Misleading advice by intermediaries;
 - Poor quality of service by solicitors;
 - The disappointing outcome for clients in costs and awards, and
 - The impact on the client's health.

Consumer entitlement

- 2.3 Compensation has always been a central pillar of the legal system, as its purpose is to provide corrective justice. Civil (tort) law requires that a person be financially compensated where injury arises out of another's negligence. Whether as employers, service providers or citizens, we all have obligations to avoid causing harm to others, and to take all reasonable steps to prevent such harm arising. Compensation is not in itself a social problem, but part of the landscape of civil and legal rights. Even small amounts of compensation can be helpful to those who might otherwise be facing financial pressures as a result of their accident. However, the legitimacy of any compensation system rests on its transparency, proportionality and equality of access.
- 2.4 Responding to concerns about the growth of compensation culture, the government's Better Regulation Task Force undertook a strategic study of the issues and perceptions of compensation culture. The study concluded that compensation culture is far more myth and perception than reality; it is a media driven "storm in a coffee cup," whilst the reality is that obtaining compensation remains difficult and highly restrictive.¹⁵ Looking at international comparators, the Task Force found that the number of tort (negligence) cases is going down, and compared to many other developed economies the UK has low tort liabilities. Furthermore, the actual number of registered accident cases has been on a downward trajectory for a decade.

¹⁴ Yarrow and Abrams *"Nothing to lose? Clients' experiences of using conditional fees"*. University of Westminster 2000

¹⁵ *Better Routes to Redress*, Better Regulation Task Force, May 2004

- 2.5 It is therefore both instructive and disturbing that many cases from CABx show serious shortcomings in the process of delivering fair compensation.

Sales practices and techniques

- 2.6 In most of the cases reported by CABx, the conditional fee agreement (CFA) is sold by an intermediary or claims management company. It is CAB experience that unscrupulous intermediaries are most interested in persuading as many people as possible to take out CFAs whether or not it would be worthwhile in their circumstances. In order to achieve this end, they may produce misleading advertising about their services, use high pressure selling techniques and fail to give potential customers sufficient information about the agreements they are entering into. They also give people misleading advice about their prospects of success and the likely scale of awards, with no legal qualification to do so. However, CAB evidence suggests that these practices are not limited to intermediaries – we see similar evidence about the practices of some solicitors' firms.
- 2.7 A lot of advertising for claims management companies is very enticing. It all sounds too good to be true: it's easy to get compensation and you won't have to pay high legal fees. The drawbacks are never mentioned:

An elderly man sought advice from a CAB in the West Midlands. He had fallen over irregularly laid paving slabs in a poorly lit area and wanted to claim compensation. The client contacted a claims management company, whose literature promised that the insurance plan would cover all the costs involved. As he was in receipt of income support and had no savings, this was important to him. He was therefore very distressed to receive a letter from the solicitors clearly stating that he could face charges for the work.

A Hampshire CAB client was seeking compensation following a road traffic accident which left him severely injured. He contacted a solicitor in response to an advert in Yellow Pages, which claimed the client would receive 100 per cent of the damages awarded if successful. Subsequent correspondence, however, gave details of the conditional fee agreement and that the client could be liable for charges and costs.

- 2.8 Many intermediaries operate on a personal basis, including cold-calling potential clients at home or approaching people on the street:

A Greater Manchester CAB reported that an elderly woman whose first language was not English and could not read, had been visited by representatives from a claims management company four times until they finally persuaded her to pursue a claim for a fall outside her house, even though she had not been hurt. The client felt she was harassed into signing a contract without an interpreter present. Having heard the representative emphasise that the agreement was 'no win no fee', she was later shocked to receive a solicitor's bill for £750.

A client of a Sussex CAB was approached in the town centre by a representative from a claims management company who had noticed that his hand was bandaged. The representative urged him to take out a conditional fee agreement to get compensation. As it was such a cold and windy day and the client wanted to get home, he quickly signed the claim application, which committed him to make a payment of £500.

2.9 Of significant concern are cases where claims management companies approach accident victims in hospital:

A Kent CAB client tripped over a paving stone and chipped a bone in her ankle. Whilst she was being treated in hospital, she was spotted by a representative from a claims management company, who subsequently contacted her. They urged her to sign up with them, sent her reams of incomprehensible paperwork which the bureau commented would have taken them at least two hours to read thoroughly and understand. The client told the CAB that the lengthy incomprehensible paperwork together with persistent calling pressuring her to sign an agreement had really upset her.

A West Yorkshire CAB were concerned about the particularly dubious tactics of a firm of solicitors who had canvassed their 86-year-old client and her granddaughter almost directly after their motorway accident. The client was still in hospital when a solicitors' firm approached her. They took on her personal injury case without explaining anything to her properly – in fact they told her that nothing would be taken from her settlement, when in fact fees were later deducted.

Poor claims advice

2.10 Claims management companies are focussed on getting the consumers to take out a conditional fee agreement. They neither seem competent or able in these circumstances to be the party able to give adequate and independent advice to the consumer as to whether pursuing compensation, and funding it through a CFA is the best option for them. It is almost unheard of for CAB clients to be offered appropriate advice on how they might improve their income and secure rehabilitation after the claim has been settled:

A West Midlands CAB reported a shocking case where a claims management company had advised a wife to sue her husband who was driving her in her Motability car when he had an accident in which she was injured. The CAB commented that in the end it was the so-called professionals involved who gained from the legal action taken rather than the couple. The wife was awarded £2,500 in compensation, but received only £1,100 after the deduction of fees. The husband received a letter stating that £800 insurance would be sought from him. This meant that between them, they would only be £300 better off.

A Merseyside CAB reported that their client was visited by a representative of a claims management company following an accident where she tripped over a broken paving stone. When the representative carried out a visit of the site of the accident, they told the client as the defect in the paving stone was less than an inch in size, she should say she tripped somewhere else, and then produced photographs for her to sign to confirm them as the actual site of the accident.

- 2.11 In many of the cases reported by bureaux, the conditional fee agreement is linked to a loan agreement on which interest is charged until the personal injury claim is settled. It is clear that some CAB clients are not aware that they are signing a credit agreement, and that the loan, plus interest and any other costs can be set-off from any compensation they will receive:

A 77 year old CAB client in Cleveland was canvassed by a claims management company on her doorstep and persuaded to take out a conditional fees agreement for a personal injury claim. She did not realise the full implications of the claim and was distressed and upset to discover on coming into bureau that she had signed a credit agreement and would not eventually receive a large award with no financial outlay. Following advice from the bureau she was able to cancel her contract but was later contacted by the claims management company both by telephone and in person in attempts to persuade her to withdraw her cancellation.

A Surrey CAB reported that a client had approached a claims management company after she tripped over a kerbstone. The client reported that she was pressured into signing a conditional fee agreement and when she returned home discovered that she had signed a credit agreement for the insurance premium for £1,300. Despite immediately cancelling, and being told that indemnity had been withdrawn, she was shocked to discover a few months later that the loan was still outstanding and interest had accrued.

Poor quality of service from solicitors

- 2.12 Once the intermediary has clinched a CFA sale, the case should normally be passed to a solicitor, although some may have been settled by insurers before this stage. However, it is our experience that the problems do not stop once the personal injury claim has been passed to a legally qualified professional.
- 2.13 CAB clients are often pursuing low value claims, which may nevertheless be of enormous financial and personal significance to them. But from the solicitor's point of view, such claims are unlikely to be profitable. Where the client is persuaded to pursue small value claims using a conditional fee agreement, our evidence suggests that they are often unlikely to recover sufficient damages to compensate them after the costs (including repaying a credit agreement) have been covered.
- 2.14 Where cases are contentious and could be decided either way, the solicitor may simply delay action on the claim as any potential 'success fee' would not

make it worth their while. Meanwhile interest is accruing on the loan agreement taken out to fund the CFA. This raises an issue about whether the solicitor should have taken on the case in the first place, or should have made an earlier diagnosis.

A CAB in Hampshire reported that a client who had had an accident was approached in the street by a claims management company representative. The client was pressurised into entering into a conditional fee agreement for personal injury claim in the belief that he could win as much as £6,000, and signed a credit agreement for £1,000 to pay for the insurance. Two years later, the client had heard nothing further from the credit company, and did not know how much he now owed. Meanwhile, one firm of solicitors had abandoned his case as they said there was less than a 50 per cent chance of success.

A CAB in South-East Wales reported two cases where clients had instructed solicitors to take forward personal injury claims, only to be told, in one case nearly a year later, and in the other case three years later, that there was no merit in the case and the solicitor would not be pursuing it further. In the first case, the client had asked for her files to be returned to her, but had received no other response than that she should expect a bill.

A CAB in Bedfordshire reported that an elderly woman was encouraged to take out a £850 loan to pay for a conditional fee agreement to pursue a personal injury claim that was weak. With interest, the debt had risen to £1,800. The client told the bureau that the solicitor had informed her to ignore the statement from the loan company as "it will all be paid when you win your claim". The client was distressed when the claim was rejected and now she has to pay a large bill.

- 2.15 Some unscrupulous solicitors have targeted ex mine workers for personal injury claims under the Department of Trade and Industry's compensation schemes for mineworkers for health problems arising from their work. Despite the fact that, within the DTI schemes, there is no liability in unsuccessful cases to pay DTI legal fees, companies have still sought to sign clients up to credit loan agreements to fund insurance premiums to cover such potential costs:

A man sought advice from a CAB in Lancashire about two unsolicited approaches from solicitors offering no win no fee agreements to pursue compensation for his deceased father who had been a miner.

A CAB in Tyne and Wear reported that a retired miner on pension credit had been cold called by solicitors about claiming on the miners' compensation scheme. The client felt the solicitor was very pushy and wanted to seek advice from the CAB about what they would be committing to if they signed a CFA. The CAB advised that any compensation could affect his entitlement to benefits.

- 2.16 In some cases seen by CABx, the solicitors dealing with the personal injury claims have demonstrated poor processes for keeping clients informed of progress on their cases:

A woman reported to an East Sussex CAB that she was concerned with the procrastination of the firm of solicitors engaged in her "no win no fee" personal injury case. She was involved in a road traffic accident, which resulted in broken bones and memory loss from a head injury. The client told the bureau that the solicitors had not taken any action for 12 months on her claim.

A Hampshire CAB reported the case of a man had an accident at work and was pursuing a claim for loss of earnings. He approached a solicitor who agreed to pursue his case with a conditional fee agreement and left them to deal with his case. After some time he visited the firm to enquire about the progress of his case. The client was shocked to discover that the barrister had decided that the case did not stand a chance of succeeding and it had been dropped. Moreover, he was then told that he now had only four days to find a solicitor before the case was time-barred. Understandably, the client was left stressed and depressed because he believed that all was well and was then let down at the very last minute.

- 2.17 The solicitor's professional duty to the client can be compromised by their having a financial interest in the outcome of their cases. This is clearly shown in cases where CAB clients have had second thoughts about the prudence of taking court action and have contacted the solicitor to cancel the agreement:

A CAB in South London reported that a client had sustained a foot injury when a brick fell on her at a home improvements store. The client contacted a claims management company who assigned a solicitor. The client signed a credit agreement for £1,500 at 16.6 per cent APR. The home improvement store later offered the client £1,350 and then she sought advice from the CAB about how to proceed. The solicitor warned her that if she withdrew from the credit agreement there would be significant costs to her including medical costs.

A CAB in Norfolk client did not have enough time to read and understand the agreement he was making with the solicitor; neither did he understand the arguments the solicitor was putting forward. When the client wanted to cancel the agreement the next morning the solicitor refused to do so and billed the client for £560 and later threatened him with court action.

Outcome for the client

- 2.18 Part of the public misperception about the so-called 'compensation culture' is that it is sometimes assumed that accident victims are entitled to significant damages arising out of common but irksome physical injuries such as fractured joints, whiplash, back strains, sprains, prolapses, and soft tissue damage. However this is rarely ever the case. The Judicial Studies Board 'tariff' guidelines on the level (quantum) of compensation, which can be

recovered for pain and suffering, states that the maximum amount of damages in such cases should be about £4,000.¹⁶ Whilst success depends on proving negligence, the level of an award is also influenced by a claimant's gender, age and previous lifestyle. In 2002, 55 per cent of awards issued by county courts were under £3,000.

- 2.19 CAB evidence would appear to confirm that under our 'tariff' system of compensation, financial awards by way of damages and settlements are not only low value but often do not meet the criteria for fair and appropriate compensation or restitution. For example

A West Yorkshire CAB client injured herself by falling on a pavement four years ago. She was stopped two years later by a claims company and encouraged to make a compensation claim. In June last year she was awarded £357.

- 2.20 As the following table of a illustrative sample of cases seen by CABx since 2001 shows, the use of conditional fee agreements to pursue low value personal injury claims can all too easily result in a zero sum gain.

Compensation gained for fifteen CAB clients

Case	Compensation awarded (£)	Legal/other costs (£)	Total received (£)	Total received as a percentage of compensation
1	£2,300	£1,500	£800	34.8%
2	£2,100	£1,650	£50	21.4%
3	£1,925	£1,375	£550	28.6%
4	£1,700	£1,700	£0	0%
5	£1,600	£1,440	£160	10%
6	£1,600	£1,430	£170	10.6%
7	£1,665	£1,606	£59	3.5%
8	£1,200	£1,176	£24	2%
9	£2,500	£2,089	£411	16.4%
10	£1,500	£1,300	£200	13.3%
11	£2,100	£1,800	£300	14.3%
12	£2,500	£2,200	£300	12%
13	£100	£300	-£300	-30%
14	£2,160	£2,135	£25	1.2%
15	£1,600	£1,300	£300	18.8%

- 2.21 Our evidence also suggests that despite the Access to Justice Act Regulations, it is not always clear whether the costs to cover loan agreements taken out to fund after-the-event insurance premiums can be recovered from the other side, especially where cases are settled. This lack of clarity has led to problems for CAB clients where their cases are settled by the insurers

¹⁶ The Judicial Studies Board *Guidelines for the Assessment of Damages in Personal Injury Cases*, Also see Kemp and Kemp, *The Quantum of Damages*

rather than by court proceedings. Some have ended up repaying such loans which they had to take out to fund their insurance policy from their compensation awards, in some cases leaving little or nothing:

A client of a Staffordshire CAB was approached in the street by a claims management company. At the time he was in receipt of incapacity benefit following a back injury at work, and decided to sue his former employer for compensation. Eventually the client was awarded £2,000, however, after deduction of fees he was left with just £98! The client was left extremely annoyed and frustrated.

A Devon CAB reported the case of a client who had had an accident in a school playground. The client told the CAB that she had seen a TV advert for a claims management company, applied to them and was put in touch with a solicitor who recommended a conditional fee agreement whereby the company provided a loan of £1,000 to finance litigation. She won the case and was awarded £2,150 compensation, but her legal costs were £2,135.

- 2.22 In other cases, the compensation has not even been adequate to cover the cost of the loan, leaving clients in debt. Not only is this a far cry from what the clients had understood by 'no win, no fee', but it also raises serious questions about the merits of the case having been pursued in the first place:

A woman sought advice from a CAB in Kent after she found herself in £1,000 of debt following a compensation claim. The client's five-year-old son had been involved in a car accident and she agreed to taking out a £1,000 loan to pay the insurance premium in case she lost. In the event she was awarded £1,000 but the insurers costs came to £2,000 leaving her £1,000 out of pocket.

A CAB in Bedfordshire reported that a client had had an accident two years earlier and pursued a personal injury claim with a conditional fees agreement. The client was informed that he had won £1,000 compensation but he still owed the credit company over £600 for the interest on the loan. The client would now have to receive money advice from the bureau because of his debts.

The impact on the client's health

- 2.23 Compensation for personal injury can help people to pay for necessary aids and adaptations, rehabilitation, complementary therapies that NHS might not provide or provide quickly. However, money alone cannot always compensate for loss of quality of life or help injury victims recover. Indeed the process of getting compensation may exacerbate any mental health problems of the victim. It is now widely accepted that even apparently minor accidents can have a significant psychological impact on the victim, contributing to greater physical deterioration, disability and/or slower recovery.¹⁷

¹⁷ *Psychology, personal injury and rehabilitation* Report of the IUA/ABI Rehabilitation working party 2004

- 2.24 Many public services such as the NHS lack the resources to provide a suitable range of rehabilitative services, despite the obvious downstream benefits that may accrue from greater investment in rehabilitation. Overall the UK has a poor record in respect of getting injury victims back to the workplace; for example the chance of a paraplegic returning to employment is at least 50 per cent in Scandinavia; 32 per cent in the USA; but only 14 per cent in the UK.¹⁸
- 2.25 Moreover, claimants can be stuck for many years in a time-consuming and legalistic process, which arguably can inhibit effective rehabilitation. Research by the Association of British Insurers and the TUC concluded that: "The UK's tort culture has built a lack of trust between parties that creates delays and so reduces the chances of an injured person being referred for treatment at an early stage."¹⁹
- 2.26 Evidence from CABx shows that sometimes pursuing claims for personal injuries does little to address the client's actual health problems:

A Berkshire CAB reported the case of a client who had tripped over a telephone wire lying across path three years earlier. The client was catapulted in the air, landed in a ditch and suffered cuts and bruises. She was offered £500 compensation from the telephone company but on the advice of a claims management company turned it down. She borrowed money to pursue the claim. The client eventually won £1,200 but this was deducted from the loan account leaving a shortfall of £950, which was still accruing interest. The client was still experiencing health problems as a result of the accident, which have been exacerbated by the stress engendered by the outcome of her claim.

A CAB in Buckinghamshire reported that a part-time supermarket cashier severely damaged her arm when it was trapped in a conveyor at a supermarket checkout. Her injuries made it impossible for her to pursue her chosen career in the police. She engaged a no win no fee lawyer to pursue her claim against the supermarket. The solicitors recently told her they were withdrawing from the case because the funding company was not prepared to fund the clients' claim to the commencement of proceedings since liability had been denied by the third party insurers. As a result, the client faced additional debt at a time when she was studying toward a degree to pursue an alternative career.

Conclusion

- 2.27 It is clear from CAB evidence that the system for using conditional fee agreements to pursue personal injury claims has failed consumers, particularly those pursuing low value claims. Often intermediaries pressurise vulnerable people into conditional fees and linked credit agreements, which they do not understand and which are not necessarily the best option for them. These

¹⁸ *Third UK Bodily Injury Awards Study*. International Underwriting Association. March 2003

¹⁹ ABI & TUC 2002, p. 16

practices can lead to the pursuit of weak claims or claims where the likely compensation will be wiped out by repayment of the loan and accrued interest.

- 2.28 The issues outlined in this chapter demonstrate the need for a better system of funding personal injury claims, including better regulation of selling conditional fee agreements, and more appropriate packages of redress. In the next chapters we examine options and ideas for achieving a better regime for providing personal injury compensation.

3 Options for regulation and market reform

- 3.1 The need for development of regulation of conditional fee agreements is recognised by government. For example, the Department for Constitutional Affairs have published two consultation papers demonstrating their commitment to making CFAs work.²⁰ The Better Regulation Task Force has called for a robust system of regulation for claims farming, and the OFT is currently investigating the insurance liability market and is considering giving approval to a voluntary 'claims code' under the Enterprise Act. Furthermore, the Independent Review of the Regulatory Framework for Legal Services in England and Wales ('the Clementi Review') is due to report imminently with recommendations for a new regime for regulating the legal industry.
- 3.2 Regulation of the sectors dealing with personal injury compensation should be directed at ensuring that the availability of insurance funded claims does not lead to a general lowering of ethical standards and any proliferation of unmerited cases. It should not only provide the consumer with protection and redress from abuses, such as the mis-selling of insurance and credit agreements, but more importantly ensure that such abuses are prevented from happening in the first place.
- 3.3 This means a robust and joined up regulatory regime covering the end-to-end process for introducing, financing, handling, settling and litigating personal injury claims. In this chapter we look at:
- The regulation gap
 - Simplifying conditional fee agreements and law society regulation
 - The options for voluntary and statutory regulation of the claims management industry
 - Regulation of insurance intermediaries and credit brokerage
 - Regulation of doorstep sales
 - Joining up regulation

The regulation gap

- 3.4 CAB evidence indicates a clear need for reform and a better regulation of the market system of using CFAs. The landscape of regulation for legal and ancillary services and products is punctuated with gaps, overlaps and anomalies. For example, some service providers are doubly regulated (such as solicitors providing non-incident financial advice, regulated both by the Law Society and the Financial Services Authority), whilst other such as claims managers appear to escape the regulatory net altogether. A number of regulators deal with different parts of the conditional fee agreement process, but, as the following table shows, not all parts of the process are covered:

²⁰ *Simplifying Conditional Fees* Department for Constitutional Affairs June 2003; *Making CFA Simple a Reality* Department for Constitutional Affairs June 2004

Who regulates? – A guide for the perplexed

Process	Regulator/self-regulator/ombudsman
<ul style="list-style-type: none"> Selling of credit agreement to pay for conditional fee agreements and conduct of loan account Fairness of the credit bargain 	Office of Fair Trading; Financial Ombudsman Service if the Consumer Credit Bill is implemented
<ul style="list-style-type: none"> Selling of conditional fee insurance 	Financial Services Authority (from January 2005); Financial Ombudsman Service
<ul style="list-style-type: none"> Legal advice given by the solicitor dealing with the claim and the charges made by the solicitor in connection with the claim 	The Law Society Legal Services Ombudsman
<ul style="list-style-type: none"> Form and content of the CFA itself (it is an allowed form) 	The Law Society
<ul style="list-style-type: none"> Level of compensation to be paid 	No regulation if the claim is settled out of court by an insurer (which most are)
<ul style="list-style-type: none"> Charges and disbursements (i.e. cost of the insurance; costs of experts etc) 	Solicitors' charges are within the jurisdiction of the Law Society and Legal Services Ombudsman. Disbursements are not regulated.
<ul style="list-style-type: none"> Legal advice given by claims handler and charges made by claims handler 	Not covered by either statutory or the self-regulatory code for claims handlers.
<ul style="list-style-type: none"> CMC sales practices and consumer service 	Partially regulated by a new voluntary code, which includes a ban on cold-calling: However this has yet to obtain OFT approved status or claims industry backing.
<ul style="list-style-type: none"> Doorstep selling of legal and insurance products 	It is proposed that OFT and Trading Standards will regulate this in relation to 'cooling-off' rights. The Financial Services Authority will also regulate insurance sales from January 2005

3.5 As is evident from the above table, it is not obvious that anyone regulates claims handlers' advice to consumers. However, CAB evidence indicates that this is the part of the process that most needs regulation.

3.6 Another linked problem is that there is a lack of connection between the regulators for the different products and services. A consumer wanting to complain about the whole process for their personal injury claim could face having to make complaints to a number of regulators and ombudsman

schemes, who would face no option but to take their decisions in isolation from each other since their remits and the matters they can consider in any case are specific.

3.7 Regulation and reform is needed to focus on the following areas:

- the transparency of the claims industry and processes;
- the accountability of service providers to the consumer;
- an ethical approach to claims handling and litigation;
- proportionality between costs and damages;
- the practices of rogue claims management firms, and
- there should be joined up regulation of the processes involved in delivering personal injury compensation to consumers.

Options for regulation

Simplifying conditional fees – Law Society regulation

- 3.8 In recent proposals the Department for Constitutional have signalled their intention to make CFAs work more transparently. These aim to simplify the regulations surrounding CFAs, deter technical litigation over CFA costs, and facilitate the development of a “Simple CFA.”²¹ The key proposal is to move solicitors’ obligations from “client care” requirements under the Courts and Legal Services Act 1990 Regulations into the Law Society’s professional conduct rules, so that solicitors can produce shorter agreements under Law Society regulation.
- 3.9 The government’s concern is that the present combination of detailed regulation and professional rules presents a complex picture for clients and leads to wasteful litigation. However, the present focus of government policy on wishing to regulate, largely, the form and content of CFAs is simplistic, and will offer an incomplete solution to consumer detriment for a number of reasons.
- 3.10 Firstly, the government’s position misunderstands the full extent and nature of the consumer detriment in the injury claims market, and ignores the key regulatory concern that practices and conduct of leading players in the market – namely claims managers - are outside the scope of the existing legal regulators and professional rules.
- 3.11 Secondly, whilst the concept of a simple CFA could improve transparency for some consumers, it is unlikely to have any real effect on the length or simplicity of CFAs. This is because there are situations where a solicitor may want to charge their client and they have to have the lengthy explanation set out in the CFA, or similar agreement, or they risk being unable to underwrite the agreement through insurance.

²¹ ‘See *Making CFA Simple a Reality* Department for Constitutional Affairs June 2004

- 3.12 Thirdly, the appropriateness of the Law Society's professional rules alone being used to regulate content and practice in relation to CFAs properly has been brought into question by recent cases.²² In addition the Law Society's rules have recently been changed to legitimise the practice of fee sharing or referral fees, effectively enabling solicitors to enter into profit sharing arrangements with claims management companies and to tailor their CFA products accordingly. This must raise questions about the interests of solicitors in the claims handling process which 'permitting' a simple form of CFA would be unlikely to address.
- 3.13 Finally, the Law Society has few, if any, powers to endorse, recognise or regulate individual claims management companies or, indeed, industry associations. Even if the Law Society rules were adapted to facilitate multi-disciplinary partnerships (MDPs) between solicitors and other non-solicitor claims handlers, changes to primary legislation would be necessary to enable the Law Society to regulate non-solicitor partners of MDPs.
- 3.14 So in considering reform, which includes improving regulation of the whole system, the government should be looking to do more than provide a permission to solicitors to simplify CFAs. Regulation and reform should address consumers' needs, which include adequate information on the CFA process, and obtaining best outcomes for clients.
- 3.15 The next questions then concern the role of voluntary versus statutory regulation in the system. **Citizens Advice consider that there is a case for statutory intervention and recommend that the Department for Constitutional Affairs, working with the Law Society, should investigate the potential to establish a statutory form for CFAs, incorporating statutory terms and leaving only individual express terms (such as the amount of the success fee) for individual agreements.** This should lead to both simpler documentation for clients and fewer challenges, and include capping the recoverability of success fees and ATE premiums proportionately to damages obtained.

Can voluntary regulation work for claims management?

- 3.16 Since 2001, Citizens Advice has been working with Law Society and representatives of the claims management industry to facilitate the development of a new trade association for claims management companies and an associated code of practice (the 'Claims Code').
- 3.17 The Claims Standards Council (CSC)²³ is a voluntary regulatory body that creates, monitors and enforces standards for claims management companies

²² One recent court case on CFA rules concluded that the Law Society's Model CFA was defective and did not accurately reflect the wording of regulation 3 of the CFA regulations concerning recovery of costs from the client where they are agreed by the parties or assessed. The Judge noted this could have 'an adverse effect on the hundreds of thousands of occasions on which the Law Society's model agreement has been used or adapted.' *Ghannouchi v Houni*. SCCO Ref: TSB 0307009

²³ The CSC has evolved out of the Institute of Claims Managers, the Claims Standards Association and the Personal Injury Federation, which merged into the Claims Standards Federation.

and similar bodies engaged in handling claims.

- 3.18 CSC standards are designed to ensure that the end-to-end process for handling claims is transparent, thorough, independently validated and monitored, and customer focused. The CSC has produced a draft code and has approached the Office of Fair Trading for approval. The Better Regulation Task Force has recommended that they should work towards approval of its Code by the OFT by September 2005. Rules of the proposed code include:
- a membership scheme;
 - a requirement that clients monies be held on account;
 - a requirement to obtain and maintain professional indemnity insurance;
 - a training accreditation scheme for those employees or contractors working with the public;
 - an independent disciplinary and enforcement process supported by an independent committee;
 - a requirement that CSC members do not 'cold call' consumers, and
 - a complaints scheme.
- 3.19 However, the code remains underdeveloped on important issues of charges, costs, transparency, advice standards, and financial security to protect the consumer. Many of its compliance measurement and enforcement tools are still in preparation. **Citizens Advice recommends that, as part of its code approval process, the OFT addresses these issues of advice standards and enforcement.**
- 3.20 Whilst this self-regulation initiative is a major step forward, it is important to recognise the limits of voluntary regulation and self-regulation. By definition, a self-regulatory body can only encourage membership rather than enforcing it and any self-regulatory scheme is only as effective as the promises made, the extent of membership in a market and compliance. In the absence of firm legal and enforceable requirements, no Code of Practice based on voluntary trade association membership can guarantee that its objectives will be met.
- 3.21 Even with its new code, the CSC faces an uphill battle to establish credibility; some of the largest insurers in the UK have said they will not co-operate with the Claims Standards Council until the accident management industry shows itself capable of good practice.²⁴ This is unlikely to happen unless the claims industry supports the CSC. To date only a few key players have approved membership status.
- 3.22 However, CSC is more likely to be effective with support from other trade and professional bodies. **Citizens Advice recommends that the Law Society examine whether their rules could be amended so that solicitors specialising in personal injury will only enter into referral agreements for PI claims with those claims companies that are members of the Claim Standards Council.**

²⁴ See CSC Press Release <http://www.claimscouncil.org/newsitem.html?itemno=55>

Compulsory regulation of claims management?

- 3.23 In 2003 the government launched an independent review into the regulation of legal services led by Sir David Clementi.²⁵ This review is expected to report imminently with a number of options for improving regulation of the entire legal services industry, including intermediaries such as claims management companies.
- 3.24 One model the review examined is to create a new ‘overarching regulator’ covering all activities falling within the sphere of legal services, as defined by statute. The regulator’s functions would be similar to those of the Financial Services Authority - including the setting and enforcement of the rules and codes governing service provision; giving guidance and advice on general policy, and exercising investigative, enforcement and disciplinary powers.
- 3.25 Other alternatives might see a continuing role, moving forwards, for voluntary and professional self-regulatory organisations that would be subject to central oversight. Under this model, regulatory functions would be given to the professions in addition to their representative functions, subject to oversight by a Legal Services Board (LSB). The LSB, as central regulator, would accordingly approve the rules, practices and procedures of these organisations; it might oversee enforcement of the rules but it would not take over their direct regulatory functions.
- 3.26 For either system to apply to claims management companies, it would either have to be a requirement for such firms to have authorisation in order to practice or, in the case of the ‘familial’ approach to regulation the Claims Standards Council would have to be regarded as a suitable self regulatory body and brought under the regulator’s jurisdiction. The review is highly likely to require major primary legislation to implement its proposals.
- 3.27 The Clementi Review has avoided taking any position on whether claims management should be considered a legal service, an issue they consider a matter for ministers and their officials. It would, however, be a missed opportunity if the Review failed to recognise the changing complexities of the legal service market – in particular the growth of unqualified intermediaries who introduce consumers to a legal process. We hope therefore that the review will propose adequate ways that consumers’ interests can be protected throughout the whole process of making a claim for compensation. **Citizens Advice recommends that in implementing the recommendations of the Clementi Review, the Department for Constitutional Affairs should ensure that claims management companies, and any other intermediary firms, are clearly included within the ambit of regulation of the legal services market.**

²⁵ *The Review of the Regulatory Framework for Legal Services in England and Wales* September 2003

Regulation of insurance intermediaries and credit brokerage

- 3.28 The Financial Services Authority (FSA) will take over regulation of insurance companies and intermediaries from January 2005. The insurance rules cover information to consumers, the selling and claims process for all types of insurance by both insurance companies themselves and intermediaries.²⁶ In addition there is an established system of licensing for the sale of credit agreements under consumer credit legislation, policed by the OFT.
- 3.29 Given the complex nature of insurance products that are used to pursue personal injury claims, we see a strong need for specific rules for insurance intermediaries selling these products. Such rules should ensure that, in seeking to match the consumer to insurance products that meet their needs, the intermediary is either competent to give advice about the overall process which the policy is being used to fund or does not sell such a policy until and unless the consumer has had independent advice on their legal rights and prospects of success. **Citizens Advice also recommends that the FSA should produce a policy statement setting out how their approach to regulation of general insurance will ensure fair treatment for consumers entering into insurance agreements to fund personal injury claims.**
- 3.30 Citizens would like to see a robust approach to the FSA's new licensing requirements of intermediaries engaged in the sale of insurance products. **We recommend an early policing initiative by the FSA on the effects of new licensing regulation on the sale of the insurance element of conditional fee agreements.**
- 3.31 With respect to credit licensing, it is important that the Consumer Credit Reform Bill provides adequate tools for OFT to police the sale of credit used in the funding of conditional fee agreements. **Citizens Advice recommends that the OFT use its new powers to take an early look at the fitness of intermediaries to sell the credit used to support conditional fee agreements and the way in which these are sold.**

Regulation of doorstep sales and cold-calling

- 3.32 Doorstep selling is widely used in the claims market. In general, doorstep selling is an area in which unfair trading practices thrive and consumers' rights are inadequate. Research from CAB evidence on this issue has already been published in *Door to Door*.²⁷ In response to this report, which was submitted as a supercomplaint, the OFT undertook a market study and made recommendations to the Department for Trade and Industry (DTI) to tighten up legislation relating to doorstep selling.

²⁶ *Insurance selling and administration: the FSA's final conduct of business rules*, January 2004, FSA

²⁷ *Door to Door CAB clients experience of doorstep selling*, Citizens Advice September 2002

- 3.33 The Department of Trade and Industry have recently consulted on a revision of doorstep selling legislation.²⁸ Within their proposals the following recommendations are particularly relevant to the selling of CFAs:
- the extension of cancellation rights to cover solicited as well as unsolicited visits;
 - the provision by traders of more prominent information about cancellation rights to consumers;
 - price transparency.
- 3.34 However, the proposals do not include establishing a 'doorstep preference service' which would allow consumers to register their decision not to receive doorstep sales, or establishing a common cancellation period across relevant consumer legislation of 14 days.
- 3.35 Citizens Advice warmly welcomes the DTI's proposals to change doorstep selling legislation. We consider that changes are long overdue to protect vulnerable consumers. **Citizens Advice therefore recommends that the Department of Trade and Industry ensure that the revised legislation is in place by the end of 2005. We consider that the legislation should include the establishment of a doorstep preference service and a common cancellation period of 14 days across relevant consumer legislation.**

Joining up regulation

- 3.36 As noted above a number of bodies have a role in regulating practices in the personal injury claims market whether their concerns are with sales of financial services, promotion of legal services and adequacy of standards or providing redress in individual cases. Irrespective of the pace and shape of regulatory reform affecting the legal services market, there needs to be a more joined-up way of protecting consumers and providing redress - a 'one-stop shop' to ensure consumers are properly protected when they pursue personal injury claims. This need not necessarily mean that there has to be one regulator for the whole process, but rather that there needs to be overall co-ordination of regulatory action. It would seem reasonable for the overall co-ordination to even become the responsibility of the new legal services regulator under consideration by the Clementi Review. In implementing the Review's recommendations, the government needs to be clear what sort of inter-agency process is necessary to make effective regulatory co-ordination happen.
- 3.37 **Citizens Advice recommends that any new legal services regulator should take early action to develop a 'memorandum of understanding' on the function, roles and powers between different regulators with respect to the legal services market.**

²⁸ *Doorstep selling and cold calling: Consultation on proposals to improve consumer protection when purchasing goods or services in their home.* DTI 2004

3.38 This over-arching regulator will, however, not be established for some time. But there are actions, which other regulators and complaints bodies could take in the meantime to ensure better co-ordination. **Citizens Advice recommends that:**

- **The Financial Services Authority and the Office of Fair Trading should produce a joint policy on how they protect consumers in relation to sales of linked insurance and credit products designed to fund legal actions.**
- **The Financial Ombudsman Service and the Legal Services Ombudsman should co-ordinate complaints procedures about conditional fee agreements so that there is a “one stop shop” for any consumer complaints.**
- **The Department for Constitutional Affairs should consider whether a Personal Injury Ombudsman could have a role in policing any statutory or voluntary scheme for providing personal injury compensation.**

4. Towards a better funding system

- 4.1 Our legal process is innately expensive. Some estimates suggest that claimants' and defendants' legal fees now account for up to 40 per cent of the cost of personal injury claims.²⁹ As Lord Justice Lightman said in a lecture last year; "To the great majority of the public the perception (if not the reality) is that the legal system is a profitable monopoly of the lawyers, a source of profit for the providers of legal and ancillary services and a business which does not adequately cater for the less advantaged...costs have reached the level that medicines and medical care have reached in the poorer parts of the world - they cannot be afforded by the mass of the population."³⁰
- 4.2 This chapter looks the problems surrounding funding and costs of legal claims and examines different models for funding the legal process and services. These issues have wider implications than funding personal injury claims, but are central to the subject matter of this report. The whole problem of controlling legal costs and expenses, so that they can be absorbed within a sustainable system of funding public access to justice, needs to be addressed.
- 4.3 A key argument for removing public funding for personal injury claims has been to widen access to justice. The evidence in this report makes such an assertion questionable for claimants on low incomes. The number of actual claims for personal injuries, of various kinds, has declined since 2000, so fewer people are going through the process than in the past. And CABx and others are reporting significant problems with the funding system, and the lack of effective control over the costs that consumers must fund from any award.
- 4.4 This must call into question whether an approach to funding legal services and access to justice, which relies on a largely unregulated market delivering suitable products to meet consumers' requirements, is working. The majority of solicitor responses to the sixth Woolf Network questionnaire (60 per cent) indicated that they had to turn away clients because no funding was available for the case.³¹ Reasons included the unavailability of no after the event insurance (83 per cent), the risks involved in conditional fees (73 per cent) and the unavailability of funding to investigate the merits of the case (75 per cent).
- 4.5 The conditional fee approach to funding civil cases is far from proven to work for individuals and the public at large. Reforms are needed to achieve the following goals:
- to control a range of costs effectively so claimants' awards are not eroded;
 - to provide a sustainable system for the future, and
 - to improve consumer understanding of their rights and the options open to them.

²⁹ *Workplace Compensation: The Case for Reform and Vision for the Future* Association of British Insurers 2002

³⁰ Mr Justice Lightman, High Court Judge 4 April 2003 *The Civil Justice System and Legal Profession - The Challenges Ahead*

³¹ *Woolf Network*, 6th Questionnaire, Law Society 2003

Facing the challenge of controlling and reducing legal and other costs

- 4.6 The underlying problem with the conditional fee system is one of costs – how the expenses of pursuing a case are established, and who should pay for what part of the process. The key challenge in any legal system is maintaining proportionality between costs (the expense of the process) and damages (the benefits accruing to the winning party). In a system based on market principles, but where there is no effective market of informed consumers shopping around to get the best price, those parties who can charge costs for their time, for financial services such as insurance, can set their prices with no check. As we have seen from CAB evidence consumers lose out from this since the value of their compensation awards can be eroded by the level of costs and fees they are faced with at the end of the process.
- 4.7 In light of evidence from the operation of conditional fees the whole framework for controlling the costs of legal and other processes involved in personal injury cases requires urgent review. In this chapter we explore the possible reforms in the following areas:
- Options for reforming the costs system
 - Making compensation fairer by linking costs and damages
 - Empowering and protecting consumers in the market
 - Options for creating a sustainable funding system for the future
 - Reviewing the indemnity principle

Reform of costs

- 4.8 Any reform of costs must address not only the costs of actual litigation, but also pre-issue cases and cases settled before reaching court. Solutions to the problem of costs must include the “protocol stage” (pre-litigious) where the bulk of settlements and contested cost assessments occur, and must also look at the costs and value of insurance products and intermediaries charges. The Woolf review of civil justice resulted in significant reforms to the legal process, but left the costs system largely unchanged and unchallenged. This work now needs to be completed.
- 4.9 The removal of legal aid from personal injury means that much of the key data about the operation of the personal injury market now lies with firms. However, a programme of work being undertaken by the Civil Justice Council has been identifying data, which suggests that concerns over the increased ‘frontloading’ of costs early on within the legal process are justified.³² This is despite the fact that pre-hearing settlements have risen by as much as 50% since the civil justice reforms.³³
- 4.10 There are a number of possible ways of improving both the level of costs as well as predictability and transparency in costs. The most obvious solution is

³² Goriely, Moorhead and Abrams (2002), *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour* (Law Society and Civil Justice Council, London).

³³ Lord Chancellor’s Department – *Civil Justice Reform Evaluation – Further Findings (August 2002) – Executive Summary*

less litigation in personal injury cases and greater resolution of cases without having to either initiate legal proceedings or attend court hearings; this is investigated in Chapter 5. While cases continue to be handled within the court system (and even those cases which are settled just after the claim has been initiated are technically within the court system), there are five main types of reform, which could significantly improve claimants' costs position.

Option 1 - Expanding the Small Claims Track

- 4.11 The Better Regulation Task Force recommended that the government consider raising the limit under which personal injury can be taken through the small claims track. For personal injury and housing repair cases the current limit is only £1,000 (compared to £5,000 in other cases). This would have the effect of moving a large proportion of cases from the 'fast-track' to the less formal small claims process in which costs are restricted to set limits. However, it could also have the effect of more claimants going through the courts unrepresented, who may lose out as a result.

Option 2 - Case Budgeting

The Civil Justice Council are examining the potential for "case budgeting" – lawyers could offer the court and their opponents detailed budgets of their historic and future costs, and case budgets should be agreed at an early stage before the case can proceed. Both sides already have to agree to "case management" plans under the (post-Woolf) civil procedure rules: Case budgeting would extend this principle to costs management (the idea was looked at during the Woolf Review). However, case budgeting is not appropriate for cases allocated to the small claims track, because costs in small claims are fixed under the Civil Procedure Rules.

Option 3 - Cost capping

- 4.12 Judges already have extensive powers of case-management (e.g. striking out), but these do not extend to costs. "Costs-capping" provides a potential procedure under which the court could impose in advance a limit on the costs that will be recoverable by one party to litigation against the other. This could be done at the summary assessment of costs stage, or at an earlier stage so would not involve any separate process. However, cost capping would only be available for litigated rather than settled cases, so it would only benefit the minority of personal injury victims whose claims are dealt with in court.

Option 4 - Fixed costs

- 4.13 A fixed fee system for personal injury road accident claims was successfully introduced in England and Wales in 2003, and could potentially be extended further. New rules of court fix the success fee paid by a defendant's insurer to the claimant's lawyer where they are funded by a conditional fee agreement. For example, insurers pay solicitors their normal costs plus a success fee of 25 per cent of these costs if they win cases that settle prior to court and a 100 per cent success fee for the riskier cases that go to trial. The Civil Justice

Council is due to undertake an evaluation of the scheme shortly, which will enable judgements to be taken as to whether this approach is working, and if so, whether it should be extended.

Option 5 - A costs regulator

- 4.14 Responsibility for controlling and dealing with disputes about costs could be passed to the legal services regulator, outside the court's jurisdiction and with responsibility for oversight over both the way that legal costs and professional fees are set. Currently the Law Society's complaints service operates a scheme whereby consumers can ask their solicitor to apply for a "remuneration certificate" in cases where court proceedings are not required. The Law Society issues this certificate with an opinion on how fair and reasonable the solicitor's charges are, and in exceptional circumstances can waive solicitors' fees. Alternatively, a detailed assessment can be undertaken by a court on a similar basis to litigated work. For cases where the client has lost money as a result of a solicitor's dishonesty or failure to pay damages, the Law Society operates a separate compensation fund. **These processes may require further rationalisation in light of the Clementi Review.**
- 4.15 All of the above proposals would represent major reforms to civil justice system and require further work, and none is a complete solution to the problems experienced by consumers. Measures leading to a reduction in costs in one part of the system could lead to cost increases in another part. The goal should be predictability throughout the whole system from first steps towards making a claim to any eventual court process. In principle, Citizens Advice favours fixed costs regimes at both the protocol and litigation stages; however in order to ensure that fixed costs are adhered to both regulatory and judicial powers may need to be strengthened.
- 4.16 **The Department for Constitutional Affairs should undertake an inquiry into effective methods of controlling costs and charges to consumers of legal services. This investigation should draw on the recent work by the Civil Justice Council on fixed costs regimes and case budgets. The review should include consideration of whether cost controls could be provided for expressly in the civil procedure rules and whether additional regulation is needed. Any such report should include recommendations on simplification and modernisation of the costs system and costs complaints processes with a view to reducing the burden of costs on the end user.**

Reform of compensation

- 4.17 CAB evidence suggests that the current scheme for awarding damages does not sufficiently take into account the problem of costs and how costs can impact significantly on claimants' lives and incomes. The Judicial Studies Board guidelines, for example, make no reference to costs and give more weight to decided cases than agreed settlements. Citizens Advice considers it to be fundamentally important that settlements are structured to be inclusive of any cost burdens and considerations.

- 4.18 Often damages do not always appear to be proportionate to the issues involved. Another historical problem is the relationship between damages and care costs; it is only recently that courts have started making periodic payments. Compensation for loss of quality of life and other non-financial detriments arising from personal injury has been notoriously hard to quantify by courts and insurers. The wider debate is whether compensation awards should be assessed within a medical or social model.
- 4.19 It is also important to look at costs management in the context of how damages are assessed and awarded, and how damages are assessed within a wider policy context of promoting rehabilitation. This raises questions about how various tariffs are set and their linkage to cost of living indices, as well as who advises on the appropriateness and methodology of different tariffs mechanisms, and whether there might be a case for a legislative tariff (or at least upper and lower limits) to replace the judicial one. At the moment, the only damages fixed by statute are for bereavement under the Fatal Accidents Act; an anomalous intervention in judicial discretion to award damages for non-financial losses (such as pain, suffering, loss of amenity, or psychological trauma).
- 4.20 Previously the Law Commission has rejected proposals to limit damages for non-financial losses. They have also suggested that there is a need for an independent board to advise assessors, courts and legal service providers on the value which society places on the consequences of personal injury.³⁴ The issue of how compensation is calculated has also been raised at EU level, where work is going on for a programme to harmonise how damages are calculated across member states (See Appendix 2).
- 4.21 **Citizens Advice recommends that the work of the Law Commission in this field should be built on and taken forward. We suggest that Law Commission conduct further research on relative discrepancies in calculating the thresholds for damages with a view to producing a new tariff system based on the principles of proportionality and fair restitution.**

Empowering and protecting consumers in the market

- 4.22 One way of giving consumers peace of mind over the costs they may face in the event of needing to make a personal injury claim would be to enable and encourage consumers to have in place 'before the event' insurance to cover legal expenses. Citizens Advice believes that as part of a strategy for improving the system for dealing with injury compensation claims much more could be done to ensure consumers are aware either of the potential benefits of having legal expenses insurance or, where they do have such insurance, what it covers and how to use it.

³⁴ *Damages for Personal Injury: Non-Pecuniary Loss* Law Commission Consultation no 140 (1996), *Personal Injury Compensation: How Much is enough* (1994) Law Com No 225

- 4.23 Where both parties to a motor accident have comprehensive insurance it is likely that policies on both sides cover the legal costs of handling the claim and in this area well insured consumers may have less need to have resort to conditional fee type agreements. Motor accidents presently make up the vast majority of personal injury claims in any one year. Before the event insurance has the advantage of spreading the risks over a longer period. It also ought to offer better value than policies taken out after the event.
- 4.24 Legal expenses insurance (LEI) was first introduced in the UK in 1974. Policyholders pay an annual premium for insurance cover for legal expenses up to a specified level of indemnity. Legal expenses may cover solicitors' fees, the opponent's legal costs if the case is unsuccessful, and payments to expert witnesses. Insurance for the cost of litigation arising from potential accidents or other civil wrongs can be taken out individually, or collectively through membership organisations such as a trade union. The model has had some success in Sweden where almost everyone has insurance of this kind.
- 4.25 The market has developed since its introduction with less 'stand-alone' policies and the streamlining of claims handling by insurers, including the development of panel firms of solicitors who conduct this work. Some consumers today will now have legal expenses insurance as part of a package of other insurance or banking services, for example as part of a package of services for particular account holders.
- 4.26 Some legal expenses insurers operate in-house claims handling functions, limited to non-personal injury motor claims or low value claims below the small claims limit, currently £5,000. Others send all claims to external solicitors for claims handling. Generally legal expenses insurers operate panels of solicitors' firms to whom they will send the majority of their work.
- 4.27 In 1998 it was estimated that over 17 million people were paying premiums for legal expenses cover. In 1999, the total gross earned premium to companies writing legal expenses insurance was £102,307,000. However, LEI is not as widely established as in other jurisdictions, for example in Germany where in 1996 premium income was £1,927 billion compared to £96 million in the UK.³⁵
- 4.28 Legal expenses insurance does not appear to have grown as a result of the removal of public funding from certain types of claim introduced by the Access to Justice Act 1999. In personal injury claims, conditional fee agreements (CFAs) backed by 'after-the-event insurance' have risen to greater prominence together with claims management companies who offer potential claimants different types of conditional fee agreements.
- 4.29 Legal expenses insurance is not without its problems. Some policies can cover a narrow range of legal advice involved in a case and given the relatively small number of personal injury claims every year encouraging large numbers of consumers to get cover could involve them in costs for insurance they might have limited risk of needing to claim on. Many consumers may

³⁵ Abrams *In Sure Hands Funding Litigation by Legal Expenses Insurance: The Views of Insurers, Solicitors and Policyholders* University of Westminster and Nuffield foundation 2002

already have cover and encouraging them to purchase additional policies may not be helpful. Information about the policy cover may be hidden in the small print and where it is 'thrown in' with a package of other services policyholders may receive little if any other written information about the product prior to purchasing it.

- 4.30 It is not therefore surprising that legal expenses insurance policies do not seem to be used as widely as they could be and consumers may not even be aware they have cover, or how to activate it. For example, recent research has found that when faced with a legal problem, the largest group of policyholders attempted to resolve it themselves by contacting the third party with whom they were in dispute and only resorting to the services provided by their legal expenses insurance policy when these attempts failed. Others made contact with advice agencies such as CABx or contacted solicitors, either directly or through referral schemes such as National Accident Helpline.³⁶
- 4.31 Many trade unions provide a range of legal services for members in areas such as personal injury, supported through collective insurance policies. Unions recover over £300 million in damages every year for their members at a cost of less than 5 per cent of that. Unlike claims management companies, union legal schemes do not pass any of the costs as charges to their litigant members, as the organisation indemnifies members for any costs liability. They take around 150,000 cases a year, and win around 95 per cent of these cases. However these schemes do not achieve universal coverage or benefit the most socially excluded. For example, TUC figures show a four per cent drop in trade union membership between 2002 and 2003.
- 4.32 Citizens Advice believes that more could be done to increase awareness of consumers' options. The Department for Constitutional Affairs should fulfil its commitments to provide improved guidance for consumers, including publishing new information about existing protections via relevant Government websites, including Directgov.³⁷ However, more action is needed so Citizens Advice recommends that
- **Government should include a greater focus on choosing and using legal expenses insurance in all of its relevant consumer information and education strategies, for example the Department for Constitutional Affairs' developing Education Information and Advice Strategy.**
 - **Government should consider establishing an independent advice line on personal injury, which could help people with questions about funding options. This could be provided through existing services such as Consumer Direct or the FSA Consumer Helpline, or funded with industry support.**

³⁶ *ibid*

³⁷ Tackling the "Compensation Culture" Government Response to the Better Regulation Task Force Report: 'Better Routes to Redress' 10 November 2004

- **The OFT should undertake a study into the value for money and effectiveness of legal expenses insurance on the market today.**

Creating a sustainable funding system

4.33 Notwithstanding the wider availability of legal insurance products, Citizens Advice considers that government should keep its options open on the longer term policy for funding personal injury cases. Different options range from public to private funding possibilities. The following three though should remain under review.

- Restoring public funding in some form;
- A civil legal aid contingency fund (CLAF), and
- Contingency Fees.

Option 1 – restoring public funding

4.34 As an overall part of the legal aid budget, funding personal injury claims did not actually present a burden that was unmanageable or out of control. In 1997/8 for example personal injury litigation accounted for 4 per cent of the legal aid budget. The personal injury element of legal aid funding was also moving towards a stable self-financing situation. In 1996 for example legal aid in personal injury cases funded 75,000 cases; those that were funded recovered £502 million in damages at a cost of £224 million. However, 86 per cent of the damages were recouped as costs. The net cost to the public was therefore £34 million. In many successful personal injury cases, legal aid could effectively be recouped through the statutory charge.

4.35 The net average cost of personal injury cases was therefore quite low compared to other categories of law. And public costs could have been reduced further if a system for payment of an administrative fee by a solicitor wishing to discharge a legal aid certificate could have been introduced.

4.36 There is also a human rights argument for restoring some level of public funding in personal injury cases. Article 6 of the European Convention on Human Rights establishes the principle of ‘equality of arms,’ which must extend to all proceedings involving the determination of “civil rights and obligations”. Even initial proceedings dealing with claimants’ issues of liability and quantum can potentially be determinative of civil rights and obligations for the purpose of article 6.³⁸ There may therefore be circumstances in which denial of legal aid in personal injury cases could breach article 6.

4.37 However, Citizens Advice accepts that re-instating means-tested legal aid for all personal injury cases is unlikely to be in prospect, and with increasingly restricted access to legal aid for civil cases would be of benefit only to people on the very lowest of incomes. **Instead Citizens Advice recommends that the Community Legal Service Funding Code should make clear that the**

³⁸ *Airey v Ireland* (6289/73) [1979] ECHR 3

Legal Services Commission will maintain a discretion to approve funding in personal injury cases where clear breaches of human rights law arise.

Option 2 – A civil legal aid contingency fund

- 4.38 Another way of helping consumers cover the costs of making personal injury claims might be would be for a proportion of any damages to be paid into a contingency legal aid fund (CLAF) to fund claims and litigation costs for consumers in general. Taxing a proportion of the money recovered by successful applicants to meet the cost of claims by unsuccessful applicants, could remove at a stroke the problems of poor sales practices and unfeasibly high priced after the event insurance policies.
- 4.39 Traditionally, the idea of a contingency legal aid fund, or CLAF, has been championed by the Bar as the most cost effective system of funding. However, whether in a culture of pre-action protocols and pre-litigious advice and negotiation, a CLAF could indeed provide a sustainable basis for cases going through the whole process is questionable. Critics of the CLAF proposal have observed that such a fund could not work alongside a busy market for conditional fees since the primary requirement for success of a CLAF would be the size of the funding pool.
- 4.40 A major problem would also be the source of initial funding for a CLAF. One suggestion is that initial funding could come from the National Lottery as in Hong Kong. However, to introduce such a scheme in the UK would take a major initiative to achieve and several issues would need to be resolved:
- Would CLAF cover all, some or none of the claimant lawyer's costs?
 - Would successful defendant costs be met from the fund?
 - How would the costs of the scheme be met for a CLAF to be viable?
- 4.41 Although the government have shown little interest in this option, the longer-term attractiveness of the CLAF concept for the public should not be underestimated, as it offers sustainability, predictable costs and efficient ways of recovering costs. Powers were included in the Access to Justice Act to establish such a fund if confidence in conditional fee agreements, and the availability of insurance, prove in the longer term to be ill-founded.
- 4.42 Citizens Advice do not consider this option to be the most practical way forward. But, given the problems outlined in this report with the operation of CFAs, we believe that, as part of an ongoing review of funding options, the government should at least keep the feasibility of creating a contingency legal aid fund, using powers in the Access to Justice Act, under consideration.
- Citizens Advice therefore recommends that Department for Constitutional Affairs undertake a CLAF feasibility study as an alternative method of legal aid funding in personal injury cases.**

Option 3 – Contingency fees

- 4.43 An alternative to conditional fees would be the contingency fee system. A contingency fee system involves successful claimants paying over to their lawyers' agreed proportions of the damages awarded to them as a reward for success in the case, and lawyers setting professional fees accordingly. Contingency fees could therefore be more accurately described as a true 'no win no' fee system, and are used for example in the USA, which operates a different costs system.
- 4.44 There are attractive arguments for adoption of this system. Whilst CFAs are impenetrably complex, contingency fees would be much easier to explain to the client and could stimulate competition on both price and incentivise solicitors to act promptly, vigorously and professionally for their clients. The Better Regulation Task Force also sees considerable merits; "Contingency fees would certainly have the benefit of bringing costly satellite litigation to an end, and be more transparent for the claimant". If supported by appropriate insurance, claimants could protect themselves from erosion of their damages.
- 4.45 Another advantage is that, unlike CFAs, they do not have the built-in incentive for lawyers to inflate their costs unreasonably in order to earn higher success fees. However, many of the legal ethics issues that apply to conditional fees apply equally, if not more so, to contingency fees. Such a system is also irreconcilable with the existing costs liability and indemnity principles of UK law (see the next section), already challenged by conditional fees, that a successful claimant recovers costs against the defendant.
- 4.46 Another weakness of contingency fees is the cherry picking effect it inevitably generates, as lawyers will select the cases from which they can win and win the most. So as a system of funding it is simple to understand, may generate the lowest costs and produce cost/charge competition but does not necessarily, in a world of no legal aid, enable consumers with low value, yet significantly important for them, cases to get access to justice.
- 4.47 Both CLAF and contingency fees are ways of taxing claimants' damages proportionately to the amount of process involved in the case and the amount of compensation received. By contrast, conditional fees are a fiendishly complicated way of to achieve a very simple effect of only having to pay costs in proportion to outcomes obtained. **Citizens Advice urges that any systematic review of funding for personal injury cases must incorporate the principles of proportionality, transparency and contingent costs recovery. In principle we therefore favour the potential development contingency fees.**

Reviewing the indemnity principle

- 4.48 A review of costs control and proportionality should include consideration of how the so-called 'indemnity principle' operates. The DCA and the legal community argue that this is a major factor inhibiting moves to a more

transparent and competitive costs regime for CFA cases, and leads to insurers mounting unhelpful legal challenges to costs in order to defer their liabilities.³⁹

- 4.49 The indemnity principle is a common law rule that a receiving party should not receive more from his opponent in costs than he is actually liable to pay his legal representative. It operates to limit the sums that can be recovered, and generally acts to keep costs no greater than the liability of the client to their solicitor. The principle has been supported by long established rules that agreements whereby the payment of the solicitor's costs were contingent on the success of the case, or other performance related arrangements, were unlawful in this country.⁴⁰ The current position is that any agreement providing that the client has reduced or no liability for costs is a breach of the indemnity principle, unless the agreement has been specifically sanctioned by statute.⁴¹
- 4.50 The indemnity principle also prevents lawyers entering into agreements with clients indicating that they would be content to receive less than the optimum amount. Although legislation has legitimised CFAs which provide for no costs recovery from the client in lost cases, the same legislation does not legitimise reduced costs recovery in winning cases. For instance a solicitor cannot agree to be content with what is recovered from the losing party and not seek to recover the remainder of the 'bill' from the client.
- 4.51 Provisions in the Access to Justice Act were intended to allow rules of court to limit the indemnity principle; however the principle remains as the court cannot abolish a rule of law. To get around this, the indemnity principle does not apply to certain types of CFAs defined by regulation. This has the consequential effect of introducing complexity into the market.
- 4.52 In theory, the indemnity principle gives the consumer reassurance that their lawyer's charges will be contained, or at least no higher than any award they receive. In practice we have seen that this does not seem to provide any significant level of costs protection or deter lawyers from inflating their costs. Moreover, Citizens Advice considers that legal professionals should have greater freedom to contract on agreed and transparent terms of contingent cost recovery.
- 4.53 **Citizens Advice would support a review of the indemnity principle provided it was undertaken as part of a comprehensive review of the way in which costs operate and are regulated, both between the parties and between lawyers, clients and their intermediaries.**

³⁹ *Simplifying Conditional Fees* Department for Constitutional Affairs June 2003; *Making CFA Simple a Reality* Department for Constitutional Affairs June 2004

⁴⁰ Contingency agreements were unenforceable in common law and at one time both criminal and civil offences under the so-called 'laws on champerty and maintenance.' (This essentially means sharing your clients' profits). The Criminal Law Act 1967 abolished such offences but still preserved the invalidity of contingent fee agreements. Consequently contingency fees are technically illegal.

⁴¹ This is how CFAs came into existence under the Courts and Legal Services Act Regulations 1995

5. Towards a better process

- 5.1 A radical approach to the problem of personal injury compensation is to ask whether personal injury cases need to go through a legalistic civil claims procedure at all. This option deserves attention in light of the civil procedure reforms and pre-action protocols, which discourage litigation from the outset. In a public lecture Lord Justice Lightman has signalled that further legal and procedural reforms are required to encourage parties to mediate, concluding that “a mediation culture is vital today where the alternative is financially crippling and socially disruptive.”⁴² Not only is there sympathy for this approach in the senior judiciary, but it would also be consistent with the Department for Constitutional Affairs’ Public Service Agreement target “to reduce the proportion of disputes that are resolved by resort to the courts.”⁴³
- 5.2 This chapter explores the following options for dealing with personal injury claims either without having to resort to the court process, and/or by building into the process measures which could assist injury victims to achieve rehabilitation.
- alternative dispute resolution (ADR);
 - a personal injury tribunal;
 - a “no fault” system, and
 - rehabilitation.
- 5.3 Citizens Advice favour a long term shift away from our litigation culture whilst maintaining the fundamental principle of fair compensation, though we recognise that implementation of these different approaches will require sustained work, action and development. We welcome the announcement by the Department of Constitutional of a proposed ministerial working party, to take forward the Better Regulation Task Force’s proposals, as this should bring interdepartmental initiatives across government to address recommendations on ADR and rehabilitation.⁴⁴ However, in order to take forward long-term developments of our personal injury compensation and tort system, and improve consumer access, government will need to work with the private sector, advice agencies and the relevant professions, and draw on models and best practice from different jurisdictions.
- 5.4 **We therefore recommend that the ministerial working party establish a Compensation Task Force to recommend long-term policy changes to the process of delivering personal injury compensation.**

Alternative dispute resolution (ADR) mechanisms

- 5.5 Increased use of ADR - mediation, conciliation, negotiation and associated procedures - could have a significant role to play in solving the market and process problems we have identified in this report by using non-litigious routes

⁴² Mr Justice Lightman, High Court Judge 4 April 2003 *The Civil Justice System and Legal Profession - The Challenges Ahead*

⁴³ Department for Constitutional Affairs Autumn Performance Report 2003

⁴⁴ DCA press release 10 November 2004

to deliver compensation. Many claims by CAB clients are of low value, so use of a costly legal process is not always proportionate. Other jurisdictions are increasingly making ADR central to personal injury compensation (see appendix 2). The aim would be to reduce the legalistic character of the process and dependency on legal services providers.

- 5.6 In principle Citizens Advice supports greater use of ADR in personal injury cases. One approach is for a **compulsory mediation process** before cases go to court. Available experience shows that compulsory mediation works as a proven alternative to voluntary court-annexed schemes. Research into dispute resolution systems in workers compensation schemes indicates that compulsory mediation and/or conciliation processes are largely successful in cutting legal costs and improving early settlement rates.⁴⁵
- 5.7 Nevertheless, barring cases from court adjudication arguably restricts citizens' access to justice by denying the right to establish legal liability. The Court of Appeal has recently given important general guidance on the use of ADR and mediation in personal injury litigation the circumstances and where it is appropriate to penalise parties who refuses mediation.⁴⁶ The court does not have power to order reluctant litigants to mediate, as ordering mediation would be an obstruction of access to the court and a violation of article 6 of the European Convention of Human Rights. The court's role is to encourage, not compel. However, if a party refuses mediation, at a subsequent trial, the court can displace the normal costs rules and order that party to pay additional costs.⁴⁷
- 5.8 How then could the court provide encouragement for ADR within the framework of the Civil Procedure Rules? The obvious mechanism would be to issue **orders imposing a deadline for parties to consider mediation**. If a party considers mediation unsuitable it must, not less than 28 days before trial, file a signed statement setting out its reasons why mediation is unsuitable. This then provides the material on which the court can decide whether refusal to mediate was reasonable or not. The Court of Appeal has expressed the view that there is no reason why this form of order could not be routinely made in general personal injury litigation. **Citizens Advice recommends that the Civil Procedure Rules Committee look at making it more commonplace in civil litigation to use cost orders where parties refuse to mediate unreasonably.**
- 5.9 However, orders to consider mediating would still not provide a principled process with settlement instead of litigation as the main goal and falls short of establishing mediation as the freeway with the courts as the turnpikes. An alternative approach to personal injury cases is needed that starts with settlement as the main goal and in which mediation replaces the trial as the

⁴⁵ Law Institute Victoria

⁴⁶ *Halsey -v- Milton Keynes General NHS Trust* [2004] EWCA (civ) 576

⁴⁷ This will only occur if the successful party acted unreasonably in refusing ADR. The burden of showing the refusing party was unreasonable lies with the unsuccessful party. If the case is mediated, the parties are entitled to adopt whatever position they want and if the case does not settle, the court is not entitled to examine why that happened (preserving the confidentiality of mediation).

ultimate aim. The value of mediation is not simply as a mechanism or process for negotiating a mutually acceptable remedy; its value lies in its potential to transform relations between parties and their wider social context.

- 5.10 The best way forward for the UK legal process has been identified by the Better Regulation Task Force, which recommended that the Department for Constitutional Affairs, working with the Rules Committee, should **strengthen the pre-action protocols** that deal with personal injury, mediation and rehabilitation. The protocols should require parties to provide an explanation of why they had rejected mediation as a means of resolving a dispute, and consider the need for rehabilitation treatment. Citizens Advice would like to see these protocols more widely used and publicised; **we therefore recommend that as well as developing existing protocols with judicial authorities, that industry bodies develop best practice guidance in using the pre-action process.**
- 5.11 Finally, it is important to note that ADR is not necessarily a more accessible option than legal proceedings. It is not a 'lawyer-free' process as lawyers may be needed to advise on settlement terms, and the availability of specialist providers of mediation services is extremely patchy. There is no national ADR scheme for personal injuries, nor any clear funding stream to support such a scheme.
- 5.12 Citizens Advice believes that ADR for personal injury cases should remain voluntary, but that there should be far greater provision and incentives to use ADR. **Citizens Advice therefore recommends that the merits and possibilities for developing and introducing ADR schemes into personal injury compensation should be investigated by the proposed Task Force on Compensation.**

A personal injury tribunal

- 5.13 A tribunal with appropriate expertise could be just as competent as any court in establishing issues of causation and fault as well as quantum. There is already some precedent in the UK for dealing with injuries compensation in this way, for example with the Criminal Injuries Compensation Board. Meanwhile, some other jurisdictions have moved to a tribunal system (see appendix 2).
- 5.14 Extending the tribunal jurisdiction to injury compensation has already been given consideration in the NHS. Although this option has been rejected, the Chief Medical Officer has proposed an alternative scheme.⁴⁸ The establishment of a new system ("The NHS Redress Scheme") of providing redress for patients who have been harmed as a result of seriously substandard NHS hospital care is proposed. The new arrangements would have four main elements: - an investigation of the incident; an explanation, to the patient and of the action proposed to prevent repetition; the development and delivery of a package of care providing remedial treatment, and therapy, and arrangements for

⁴⁸ *Making amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS* report by the Chief Medical Officer DoH July 2003

continuing care where needed and payments for pain and suffering, out of pocket expenses and care or treatment which the NHS could not provide.

- 5.15 Patients would be eligible for payment for serious shortcomings in NHS care “if the harm could have been avoided” and if the adverse outcome was not the result of the natural progression of the illness. Payment would be made by a local NHS Trust for reimbursement of the cost of the care leading to harm (or similar amount), by a national body (an NHS Litigation Authority) for amounts up to £30,000. These proposals could be transferred to personal injury compensation.
- 5.16 In principle, Citizens Advice considers that for many cases, a tribunal would be a far more effective and proportionate process than legal proceedings. Existing models though would need to be thoroughly evaluated against criteria of access, cost, capacity and outcome delivery. **Citizens Advice recommends that the proposed Task Force on Compensation should look at the feasibility of establishing a tribunal jurisdiction for personal injury cases, working with the DCA Tribunals modernisation team and drawing on best practice overseas.**

A ‘no-fault’ system

- 5.17 The final alternative model of delivering compensation is to ask whether the process should be unduly grounded in and tied to the “fault principle” and the accompanying standards of proof that require a processed system of legal adjudication. The fault principle means that in practice we have a ‘cause-based’ system of compensation rather than a ‘needs-based’ system. Arguably, this discriminates between accident victims, with exactly the same needs for compensation, on the basis of whether or not they can prove fault on the part of another person. Advocates for such a system argue that proving fault and establishing liability bears little relationship to actual blameworthiness.⁴⁹
- 5.18 There are examples of statutory schemes dealing with accidents relating to particular activities such as motor accidents, work accidents and medical negligence, which derive the rights to redress from proof of injury and loss rather than fault. The NHS is also considering reforming clinical negligence compensation, with a no fault compensation scheme in cases involving babies with severe birth related neurological damage.⁵⁰ The basis of a no fault compensation scheme is that compensation should be made available through the social security system on a similar basis to other sickness and disability benefits.
- 5.19 Whilst a similar model to the New Zealand system was last considered and rejected by the Pearson Commission,⁵¹ the case for the systematic reform of tort law and processes is now becoming more compelling. As a mechanism for

⁴⁹ See Peter Cane: *Atiya’s Accidents, Compensation and the Law*, Butterworths 1999

⁵⁰ *Making Amends DoH*

⁵¹ A Royal Commission on Civil Liability and Personal Injury Compensation (‘the Pearson Commission’), was established in 1974 to look at the operation of the tort system, its overlap with social security, and compensation systems; this reported in 1978.

delivering compensation, the tort court-based system costs 85p to deliver £1 of compensation, compared to 15p to deliver £1 of social security benefits.⁵² The costs of handling claims under the New Zealand Accident Scheme is about 7 per cent of the benefits paid out. Clearly though shifting responsibility for personal injury compensation from the court to social security would have serious implications for legal and ancillary services.

- 5.20 The “polluter pays” principle remains popular with UK policy-makers, indeed the Department of Health have recently published proposals for including recovery of NHS costs in treating injuries within personal injury liabilities.⁵³ However, although not on any immediate political agenda, the no fault option should not be ruled out altogether for all types of personal injury claims. It is now nearly thirty years since this issue was last addressed by the Pearson Commission; given the problem of the growing costs of the tort process, it is time that greater consideration were given to whether elements of personal injury compensation could be better dealt with on a no-fault or compensatory scheme basis. Historically, the tort and benefits systems have been allowed to develop separately, though both operate as methods of financial support for those who have lost suffered losses through accidents and injuries. The relationship between the two systems needs greater clarity and joined up policy-making.
- 5.21 This raises issues outside the responsibility of the Department for Constitutional Affairs and concerns other government departments, in particular the Department for Work and Pensions. Consideration of the relationship between tort damages and benefits requires an inter-departmental process. Although Citizens Advice does not believe that a “no-fault” system would provide a comprehensive solution in all cases to personal injury compensation **we recommend that the proposed Task Force on Compensation should look at the different processes and mechanisms for delivering injury compensation and make recommendations for long-term policy development, with particular reference to the relationship between legal remedies and state benefits, and where statutory schemes may be appropriate.**

Rehabilitation and prevention

- 5.22 While the government talks of prevention rather than cure, and rehabilitation rather than litigation, the onus of picking up the pieces after a life-shattering event is still invariably down to the individual. They have to negotiate their way through medical, social, employment, welfare, legal and insurance none of which are geared up to work together. The problem is that the relevant services such as sub-acute and long-term care, human resources, line management, state benefits system, legal support, claims management, general practice, and occupational health are poorly co-ordinated in our system of personal injury compensation.

⁵² Peter Cane: *Atiya's Accidents, Compensation and the Law*

⁵³ The recovery of NHS costs in all cases involving personal injury compensation: A Consultation on the draft regulations, DoH November 2004

- 5.23 The best way to prevent litigation, or the threat of litigation, is to better manage those risks that cause people to have accidents or suffer injuries in the first place. There is extensive evidence of the benefits of involving employees in the drive to improve health and safety standards. Personal injury is usually avoidable and always pernicious in its impact on both the individual and society. Work done by the Department of Health on a number of National Service Frameworks (NSFs) has identified the health economics of injury prevention, early intervention and comprehensive rehabilitation.
- 5.24 In 1999 insurers launched a voluntary Rehabilitation Code of Practice, which sets out important good practice principles, which can be applied by employers and service providers alike. However, many public sector providers such as the NHS lack the resources to provide a suitable range of rehabilitative services, despite the obvious downstream benefits that may accrue from greater investment in rehabilitation. The Better Regulation Task Force has recommended that the Chief Medical Officer should lead a cross-Departmental group to assess the economic benefits of greater NHS-provided rehabilitation to report in 2005. The Task Force has also recommended Department for Work and Pensions should lead a group, which includes insurers, lawyers, HSE, the NHS and other interested parties, to look at developing mechanisms for earlier access to rehabilitation and that this group should make recommendations in 2005. **Citizens Advice endorses these recommendations.**
- 5.25 However, real action rather than talk is needed to address the problem of the UK's poor record in rehabilitation, including strengthening existing employment and discrimination protection legislation (Eg Disability Discrimination Act). In order to be most successful, rehabilitation has to occur promptly after an injury or illness has occurred. It must deal not only with the medical aspects of an injury or illness, but also the psychological and social aspects of rehabilitation also. Some new schemes sponsored jointly by the Department for Work and Pensions and the Department of Health, such as Pathways to Work and the Job Retention and Rehabilitation pilots, may go some way towards this.
- 5.26 The Disability Discrimination Act protects people who meet the Act's definition of disability and obliges employers to make reasonable adjustments in the workplace to accommodate the requirements of employees, or potential employees who are disabled. This can involve adapting buildings or providing equipment. There is an important role for occupational health specialists who have the skills required to advise individuals and employers about 'reasonable adjustments'. What is now needed is greater use of and access to occupational health services in helping accident victims retain their jobs and settle into new ones.
- 5.27 Citizens Advice's report *Out of the Picture*, which looked at the experience those with mental health problems seeking to return to work, found that the disability allowance and tax credit systems can mean that many people who would return to low paid employment are unable to escape the worst effects of a poverty trap; often they are little better off in work than when on benefits. Only 25 per cent of people on incapacity benefit would be at least £40 a week better off if they moved into work of 30 hours or more a week.

- 5.28 The extremely lengthy nature of personal injury proceedings often prevents prompt intervention and rehabilitation, which is both cost effective and also maximises health outcomes. Psychological damage is also much more likely in this situation.⁵⁴ **Citizens Advice recommends that the Compensation Task Force should investigate how rehabilitation could be better integrated into the process of personal injury redress.**
- 5.29 The Department of Health recently published draft Regulations for a new expanded NHS Injury Costs Recovery (ICR) scheme.⁵⁵ For the first time ever, the NHS will be able to recover costs from insurance companies for treating patients in all cases where personal injury compensation is paid. Hospitals are already able to recover the costs of treating people injured in road traffic accidents (RTA) where they have successfully claimed compensation for their injuries. NHS costs are payable by the insurer that pays the compensation. Five years after the RTA scheme came into operation it is recovering around £105 million per year for the NHS. It is expected that the expanded scheme will eventually recover an additional £150 million per year. Citizens Advice is anxious that this proposed cost recovery may erode damages packages payable to successful claimants and lead to significant hikes in insurance premiums. It must not damage the principle of free and prompt health and social rehabilitation at the point of need. Moreover, greater priority should be given to rehabilitation services from these additional resources.

⁵⁴ *Psychology, personal injury and rehabilitation* Report of the IUA/ABI Rehabilitation working party 2004

⁵⁵ *The recovery of NHS costs in all cases involving personal injury compensation: A Consultation on the draft regulations* DoH November 2004

6. Conclusions and Recommendations

The case for change

- 6.1 Personal injury compensation is not delivering access to justice and this is a very major concern for public policy alongside disability rights, benefit entitlement, pensions, health and rehabilitation. Indeed all these areas are closely affected by the experience of personal injury. Although in principle CFAs offer the potential widening of access to justice, the current situation cannot be defended as a rational solution to the important task of ensuring a fair compensation process for accident victims. Nor can it be described as “compensation culture”, but should rather be understood as a crisis over costs in the civil justice system which impacts adversely on access to justice. From the consumers perspective this leads to a compensation deficit.
- 6.2 This final chapter brings together our key recommendations for change. These are by no means a comprehensive package and many elements would require further work, which is why we have suggested a Task Force be established to consider these issues. However, we have attempted to evaluate our preferential options for reform with reference to consumers’ entitlement. Too often this important issue is discussed and debated by a narrow group of service providers and policy makers in an arcane way that is far removed from consumers’ experience.
- 6.3 CAB evidence on consumers experience suggests that the market is not always functioning in their best interests. **Citizens Advice therefore recommends that the Department for Constitutional Affairs establish a moratorium that CFA’s should not be further encouraged as a replacement for legal aid until further work has been undertaken to evaluate the impact of conditional fees against clear criteria of consumer benefit, confidence and access to justice.**
- 6.4 Our evidence suggests that the move from public funding to CFAs is not having the intended effect of extending access to justice, in fact some of the evidence we have been able to gather suggests that in many cases the opposite is happening. Moreover, we are concerned at the way in which the availability of CFAs is being used as a reason to further reduce the availability of legal aid by removing certain categories of case from the scope of public funding on the basis that CFA funding is available as an alternative. The experience of CFAs to date from the consumers’ perspective has not been satisfactory due to mischief in the marketplace and the underlying problem of costs inflation. Unless these problems are brought under control those who have been injured will not have access to effective redress.

Recommendations for regulation

- 6.3 The fundamental problem is that a ‘market’ system was created with the intention of being apparently costless to the initial consumer. However, the system has been mediated through the commercial interests of insurers, claims management companies and law firms. Only where clients’ interests are

aligned with insurers and solicitors can the system of CFAs promote access to justice.

- 6.4 Consumers in the personal injury market are often vulnerable, disadvantaged and sometimes socially excluded, so a higher standard of care is required. This should be the starting point for regulation. CAB evidence suggests that it is essential for claims intermediaries, lawyers and insurers to consider that they are introducing consumers to complex legal and financial products and processes, and that consumers' knowledge of any aspects of these processes should never be taken for granted.

New legislation

- 6.5 Without changes to legislation, regulation will only have a limited impact on the personal injury claims management market. This is not a 'buyers' market where consumers are easily able to drive down prices and obtain the most appropriate products. Citizens Advice favours compulsory over voluntary regulation.
- 6.6 The government should therefore introduce primary legislation to bring CMCs and other relevant intermediaries in the personal injury market into the scope of legal services regulation, and to extend the duties on solicitors to explain and inform clients about the balance of risks to entering into CFAs in the legal services market.
- 6.7 **The DCA, working with the Law Society, should investigate the potential to establish a statutory form for CFAs, incorporating statutory terms and leaving only individual express terms (such as the amount of the success fee) for individual agreements.** This should lead to both simpler documentation for clients and fewer challenges, and include:
- capping the recoverability of success fees and ATE premiums; proportionately to damages obtained, and
 - removing the indemnity principle and providing that only claimants can seek to challenge the validity of their CFAs.

Action by regulators

- 6.8 Without prompt and firm action by both regulators and self-regulators' unscrupulous behaviour by claims management companies will remain a significant danger.
- 6.9 **Citizens Advice recommends that, as part of its code approval process, the OFT should ensure that the Claims Standards Council's code covers issues of advice standards and enforcement. The OFT should also undertake a market study of the Claims Management Industry with a view assessing all the consumer detriments which may need to be addressed.**

Recommendations for reform of costs and funding

- 6.10 The growing discrepancy in the legal process in respect of the proportionality between costs and damages needs to be tackled urgently. Costs at all stages of the process are getting out of control and the growing number of intermediaries in the marketplace adds to the overall burden of claimants' costs liabilities. The whole problem of controlling legal costs and expenses, so that they can be absorbed within a sustainable system of funding public access to justice, needs to be addressed.
- 6.11 **Citizens Advice recommends that the DCA should establish a review of costs of the civil justice process to identify specific measures, which could result in reducing the costs burden on the consumer.**
- 6.12 **Citizens Advice recommends that the work of the Law Commission in the field of assessing damages should be built on and taken forward.**
- 6.13 Conditional fee agreements and 'after the event' insurance products are an exceptionally complicated way of funding legal claims, which combined with the complex costs rules over whether claimants can recover their lawyers success fees' and their insurance premiums, contributes to a legal maize of indemnities that cannot accurately be described as 'no win no fee'.
- 6.14 Before the event insurance is undoubtedly simpler to understand. Citizens Advice believes that as part of a strategy for improving the system for dealing with injury compensation claims much more could be done to ensure consumers are aware either of the potential benefits of having legal expenses insurance or, where they do have such insurance, what it covers and how to use it. **We recommend that this become part of the government's consumer education, information and advice strategies.**
- 6.15 However, there will always be those, most especially the socially excluded, who due to lack of insurance, poor information or low incomes will need alternative funding routes or support in order to achieve access to justice. **Citizens Advice recommends that the DCA should keep alternative funding options such as contingency fees and a contingency legal aid fund under review.**

Recommendations for reform of the compensation process

- 6.16 There needs to be more strategic consideration across government on role of ADR, rehabilitation, prevention and occupational health both in reducing liability costs for personal injury and promoting a culture of rights and rehabilitation. In the longer term, and following the pattern of other legal systems, the alternatives to CFA funded litigation suggested in this report need to be considered as the basis for a comprehensive review, reform and modernisation of the tort system.
- 6.17 The recommendations of the Better Regulation Task Force provide a good starting point, but more work needs to be done on alternative methods of funding personal injury compensation. The government's recent response to the

Better Regulation Task Force has proposed that a ministerial working party, led by Constitutional Affairs Minister David Lammy, ensure the BRTF's recommendations are taken forward in a co-ordinated way across government.⁵⁶

- 6.18 Citizens Advice therefore recommends that the ministerial working party should establish a Task Force on compensation to look at the different processes and mechanisms for delivering compensation and to make recommendations for long-term policy changes.**

⁵⁶ Department for Constitutional Affairs press release, 10 November 2004

Bibliography

Access to Justice Final Report to the Lord Chancellor on the civil justice system in England and Wales Lord Woolf (1996)

Atiya's Accidents, Compensation and the Law Peter Cane (1999)

Better Routes to Redress, Better Regulation Task Force, (2004)

Compensation for Personal Injuries Peter Barrie, Oxford (2002)

Compensation for Personal Injury in a Comparative Perspective B. Koch, H. Koziol, Helmut Koziol, Springer Verlag (2003)

Conditional Fees - A Survival Guide Michael Napier (1995)

Costs of Low Value Employers' Liability Claims 1997-2002 Paul Fenn University of Nottingham and Neil Rickman University of Surrey (2003)

Damages for Personal Injury: Non-Pecuniary Loss Law Commission Consultation no 140 (1996),

Door to Door - CAB clients' experience of doorstep selling, Citizens Advice (2002)

Geography of Advice – An Overview of the challenges facing the Community Legal Service Citizens Advice (2004)

Guidelines for the Assessment of Damages in Personal Injury Cases The Judicial Studies Board, (2003)

Liability insurance A report on an OFT fact finding study, Office of Fair Trading (2003)

More Civil Justice? The impact of the Woolf reforms on pre-action behaviour, Law Society and Civil Justice Council, London. (2002),

Making amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHA report by the Chief Medical Officer DoH (2003)

Making CFA Simple a Reality Department for Constitutional Affairs (2004)

No win, no fee, no worries, Kerry Underwood (2001)

Nothing to lose? Clients' experiences of using conditional fees,. Yarrow and Abraham (2000)

Out of the picture – CAB evidence on mental health and social exclusion, Citizens Advice (2004)

Personal Injury Compensation: How much is enough? (1994) Law Com No 225

Psychology, personal injury and rehabilitation Report of the IUA/ABI Rehabilitation working party (2004)

Price of Success Stella Yarrow PSI (1997)

The Quantum of Damages Kemp and Kemp (2002)

The Review of the Regulatory Framework for Legal Services in England and Wales ('Clementi Review') (2003)

Royal Commission on Civil Liability and Personal Injury Compensation (the Pearson Commission') HMSO (1974)

Simplifying Conditional Fees Department for Constitutional Affairs (2003)

UK Bodily Injury Awards Study. International Underwriting Association. (2003)

UK Personal Injury Litigation 2003, Datamonitor (2003)

Workplace Compensation: The Case for Reform and Vision for the Future Association of British Insurers (2002)

Appendix 1: Personal Injury Statistics

Paragraph explaining source of statistics

Accident cases

	Clinical Negligence	Employer liability	Public Liability	Motor	Other	No liability	Total
2000/01	10,890	97,675	94,000	401,740	2,882	4,933	612,120
2001/02	9,773	97,004	100,663	400,434	1,843	4,409	614,126
2002/03	7973	92,915	109,441	398,870	2168	4179	615,546
2003/04	7109	79,286	91,177	374,740	1881	2993	557,186

Disease cases

	Clinical Negligence	Employer liability	Public Liability	Motor	Other	No liability	Total
2000/01	11	121,508	1883	17	238	154	123,811
2001/02	6	73,550	326	11	110	186	74,189
2002/03	4	90,427	341	22	122	235	91,151
2003/04	12	211,924	276	21	188	636	213,057

Total combined numbers of claims registered

	Clinical Negligence	Employer liability	Public Liability	Motor	Other	No liability	Total
2000/01	10 901	219 183	95 883	401 757	3120	5087	735 931
2001/02	9779	170 554	100 989	400 445	1953	4595	688 315
2002/03	7977	183 342	109 782	398 892	2290	4414	706 697
2003/04	7121	291,210	91,453	374,761	2069	3629	770,243

Appendix 2: International comparisons

Scandinavia

In Sweden, the government has introduced measures to encourage legal expenses insurance and as a result 97 per cent of the population have this sort of cover.

Australia

Various Australian jurisdictions have undergone systematic programmes of tort law reform and have moved towards compulsory mediation in light of a perceived public liability crisis. Over the last 10 years a number of schemes involving compulsory mediation, some legislative and some industry based, have come into operation with considerable success.

For example in New South Wales the court will not list matters for hearing before a judge unless the parties have mediated, attended neutral evaluation or an arbitration has occurred under the Arbitration (Civil Actions) Act 1983. Parties need to file a Notice of Motion to avoid the need to arbitrate or mediate or attend neutral evaluation; 70 per cent or more of the cases listed for arbitration settle at or about the time of the arbitration. With the introduction of their Compensation Commission, the government of New South Wales have cut legal and investigation costs by \$1.4 billion. The Civil Liability Act 2002 has codified and to some extent restricted the whole body of principles in the law of negligence. A similar scheme is in operation in Victoria.

New Zealand

New Zealand operates a no-fault accident compensation scheme. New Zealand has had a national accident compensation scheme and no common law access for injury for nearly 30 years since the introduction of the Accident Compensation Act 1972. From the outset, the right to recover compensation under the scheme was based not on any question of liability but simply on the claimant coming within one of the statutory conditions for cover, in which case he or she could make a claim to the Accident Compensation Commission, the public body administering the scheme. The Commissions' functions include taking various steps to promote safety and rehabilitation and making payments to those entitled to accident compensation benefits. Weekly compensation was made available for loss of earnings at the rate of eighty percent of the claimant's earnings prior to the accident. Medical expenses and other incidental costs, like transport to hospital and replacement of damaged clothing, were also covered. The scheme provides for 80 per cent of lost earnings.

Hong Kong

Hong Kong has a CLAF known as a 'Supplementary Legal Aid Scheme', aimed at citizens who are too rich for legal aid but too poor to be able to afford their own lawyers. The scheme was established in 1984 with a State Lotteries Fund loan of £90k. The loan was fully repaid in 1988 and then a further £2.5million was put into it to increase the scope and eligibility of the scheme to cover medical and dental claims and employee related issues. Applications are subject to a rigorous merits test and

there is a non-refundable fee of £100. If the case is accepted, a claimant with a salary of £15,000-£30,000 has to contribute a further sum of up to £4,000, on a sliding scale. Claimants also pay a percentage of the amount they recover: up to 15% if the claim proceeds to judgment. The CLAF is self-financing: in 2000 it had a surplus of £5 million, but only deals with a modest number of applications – in 1999, 268 certificates were issued, as against 365 applications.

Ireland

Following the publication of the report, *Economic Evaluation of Insurance Costs in Ireland*, the Irish Government in 2001 established a special working group to progress the establishment of a personal injury tribunal. The government decided to approve the establishment of a personal injuries assessment board (PIAB). The PIAB became operational in 2003 with all personal injury claims arising from employer's liability and motor insurance having to be referred to it.

The PIAB's system is known as "scheduled" damages; the compensation value of a broken arm or leg (aside from lost wages and other economic damages) are determined with reference to a schedule or table known as the "Quantum" which serves as an indicated settlement figure in cases of uncontested liability and as a recommendation of appropriate damages to the courts in cases which are litigated. Quantum damages were retained for flexibility to account for the details of particular injuries and injured persons and are set at the same average level as the Irish courts; the difference is that there is less of an occasion for duelling lawyers to argue damages afresh in each case in hopes of getting something higher or lower than the norm.

From 22 July 2004 all personal injury claims (including those arising from public liability and motor accidents) must be referred to PIAB before legal proceedings are initiated. The Irish government considers that PIAB offers a speedier method of delivering compensation to accident victims while curtailing the litigation costs previously associated with delivering compensation.

European Union

The European Commission has long argued the case for greater approximation of civil law procedures in Member States. In this context Willi Rothley MEP, the Vice-Chair of the Legal Affairs Committee, has come forward with a proposal to harmonise compensation for personal injury.⁵⁷ Rothley argues that compensation for personal injury frequently gives rise to disputes and litigation beyond traditional national boundaries and that the "cross border" nature of litigation results in injustice and inefficiency due to the divergence and discrepancies in Member State systems. To remedy this he proposes the harmonisation of compensation for personal injury throughout the EU. He presents a detailed recommendation for a European disability scale, "la barème", designed to facilitate standardised assessment procedures for damages. This medical scale would set guidelines for assessing the extent of personal injury and assigns a percentage value to that injury based on the nature of the impairment to an individual's physical and/or mental integrity. When the

⁵⁷ <http://www.europarl.eu.int/meetdocs/committees/juri/20031001505310EN.pdf> draft report to the European Parliament's Committee on Legal Affairs and Internal Market

percentage value of an injury has been assessed, a monetary value can then be assigned. This monetary value will be assessed according to national guidelines. Appearing to offer flexibility and acknowledge national particularities, the proposal suggests reducing the margin of discretion for the judge to within a range of +/- 20 per cent with regard to the monetary award resulting from the application of the scale.

PEOPIL has also recently completed a European Commission sponsored study on "Personal Injury Compensation in Europe". This comparative study contributes to the academic debate and provides a comprehensive guide for practitioners. PEOPIL's work assesses whether legislative intervention in the field of personal injury damages at the European Union level should actually take place and, if so, to what extent. Their analysis focuses not on immediate procedural and substantive harmonisation but on long-term evolution and further research; the focus is on approximating procedure, not providing for wholesale unification of substantive law.

Appendix 3: CABx submitting evidence on personal injury compensation between January 2002 and August 2004

EAST REGION

Basildon
Bedford
Bishop's Stortford District
Broxbourne
Bushey
Castle Point
Colchester
Dacorum
Dunstable & District
Harlow
Haverhill
Huntingdon
Ipswich & District
Loughton
Luton
Mid-Bedfordshire
Norwich & District
Oxhey & District
Rayleigh
Royston
Stevenage
Thurrock
Watford
Witham
Wyomondham,
Attleborough & District

LONDON REGION

Beckenham & Penge
Bexleyheath & Welling
Bromley Town
Catford
Chelsea
Dagenham
Havering
Islington
Lambeth
Mare Street
Mitcham
Orpington
Roehampton
Woolwich

MIDLANDS REGION

Ashfield
Bassetlaw

Bedworth & District
Biddulph
Birmingham North
District Health Unit
Bridgnorth
Bromsgrove & District
Burton-upon-Trent
Cheadle
Chesterfield
Derby
East Northants
Handsworth
High Peak
Kettering
Kingstanding
Lichfield
Louth
Malvern Hills District
Mansfield
Newark & District
Newcastle-under-Lyme
North East Derbyshire
Northfield
Northampton
North Warwickshire
Nottingham & District
Nuneaton
Ollerton & District
Shirley
Solihull
Stamford & District
Stone
Tipton
Walsall
Wolverhampton
Worcester
Yardley

NORTH REGION

Barnsley
Bradford
Castle Morpeth
Darlington
Derwentside
Doncaster
East Yorkshire
Gateshead
Hull City Centre

Leeds
Middlesbrough
Morley
North Tyneside
Pontefract
Redcar & Cleveland
Ripon
Rotherham
Scarborough & District
Scunthorpe & District
Selby District
South East Sheffield
Stockton & District
Information & Advice
Service
South Elmsall
Spen Valley
Wakefield District
Wansbeck
Washington
York

NORTH WEST REGION

Atherton
Birchwood
Birkenhead
Blackburn
Bolton & District
Burnley
Chester
Congleton District
Cumbria Rural
Eccles
Hazel Grove
High Peak
Hindley
Hyndburn District
Knowsley
Lancaster
Leigh & District
Longsight
Manchester South
Marple & District
Pendle District
Prestwich
Ribble Valley
Salford

South Ribble
 St Helen's
 Stockport
 Stretford
 Swinton
 Tameside
 Walkden
 Warrington
 Wallasey
 Whitehaven
 Wigan
 Workington

NORTHERN IRELAND

Ards
 Holywood

SOUTH EAST REGION

Addington
 Aldershot
 Andover
 Ash
 Ashford
 Basingstoke
 Bracknell
 Brighton & Hove
 Camberley
 Caterham &
 Warlingham
 Didcot & District
 Eastbourne
 Fareham
 Guildford
 Hastings & Rother
 Havant & District
 Henley & District
 High Wycombe
 Leatherhead
 Lewes
 Littlehampton
 Lymington
 Maidenhead
 Maidstone
 Malling
 Portsmouth
 Reading
 Runnymede
 Sevenoaks
 Southampton
 Swanley

Tonbridge
 Tunbridge Wells
 Walton Weybridge &
 Hersham
 Winchester
 Witney

SOUTH WEST REGION

Barnstaple
 Bournemouth
 Christchurch
 Cirencester
 Kennet
 Penwith
 Purbeck
 Sedgemoor
 South Gloucestershire
 South Somerset
 Stroud
 Tavistock
 Torbay
 West Wiltshire

WALES

Aberystwyth
 Ammanford
 Bangor
 Bargoed
 Gwynedd
 Cardiff City Centre
 Caerphilly
 Cynon Valley
 Flintshire
 Llandudno
 Maesteg
 Merthyr Tydfil
 Neath
 Newport
 Port Talbot
 Powys
 Prestatyn
 Risca
 Swansea
 Tredegar
 Vale of Glamorgan
 Ynys Mon