House of Commons
Constitutional Affairs Committee

Compensation culture

Third Report of Session 2005–06

Volume II
Oral and written evidence

Ordered by The House of Commons
to be printed 14 February 2006
Constitution Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor’s Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

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The current staff of the Committee are Roger Phillips (Clerk), Dr John Gearson (Second Clerk), Alexander Horne (Legal Specialist), Richard Poureshagh (Committee Assistant), Anne Woolhouse (Secretary), Tes Stranger (Senior Office Clerk) and Jessica Bridges-Palmer (Committee Media Officer).

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Witnesses

Tuesday 6 December 2005

Rt Hon Lord Phillips of Worth Matravers, Lord Chief Justice
Judge Peter Hurst, Senior Costs Judge
District Judge Michael Walker, Hon Secretary and District Judge David Oldham, Chairman of the Civil Committee, Association of District Judges

Tuesday 13 December 2005

Anna Rowland, Policy Manager, Civil and Family Justice, David Marshall, Civil Litigation Committee and Council Member, The Law Society
Richard Langton, Vice President, Association of Personal Injuries Lawyers (APIL)
Tony Goff, Vice Chairman, Motor Accident Solicitors Society (MASS)
David Foskett QC and Stephen Worthington, Vice Chairman of the Law Reform Committee, The Bar Council

Tuesday January 10 2006

Nick Starling, Director of General Insurance and Justin Jacobs, Head of Motor, Liability and Risk Pricing, Association of British Insurers (ABI)
Dominic Claydon, Director of Technical Claims, Norwich Union
Phil Ruse, Divisional Manager, Allianz Cornhill
Jonathan Rees, Deputy Chief Executive, and Colin Douglas, Director of Communications, Health and Safety Directorate (HSE)
Dr Justin Davis-Smith, Deputy Chief Executive, Volunteering England
Derek Twine, Chief Executive, Scout Association

Tuesday 17 January 2006

Stephen Walker, Chief Executive and John Mead, Technical Claims Director, National Health Service Litigation Authority
Teresa Perchard, Director of Policy and James Sandbach, Social Policy Officer (Legal Issues), Citizens Advice
Adam Griffith, Policy Officer (Legal Services), Advice Services Alliance

Tuesday 31 January 2006

Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs
Rt Hon Jane Kennedy MP, Minister of State for Quality and Patient Safety, Department of Health
List of written evidence

<table>
<thead>
<tr>
<th>Organization/Individual</th>
<th>Page Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Association of District Judges</td>
<td>Ev 63</td>
</tr>
<tr>
<td>Law Society</td>
<td>Ev 66</td>
</tr>
<tr>
<td>Association of Personal Injury Lawyers (APIL)</td>
<td>Ev 70</td>
</tr>
<tr>
<td>Motor Accident Solicitors Society (MASS)</td>
<td>Ev 73</td>
</tr>
<tr>
<td>Bar Council</td>
<td>Ev 75</td>
</tr>
<tr>
<td>Association of British Insurers (ABI)</td>
<td>Ev 80</td>
</tr>
<tr>
<td>Norwich Union</td>
<td>Ev 84</td>
</tr>
<tr>
<td>Allianz Cornhill Legal Protection (ACLP)</td>
<td>Ev 87</td>
</tr>
<tr>
<td>Health and Safety Executive (HSE)</td>
<td>Ev 88</td>
</tr>
<tr>
<td>Scout Association</td>
<td>Ev 92</td>
</tr>
<tr>
<td>Volunteering England</td>
<td>Ev 94</td>
</tr>
<tr>
<td>NHS Litigation Authority</td>
<td>Ev 96</td>
</tr>
<tr>
<td>Advice Services Alliance (ASA)</td>
<td>Ev 98</td>
</tr>
<tr>
<td>Department for Constitutional Affairs (DCA)</td>
<td>Ev 99</td>
</tr>
<tr>
<td>Department of Health (DoH)</td>
<td>Ev 104</td>
</tr>
<tr>
<td>Associated Newspapers</td>
<td>Ev 108</td>
</tr>
<tr>
<td>Guardian Newspapers</td>
<td>Ev 112</td>
</tr>
<tr>
<td>Trade Union Congress (TUC)</td>
<td>Ev 117</td>
</tr>
<tr>
<td>Medical Defence Union</td>
<td>Ev 121</td>
</tr>
<tr>
<td>Ken Oliphant, Senior Lecturer, Cardiff Law School</td>
<td>Ev 122</td>
</tr>
<tr>
<td>St John Ambulance</td>
<td>Ev 123</td>
</tr>
<tr>
<td>All Party Group on Adventure and Recreation in Society (A RIsC)</td>
<td>Ev 124</td>
</tr>
<tr>
<td>Resolve</td>
<td>Ev 127</td>
</tr>
<tr>
<td>Newspaper Society</td>
<td>Ev 128</td>
</tr>
<tr>
<td>Times Newspapers Ltd</td>
<td>Ev 130</td>
</tr>
<tr>
<td>Bloomberg News</td>
<td>Ev 135</td>
</tr>
<tr>
<td>British Broadcasting Corporation (BBC)</td>
<td>Ev 136</td>
</tr>
<tr>
<td>Channel 4 Television Corporation</td>
<td>Ev 138</td>
</tr>
<tr>
<td>Newsquest Media Group</td>
<td>Ev 140</td>
</tr>
<tr>
<td>Ian Hislop, Editor, Private Eye</td>
<td>Ev 140</td>
</tr>
<tr>
<td>Trinity Mirror Plc</td>
<td>Ev 142</td>
</tr>
<tr>
<td>Independent News and Media</td>
<td>Ev 147</td>
</tr>
<tr>
<td>Reynolds Porter Chamberlain</td>
<td>Ev 148</td>
</tr>
<tr>
<td>Media Law Resource Center (MLRC)</td>
<td>Ev 152</td>
</tr>
<tr>
<td>Karen Stewart</td>
<td>Ev 153</td>
</tr>
<tr>
<td>Advertising Standards Authority (ASA)</td>
<td>Ev 155</td>
</tr>
<tr>
<td>Zurich Financial Services</td>
<td>Ev 157</td>
</tr>
<tr>
<td>AXA Insurance</td>
<td>Ev 159</td>
</tr>
<tr>
<td>Actuarial Profession</td>
<td>Ev 163</td>
</tr>
<tr>
<td>Aon Ltd</td>
<td>Ev 165</td>
</tr>
<tr>
<td>National Accident Helpline (NAH)</td>
<td>Ev 167</td>
</tr>
<tr>
<td>WITNESS (against abuse by health and care workers)</td>
<td>Ev 170</td>
</tr>
</tbody>
</table>
Action Against Medical Accidents (AvMA)  Ev 172
British Association of Leisure Parks, Piers and Attractions Ltd (BALPPA)  Ev 177
Field Studies Council  Ev 178
Anthony H Silverman, Fellow, Institute of Actuaries  Ev 179
Kevin Williams, Reader in Law, Sheffield Hallam University  Ev 182
Professor Michael Jones, University of Liverpool  Ev 185
Richard Mullender, Lecturer, Newcastle Law School  Ev 191
Mark Lunney, Associate Professor, School of Law, University of New England, Australia  Ev 194
Berrymans Lace Mawer Solicitors  Ev 197
Andrew Twambley, Director, injurylawyers4u.co.uk  Ev 200
Kerry Underwood, Underwoods Solicitors  Ev 201
Andrew Parker, Head of Strategic Liaison, Beachcroft Wansbroughs  Ev 204
Tony Jaffa, Partner, Foot Anstey Solicitors  Ev 207
Richard Shillito, Partner, Farrer & Co Solicitors  Ev 210
Davenport Lyons Solicitors  Ev 212
Thompsons Solicitors  Ev 214
Amicus  Ev 222
InterResolve Holdings Limited  Ev 227
Headmasters' & Headmistresses' Conference (HMC)  Ev 229
Oral evidence

Taken before the Constitutional Affairs Committee
on Tuesday 6 December 2005

Members present:

Mr Alan Beith, in the Chair

Barbara Keeley
Mr Piara S Khabra
Jessica Morden
Mr Andrew Tyrie

Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Witnesses: Rt Hon Lord Phillips of Worth Matravers, a Member of the House of Lords, Lord Chief Justice, and Judge Peter Hurst, Senior Costs Judge, gave evidence.

Chairman: Lord Chief Justice, welcome. This is your first time in front of this Committee, and we have another visit booked already, in the very near future. Judge Hurst, welcome to you also. We have to declare interests before we start the proceedings, and I have discovered that I have one, because we have received written evidence from the British Association of Leisure Parks, and I am a consultant to a company called Bourne Leisure, which does operate leisure facilities.

Jeremy Wright: I should declare I am a non-practising criminal law barrister.

Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial appointment.

Q1 Chairman: I do not know if there is anything you would like to say to us by preface, although my first question will probably give you the opportunity to say almost anything you would like to.

Lord Phillips of Worth Matravers: I will leave you to ask the first question then.

Q2 Chairman: Is there a compensation culture in the United Kingdom, in your view?

Lord Phillips of Worth Matravers: I do not believe there is and that is a view that is based on statistics. The Compensation Recovery Unit is a unit to which all claims for personal injuries are supposed to be reported, whether they result in a judgment or a settlement, and their statistics indicate that over the last five years there has been a drop of about 5% in claims for personal injuries. If you take out of the equation claims for road traffic accident injuries, which are probably not influenced by any kind of culture, then the drop is very much more substantial: employer’s liability 20%, clinical negligence 34%, and I think the statistics for claims by patients in hospitals who have suffered an untoward event in the course of their treatment suggest that less than 1% of such patients bring a claim against the hospital, so it does not look like a compensation culture.

Q3 Chairman: Are you, as judges, aware of the perception amongst those who might not appear before you that their activities are circumscribed because of the fear that there could be litigation against them, voluntary organisations, schools, all the bodies which are alleged at times not to be doing things any more because of the fear that they will end up in court even if they win at the end of the day?

Lord Phillips of Worth Matravers: As judges, we would not become aware of those because they would, by definition, be non-events as far as litigation was concerned because they would never have exposed themselves to risk. As everybody else, we read the newspapers and the newspapers paint a picture of a compensation culture. There are occasional stories of schools or local authorities acting in a way which appears to be over-concerned with risk and such stories tend to be given prominence in the media. Apart from that, one has sometimes personal experience of concern about risk. Certainly I think there is concern in the field of swimming. I am Chairman of the Governors of my old school, and in the past when I went down there I would have a swim before breakfast with one member of the staff who used to like to do this. I am now told by the bursar that we cannot swim unless there is a life guard present. Why not? The insurers require this. That is perhaps an example of concern about risk.

Q4 Chairman: So you meet it in your daily life. What about clause 1 of the Compensation Bill then? Would it be helpful to have such a declaratory clause? Would it reduce litigation or the perception of litigation as a possibility?

Lord Phillips of Worth Matravers: I do not know who is going to read it. The average man in the street is unlikely to be reading clause 1. As far as the judges are concerned, and judges and lawyers are the ones likely to be reading statutes, the clause sets out to define the position at common law, not to change it, and I would hope that most judges are now fairly well aware of the position at common law. Lord Hoffman enunciated it very clearly fairly recently in the case of Tomlinson.

Q5 Chairman: Is the attempt to refer to “desirable activity” undermined by the fact that we do not have a legal definition of “desirable activity” at the moment and this might lead to further litigation?
Lord Phillips of Worth Matravers: One can see the thinking behind it. Obviously, if you are considering whether or not to impose a restriction, part of the equation will be what effect that will have on the particular activity restricted and is that a good thing or a bad thing? So one can see the thinking behind it. Equally, I am aware of quite a lot of criticism of that word on the basis that lawyers can dance on the head of a pin and they can certainly have an argument about what “desirable” means.

Q6 Chairman: When you were told you could not have a swim, did you say, “I am the Lord Chief Justice and you should tell your insurers that if they were foolish enough to bring a case before the court that there was not a life guard present when the Lord Chief Justice went for a swim they would not have leg to stand on in my court”? Lord Phillips of Worth Matravers: No, I am very careful not to make those kinds of statements.

Q7 Jeremy Wright: Coming back to the case of Tomlinson, I am sure you are right that the Government’s intention in clause 1 of the Bill was simply to codify the position in common law but having looked at what Tomlinson says and looked at what clause 1 says, is it your view that they do say the same thing?

Lord Phillips of Worth Matravers: That is a question that I do not think I should answer because it is really a question I might ultimately have to answer as a judge.

Q8 Jeremy Wright: Let me ask you this thing: if you look at clause 1 of the Compensation Bill and you consider the position from the point of view of an employee, the TUC are concerned that what clause 1 of the Compensation Bill does not do that Tomlinson does is to make it clear that what is being referred to in Tomlinson is a voluntary activity and the Bill does not make that clear. Again, you might refuse to answer this for the same reasons but does that present a problem?

Lord Phillips of Worth Matravers: I do not think I want to answer the question as asked. All I would say is it is quite impossible to encapsulate the law of negligence in a single sentence.

Chairman: We understand the difficulty. Obviously, it is part of the understanding between the Committee and yourselves that when judges appear before us we do not expect them to give answers which might prejudice their ability to give judgment in a case in the future. We fully appreciate that.

Q9 Keith Vaz: Lord Phillips, what has been the impact of the move from Legal Aid to CFAs? Lord Phillips of Worth Matravers: I imagine you mean the more recent move. The move to CFAs was in two stages. The first stage allowed lawyers to act on a no-win, no-fee basis and to charge an additional success fee, but if they did so, the successful claimant had to pay the success fee out of his or her recovery. The effect of that was not very marked. There were something like maybe 1,500 claims a month at the most that were brought under a conditional fee agreement, but I suspect what you have in mind is the second step, which was a step that enabled the success fee and the after-the-event insurance to be passed on to the unsuccessful defendant when costs were recovered and this was coupled with the withdrawal of Legal Aid for personal injury claimants. We can see that it has not resulted in an increase in claims. As I said at the beginning, there has been something of a decrease. Equally, I do not think one can postulate that it is responsible for the decrease. I do not think we have the data. What I think it has done is to increase the costs that are borne of litigation because the success fee and the after-the-event insurance probably—say probably because one does not have precise data—imposes on society a greater cost of litigation than the £37 million which have been saved to the Legal Aid fund as a result of withdrawing Legal Aid for personal injury. The other thing it does, of course, is instead of that cost being borne by the taxpayer as a whole, it is transferred to the sector of society which is more concerned with these particular personal injury claims, very largely those who pay insurance premiums for driving a car or employers who pay insurance premiums or of course those who self-insure.

Q10 Keith Vaz: Do you believe that CFAs adequately ensure access to justice? Have they been a success? Lord Phillips of Worth Matravers: Again, one has to look at statistics. In the area where one has them, personal injury, they do not seem to have resulted in an increase. One cannot say that they have resulted in a significant decrease. They do mean that you need to have a fairly good claim before you can persuade a lawyer to fund it. Solicitors, certainly those who deal in bulk litigation, do not nicely assess every single claim and say “Is the chance of this claim succeeding better or worse than 50%?” If one is dealing with motor accidents and so on, you probably will get a solicitor acting for you under a CFA even if on analysis at the end of the day one might say that was not a claim that had a 50% chance of success, but if you are looking at a more substantial claim and, let us say, the chance of success is 40%, and lawyers look at it rather carefully, they may well say, “No, we are not going to agree to act on a conditional fee basis.” Would you have got funding, would you have got Legal Aid if you had a 40% chance? I do not know. You might have done.

Q11 Keith Vaz: What are your views on the advertising of CFAs? Do you think that the consumer is able to make an informed judgment as to whether or not they are going to get a quality service?

Lord Phillips of Worth Matravers: Certainly, I do not think advertising enables the consumer to decide whether they are going to get a quality service. One is personally aware of some of the advertising that has taken place, trying to persuade people to litigate on the basis that they will not have to pay a penny if they lose. What the advertisements do not tell the
litigant is how much they may have to pay if they win. The providers of the service may say, “Well, you have got to insure against the other side’s costs if you lose. You will have to pay an insurance premium. We can arrange a loan for your insurance premium.” That is a loan that is going to be paid for by the litigant out of the recovery. There have been cases, I believe, where when the cost of the loan has been paid there has been little or nothing left out of the recovery. Equally, those who advertise on a no-win, no-fee basis include claims managers. There is a big question mark in relation to some as to whether the litigant is going to get value for money as far as the client is concerned, he probably does not win, no-fee basis include claims managers. There is as nicely as that. That is one point, so I do not think have been paid there has been little or nothing left out of solicitor will probably accept the instructions on a premium. We can arrange a loan for your insurance subtracting fees.”

You have got to insure against the other side’s costs should be “You should go into it in the normal way by the litigant out of the recovery. There have been do not think it is a realistic example because in the vast majority of cases that are done under CFAs, the solicitor will probably accept the instructions on a CFA basis before he is in a position to assess the case as nicely as that. That is one point, so I do not think it is a very realistic example. The next point is that, so far as the client is concerned, he probably does not mind because he is told “No win, no fee, and if you win, the fee will be paid by the other side.”

Q16 Mr Tyrie: We are in a market, are we not, and it is up to the client to decide?

Lord Phillips of Worth Matravers: Yes. One of the problems with the CFA agreement is the market does not work very well because the client is not at risk in relation to the costs that are being incurred.

Q17 Mr Tyrie: Do you think it would be helpful if some guidance were given to encourage a percentage figure to be given in all cases?

Lord Phillips of Worth Matravers: I am not sure that it would be very helpful. I do not see myself that this is at the heart of any problems that exist with CFAs. You are in the back of a car and somebody runs into you, and you go to the solicitor and the solicitor says, “Well, I will act on a conditional fee basis, but I have to tell you I think your chances are excellent.” You are still not too concerned as to whether the mark-up that you agree is 20%, 40%, or 60%. Of course, the defendant insurer is going to be very concerned and if he thinks that you have agreed an extortionate mark-up he can challenge it, and there were a lot of those challenges, and the Civil Justice Council has done quite a lot to mediate between what were warring factions and to get an agreement of predictable costs in these small claims situations, which of course are the vast majority of them.

Q18 Dr Whitehead: I was interested to observe the resolution of a dilemma from my local hospital trust recently, which had been enjoined to gain more revenue from its estate, and it solved that problem by renting out a large amount of space in its foyer to a claims management company whose sole purpose is to try and persuade hospital patients to sue the hospital.

Lord Phillips of Worth Matravers: It sounds rather like shooting yourself in the foot.

Q19 Dr Whitehead: Indeed. I wonder if you have any thoughts on whether the Government, which is consulting about proposals to open the market for the provision of legal services, which it is going to do on the basis of the draft Legal Services Bill, is perhaps in a similar dilemma, bearing in mind the current experiences of claims management companies which would allow a number of companies to join the market and perhaps provide cheaper legal services. Would that perhaps be seen as...
expanding access to justice or perhaps further developing the possibility of a compensation culture taking root?

**Lord Phillips of Worth Matravers:** One has to draw a distinction between what is a desirable aim, which is facilitating those who have valid claims to bring them, and to find out whether they have valid claims, and an undesirable aim of encouraging people who do not really have valid claims to try and jump on the bandwagon. I think suggestions of expanding the ambit of legal services or the circumstances in which they can be provided should go hand in hand with regulation.

**Q20 Dr Whitehead:** So in terms of making sure that that regulation goes hand in hand with expanding services, could one, for example, provide means to cap legal costs to ensure proportionality of legal costs under CFA?

**Lord Phillips of Worth Matravers:** Capping legal costs is something that certainly could be done by regulation or by statute. It is something that can be done by the judges if an application is made at an early stage.

**Q21 Dr Whitehead:** What discretion does the judge actually have in that respect?

**Lord Phillips of Worth Matravers:** I think this is just the moment for me to pass the ball to Peter Hurst because this is just the kind of thing he does.

**Judge Hurst:** Section 51 of the Supreme Court Act 1981 gives the court full power in relation to costs, and that power was interpreted as giving the power to make a costs capping order in the organ retention litigation which is reported as *AB and Others v Leeds Teaching Hospital*. Mr Justice Gage in that case was persuaded that he had the power to make a cost-capping order and, as far as I know, that was the first time that power was used. It was subsequently used in the Ledward group litigation. Mr Ledward was a consultant who was alleged to have assaulted a number of his patients and they, having recovered damages, brought a subsequent action against the hospital authority for negligence in not controlling the activities of their consultant, and the NHS LA were very concerned about the level of the costs and Mrs Justice Hallett, as she then was, was again persuaded to make a cost-capping order. In a more recent case, *King v Telegraph Group Ltd*, which was a defamation case, there was an application for a cost-capping order but it was only made two weeks before trial, and Lord Justice Brooke, with whom the other members of the court agreed, refused to make such an order but in so doing he confirmed that what he did was allowed to run up enormous bills, and the case management powers of the court are such that the court can control what the parties do. You may be familiar with the overriding objective of the Rules,

**Q22 Dr Whitehead:** There is however an issue, I think, of the whole taking root of uplifts in terms of what is being charged in order to take account of the fact that the costs may not be recoverable by a lawyer if they lose the case. Are there mechanisms or should there be mechanisms to ensure that those uplifts are actually proportionate to the risks?

**Judge Hurst:** Yes, there is a mechanism. The lawyer, when taking on the client and signing the client up to the CFA, has to explain to the client what it involves, and also has to prepare a risk assessment at that time, because it is very easy at the end of a case to look back and think it was actually a very easy case or a very difficult case, but the lawyers have to enter into these agreements at an early stage and so they have to record their risk assessment. At the end of the case, if the costs are not agreed, the matter is assessed by judges like me up and down the country, district judges and cost judges, and there may be tremendous arguments about the level of the success fee and the costs judge has really a very difficult task because he or she has to put himself or herself in the position of that solicitor right at the beginning of the action and say, “Was this a reasonable and proportionate figure to arrive at?” So there is that control. If I can put this rider on it, it is very difficult at the end of the case to actually control the costs that have already been spent and so, as Lord Phillips has said, there is the cost-capping power, which is not extensively used at the moment but I suspect it will be. In the more expensive cases there is that power which would control costs from the outset. The difficulty with cost-capping is, like everything else in the law, it is extremely expensive and so for modest claims, it is really not a sensible option.

**Q23 Dr Whitehead:** Is there not a sense though that the culture of uplifts could be in danger of becoming something like a general tax on the whole method of doing things and as such, perhaps beyond the mechanisms that you have described in order to maintain proportionality?

**Judge Hurst:** Yes. You say the culture of uplifts. This is the system we have of access to justice. We used to have Legal Aid; now essentially in personal injury cases we do, does that mean that, in the absence of Legal Aid, we no longer have that. Liability insurers are now not really have valid claims to try and jump on the bandwagon. I think suggestions of expanding the ambit of legal services or the circumstances in which they can be provided should go hand in hand with regulation.

**Q24 Chairman:** If that is what the liability insurers do, does that mean that, in the absence of Legal Aid, you have lost the mechanism that would otherwise drive down costs and discourage cavalier costs in the form of either excess fees or unnecessary processes and disbursements?

**Judge Hurst:** No, I do not think so. The Woolf reforms, the Civil Procedure Rules, are designed to prevent those sorts of abuses, and my perception is that they work extremely well in that regard. The Legal Aid system—and it still exists in part—is very strictly controlled and solicitors are quite simply not allowed to run up enormous bills, and the case management powers of the court are such that the court can control what the parties do. You may be familiar with the overriding objective of the Rules,
which is that the case is dealt with justly, which includes dealing with it proportionately. That objective overrides the whole of the Rules, so every aspect of litigation is governed by that objective.

Q25 Jessica Morden: Do you think that the media are disproportionately disadvantaged by people using CFAs in libel and privacy cases because of the costs involved?

Lord Phillips of Worth Matravers: I think there can be a real problem. The problem arises in part because the costs of defamation actions seem to be so enormous, for a start. There are some claimants' solicitors who are prepared to undertake to act in defamation actions on a conditional fee basis, with uplift. Defamation actions are quite speculative, and if you are giving an uplift that reflects the risk, it may be quite considerable. If they do not take out after-the-event insurance, and the litigant himself has no significant means, the publisher who is being sued is on the horns of a dilemma. If he fights the case and wins, he will have incurred very substantial costs and will not be able to recover them. It may be cheaper to settle at the outset, even if he thinks he has a strong case, and so there is I think a potential problem there. I am not sure that it would be solved by saying the claimant must take out after-the-event insurance against the risk of losing, thereby in effect ensuring that the defendant will get his costs if he wins, because the premium for such insurance cover would again be enormous and I suspect the publishers, when they lost, would be complaining at the quite inordinate, they would say, bill of costs that they were then called upon to pay.

Q26 Jessica Morden: In a recent judgment, the House of Lords made reference to the possibility of primary legislation. Do you think that would be a way forward or do you have any other suggestions to help solve the situation?

Lord Phillips of Worth Matravers: The law lords in that case drew attention to this problem. It is not a problem that it is very easy to solve if you are going to have access to justice for a claimant who has been defamed who does not have much money. It is not easy to work out a system which will ensure access to justice for that claimant without exposing the defendant to a situation where he may not be able to recover the costs. Who is going to pay the costs if the claimant fails?

Q27 Chairman: You have referred to the potentially very high costs in defamation actions. Is that not an illustration that the mechanisms that Judge Hurst described as perhaps working in other areas of the law just do not work here and the cash register just rings up and up as those practising in the area know that they can charge more and more?

Lord Phillips of Worth Matravers: The remedy must be to apply at an early stage for a cap on the costs.

Q28 Chairman: There is an issue here, is there not, particularly for smaller periodicals and perhaps regional publications, that the ability to engage in investigative journalism could be severely circumscribed?

Lord Phillips of Worth Matravers: There is an issue here. Of course, defamation is one area where there never was Legal Aid.

Q29 Chairman: That makes me ask the question really. Is that a reason that there has not been anything else to hold down the costs?

Lord Phillips of Worth Matravers: I do not know. I think in the past you very often had libel actions in which each side was quite well-heeled. There are small publishers but there are also big publishers, newspaper magnates, and very often a defamation action would be by a claimant who had no difficulty in finding the costs because otherwise he would not be suing. He could not get Legal Aid, he could not agree no win, no fee because that was unlawful, so if you had a claimant it must be somebody who had quite a lot of money to fund the litigation, therefore he would probably have the money to meet the costs of the defendant if the claim failed. The difference now is that the claimant can get support on a no-win, no-fee basis.

Q30 Barbara Keeley: Lord Phillips, moving on to the NHS Redress Bill, obviously, as it is currently drafted, do you think it will achieve its aim of removing people from the court process?

Lord Phillips of Worth Matravers: The Bill really does no more than open the door to an alternative scheme to litigation. It builds in the possibility of safeguard for the claimant in the form of some kind of impartial legal advice being provided. I believe that it ought to be possible for hospitals to run a scheme which will encourage those who have claims against them to negotiate and to settle them without expensive litigation.

The Committee suspended from 5.12 pm to 5.36 pm for a fire alarm

Witnesses: District Judge Michael Walker and District Judge David Oldham, Association of District Judges, gave evidence.

Q31 Chairman: I am sorry for that interruption, for which I take no responsibility. What I do take responsibility for is letting the Lord Chief Justice go because he had another engagement and we were on the last question we were going to ask him. We have invited him, if he wants to add anything to what he said, to let us have a note on that subject. District Judge Walker, an old friend of ours, a regular witness, and District Judge Oldham, we are very glad to have you here to take us further through these same matters, and we are sorry you were standing out in the rain for a while. Have you given thought to the utility of clause 1 of the Compensation Bill?
District Judge Walker: We have, but before I start, could we just convey the Lord Chief Justice's apologies? He did actually ask if we would apologise for him having an engagement and having to go. Yes, we have and you will have noticed in our evidence we have annexed a series of cases which have been reported over the last two or three years. It is a difficult area for us to comment on because, as the Lord Chief said, cases may come before us and the point may well be argued. It may seem unsatisfactory but I would rather like to answer your question with a question and leave it with the Committee as a whole to look at those cases to read clause 1 and to ask whether or not clause 1 would have made a difference. It is debatable.

Q32 Chairman: I think we will find ourselves doing that in the course of the evidence and obviously, we will ask other people the same thing. Are there any other ways of discouraging weak claims which might be better?
District Judge Walker: There is an interesting experience with Knowsley metropolitan borough council. They were faced with about 150 slipping and tripping cases a year, and found in the late 1990s that rose to about 1,700. Listening to them recently, they took the view that instead of settling what were low-value cases, they would actually fight those which they thought should be fought. As a result, their record now is back down to about 250 claims a year. There is perhaps a lesson for others in there, that, rather than settling cases, they fought those which needed to be fought and messages were conveyed.

Q33 Chairman: What about the other issue that we talked about earlier, which was the move from Legal Aid to CFAs?
District Judge Walker: In terms of have we noticed a difference?

Q34 Chairman: Yes.
District Judge Oldham: I think the biggest difference that we notice, particularly at the level of the cases with which we deal, is the enormous increase there has been in costs, particularly in the smaller claims, where the proportion of course is so much greater. You can frequently have a case that may resolve for £2,500 or thereabouts, or possibly substantially less but the costs may be at least twice if not more than the amount that is actually involved.

Q35 Chairman: How much can you do about that?
District Judge Oldham: Not a great deal really. Obviously, we do have a complete discretion if there is an issue about the costs to decide whether or not the costs that are being claimed should be reduced, but we have to do that within the parameters that are provided by the Civil Procedure Rules. The issue of success fees that has already been discussed this afternoon of course does have a bearing on that. Even in the smallest claims, if there is a conditional fee agreement there may well be a success fee claim and that may be up to 100%, so one can see that there is a significant increase in the overall costs. I think it is at that level perhaps that it is most noticeable because it is so disproportionate very often to the amount of damages that the claimant is actually receiving.

Q36 Chairman: Looked at from the other standpoint, as judges, do you look at claims coming before you now and think, “Here are people who might not have got the same access to justice under the previous system. I am glad to see them in my court”? 
District Judge Walker: It is difficult to answer because of course we see a claimant. What we do not do is enquire into their personal finances, so we obviously would not know whether or not they would have qualified previously for Legal Aid. I do not think in general terms we are aware of an increase or decrease in trials coming before us. Matters seem to be very much carrying on as they always have been.

Q37 Jessica Morden: What impact do you think claims management companies have? Do you think they play to people’s expectations? To follow on from that, do you think that the Compensation Bill is likely to reverse that trend?
District Judge Walker: The first part of the question is very difficult to answer because we are on the whole not aware as to how the solicitor got his instructions; what we are presented with is a case and a defence and we try it. One does not actually, as part of that process, enquire as to how the claimant made contact with his solicitors. So from our point of view it is somewhat of an unknown, I am sorry to say. We cannot really assist you on it.

District Judge Oldham: I think there have been instances of cases, particular types of cases, particularly housing disrepair cases, where there was a huge explosion of such cases two or three years ago, which were as a result of council estates being leafleted by claims management companies asking if there were any houses in disrepair, and ultimately, if there were, those claimants were referred to a solicitor, often hundreds of miles from where the estate was, and then a claim might well be brought. This actually caused for a period of time significant difficulties within the court simply because of the volume of these cases that were being issued. To a large extent they resolved for two reasons. One is the local authorities responded immediately once they became aware of the lack of repair and dealt with it, and secondly because I think many district judges considered these claims should properly go into the small claims tribunal, and the costs issues disappeared and they have gone extremely quiet.
Chairman: We published a report on the small claims track today, encouraging more use of it.

Q38 Jessica Morden: You have partly answered that, but what do you think the effect then of the liberalisation of advertising has been, and are claimants better informed as to their choice of lawyer?
District Judge Oldham: Again, I think it is difficult for us to answer that, because obviously we only see the cases that actually come before us. There may be a much higher proportion of cases which never come before us because they are resolved between the insurers and the claimants' solicitors. Our perception, as we say in our evidence, is that more people are aware of the possibility that they might be able to make a claim, and that must be, I assume, as a result of greater publicity for the possibility of making a claim. I do not think that has fuelled a compensation culture as such. I think it has simply increased the perception that people have that there may be some sort of compensation available for any sort of accident that they suffer.

Q39 Dr Whitehead: You have mentioned the question of claims that in a sense were not resisted when CFA first came in. Do you think there is a reflection between the fall in the number of claims that have gone to court directly against the number of claims that were settled before the case reached court since the introduction of CFA? I imagine there is some difficulty in obtaining evidence from cases that never get to court, but is that your impression, that that has been a contributory factor to the fall in claims over recent years?

District Judge Oldham: I do not know that we are able to have any perception at all on it, because there are no statistics that we have about cases that never come to court. You have already heard something of the statistics of the general trend of cases that are issued. The reasons why there has been a decrease we simply do not have the answer to, I am afraid.

District Judge Walker: Having said that, it is certainly universally accepted that the number of claims is apparently decreasing.

The Committee suspended from 5.45 pm to 5.57 pm for a division in the House

Chairman: Our apologies. Dr Whitehead, you can resume.

Q40 Dr Whitehead: I think I was halfway through asking you a question about the claims that are settled before a case ever reaches court and, perhaps even on anecdotal evidence that you may have, whether or not that has been a feature of the development of CFAs and there are ways in which that might be considered. Perhaps in terms of whether or not, say, local authorities decide to pursue weak claims rather than accept them at face value, as has been suggested, one would anticipate the number of claims might then rise again, for example.

District Judge Walker: As I said, it is interesting looking at the experience of Knowsley Metropolitan Borough Council. One member of the secretariat heard the same presentation I did where they were faced with this very large increase in claims that traditionally they might have considered settling on the basis that the costs of settling were going to be a lot less than the costs of investigating and defending. However, they took the deliberate policy decision to defend the unmeritorious cases and, as a result, have seen the number of claims notified to them fall off considerably. I think from memory, from 1,700 a year at its peak down to 250, an enormous decrease in the number of cases.

Q41 Dr Whitehead: These are cases that appeared in front of a local authority prior to ever having gone to court?

District Judge Walker: They were claims notified to the local authority that traditionally, on the whole, they would have settled, but they took the conscious decision to fight those which they thought were unmeritorious. Chairman, whilst you were voting, I just looked up some figures which you might be interested in. The Compensation Recovery Unit is part of the DWP and what it seeks to do is to recover benefits which have been paid to claimants where those claimants subsequently make a successful recovery. Of course, the advantage of those figures is they accumulate data on all claims rather than just those which are issued or tried in the courts. What they show is over the period 2000 to 2005 there was an overall decrease in the number of cases where there was a payment of 5.4%. But the more interesting figures, I think, are in relation to the number of cases notified to them: criminal negligence cases fell by 34%; employers’ liability cases have fallen by 20%; public liability which is the slipping and tripping type of cases have fallen by 7.5%; road traffic cases increased slightly by 0.3%, so those figures show an interesting trend downwards. That is a more significant trend downwards than the number of cases issued compared with those which are settled by a claimant.

Q42 Dr Whitehead: When we discussed the evidence concerning a previous report on the small claims courts in this Committee, there was a suggestion examined that the claims for personal injury could be raised. The discussion at that particular time looked also at the question of how that would work out in terms of the way claims would be put forward. Do you think that that might be a disincentive for lawyers in claims management companies pursuing small value claims that they would hope that insurers would settle?

District Judge Walker: It would certainly take away their financial interest in those cases because if your own report of today was accepted and the personal injury limit in small claims rose to £2,500, that would remove quite a considerable number of cases, which at the moment are at the low end of the fast track where solicitors can claim success fees and the like. Clearly they would see a fall-off in business. Personally, I do not think there would be any reduction in access to justice because it would bring within the small claims track cases which, on the whole, people would be able to bring themselves. That is a road we went down two months ago.

Q43 Mr Khabra: In my constituency I know there are cases of compensation claims by some of my constituents against hospitals for neglect and there are similar sorts of cases in the rest of the country. As
you know, the Government is introducing the NHS Redress Bill to establish a scheme to enable settlement without the need to commence court proceedings of certain claims which arise in connection with hospital services provided to patients as part of the NHS, and the proposals in the NHS Redress Bill and the Compensation Bill are both complementary. The question is, what impact do you believe the NHS Redress Bill will have on access to justice?

District Judge Oldham: From the time the Chief Medical Officer made his report, we supported the concept of a redress scheme; in fact he was suggesting two redress schemes, this is the first one which is being pursued. I think it has a number of potential advantages, not least of which is that our understanding is that a very considerable number of patients who do suffer some sort of incident want more than anything an explanation and apology, not necessarily financial compensation, and that has always been very hard to get. Of course, the scheme that is now proposed under the NHS Redress Bill would incorporate exactly that. It would be a provision for compensation in an appropriate case. There would also be provision for some sort of ongoing care or treatment if that was appropriate and there may well be a significant number of cases which are worth less than £20,000. They are still significant cases, of course, at that level where people might well feel able to pursue a claim through a scheme such as the NHS redress scheme, but in a situation where they might have difficulty in getting a conditional fee agreement with the solicitor and they may well equally have difficulty in getting Legal Aid. Of course, the scheme does not prevent them subsequently, if they wish, from taking proceedings if they are not able to get redress through the scheme. At least it would enable them to have a system which they could use as a first port of call, perhaps, to try and get an explanation and an apology and, if appropriate, some degree of compensation or further treatment. I think that is to be welcomed.

Q45 Mr Khabra: Are there any practical ways that independent verification of the settlement can be conducted without introducing undue cost into the process?

District Judge Oldham: Are you speaking again of clinical negligence claims?

Q46 Mr Khabra: Yes.

District Judge Oldham: The scheme intends that there will be provision for independent medical assessment if that is felt to be necessary. Obviously it will depend on the individual facts of the individual case, but at the moment a very significant part of the cost of pursuing clinical negligence claims is the obtaining of independent medical expert reports to decide whether there is or is not a claim. I would hope that the scheme, as it is envisaged, would enable a proper assessment to be undertaken without, obviously, disproportionate costs. That is clearly the intention of the scheme, to try and ensure there is such a scheme to deal with these smaller claims without the need for legal proceedings and without incurring disproportionate cost.

Q47 Mr Khabra: In a number of cases, the number of claims will rise, will it have any budgetary implications for the NHS?

District Judge Oldham: I am sure it will. There will inevitably be some sort of resource implication for those operating the scheme because they are going to have to have processes in place to deal with complaints or investigations that need to be made. There must be some form of resource implications within the health service.

Q48 Barbara Keeley: This is just a question I may have asked earlier, but I think it might be helpful to ask you too. On the one side, obviously the number of cases may rise, but in terms of the most vulnerable groups, I think there is a fear that people who are less well informed might in fact settle for a lesser amount outside the courts than they would if their case had proceeded to the court. Do you think that is a likely outcome or is that something people ought to be careful about?

District Judge Walker: As I understand it, the intention would be under the scheme that the claimant would have access to independent legal advice throughout, so hopefully the sort of fears that you have would not actually arise.

Q49 Barbara Keeley: Do you think there are sufficient safeguards?

District Judge Walker: The devil is always in the detail and we have not got the regulations yet. As I understand it, that is certainly the Government’s intention and, if so, it would certainly be supported.

Q50 Chairman: Do you think the care contract principle is one which could eventually apply much more widely, and would judges be comfortable with putting in place care for people who are very seriously injured rather than granting vast capital sums, while making estimates as to how long people are going to live?
District Judge Walker: In a more general sense, if I could answer that question, what we have always thought of as the idea of rehabilitation, namely that it is much better someone gets back to good health quickly than have a larger claim, must be right and I think that is now generally accepted by everyone involved in claims from both the claimants’ and defendants’ sides.

Q51 Chairman: What about claimants whose injuries are permanent and very restricting indeed and therefore need continuous care? At the moment, all you have to do is make an assessment of what capital sum would be necessary to guarantee their care over however long the court judges they are likely to live, and we must assume most generously on that score.

District Judge Oldham: It is now established the court has to look at the issue of periodical payments, in other words paying for care periodically, fixing a sum which would be index linked in some way per year for the care, which is something that certainly the insurers like. In a case where there is some doubt about the life expectancy, for instance, it would mean insurers were not necessarily going to pay out a huge capital sum when in fact the care might not be needed for as long as it is estimated. Equally, for somebody who lived much longer than their anticipated life expectancy, it would mean their payments were secure. So that is already happening. Q51 Chairman: Thank you very much indeed. I am sorry you have had such an interrupted afternoon and it therefore has gone on longer than you might have expected it would, but we are very grateful for your help. Thank you.
Tuesday 13 December 2005

Members present:

Mr Alan Beith, in the Chair
David Howarth
Barbara Keeley
Keith Vaz

Witnesses: Anna Rowland, Policy Manager, Civil and Family Justice, and David Marshall, Civil Litigation Committee and Council Member, The Law Society; Richard Langton, Vice President, Association of Personal Injury Lawyers (APIL); and Tony GoV, Vice Chairman, Motor Accident Solicitors Society (MASS); gave evidence.

Chairman: Ms Rowland, Mr Marshall, Mr Langton and Mr GoV, welcome. Apologies from us, I think actually you outnumber us; that is because at the last minute the Government has put on the Criminal Defence Bill this afternoon and some members of our Committee are involved in that and representing us over there, but they will all be made fully aware of everything that you say. We have interests to declare. I am a consultant to a company which is involved in the leisure industry.

Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial appointment.

David Howarth: I write on the subject of tort law.

Barbara Keeley: I have an unresolved claim for a road accident involving personal injury.

Q52 Chairman: Thank you very much indeed. I think perhaps it would be helpful if we could start by asking you what your experience is of the introduction of Conditional Fee Agreements, what view you take of experience so far?

Richard Langton: My personal experience as a solicitor has been that by and large it has been successful, although obviously there have been a lot of cost issues that have been resolved or are being resolved now through litigation in the higher courts. I think there has been a sort of Alice in Wonderland approach to recovery of costs, where the losing party pays up to double the costs even if they have got a good claim that they can defend. I think that is something that the insurance industry does not like very much and is intellectually difficult perhaps to explain to some people. I think that there has been a saving to the legal aid fund from all this. People forget sometimes that when legal aid was around to take out liability insurance then it becomes a cost which can be levied?

Tony GoV: No. The point that I am making, therefore they were forced into settling cases because the claimant had legal aid and therefore they could not recover their costs against them, come what may, so they were forced into settling cases. If you look at the financial statistics, the saving for the insurance industry there is much bigger than the £37 million that is sometimes quoted.

Q53 Chairman: We might look at costs in more detail in a moment, so perhaps it would help if I were to focus your attention on whether you think there has been any change in the types of cases which have been pursued under CFAs, as compared with the situation there would have been before they were introduced?

Richard Langton: People who have a 50% better chance of success are still getting access to justice, but I think there are some cases, lower-value cases, where perhaps solicitors are not prepared to take a chance. My experience is that people going to the right solicitor can get access to justice with CFAs, as they could in the past.

David Marshall: I think there are two separate points here. First of all, Conditional Fee Agreements came in in 1995 and I think at that point they were a very valuable contribution to access to justice because they allowed those people who were not eligible financially for legal aid to bring cases, and of course there was no question of recoverability. The big change was with the Access to Justice Act coming in, in 2000, which obviously took all of these cases out of legal aid and introduced recoverability; that is what caused a lot of issues within the system. I think Conditional Fees themselves did increase access to justice and allow people to bring claims. Problems have arisen out of recoverability, although I think probably they are being resolved over a period of time.

Tony GoV: I am from a group called MASS and my take on all this is that it is not so much CFAs that need to be looked at but what CFAs brought with them, which was recoverability of insurance premiums and success fees. In fact, MASS warned the Government five years ago that we thought recoverability of insurance premiums would promote a whole host of satellite litigation, which in fact it has done, because liability insurers were not going to take that sitting down.

Q54 Chairman: This is a situation where having had to take out liability insurance then it becomes a cost which can be levied?

Tony GoV: No. The point that I am making, Chairman, is that under a Conditional Fee Agreement you take out what is called an “after the event” insurance policy. In the early years, that opened the floodgates to opportunists to come in and make a lot of money on the back of that. Claims Direct and TAG I think are two who came in on the back of that and made a lot of money out of selling overpriced insurance policies. With hindsight, I think that may have been a mistake. It has settled down now. This problem, I think, as David Marshall
said, has now bedded in. The success fees that are recoverable are much more realistic, perhaps. I read in the evidence from last week that there are cases where there are 100% success fees, but these now are very few and far. In motor claims, which is what I am here to talk about, we have had a 12% success fee now for some time. The worst excesses, in fact, perhaps have disappeared, with regard to success fees. As far as the insurance premiums are concerned, they are bedding down as well. You cannot operate a Conditional Fee Agreement without insurance, they go together, you cannot have one without the other. Perhaps the worrying thing is, where we are at the moment, that if you speak to “after the event” insurers they are considering their position as to whether they can go on; some are leaving the marketplace, others are contemplating it. The worry, moving forward, is to make sure, I think, that you can continue with the “after the event” insurers being around.

Anna Rowland: I think one of the benefits that CFAs have brought has been about who can bring claims, because the eligibility rates for legal aid are now very low, whereas CFAs have opened up the possibility of getting redress for middle-income people who would have had no hope of getting legal aid and they would not have had enough money to fund the case themselves. There is a whole tranche of people who had no access there who will now be getting access.

Richard Langton: I do not know if you are getting quoted 30% as being a fairly consistent level, across evidence from trade unions but I would find that most of them would say this has been much more expensive. Extremely beneficial to them and their members.

Q56 Keith Vaz: Do you think these costs are generally proportionate to the damages that the client obtains?

Richard Langton: I think it is difficult for the lower-value cases, because really the same amount of work has to be done to investigate issues of liability and a quantum for a low-value case as for a big one. In the very low-value cases, one can see that the ratio gets worse and worse, but then there has to be some minimum figure at which any business has to operate, employing a level of staff to do the work, to provide the client care, to understand the difficult law, the CPR, and so on.

Q57 Keith Vaz: In what proportion of cases do you think that the legal costs amounted to more than 50% of the final settlement?

Richard Langton: Statistically, I would think a very small number where the legal costs were more than 50%. I have seen some statistics which suggest I think that 40% is about an average, and they are not my statistics.

David Marshall: Yes, and I think the insurers have quoted 30% as being a fairly consistent level, across all cases, of damages to claimant legal costs for quite a long period of time. We do not have the statistics here, but I think the vast majority of cases, of course, are settled before they actually go into court, so I suspect in those cases proportionality is reasonable, but also cases go right through the court system, to the door of the court, where settling them can be much more expensive.

Q58 Keith Vaz: Has the introduction of CFAs had a disproportionate impact on libel and privacy cases and, if so, is cost-capping a potential method of resolving this problem?

Anna Rowland: I think there have been some specific issues that have arisen with CFAs and defamation cases, but it is important to remember that before we had CFAs there was no mechanism for people to bring cases at all unless they were fabulously wealthy. The media could report something quite irresponsibly and the injured person would have no redress at all and with the introduction of CFAs it gives a mechanism for people to bring a claim. There have been some specific issues, mainly because the costs in defamation cases tend to be quite high. It is a very specialist and technical area, and previous to CFAs it was typically only the very wealthy who could afford it, so the specialism tends to be centred on those firms whose clients are extremely wealthy, so for a combination of reasons the costs are quite high. It is also a very speculative area of law, though compared with other areas, where you can have a reasonable assessment at the beginning of what the outcome might be, that is much more difficult in a libel case. For that reason, the success fees will tend to be much higher, because it is so difficult to tell
early what your prospects of success are and, I think, for that reason, costs to the defendant on paying costs when they lose has been felt more keenly, but it is really difficult to balance the rights of claimants to bring a case and, obviously, the experience of defendants on the other end, it is not very clear how you do that.

Q59 Keith Vaz: Mr Marshall, what impact has the introduction of advertising by claims farmers had on the expectation levels of potential clients?

David Marshall: On the expectation levels of damages, I think that the biggest period of advertising was some years ago and obviously those claims management companies have gone bust now. Certainly The Law Society advertising code requires the advertising to be proper advertising, that it is not creating unrealistic expectations.

Anna Rowland: Yes, that it is accurate, decent and truthful, basically in accordance with the ASA guidelines.

Q60 Keith Vaz: You feel it provides a useful service for consumers. Does anyone not think that it provides a useful service?

David Marshall: Certainly there was criticism, say, 10 years ago, that there was not sufficient access to justice and a lot of the studies showed that many people were not aware of their ability to bring claims. I think now most people are aware of their ability to bring claims because of the advertising and I think that is a useful service. The question of whether the advertising is proper and decent is a separate one.

Richard Langton: Going beyond advertising though, I think the biggest problem is the cold-calling, the knocking on doors and stopping people in the street, which we have all experienced personally, or know somebody who has, whether or not we have been wearing a neck-collar at the time, and that is something which APIL would certainly like to see stamped out completely. A lot of the drivers for that, the profits for that, being done by unqualified, unregulated claims farmers, have gone, but it is still happening and I think we would be keen for that sort of monitoring, rather than pure advertising, to be stopped.

Q61 Keith Vaz: Have any of you observed claims farmers that have encouraged people with doubtful or non-existent cases to take those cases forward?

Richard Langton: One has somewhat anecdotal experience where marketing salesmen are targeted by results to produce individuals to sign on the dotted line a loan agreement, and totally spurious claims are brought forward. I think almost all solicitors would say that we can spot those a mile off and we would never act, because we would not waste our time on dealing with a hopeless case.

Tony Goff: The question has been has CFA fuelled spurious claims; if you think about it logically, it would have the reverse effect. In any firm of solicitors you have to do risk assessment; for each case that we take on at my firm we have a committee and we have a look at it. If the case is spurious or cannot win, there is no way we would put it on to a CFA, otherwise we are working for no payment over an indefinite period. The argument that CFAs have actually fuelled spurious claims, I would say they may have fuelled the, what was called, “have a go” culture some while ago, but it is solicitors perhaps who look at the claims and say to the clients “This can’t go forward.” I would say my experience is that any firm which takes on claims in that way is heading for financial disaster.

Q62 Keith Vaz: Are any of you aware of cases where claims farmers have offered incentives, financial or otherwise, for people to bring cases?

David Marshall: I cannot think of any, this is all anecdotal really. There is quite a lot of evidence, certainly in the investigation of the TAG scheme, in some of the judgments of Peter Hurst, that certainly there were incentives for those who were signing up, to sign up and issue policies, and so on. It was a very peculiar business model and rather different from the one which most solicitors would operate.

Richard Langton: There was an example, I think, in Liverpool of a company, a firm of solicitors, which advertised £200 up front, on a billboard, in the city. Certainly in Ireland it became very common for solicitors almost to bid amongst themselves for a new client and claimants would go around to see who would offer the most upfront payment of their compensation, but that has been stopped by professional rules now so that does not happen.

Q63 Keith Vaz: Given that the Government is proposing less self-regulation for lawyers, is it reasonable to expect the Claims Standards Council to look after both the interests of consumers and claims management companies?

Anna Rowland: I think what we would like to see the Compensation Bill do is introduce a statutory regulator. Really we would like to see the regulator set up in the Bill, because it seems that it is too important an issue to leave for secondary legislation, so that Parliament can scrutinise what powers the regulator has and what sort of level of protection that ought to provide to consumers. We would like to see the scheme quite akin to the protection consumers have from solicitors and to be equally robust, especially because there has been experienced of abuses in this market so we know already what the evil is that it is intended to address. I think the worst possible scenario is that regulation would come in that is not effective which lends some sort of credibility to some of the less reputable operators.

Q64 Keith Vaz: Do you agree with that? Nobody disagrees. Given the experience which the claims management companies have had, what would be the effect of allowing commercial companies, like the AA or even Tesco, to enter the market providing legal services?

Anna Rowland: I think the issue, again, is regulatory. It is extremely important that the same abuses do not sneak in through this route. Having seen the White Paper, we hope, and we feel somewhat confident,
that the alternative business model which is being suggested is proposing that, even though an external body might own the firm which operates the legal cases, the legal department itself would have to be headed by somebody who was considered fit and proper and who was subject to the same rules which apply currently to law firms, and we will be lobbying on that.

Q65 Chairman: Fit and proper, or a solicitor or barrister?
Anna Rowland: I think the phrase which has been used is fit and proper.

Q66 Chairman: That is a much narrower definition though, is it not? It is broader in another sense. I suppose they would be fit and proper, they are not going to put their hand in the till, but they will not be professionally qualified?
Anna Rowland: I think many of the people working within it will be solicitors, so what we would want to see is that the rules operating the department are of the same standard.

Q67 Keith Vaz: What the Chairman is saying is should the head of this legal section be a qualified lawyer?
Anna Rowland: That is what we would want. There is not enough detail yet in the White Paper. I think at the moment it says something like fit and proper. Certainly our position would be that they should be a solicitor and therefore tied into the same regulatory regime.

Q68 Keith Vaz: Of course, there are those who believe that all solicitors are fit and proper.
David Marshall: I think the important thing is that the changes within the White Paper do not allow back-door entry, to allow some of the people who abused the unregulated system before another way in, even though claims management companies will be regulated under the Compensation Bill, so it is very important that is a robust system.

Q69 Keith Vaz: Such regulation should cover them as well; there is no reason why it should not be linked?
David Marshall: Yes, indeed.

Q70 David Howarth: In terms of Clause 1 of the Compensation Bill, I was just wondering what impacts you thought that Clause 1 was likely to have?
Richard Langton: Clause 1, as it is drafted currently, as you will know, we think is unnecessary and will only cause confusion by giving areas for people to argue about which are already covered by the common law at the highest levels.

Q71 David Howarth: Do you think that it would be better to draft the Bill in terms of social value rather than in terms of desirable activity?
Richard Langton: No. I do not think the law needs to be put into a statutory format in that Bill.

Q72 David Howarth: If we have to have a clause, if we are stuck with a clause, what would be the better way of drafting it between those two?
Tony Goff: It is like being asked whether it is better to be hit by a rock or a brick.

Q73 David Howarth: If we are going to be stuck with a clause, we must have some influence on what it says?
Anna Rowland: I think what we would like to have seen in it is, I do not know if this helpful, my understanding is, what it is intended to achieve is to reassure the public and organisations that they will not be subjected to excessive litigation. What we do not believe is that those bodies will be reading the Bill, so what might have been helpful is to have something in there that requires people who are frontline claims handlers to deliver some sort of educational information to claimants, so that you are getting education straight to the people who are making the claim. We do not believe that the Bill will achieve that objective by this route.

Q74 David Howarth: You think that no cases are going to be decided differently; you do not think any cases are going to be decided differently as a result of Clause 1?
David Marshall: I think the danger is that they might be. The Bill says that it is not intended to change the law, but one wonders, when it gets before a court they might have the clause there and will they be saying “What is a desirable object?” and we fear there will be satellite litigation over what that means.

Q75 David Howarth: I have heard of that several times.
Richard Langton: You will know that the young man concerned broke his neck diving into a shallow part of the lake. In fact, the worry that the local authority had beforehand was that children might drown, because they were going out in small boats onto this lake and there had been a few near-misses. I think that, possibly, if the claimant in the Tomlinson and Congleton case had been a small child who had drowned, or suffered very serious injuries as a result of that, the House of Lords might have found differently, because they were certainly looking in terms of what an adult can do on somebody else’s property and they should not be prevented from shallow-diving if that was what they chose to do, despite warning signs. The answer to the question is that I think, in slightly different circumstances, with the Clause 1, the court would still find against a child claimant, whereas previously, without this, they might not. One struggles to find examples of how it will apply.
Tony Goff: If the purpose of Clause 1 is to try to take those cases out of court which may close down swimming pools or may stop my son going on a school trip—
Q76 Chairman: Or, as we discovered last week, the Lord Chief Justice going for a swim?

Tony Goff: Yes, I would suggest it would not do that, because, I think, if you asked a schoolteacher who was taking a group of children on a trip why did they decide not to go on that trip with the children, I think health and safety would be a much greater deterrent than the possibility of being sued; they could well end up in prison. Health and safety are very vigorous in bringing these prosecutions, so I do not think dampening down a perceived compensation culture in those cases would have much effect on a schoolteacher, whose decision not to go on the trip probably has more to do with prosecution from health and safety, I would suspect.

Q77 David Howarth: Can I come on to that, because I think that is an important point to pursue. We have heard a lot of evidence that there is no compensation culture but there is a perception of it and I was just wondering what you thought could be done to tackle the perception? One point just raised is the Health and Safety Executive and the question of risk assessments. I was wondering whether you have come across the use of the concept of risk assessment that would strike you as excessive?

Anna Rowland: I do not know if I can do that. One of the things that has changed in the last 10 years is that the process of risk assessments has become much more widespread. It was introduced with the Turnbull risk assessments in the nineties, but a lot of public bodies have adopted that voluntarily. I think the fact that lots of organisations are doing risk assessments where they never did before is as much to do with the overly cautious way people are handling risk that we hear about, rather than a fear of litigation, although that has increased.

Q78 Chairman: If they have not done a risk assessment, or have not followed their own risk assessment, and you were appearing for a client, would you draw attention to this legislation?

Anna Rowland: I think the increased use of risk assessments is a good thing but what we have seen is that in some cases decisions are made that are not particularly sensible. The point of a risk assessment is to identify the risk, decide how great it is, look at what is involved in avoiding it, weigh those up, and how big is the risk, how likely is it to happen and then either do something to avoid the risk or seek to manage it. I think what we have seen sometimes is, once a risk is identified, no matter how small or how cumbersome it is to eliminate it, some risk managers simply ban the activity or seek to eliminate it. I think what we are saying is that it is about managing risk, not eliminating risk, and education and guidance are needed. To go back to risk, I think sometimes the fear is not about being sued but being blamed, so if you are in that position do you want to be the person who said, “Oh, no, that’s fine, it’s too expensive to do that, we’ll go ahead.” Really, people need to be weighing up how big is the risk and what will be lost by simply not doing that activity and is that reasonable.

Richard Langton: My experience is that sometimes risk assessment, because it is done all the time, is not done appropriately in the serious cases. I had a client in the office on Monday, a new client, who had a risk assessment done but the one thing they did not identify was the risk that actually poured molten steel down his neck. It is important that there should be proportionate risk assessment and it is taken seriously in those serious risk cases, and it may be that there are examples where it is overdone. I have to say, I am a director of a Headway charity, which runs a day centre. We have seriously injured, head-injured clients, looked after by volunteers, almost exclusively, who have to be trained. We have no accidents. We have them using woodworking materials, they go out on trips, they go swimming, they go out in vehicles, they do everything at the day centre and are out and about. We have a commonsense risk assessment approach to this. We do not have a huge number of forms, we just look at the really serious issues and deal with them, and I think probably that is the approach we would advocate, targeted risk assessment.

Q79 David Howarth: Is there anything that other social actors might do to reduce this amount of risk-averseness that we are seeking? Some people have suggested that insurance companies might do that business; they make money out of risk-averseness so that does not seem very likely. Also the media has been blamed, such as by the Better Regulation Task Force. Is there anything else that might be done, apart from just general education?

David Marshall: I think insurers probably do have a role there with employers. I think that they can promote proper risk management and perhaps link that to premiums, and so on. Businesses have got to accept some degree of risk but it is a question of managing it and I think insurers do have an important role, they are directly in contact with them.

Tony Goff: This might be a controversial point. I think insurers have had an interest in perpetuating the myth of a compensation culture. It has been one of the main planks in their argument, to raise the small claims limit, for instance, and they have ridden on the wave created by the media, that is a view, I think, widely held within MASS, certainly it is my view.

Q80 David Howarth: I will ask you to elaborate on that point, if you might. What is the nature of the insurers’ interest?

Tony Goff: That is another issue altogether. The insurance industry appears to have an agenda to change the way in which personal injury claims are handled. They have had that for some time, and I think creating the myth, the perception, shall we say, that there is a compensation culture has suited their purpose, insofar as it has helped them in their arguments, with regard to small claims and other issues. I think they have used it very successfully.

Richard Langton: There is a widespread belief in the claimant side that insurers have been writing premiums that are too low to get market share for
many years, that they have taken on the wrong risk or have been unlucky with natural disasters, things like the asbestosis claims that have come out they were not expecting. The number of insurers has reduced over the last 10 years, there has been a lot of price competition in order to gain market share and now perhaps they are looking at ways in which they can recoup some of the losses; they were hit by the stock market crash, perhaps they underreserved for the risks involved. That is the claimants’ perception and now this is a golden opportunity perhaps to get back into profitability.

Q81 David Howarth: What you are saying is that if there is a sudden, unexpected reduction in the scope of liability they get a windfall?

Richard Langton: The experience in Australia was that when the tort law reform stopped people pursuing claims insurance premiums did not go down, and I think we are sceptical as to whether there will be a direct cause and effect of, say, increasing the small claims limit and reduction in premiums.

David Marshall: Certainly the DWP ELCI review did not really find a very close correlation between underwriting costs and premiums, and this idea that, in fact, policies were being underpriced to get market share, it may well be that is a way of recouping, if you can reduce the number of claims. I think that the media side of it and the power of anecdote, it is good stories to read in the press, it is like urban myths being carried forward and often they are very entertaining stories, but when you actually scratch the surface of them . . . I think I was called in once by Sky to talk about backstroke was going to be banned at a local swimming baths because of a risk of injury. I was about to go in, on the seven o’clock news on Sky, to talk about this, and, to their credit, they looked into the story and discovered it was detail.

Tony Goff: This is similar to the Irish system (PIPA). Our experience so far of the Irish system is that a lot of claims have gone into it but we are told very few yet have come out and perhaps when some do we will have some evidence as to how it works. It seems difficult to believe that an efficient lawyer, doing sufficient work on a case, in terms of taking instructions from a client, gathering the necessary evidence to prove a claim, putting in a letter which the insurers accept, in fact is going to do more work than an ombudsman or an administrative bureaucracy; this is just a way of shifting the cost to the ombudsman from the law firm.

David Marshall: I think the experience of dealing with MIB and CICA, which are very similar sorts of schemes, MIB untraced cases, is it does not speed things up, in fact they are very, very slow and bureaucratic. I think there is an issue of public confidence really, because you talk about the insurer of the wrongdoer and I think the lawyer does add that, that public confidence.

Q82 David Howarth: It has been suggested that, instead of the existing court case system, there should be an ombudsman-type, inquisitorial system for smaller claims, funded by the insurance industry. I was just wondering what your view was of that suggestion?

Tony Goff: This is similar to the Irish system (PIPA).

Richard Langton: Our experience so far of the Irish system is that the claimants’ perception and now this is a golden opportunity perhaps to get back into profitability.

Q85 Barbara Keeley: In terms of guaranteed care contracts introduced under the Bill, do you foresee difficulties in drafting those, managing those or enforcing those?

Richard Langton: We have not got to that level of detail.

Chairman: Do you think it is a problem?

Q86 Barbara Keeley: A further question is around really the provision of independent medical reports. I think The Law Society have touched on this in your written evidence to us for today. What practical difficulties do you envisage if solicitors are not provided with that independent medical report but are still asked to advise clients on whether to settle the claim out of court?

Anna Rowland: I think two issues arise. As you rightly say, there is the issue of independence, which is to do with consumer confidence. I heard a minister speak recently and say that independence would be guaranteed by the fact that the NHSLA would be involved. Certainly our view is that if the redress claim does not work and the claimant goes to court the NHSLA will then be representing the person on the other side. Clearly, there is an issue of consumer confidence there. The second issue is about how the role of the lawyer and independent advice will work, which is connected to that, to the extent that it depends at what stage the lawyer gets involved. We do perceive some practical difficulties if what is envisaged is that presumably there is an internal investigation and then an offer is made and the
Ev 16

13 December 2005 Anna Rowland, David Marshall, Richard Langton and Tony Goff

The claimant is simply sent along to a lawyer. What the lawyer will not know is was there other information that has not been considered, has all the information been considered, so what are the difficulties, and what you do not really want happening then is the lawyer having to reinvestigate just in order to advise the client. Clearly, the issue of how independent are the documents they are seeing will be a factor, but we think there is a further factor about how does a lawyer, also from the terms of their own duty to give best advice to the client, say “Yes, this is good,” or not, if they do not know whether they are seeing the full picture or not. I think what we would like to discuss at the Department of Health is how that relationship might work and how you ensure that the lawyer has enough information to say to the claimant, “Well, this is the ballpark of what I think you should get; this looks fair,” or “this does not.” I think that needs a little more thought, although we accept that you are going to want their involvement to be more streamlined than it is at present, in most cases.

Q87 Barbara Keeley: Clearly, the aim is to avoid introducing undue costs into the scheme, clearly that is an overall aim. Is there a way, do you think, to allow for independent verification of settlements, is it a balance, is it not, costs on one side and independent verification on the other side?

Anna Rowland: I do not see why it should be impossible to do that. I think the details need some further thought. I think that is something we will want to discuss in greater detail. I do not see why that should be impossible but, we have very little detail. Just saying, “Oh, you can then go along for some advice” there are difficulties with that. Certainly we would think it must be possible to create a streamlined system, but it needs some thought.

Q88 Barbara Keeley: My final question was going to be do you think such a scheme could operate fairly without input by lawyers, but I think you have answered that. You see it coming in at a couple of points?

David Marshall: Yes.

Chairman: Thank you very much indeed for giving us the benefit of your experience. Clearly there are further meetings we are going to have to have with the Department in order for them to answer some of the questions we were putting today. Thank you very much.


Q89 Chairman: Mr Worthington, Mr Foskett, we are very glad to see you both. You have experience at the bar in these matters. You probably heard the discussions that were going on previously about compensation culture. In your own written evidence you talked about the perception issue. What do you think the Government should do about perception and the compensation culture?

David Foskett: The easy answer to that is it is a matter for the politicians and not for the lawyer. I do not know what the answer is, other than to say that it is probably a matter of education generally. I think, from what I have been able to read and what the Better Regulation Task Force produced, and so on, it is largely a matter of headlines that create the perception and quite how one addresses the issue of headlines I am afraid I do not suppose I have an answer to and I do not suppose anybody else does. I think perhaps the more serious issue is whether there are professionals, like teachers and others, who feel that they are under threat from a perceived compensation culture and I am not sure that the two of us would say anything very different from what you have heard from our colleagues from The Law Society and other organisations today. I think our collective view would be that if there is a risk-averse culture out there it is probably caused by things other than a fear of claims for compensation. You have heard, for example, one gentleman talk about concerns about prosecution. I think that is something that found its way into our submissions. Again, one can only ever talk anecdotally, because of the sorts of conversations one has with people just quietly from time to time, but undoubtedly there are, for example, teachers who would be concerned about possibly risking prosecution if they did not look after some children properly in their care and a child died. One knows, of course, that there would
be inquests, and things like that, which could certainly give rise to possible criminal sanctions. In terms of what one does to deal with it, as I say, in terms of the perception created by headlines, I simply do not know the answer and I am not sure anyone does. So far as the other side of things is concerned, our view, which we hope is not totally complacent, is that the law does protect those in that position, teachers and others, and will not find them guilty, as it were, of negligence if the circumstances do not dictate that finding should be made.

**Stephen Worthington:** It is a pity perhaps that when one gets a headline to the effect, for example, that children cannot play conkers in the playground, one does not know where it comes from, and then when one hears a headline to the effect that a particular case has come before the court the next day’s newspaper seems never to tell us that the claim failed. One sees what, at first sight, appears to be a ridiculous claim going through the courts; one does not then discover that actually it failed.

Q90 **Chairman:** Usually they have not got a claim, have they, it is simply somebody feels that there might be one?

**Stephen Worthington:** Often it is a headline from a case which has been picked up and run through the major newspapers, often a snippet from the case, which is then thrown into relief, and yet, as I say, no indication of what the final outcome of the trial was.

Q91 **David Howarth:** Can we return to this question of Clause 1 of the Bill and just take up the point that was raised earlier about its relationship with the Tomlinson case and ask for your view of whether Clause 1 of the Bill takes us beyond Tomlinson or just leaves us in the same position in which Tomlinson left us?

**David Foskett:** As everybody knows, the draftsman thinks that this reflects the existing law and, from a superficial reading of it, certainly when I first looked at it, I thought what difference does that make. I think one has got to examine it perhaps a little more closely than that. When we prepared our response I do not think we had checked to see whether the expression “desirable activity” was one which had appeared in any of the other cases that had been decided over the last 10 years or so. I noticed I think in the APIL evidence that they thought there had been one case in which it was referred to, but I did a search over three of the major legal databases this morning and could not find it anywhere. The only point of that little story is, that means there is a new phrase there which will require interpretation by the courts and, of course, it will always be something the lawyers can always produce in arguments one way or the other about what is desirable, it is true, and of course the courts will have to decide. I think that the short answer to the question is, it is not designed to change the law but it could well have that impact because, for all the reasons that we have set out in our paper and other people have set out in theirs, it has such a strong subjective element to it. I am afraid our general position is “if it ain’t broke don’t fix it” and, again, I hope without sounding unduly complacent, we feel that the present system, as the Better Regulation Task Force said, sorts out the wheat from the chaff.

Q92 **Chairman:** Do you think that will just open the way to cases hinging on whether scouting or paint-balling are desirable or sufficiently desirable?

**David Foskett:** I think the short answer to your question is, yes, it does open the way for that kind of argument. One has to be frank, that kind of argument is available now. It does not require a clause in a bill for that kind of argument, or even, as I think we hint at the end of our paper, for evidence about what is socially desirable or desirable from a leisure point of view; it does not prevent evidence of that being given now, if a judge is prepared to receive it. I think the way we would advance it simply is the danger of passing this particular clause is that it may open the way for all sorts of interpretations which in fact were not intended by those who are promoting the clause itself.

Q93 **David Howarth:** Can I just come back to the point that I put to the previous witnesses, that in Tomlinson itself Lord Hoffman uses the phrase, and several of us have used this phrase in the past out of context, the “social value” of the activity. Would it be better to use that phrase rather than the new phrase put into Clause 1?

**Stephen Worthington:** When you put the question I was reminded of Dr Johnson, what is the difference between a louse and a flea. I think probably our view is that neither of the phrases is terribly good and is likely to bring forward satellite litigation as to the meaning of it. It seems to me that the whole point of what Lord Hoffman was saying, whatever wording he used—social utility, social value, desirable activity—is that the courts will look at all the factors and take them into account when deciding whether or not there has been a breach of duty. Richard Langton said that on different facts in Tomlinson, for example, children playing in a canoe, the result might have been different and I respectfully agree with that. The whole point about Tomlinson was that what the House of Lords was saying was that you do not have to tell an adult that it is dangerous to dive into shallow water, and therefore no breach of duty.

Q94 **David Howarth:** Could I come to another point in Tomlinson, where Lord Hoffman talks about employees and the question about them having choice or no choice and the law there; is there any danger that Clause 1 might change the law about employees?

**Stephen Worthington:** It is difficult to say. Two of the problems with Clause 1 are, first of all, that it relates only to claims in negligence, not as drafted to claims in breach of statutory duty. For example, on the facts of Tomlinson Clause 1 would not apply, because in Tomlinson the claim is brought under the Occupier’s Liability Act 1984, so Clause 1 would not apply to that case. The second is, and I think probably this goes to the issue of risk-averseness as well, that, particularly in the field of employer/
employee liability, so much depends upon health and safety regulations, which have been brought in pursuant to our obligations under the Treaty of Rome, that the result, and again I am echoing what other people said a few moments ago, is that there is a great deal of risk assessment. The moment you start risk-assessing in order to protect your employees, that is, almost by definition, going to have an effect on the way in which you look at things generally. For example, if you are assessing risks in a playground pursuant to your obligations to your employees, that is going to have an effect on what you will let the children do. To that extent, I think that Clause 1 does have an effect and one has got to look at it from a different point of view.

Q95 Chairman: Possibly, if a child might be injured in a way that was traumatising to the employee? 
Stephen Worthington: Yes. I did not actually mean it like that really. Suppose, for the sake of argument, you have risk-assessed the playground and seen that there is a potential danger which you feel you ought to deal with, because you are taking risk assessment to its highest level, in order to protect a teacher, that may mean that then a child cannot carry out what under the Bill might be a desirable activity.

Q96 Chairman: Going back to a question which was raised in the earlier session, in your written evidence you said there is a strong feeling amongst practitioners that, in the personal injury field, difficult cases are not now being pursued, I am paraphrasing the words, for the reasons that we explored earlier. Do you seriously think we could go back to the old legal aid system in this area?
David Foskett: It is unrealistic to expect that will ever happen and I do not think we are suggesting that at all. I think all we were asked to do was to reflect on the effect that CFAs have had, and, like so many aspects, there are two sides to this particular coin, there are good features and bad features, as you have heard already this afternoon. One of the disadvantages may be that there are some cases which really ought to be brought perhaps, because they are hovering on the 50% viability threshold, but which now would not find a solicitor to pursue it, and that is a matter of view but that perhaps is undesirable. There are other aspects of the CFA system which are plainly desirable. They have weeded out some cases which plainly should never be brought, they also do have some costs and balances, as again you have heard from various witnesses at various times, so it is a feel, though it is very difficult to have a very clearly-defined view.

Q97 Chairman: Do you think that these are rather rare cases where there is an important point to be established, or simply deserving individuals, where the negligence element may be in question? 
David Foskett: When I was addressing you, I was probably thinking of that, the deserving case. One of the concerns, obviously, is that the less throughput of cases there is through the courts of course the less opportunity the courts have to either develop the common law or reign it in, as the case may be, and that is a serious point. As you will have seen from the various statistics that we provided you with, and others have as well, there has been a huge downturn in the number of cases being heard by the courts and you can see the way the pie-chart is down over the last 10 years or so.

Stephen Worthington: One of the problems with the CFAs, I think, is that solicitors have to take a quick view on the available information. One of the benefits of the legal aid system was that a solicitor could say to the Legal Aid Board “I think there might be something in this case. I think it bears investment of some money while we investigate it and then I’ll be able to give you an opinion as to whether or not it ought to proceed.” That tends not to happen, I think, in a lot of CFA cases. A view is taken on a fairly sparse amount of information, in many cases.

Q98 Chairman: For deserving cases, is there scope for some pro bono involvement? 
David Foskett: Yes, around these margins.
Stephen Worthington: Yes, there may be, if you can persuade lawyers to do it on that basis.

Q99 Chairman: Turning to the media issue, ought we to take seriously this concern amongst some quite well-heeled newspaper corporations that the disproportionate costs they can face under CFAs are a deterrent to free speech?
David Foskett: Shall I try to field that; neither of us is a defamation lawyer so I am afraid that what we say is very much from an amateur viewpoint. I did have quite a long conversation with a couple of fairly senior people in the field, so I hope what I am about to say makes a degree of sense, but if it does not then I hope the transcript will forgive me. Yes, I think there is a concern, in monitoring high-profile cases, which I am sure the Committee know about and probably represents the origin of the question. It is the case where there is no “after the event” insurance, as I understand it, and the newspaper loses, that they find themselves picking up a huge tab at the end of the day, if there has been a 100% uplift and, of course, the costs involved in defamation proceedings historically have always been high. The short answer to your question is that there does seem to be a problem which has been highlighted with a lot of these cases. I think you heard from Master Hurst last week about efforts that are being made at the level of the courts to try to deal with this and that capping, I think was the expression that was used, as I understand it, is becoming a rather more frequent requirement now at a fairly early stage, where there is no “after the event” insurance involved. There is, I understand, a standard direction now which requires a specifically-designated Master to consider the issue of the capping of fees, and indeed I understand that orders are beginning to be made. Whether that will be a full solution to the problem I simply do not know and I am not qualified to say, but at least it shows that the problem has been appreciated and, as far as I can see, is being addressed.
Q100 Chairman: Do you think it is harder to reach settlements in defamation cases because of the instances of CFAs?

David Foskett: I simply could not tell you. I simply have no personal experience of that.

Stephen Worthington: I do not know either. All I can say is that it does not seem to be a deterrent in ordinary personal injury cases. Indeed, in many cases, it seems to be advantageous to an insurer to settle early because, as you heard, for example, in simple RTA cases, the mark-up which is permitted by the various protocols goes up the closer you get to trial. For example, a claimant whose case is settled at an early stage, his solicitor will get only a 12½% mark-up, but if the insurer fights it to trial and loses the mark-up is 100%, so, there, there is certainly an indication for early settlement.

Q101 Chairman: That system could be applied in defamation?

Stephen Worthington: Yes, but I would repeat what David said, neither of us is an expert in that field.

Q102 Chairman: It is not necessarily a bad thing?

Stephen Worthington: No.

Chairman: Let us turn to NHS Redress.

Q103 Barbara Keeley: In the discussion earlier, we said that the Bill does not provide details of the scheme, so if any of these questions go into areas where we do not have details we will understand. What safeguards do you think are necessary in the Bill, or in fact in subsequent regulations, to ensure that potential claimants are not pressured to agree settlements which are not reflective of what they would have been awarded in court?

David Foskett: I think the short answer to that is independent advice, both legal and medical, at an appropriate time, and by that relatively early in the procedure. Like everybody, I am sure we shall just simply be saying that there is not very much detail at present and when we see the nuts and bolts we will be able to give a rather more definitive view. I think, in terms of the barrister’s general position, there must be independent advice on both counts at an appropriate stage to ensure that the claimant is properly advised.

Stephen Worthington: I think, as was said earlier, the crucial thing to make a scheme like that work is consumer confidence, and in order for the consumers to be confident I think they have got to feel (a) that they understand they are not precluded from going to court if they choose to do so, and (b) that they have access to independent legal advice.

Q104 Barbara Keeley: Thinking about consistency in quantum of offers, if that is to be ensured, do you think it would be helpful for the NHS Litigation Authority to publish tariff criteria?

David Foskett: It might be. As you may or may not know, in ordinary personal injuries cases now, the Judicial Studies Board issue some guidelines, they are not binding but they do assist practitioners to advise people about what their claim is worth and assist the judges in determining what their claims are worth. That kind of set of guidelines might well be useful.

Q105 Barbara Keeley: Do you anticipate a role for barristers, for instance, who often provide advice on quantum in injury cases? The NHS Redress Bill clearly does anticipate some independent legal advice on the process and I just wonder if you foresee a role for barristers in that?

Stephen Worthington: That may well depend on whether or not the solicitor who is initially instructed, if instructed, is a specialist. If he, or she, is a specialist then there may be no role for the bar. On the other hand, something which perhaps sometimes is overlooked, the bar is frequently a lot cheaper than solicitors, particularly down at the junior level, but if you want a specialist barrister to give an opinion on quantum you may be able to do that more cheaply by going to the bar, a bar solicitor, than if you go and ask for a solicitor to do it all on his, or her, own.

Q106 Barbara Keeley: One detail which does seem to be there is examples are given, in Clause 3, about future remedial care which may be settled, in terms of a level of compensation being settled for that aspect. Do you think there are going to be difficulties around that aspect of the Bill?

Stephen Worthington: It is something which the courts are already wrestling with, with periodical payments, because under the relatively new periodical payments regime the court has to ask itself the question as to what a severely injured person’s care needs may be into the future and how they should be catered for, whether by a lump sum or, under periodical payments, by so much per annum. The knowledge in that area is fairly sparse at the moment because, as I say, it is a fairly new regime. I think the courts will be able to deal with it and I think, under a regime that is being suggested under the Bill, it ought to be possible too.

Chairman: Thank you very much indeed. We are very grateful for your time and the care and frankness with which you have answered the questions. Thank you very much.
Tuesday 10 January 2006

Members present:

Mr Alan Beith, in the Chair

James Brokenshire
David Howarth
Mr Piara S Khabra

Jessica Morden
Julie Morgan
Dr Alan Whitehead

Witnesses: Nick Starling, Director of General Insurance. Justin Jacobs, Head of Motor, Liability and Risk Pricing, Association of British Insurers (ABI), Dominic Clayden, Director of Technical Claims, Norwich Union and Phil Ruse, Divisional Manager, Allianz Cornhill, gave evidence.

Chairman: Welcome everyone. Welcome, in particular, Mr Starling and Mr Jacobs from ABI, Mr Clayden from Norwich Union and Mr Ruse from Allianz Cornhill, if I have got all that right. Before we seek your invaluable help, and we are very glad that you have come along to help us today, we have the duty to declare any interests that we might have.

David Howarth: I write legal text books on the law of tort.

James Brokenshire: I am a non-practising solicitor.

Chairman: I am a consultant to Bourne Leisure, which has holiday park interests.

Q107 David Howarth: Can we start with clause 1 of the Compensation Bill and your views of it? Obviously there have been grave doubts expressed, first of all, about the need for such a clause at all and, secondly, even among those who think that it might be a good idea to have a clause, about the way it is drafted. Can you start by giving us your general view at this point of clause 1?

Dominic Clayden: We support the principle behind seeking to address the issues around a compensation culture. We have got some significant reservations around how clause 1 would actually be interpreted by the courts. We are concerned that there would be a period of uncertainty while the courts work out its impact, and, as such, we do not support it in its current form.

Q108 David Howarth: In what form would you support it?

Dominic Clayden: We would look to have a situation where there is greater clarity for what the Government is seeking to put outside of claims for compensation. I think that is a matter of government policy.

Q109 David Howarth: Is it not inherent in the exercise of legislating and producing a statutory section that there will be litigation about it? Does not the logic of your argument take you to a different position of not being in favour of such a clause in the first place?

Dominic Clayden: I think the issue is that there is a reasonably clear body of case authority around what is covered by negligence and what is not, and if the whole body of negligence law was going to be relooked at in individual circumstances that would lead to a significant period of uncertainty.

Q110 David Howarth: What sort of more limited clause are you suggesting? What sort of issues are you suggesting should be covered by legislative action and what not?

Dominic Clayden: At the moment we do not believe that there should be an extension of that in terms of seeking to reduce the scope of negligence.

Q111 David Howarth: What about the other problem that has been raised, which is the problem of the legal scope of the clause? I think in the House of Lords there was some discussion of whether the clause should or should not cover breach of statutory duty, which of course itself is an ambiguous term. What is your view on that?

Dominic Clayden: I think in truth if I were to go into a level of detail I would probably have to write to you separately.1

Q112 David Howarth: Does anyone else have any views on that?

Nick Starling: Broadly speaking, we do not see the need for this particular clause. It is not for us the main issue in the whole issue around the compensation culture and the compensation debate. We think that the Bill in general is a good first step, if you like. We would like it to go much further. That is our broad approach.

Q113 David Howarth: Could you tell us a bit more about in what way it could go further?

Nick Starling: We think that there are problems in the personal injury compensation system. We do not think it is working effectively. We think it is adversarial. It is complex, it costs too much, it takes too long, it undervalues the importance of getting people better after personal injury, it encourages frivolous claims and, in fact, deters legitimate claimants. We think that what is actually needed is a proper reform of the compensation system, and we have put forward proposals, as you know. We think

1 Note by witness: There are many claims particularly in public and employers liability cases where the cause of action will be pleaded both in terms of negligence and/or breach of statutory duty. In view of the way Clause 1 is presently worded and in addition to our written evidence, a judge when considering if a desirable activity may be affected by alleged breach of the standard of care in negligence has no similar discretion to apply to breaches of statutory duty. This could result in the intention and purpose of the Bill being obviated in a considerable number of cases
that the Bill is a good first step, but it needs to have something which addresses some of these issues which I have set out.

Q114 David Howarth: Before we move on, I think you are suggesting some sort of parallel to the NHS Redress Bill, and I want to cover that in a second, but could I finish off this line of questioning by asking whether you think there needs to be any legislative change to the common law of negligence. Dominic Clayden: No.

Q115 Chairman: You do not all have to have the same view. Nick Starling: No.

Q116 David Howarth: No conferring, should I say! Justin Jacobs: I think the general point is we agree that there needs to be greater clarity about when people are entitled to compensation. It might be the case that clarity has been lost in recent years, but whether the best way of achieving that clarity is through legislation is something which is clearly open to debate and perhaps not the best way forward.

Q117 David Howarth: Could I go on to the recommendation that you are making that there should be consensual mechanisms, I think is the best way of putting it, similar to the NHS Redress Bill. Could you just take us through the system that you would expect to come into place were your recommendations to be taken up? Nick Starling: The problem at the moment with the personal injury system, the compensation system, is that it starts off as if everything is going to end up in the courts, and we think that for claims below £25,000, which is about 90% of claims, in a very large number of cases they can be sorted out without recourse to the courts and they can be sorted out much more quickly. We are proposing a set of proposals which essentially mean that, instead of an average of I think it is 400 days for a personal injury claim to be notified to an insurer, notification happens virtually immediately. It means that arrangements can be made to get the person better—rehabilitation, medical treatment and so forth—and a process then starts whereby insurers have to come back with whether they accept or reject the claim within three months and with a figure for compensation within six months via a form, a proposal for people putting their claim forward on which there will be a free helpline. Once the claim has been received, once the suggested compensation has been received by the claimant, it will be informed by a tariff of compensation payments, which will be set by government, it will then be open for claims above the small claim limit for the claimant to accept or reject or to go for legal advice. The next step beyond that, if is not settled, will be mediation and only, finally, after that, would it go to the courts. So we think there is a system which would enable the straightforward claims where everyone is agreed where liability falls, everyone agrees what the compensation should be by a tariff of compensation proposals, and they can be sorted much more quickly than the current three-year average which we see and reduce the costs, which are very high—40% transaction costs.

Q118 David Howarth: Can I ask a couple of questions about that. The first question is how do you envisage the tariff being drawn up? Would it be based on the courts’ present methods of estimating damages? Nick Starling: I think that would be the starting point. I think it is important that it is society which decides what compensation levels are appropriate, and that is the courts, that is government. It is not for the insurance industry itself to decide what the compensation should be. I think that is quite an important point.

Q119 David Howarth: The second point is how would you envisage giving incentives for people to stick to this system, this line of going first to the tariff, then to mediation and then only finally to the courts? How would that work? Nick Starling: We think there should be penalties for people who do not stick by the laws, insurers who do not stick to the three months plus three months system, and there should be penalties for exaggerated or frivolous claims as well.

Q120 David Howarth: That would be enforced how? Nick Starling: There are a variety of ways in which it could be enforced, but we think that ideally this system would need to be enforced by government through the DCA. Justin Jacobs: I was going to say, ultimately what we are proposing is that the Government should introduce these reforms and they would then be the norm to follow through this process, and only if agreement cannot be reached would you fall out of it and go into the court system.

Q121 David Howarth: But you envisage some sort of administrative system to enforce rather than using the court system itself? Justin Jacobs: The court system would still be there as a last resort.

Q122 David Howarth: One final question. I think you mentioned somewhere in your submission that there should be more cooperation between government departments about rehabilitation. I am wondering what lay behind that. Do you want to say a few more words about that? Nick Starling: We think this country is actually quite poor at rehabilitation, about the business of getting people back in health and back to work, and the problem is that everyone thinks it is a good idea but everyone thinking it is a good idea does not mean it has the drive that is needed. We think that it needs much more attention from providers, from the Department of Health; we think it needs to be focused via formal requirements on the Health and Safety Executive, to have it as part of the Health and Safety at Work Act. It essentially needs an impetus from government that says rehabilitation is
extremely important, it is a vital part of our Health Service and a system which would work better as a result.

Q123 Chairman: The legal profession in their evidence to us, if I can use that term generally of those who spoke to us, did not think that the Motor Insurers Bureau provided a very good model for an insurance industry organised scheme of the kind you are talking about, that actually that is quite a slow and cumbersome process rather than something that is speeding things up and making them easier. Do you have an answer to that?

Justin Jacobs: The Bureau is part of the current compensation process, so it is still subject to the same process that all insurers and all claimants are. What we are proposing would be a whole new process. It is not saying insurers have the right to handle claims however they want; it is a whole new process which sets new timetables, new targets, new penalties on both sides; so I am not sure that the Bureau is an embodiment of what we are proposing, the Bureau itself it is part of the common process that we are seeking to move away from.

Q124 Chairman: I mention it to bounce the lawyers’ arguments off you. They say that insurers consistently undervalue claims. How do you prevent that from happening where the lawyers are excluded?

Dominic Clayden: The issue is that at the present time we have an adversarial system where, for want of a better phrase, horse trading occurs. We believe that adds delay and cost to the system. We believe that the assessment of damages should be subject to transparency, clarity and independent scrutiny so that everyone is clear what is going to be awarded, committee, but I think in this context it would be interesting to hear your views on whether some of the perceptions of risk in the “compensation culture”.

Nick Starling: It goes alongside, I think, the tariff of general damages so it is quite clear what people deserve to receive.

Q125 Chairman: Where does that leave the consumer? If insurers are organising medical reports, they are funding the legal advice, where is the independence?

Justin Jacobs: The independence is there because, although it might be funded by the industry, it does not mean that it is doing the industry’s wishes. They will ultimately be accountable. The legal advice will be accountable to the claimant and responsible to them. It would then be funded by the insurer.

Q126 Chairman: Do you think that if this process was adopted there would be real cost savings, and how much could you see premiums being reduced as a consequence?

Nick Starling: At the moment there are something like 40% transaction costs, and for claims under £5,000 I think something like 93% are transactions costs—in other words, there is £5,000 compensation and 93% on top of that—so there are huge costs at the moment. If you can reduce those costs, that would be a downward pressure on premiums. Many of the other cost pressures in the compensation system are in terms of real value of compensation claims themselves, so we would expect those things to balance to some extent, but any reduction of costs and time would certainly benefit consumers.

Q127 Chairman: You do not like to put a figure on it though, do you?

Nick Starling: No, of course not.

Q128 William Hague: You have already touched upon the issue of costs, and I note, Mr Starling, you have just referred to this figure of 40% in terms of the legal or other costs associated with a claim, and I note, Mr Clayden, that in the evidence from Norwich Union you have also highlighted this 40% figure in terms of the overall legal costs in personal injury claims. Cost is a factor in terms of the perception of risk in the “compensation culture”. Part of that might be addressed through the reform of the small claims system and raising the thresholds. As you may be aware, we have examined that as a committee, but I think in this context it would be interesting to hear your views on whether some of the problems might be addressed more easily by raising the small claims threshold?

Dominic Clayden: I think if the small claims limit was raised, and we believe it should be, it is clear that we would need a system to ensure that people who have had an accident get the compensation they are entitled to, so we believe that part of the debate with raising the small track limit is how do we ensure compensation is paid, and we believe that the system we are proposing can have a part in that so that consumers get a fair deal.

Nick Starling: We believe it should be raised to £5,000.

Q129 James Brokenshire: But part of that in terms of ensuring that people do get the compensation that they are entitled to, in terms of the process that you go through and in personal injury claims, and that is partly the medical evidence, and one of the stumbling blocks in terms of the procedure and ensuring that you can actually claim the compensation that you justly deserve is presenting medical evidence in a cost-effective and simple manner. What would your views be in terms of the procedural side of accepting less comprehensive or more straightforward medical evidence submissions on a small claims case to actually speed up the
process and in some ways assist justice by ensuring that a matter is dealt with more efficiently and effectively? 

**Dominic Clayden:** Provided that medical evidence is sufficient that you can understand what injury a person suffered and what their likely prognosis is, I think it is to be welcomed. To give you an example, in a simple road traffic case where somebody suffered a whiplash injury which has resolved within two or three weeks, I actually believe a report from a GP, who are the normal clinical practitioners who would see people with that type of injury, is the correct route to go, and I do not believe, for example, the additional costs and delay of having a consultant seeing that person is really going to assist the process.

Q130 **James Brokenshire:** We have touched upon the issue of legal involvement on small claims, and it is interesting that, despite the issue of a legal costs not arising in the small claims procedure, quite frequently, as we heard in our submissions on our previous inquiry, lawyers are still directly involved on a small claims matter and insurers quite frequently send a legal representative, or a lawyer, or a solicitor, to represent them on the small claims case even though technically that is not required and the fact is that those costs would not be recoverable. Why is it, do you think, that that procedure is still followed and, for example, the claims handler could not go along and present the evidence and not sort of overlay that additional cost and hopefully cut the premium by cutting the cost?

**Dominic Clayden:** Each case will be on its individual facts. My immediate reaction to that is in a practical sense on a lot of occasions the person who is handling the claim may be geographically a long way away from the court, and it is simply ensuring that there is someone to go along and be present at court and it is convenient to have somebody who is a lawyer attend. There is no particular reason why a lay person could not do it.

Q131 **Chairman:** That is a surprising answer! Normally you would measure people’s time and what it was costing you and also the effect on the conduct of the case. I asked a judge in a very minor road traffic case how long it would have taken to hear the case in the Small Claims Court if the two lawyers had not been there and the reply was about half the time; and you are paying someone for that time in the case of a lawyer.

**Nick Starling:** We are dealing with the system as it is now, and it is an adversarial system and everyone behaves in adversarial ways. What we are trying to do is to get that adversarial system removed in the vast majority of cases, and this is not us just saying that lawyers have to change, we are quite clear that insurers have to change their behaviour as well. It is not pointing the finger at other people; our whole system needs overhauling.

Q132 **James Brokenshire:** Although it is arguable that the small claims procedure itself is somewhat less adversarial by the involvement of the deputy district judge and the way that evidence is taken during that format, given that in many cases people are unrepresented and, therefore, it is not consensual, but the way it is presented is less confrontational, if I can put it in that way, and whether that might lend itself to not have the lawyers directly involved, as the Chairman was suggesting?

**Dominic Clayden:** It may be a way forward. The other thing to bear in mind is that the vast majority of cases do not end up in the court process, and particularly when we are dealing with injury claims, very few claims fall below the current threshold for small claims. Minor cuts and scrapes are the typical types of injury that attract damages below a thousand pounds.

Q133 **Chairman:** Going back to the rehabilitation agenda you mentioned earlier, would you see benefit in developing a scheme for contracts to provide care or treatment such as envisaged in the NHS Redress Bill, and, if so, should those be contracts with the Health Service or would the consumer have any greater confidence if it created an entitlement to private sector treatment?

**Nick Starling:** For that I think that we would like to see a whole variety of providers. We think the NHS would have an important role to play, but we think there is also a role for government in accreditation of such providers, but we think that the wider the provision and the more varied the better.

Q134 **Chairman:** Is that because it allows for the variety of outcomes that cannot be predicted at the time that the settlement is made as between something which could go on for years and maybe exceed what appears initially to be the appropriate amount provided, if you do it by way of a capital sum, or, conversely, a problem which maybe even goes away because the person dies not very long after the accident? Is that what you are trying to address by this, or is it purely motivated by the rehabilitation technique, getting people back to work?

**Nick Starling:** There are a variety of things with rehabilitation. In some cases it is simply repairing people and getting them back to work as quickly as possible, making sure that their condition does not get worse. Obviously the more serious the case, or a case that develops over time, then it is a much more complex situation, it is likely to be a much higher cost compensation proposal anyway. I think we are basically making the point that rehabilitation services in this country are not as developed as they should be. We would like to see a much stronger market in it. Insurers can play their role, but there are issues around the supplier side, which is both from the NHS and from private providers.

**Dominic Clayden:** I think there is an additional feature in terms of how compensation is paid in respect of catastrophic injury claims where in the present environment we are, in effect, building one-person care regimes around an individual, and it may be, by engagement with the NHS, that the
services can be spread across a number of people as a potential option and we could produce a social benefit and cost saving.

Q135 Dr Whitehead: When we received evidence from the Motor Accident Solicitor Society we were told that conditional fee agreements, particularly as far as motor claims were concerned, were very much pivotal on the existence of after-the-event insurance and that that was certainly the case with motor insurance, not perhaps to the same extent as with other claims, but the point that was impressed upon us at that time was that “after-the-event” insurers were leaving the market place, or if they were not leaving the market place were contemplating doing so, and that was perhaps a potential problem in terms of the continuing integrity of conditional fee agreements. Is that something that is your experience? What is the health of the “after-the-event” insurance market?

Phil Ruse: I am probably best placed to speak to that being the legal expenses insurer. I think what we would say, and I am not really sure whether it addresses the link you made with CFAs, but after-the-event insurance has really developed since 2000 really to dovetail in with the Access to Justice and sits alongside CFAs, but that does not mean that it has been perfect over the last five years. It has been extremely difficult, as an underwriter of after-the-event insurance, with any predictability to actually set premiums or terms. What we would say is that there has not been any great certainty around premiums. We have had premiums that have been, if you like, decided upon at the conclusion of a claim by the courts, and that, as I say, leads to a great deal of uncertainty for us. It is how we can manage that uncertainty, speaking for Allianz Cornhill, that would determine the extent to which we stay providing after-the-event insurance in the future, but certainly, as we have seen over the last few years, plenty of underwriters have exited the market, and there are two features that have been driving that. One is unprofitability and the other one is uncertainty.

Q136 Dr Whitehead: Does that mean the eight premiums are rising?

Phil Ruse: No, they are not rising. If anything, as a result of legal challenges, we are actually probably seeing some of the premiums coming down. Certainly in the sector where I am involved, which is mainly around the fast-track claims, the lower level claims, there has been a lot of downward pressure on premiums.

Q137 Dr Whitehead: So when we come to the extra costs that are involved in the process, what proportion would you say then arise from success fees and, to counter that, are insurers making savings, for example, due to the absence of legal aid or are those savings being taken up, for example, by after-the-event insurance?

Dominic Clayden: For our part what we have is an industry negotiated agreement that the success fee mark up for solicitors in motor cases is 12.5% and in accident at work cases 25%.

Q138 Dr Whitehead: Is that an across the board agreement by insurers?

Dominic Clayden: And solicitors; and it is actually the rules of court. That is a standard figure representing the premium paid to solicitors across the board, and, in addition, we pay the after-the-event insurance premium which is added on top of that. For our part, it was government policy to, in effect, transfer the cost of legal aid to the insurance industry, but we certainly have seen a significant increase in the overall cost to us which far outweighs the legal aid savings.

Q139 Dr Whitehead: Is there anything in the argument that part of the additional cost might be, indeed, as I think the ABI reported to us in written evidence, that actually claimant representatives are not checking to see whether their client has got before-the-event insurance and is selling their client after-the-event insurance so that effectively the insurance is doubled with the person going into court? Do you think more could be done to discourage that kind of practice and do you think if that practice were discouraged it would make a substantial difference?

Justin Jacobs: We certainly think it is important that where a claimant already has before-the-event insurance it is used, and I think there is evidence that that is not always the case, and that clearly is something that we would like to address, but in terms of your questions about the costs over recent years, certainly since around 2000 there is a lot of evidence that the claimant costs and disbursements have increased dramatically over that period.

Q140 Dr Whitehead: Would it be, for example, a good idea to include before-the-event insurance on all policies, so that you would not have to take out after-the-event insurance, and would that have a substantial impact were that to be done?

Justin Jacobs: I think ultimately it has to be customer choice, and the market cannot decide actually that it will force people to buy before-the-event insurance because that would be anti-competitive, but it is a product that is out there and it is often attached to motor insurance, for example, and it has to be customer choice about whether they wish to take that up.

Q141 Dr Whitehead: When you say “cannot force it”, would any sort of code, or arrangement, or agreement such as you have on the success fees, be the sort of mechanism which might replace compulsion but bring about a beneficial result?

Justin Jacobs: I think if insurers as a market said, “We are only going to sell X policies if they include before-the-event”, no, that would be anti-competitive according to the competition law.
Q142 Dr Whitehead: You would not advocate, for example, changing competition law then?
Justin Jacobs: No, I think that would be quite difficult.
Dominic Clayden: I can add to that. For example, in the motor market there is evidence to show that the level of take up of before-the-event insurance is in the range of 80 to 90%, so there is a real take up of it, and we would certainly prefer people to use that in preference to the more expensive options, and we believe solicitors should look at that. In any event, if before-the-event was a blanket across the board, there would be a group of claimants who have suffered injuries who would not ordinarily be covered. For example, pedestrians would not necessarily have the coverage, so in the current system there would be a place for after-the-event insurance, and we are not per se against it. We have concerns how the system operates in part, but we are not desperately against all of it.

Q143 David Howarth: Can I take you back to the answer you gave to me earlier about the tariff system? I am trying to think through why you are suggesting this, and I am puzzled by something. I am obviously just missing something. At present what happens—and I know this from personal experience—is that the initial offer to the victim from the insurance company is rather low and then, as you say, it is then haggled up. If there is a tariff and the tariff is based on the existing law, that at first sight would mean that insurance companies would be losing, because instead of getting some people to settle at below the tariff rate they would now be settling at the tariff rate. That means that the savings that you would make in terms of lower transaction cost—that is those lower haggling costs—must outweigh that difference; but that then the raises the question of why you do not do this now. Why do not you just offer people more at the tariff rate at that set in the well-known practitioners’ books like Kemp and Kemp and save yourselves this money from the start?
Nick Starling: Can I make a general comment about that, and I think Dominic will want to answer the specific point. Insurers want to pay appropriate compensation, and, as I said I think earlier, it is for society to decide what those levels of compensation are, and those levels of compensation are then reflected in the premiums that you pay, that we all pay, and I think that is a fundamental to the way we approach things. A tariff system just makes it clear what levels can be expected for relatively straightforward accidents. We do not have that at the moment, and I think that leads to the sort of negotiation and discussion which happens now with the system.

Q144 David Howarth: But we sort of do, do we not? Through the Judicial Studies Board’s tariff and through the leading practitioners’ works like Kemp and Kemp we do have a tariff. My own experience of this negotiation was as follows. Insurance company to my wife, who had been injured: “We will offer you £500.” My wife to the insurance company: “I have looked it up in Kemp and Kemp. It is more than £4,000.” Insurance company: “Okay, here is 4,000.” Why do we need to go through that iteration? Why did they not just say, “Here is £4,000”?
Dominic Clayden: I think that what we are identifying as part of the difficulty with the current system, that what we see on a number of occasions is a situation where the claimant lawyer will, when asked for the current figure, pitch at a figure which is very high, and we do go through this horse trading to get to what is an end position which happens at present. What we are suggesting is that those transactional costs should be avoided and we cut to the chase and have a system with a tariff that produces the level of settlements that we are currently achieving at the moment.

Q145 David Howarth: So this seems to work by getting the lawyers to accept what is in the tariff, you are saying?
Dominic Clayden: What we believe is that the tariff should be subject to transparency and independent scrutiny. We would not wish to as an insurance industry impose numbers. We believe that should be by discussion with stakeholders.
Justin Jacobs: There is an additional point as well in having transparency for the claimant, because there are the JSB guidelines, there is a lot of case law. It is not as simple as saying that any independent claimant can work out what they are entitled to. We think there is a strong advantage in the claimant being able to see, “I have had this injury. I know that insurance companies would be losing, because instead of getting some people to settle at below the tariff rate they would now be settling at the tariff rate. That means that the savings that you would make in terms of lower transaction cost—that is those lower haggling costs—must outweigh that difference; but that then the raises the question of why you do not do this now. Why do not you just offer people more at the tariff rate at that set in the well-known practitioners’ books like Kemp and Kemp and save yourselves this money from the start?
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Q146 Chairman: Later today we will be hearing from voluntary organisations who are at the sharp end of all these perceptions about compensation culture, and it is quite possible they might refer to the insurance industry and to either their difficulty in securing insurance for some activities and ventures or the conditions the insurers might impose, which could be a discouragement from carrying out these activities, the very issue which clause 1 at a different level seeks to address: balancing desirable activities against all the issues around risk management. Are you the villains of the piece? What would be your answer?
Nick Starling: We are certainly not the villains of the piece. What the insurance industry wants to do is to encourage sensible risk management, and, for all activities, if you manage risks sensibly and appropriately, then you do not get into trouble. That is the broad principle we take. We try and encourage it. We issued a publication last year on precisely this and directed at the voluntary community. We are very happy to send that to you if we have not done so already. It just sets out the basic rules about ensuring you manage your risks effectively.
Q147 Chairman: Obviously not just the voluntary community, the public authority sector, the local authority sector in particular, for example, will sometimes cite the same reasons: “Our insurer has told us that if we did this we would have to up the premium or install this that or the other.” In the voluntary community it is even harder because of the time and expertise available on the part of volunteers to meet some of these demands.

Nick Starling: I think that you quite often have to look behind the stories here, but before I joined the insurance industry I was in the Health and Safety Executive where the line was always, “Health and Safety will not allow it.” Now I have joined the insurance industry they say, “Insurance will not allow it.” Sometimes that means that people have not actually bought the insurance, which is slightly different. Quite often it means that people cannot be bothered, to be honest. I am not saying that your witnesses who are coming up are saying this, but people do not want to think about it, do not want to manage the risk sensibly and use insurance as a bit of a scapegoat. In most of the cases where people say, “Insurance will not allow it”, you will find generally it is people over interpreting, being risk averse, not having the right insurance, and we think that is a situation that does not need to be and should not have been.

Q148 Chairman: Is there anything more you can do to challenge the perception on which that is based, to say, “Yes, of course there is insurance available. No, it does not cost much more money. No, it is not incredibly bureaucratic and beyond the abilities of a scout troop or a church organisation to meet our very limited requirements”?

Nick Starling: We are extremely keen to participate in this wider risk debate, and the Prime Minister, you will recall, gave a speech on this in May which we supported. As I said, we have issued publications and the next witnesses have started a very interesting debate about this and we are very keen to do this. Sensible risk management is usually commonsense. It is taking the risk in the first place in a managed way, seeing what might go wrong and seeing if you have got mechanisms deal with it, and insurance is there to help you do that. It is not the villain of the piece in stopping it. My own personal advice is if anyone ever says to you, “My insurance company will not let me”, ask them what the insurance company has actually said and whether it is simply a matter of not having the cover or not having spoken to the right people.

Q149 Chairman: Have you come across any cases where the premium you think you are obliged to require in order to meet your level of risk actually turns out to be disproportionate to the amount of money which can be found from, let us say, the parents or whoever else it may be, to fund the particular activity? Have you come across a situation, “We have to admit actually it would cost more to insure than we think could reasonably be raised around this voluntary activity”?

Nick Starling: I have not.

Dominic Clayden: I cannot think of a particular example. What I can add in that debate is that how we assess premiums is quite simple, and we look at what we assess the potential claims cost to be and the potential frequency of those claims costs and that helps to build the potential cost of a premium, and that does create difficulties in, for example, riding schools, which was a particular feature, where unfortunately potential claims costs in those establishments historically have been large, and that in itself drives large premiums into an environment where it may be difficult to pass those costs on and it may have an impact on people’s ability to enjoy it.

Justin Jacobs: I think the consequence of that is that the industry is doing everything it can to understand this better and to price premiums according to those risk levels. Naturally therefore the result is that if companies, voluntary organisations and others are managing their risks effectively, those organisations, companies, charities will find competitive insurance. Equally, however, we have to recognise that if there are organisations which are not managing their risks effectively, despite support and help and encouragement to do so, then the result is that they will find their insurance is higher because that is the nature of effective risk pricing. Those who manage their risk well will benefit, but those who do not, for whatever reason, will find themselves facing high premiums.

Chairman: Gentlemen, thank you very much indeed for your help this afternoon.

Witnesses: Jonathan Rees, Deputy Chief Executive and Colin Douglas, Director of Communications, Health and Safety Executive, gave evidence.

Chairman: Mr Rees, Mr Douglas, thank you for joining us this afternoon. You have already sent us some helpful material in the form of a memorandum to demonstrate that you are not the villains of the piece either, and we would like to ask you some questions, if we may.

Q150 Julie Morgan: Good afternoon. You say in your evidence that there are a number of reasons why risk averse decisions are made and activities are not carried out, services are not provided, and it is not just the perception of a compensation culture, but, as you say, health and safety and other issues cause these sorts of decisions to be made. Do you think that the risk of prosecution leads to greater risk aversion in public bodies than the fear of litigation?

Jonathan Rees: We have looked at that, and, of course, as always, there are two sides to the question. The risk of prosecution is very important and I would say that, would I not. But actually our key role in the HSE is to prevent accidents, and a considerable number of accidents and ill-health or
fatalities unfortunately still occur, so we do wish people to realise that there is a risk of prosecution where they do things wrong. Equally, what we do not want to happen is that where people have taken the appropriate measures to manage the risk, they should not fear that they can be prosecuted. If we take an area like education, which you may want to come on to, we have actually prosecuted very, very few teachers—three, in practice, over the last five years—but I accept entirely that there is a fear among teachers—and I know lots of teachers—that they could be prosecuted. I think that is a rather long-winded way of answering the question, which is, yes, I do think that there is a fear of prosecution as well as the fear that somebody might be sued amongst the voluntary sector, local authorities and other parts of public sector who are duty holders.

Q151 Julie Morgan: You say you have prosecuted three. How many have you investigated with a view to possible prosecution?
Jonathan Rees: By and large not a great number more. I do not have those figures. I can give you them, but broadly of the people we investigate for a serious incident and then prosecute, if you look at the surveys, we actually have quite a high success rate.

Q152 Julie Morgan: Do you think that a lot of public bodies and other organisations are doing risk assessment in a way that they did not do before, and do you think that sometimes they are being overly cautious in doing risk assessments that may not be necessary?
Jonathan Rees: I think the short answer is, yes. We would say this, but risk assessment is not meant to be a particularly complicated process. When we have talked at events, and you will have seen them too, of the professor who had to fill in a 69-page risk assessment before he went on a field visit, that is ridiculous, and we have said it is ridiculous, but there is no doubt that that exists, and one of the issues that we are trying to get at is why does that exist? What is it that actually caused a university to require someone to fill in a 69-page risk assessment before they went on a field trip? We do not know, and that is part of the evidence that we are trying to collect. I suspect it is for a whole series of reasons, and we have commissioned Greenstreet Berman to actually do a bit of research into those instances. What we also do not know is how many of those instances occur. I think that they are well reported, and whenever we do come across them we do try and look into them to see if there is any evidence behind them?

Q153 Julie Morgan: Are there any particular sectors that it particularly does not get across to?
Colin Douglas: I think this is an issue that crops up across a range of sectors. There are some sectors where the urban myths run around the network and the grapevine apparently at a greater rate. So there are some real issues within education, not least because some of the urban myths within education grab media attention and so they feed themselves through that fuel, they also feed themselves through the accessibility of that network. We go to some great lengths, as does DfES, to try to calm those myths in terms of putting things into clearer context, but this is an issue that we have identified as being a problem across a range of sectors.

Q154 David Howarth: Can I suggest to you that from one of your answers you might unconsciously be promoting risk aversion. You said that your job was to prevent accidents. Can I suggest that might be part of the problem, because a different way of putting your job is to stop people taking unreasonable risks that might cause accidents, but, of course, at some points there will be people who take a reasonable risk, a bad thing happens, but from your point of view that should be of no interest; but if you define your job as preventing accidents, are you not going to be always raising the bar, because every time an accident happens you will see that as somehow a matter for regret that should have been stopped even if people acted reasonably.
Jonathan Rees: I think it is a fair point. I suppose I describe it in that way because that is the public service agreement that the Treasury has set us, which is to reduce the number of accidents, reduce the incidence of ill-health and reduce days lost. But I accept entirely the thrust behind it that what we are about is promoting sensible risk management, and I think that we as an organisation accept that accidents will always occur. At some point, and I do not think we are quite there yet, we will enter the period where all risks are sensibly managed. But, as you will be well aware, last year when we published our statistics there were still 220 people killed, 150,000 serious injuries and accidents that occur in the workplace and two million people suffer from work related ill-health so it remains important for us to try and reduce that.

Q155 David Howarth: Is there not a serious tension here between a risk management culture, which you might think was a negligence or reasonable behaviour approach, and an absolute target on a number of accidents, which is a strict liability process that says that the test is how many accidents there are rather than did people act reasonably?
Jonathan Rees: I think at the global level, and if you take a sector like agriculture, we know that there will continue to be a certain number of fatalities. That is tragic but it will happen, despite the fact that we have tried to educate people into assessing what all the risks are and managing them carefully. Our job is to try to make sure that all, as we call them, duty holders—people who operate a business—understand the risks that they are running, and that will vary across different bits of the economy. I think it
is also worth underlining that we regulate from nuclear power stations to petrochemical plants to very small offices and premises. From an operational point of view we want to concentrate our resources on those areas where the risks are greatest, which will predominantly be areas like construction, or where the risks of something going wrong is catastrophic, which is nuclear power stations; so we are not interested, by and large, in worrying about hanging baskets or some of the other areas which undeniably do occur in the press.

**Colin Douglas**: Whilst we are unapologetic about having an objective of reducing the numbers of accidents, the 220 odd fatalities that happened last year, 150 odd thousand serious injuries, that is not at all inconsistent with us making clear that we are not about a zero risk society where no accidents happen. But we come across too many very avoidable accidents that result in serious harm or death which our inspectors investigate where they have to explain to the relatives of those people who have died why they died. It is entirely consistent with an approach to sensible risk management that you focus on the major causes of harm, and the purpose in doing that is in order to reduce the risk of serious injury rather than generating a huge mountain of paper work that focuses on trivial risks. This proliferation in risk aversion has done great right signals to people who are operating—we call them duty holders, but businesses, voluntary organisations and schools, and develop a debate about how can we give the public and industry the right sorts of guidance. The only way that accidents will be reduced is if the advice that we produce guidance, which I fear is quite thick and voluminous, you can look at it on the website, then gets people to think, “Aha, maybe there is a risk around swimming pools”, and that is one of the issues that we are concerned about in terms of are we sending the right signals in the guidance which we are trying to give in terms of being helpful? Part of the risk debate that the Minister, Lord Hunt, launched last July was to try and develop a debate about how can we give the right signals to people who are operating—we call them duty holders, but businesses, voluntary groups, and so on—and I am sure you will hear from the next witnesses that there is clearly a perception which does not always reflect the reality.

**Q156 Chairman**: Putting it another way, it would not have been possible to prove that you could fly and develop something called an aeroplane if the target had been to prevent accident rather than to manage the risk involved.

**Jonathan Rees**: I understand the point you are making. I would simply say that by focusing on the outcome target we can measure whether we are making a difference, and actually that is quite important for us because we actually have in the last five years reduced the number of ill-health cases and reduced days lost. Unfortunately we have not reduced the number of major accidents. We have reduced the number of people killed at work. You can couch the targets in different ways. I personally think that an outcome based target is a pretty good thing for an organisation to have. I would say that it is not only us that will help achieve it, and I think that then perhaps helps with the link. The only way that accidents will be reduced is if everybody in the system actually manages risk sensibly.

**Q157 Mr Khabra**: The Health and Safety Executive’s view is that the perception of compensation culture is not the only reason that unnecessary risk aversion decisions are made in relation to health and safety management. Our view is that a number of other factors play their part. In your opinion what more does the Health and Safety Executive have to do to educate people about proper risk management and about unnecessary risk aversion?

**Jonathan Rees**: I think the short answer is that we do need to make sure that the advice and guidance that we give to people is not encouraging unnecessary risk aversion. Let me give you an example which may or may not come up—swimming pools. We produce guidance on swimming pools which is designed to give best practice for those who operate swimming pools, by and large local authorities. The aim of that guidance is to prevent something like 800 or 900 operators of swimming pools having to work out what their own guidance could be as to the sorts of things that they ought to look for, but the very fact that we produce guidance, which I fear is quite thick and voluminous, you can look at it on the website, then gets people to think, “Aha, maybe there is a risk around swimming pools”, and that is one of the issues that we are concerned about in terms of are we sending the right signals in the guidance which we are trying to give in terms of being helpful? Part of the risk debate that the Minister, Lord Hunt, launched last July was to try and develop a debate about how can we give the right signals to people who are operating—we call them duty holders, but businesses, voluntary groups, and so on—and I am sure you will hear from the next witnesses that there is clearly a perception which does not always reflect the reality.

**Q158 Mr Khabra**: What steps would you suggest we take that excessive risk averse decisions are not made?

**Jonathan Rees**: Well, part of that is, I think, we need to understand better why seemingly stupid decisions, I can put it like that, can be made. The Financial Times rang me up a few months ago and said, “Why has a school banned egg boxes because of the risk of salmonella?” We said, “There is no risk of salmonella from egg boxes.” They tried to find out why the school had done it, and they still managed to get a two-page spread on it, but essentially they did not actually work out why the decision had been taken. Part of the reason was that the headmaster thought it was the local education authority, the local education authority thought it was some guidance he read, we said that there was no guidance, it might have been the insurance or what have you. We are now doing some analysis to try to understand what it is that leads to these apparently perverse decisions, which is a rather long way of saying nobody really knows why people take these odd decisions; but I suspect that we and other parties all share some of the blame.

**Q159 James Brokenshire**: I just want to follow on from that point, because they say in politics that perception is reality. I think it can also be said equally in this area, and the fact that there is the perceived risk that means that people behave in a particular way. In part that may well be the fact that people think to themselves, “If I get this wrong I could go to jail”, and that therefore if you are
Colin Douglas: The short answer is, yes, and, if you take your example, people who go on field trips—teachers and others—are put off for fear of prosecution. There was an example about three years ago where we did prosecute someone when a child was killed, and as a parent I would expect us to prosecute someone because the person who organised that trip was in flagrant breach of all the best practice guidelines and in this particular case they actually ignored the advice of other teachers who were on the spot. That said, those are exceptional cases, and your point is that we need to make absolutely clear that those are exceptional cases and that the vast majority of trips, school trips and other sorts of activity, pass off perfectly safely, and that is one of the messages we have been trying to get across through the sensible risk debate.

Jonathan Rees: The short answer is, yes, and, if you take your example, people who go on field trips—teachers and others—are put off for fear of prosecution. There was an example about three years ago where we did prosecute someone when a child was killed, and as a parent I would expect us to prosecute someone because the person who organised that trip was in flagrant breach of all the best practice guidelines and in this particular case they actually ignored the advice of other teachers who were on the spot. That said, those are exceptional cases, and your point is that we need to make absolutely clear that those are exceptional cases and that the vast majority of trips, school trips and other sorts of activity, pass off perfectly safely, and that is one of the messages we have been trying to get across through the sensible risk debate.

Colin Douglas: There was the tragic plotholding death of a few months ago of a school pupil. Our response to that is that the regulator of health and safety was to issue a statement making clear that we believe that school trips are an important part of pupils learning about risk and coping with risk, encouraging schools to not be discouraged from organising school trips and pointing them towards practical guidance on our website in order to help them to manage those risks. We agree with you, we think there is a risk of schools and others being discouraged from undertaking such vital activity and we would be keen to work with others to encourage them not to be discouraged, but your point about making our processes transparent—we do wish to be as transparent as possible,—it is one of what we see as the key principles of good regulation—but there is also a risk in transparency that the more we are communicating what our processes are in order to be transparent we are perceived, as the regulator, as waving a threat at people rather than giving reassurance. We need to take action, we absolutely accept, but given who we are, we also want to encourage others to take action so that the message about avoiding risk aversion coming from people other than the regulator can actually play more powerfully than sometimes it can when we communicate that message.

Q160 James Brokenshire: I was interested in one of the points you made there in terms of the tragic accident where you felt it was your duty to prosecute. Would you say there was any mind-set that if there is a serious incident you feel you are duty bound to take some sort of formal action and whether that sways your perception of the risk because obviously that could contribute to the perception that “if there is a risk of an accident taking place you will prosecute therefore I cannot put myself in that position”?

Jonathan Rees: To be clear, where it is a fatality it is the CPS that prosecute but we obviously work very closely with them. We clearly do not prosecute in all fatalities. It depends on the circumstances and we mention in our evidence something called the Enforcement Policy Statement, but broadly speaking we would only prosecute where there seemed to be wilful or flagrant disregard for sensible risk management. One of the things that we do need to balance is not only did the duty holder actually not take due care and attention, not speaking as a lawyer here, but also was there a public good in what they were doing. You may or may not ask me about clause 1 to comment in a sense, but I think the general thrust that you do have to balance these considerations out is right.

Q161 James Brokenshire: One final point on this issue: would you accept that there is a difference in terms of the ability of a statutory body to respond to this level of detail of regulation and assessment as compared to voluntary organisations that may not be fully equipped and supported and have all of the technical know-how to be able to get to grips with the volume of regulation, the depth of regulation or the guidance or the information to be able to cope with it, and from a voluntary organisation’s perspective you might say it is too much like hard work?

Jonathan Rees: I think I would look more in terms of the size than the nature of organisation but I accept entirely the point that we should not expect small organisations, unless they are really engaged in very hazardous activities, to do the same sort of risk assessment, and indeed we do not, so organisations which employ less than five people do not have to record risk assessments. We are going to look at those issues as to whether that threshold is right. Equally, if you are talking about the voluntary sector it is right that where they are small (and some voluntary organisations are clearly big, for example, social housing) I think it is much more to do with the size than the nature of the organisation, but the thrust I agree with what you said.

Q162 James Brokenshire: You talked about research and the investigations that you are doing on risk management. To what extent are you working in conjunction with other governmental departments? From what you have said it sounds as though it is almost inextricably linked in terms of the remit that you have been given as an organisation. If so, how do you intend to link your research with research that maybe being commissioned by other governmental bodies to come up with a more formulated view?
Jonathan Rees: We are working very closely, as I am sure you will hear in a couple of weeks’ time, with the Department of Constitutional Affairs. We are part and our representative who is Phillip Hunt is part of the ministerial steering group that has been set up. We took an active part in the events that took place in the middle of November and we have shared, as it were, the research remit. We are also working with some of the other people like CABE who are interested in the built environment to share our research and we have also done quite a lot of work with local government and the LGA because I think we all accept that we need to understand better why it is that what looked from the outside sometimes to be rather odd decisions are taken. Once we understood that we can then see whether indeed it is all about guidance, whether it is all about insurance, whether it is all about consultants perhaps giving them over-cautionary advice. I suspect it is a mixture of all of those but we do not necessarily know. So we will be looking at the stories of why did the council ban a hanging basket and what caused that and what was the decision tree that got them to that position.

Colin Douglas: We are also working with the Home Office and with Volunteering England on a range of research activity that works very closely with the thrust of our research, so it is both sharing and coordinating research activity in this area.

Q163 Mr Khabra: What support are you able to give to voluntary bodies which may not have the ability of larger services at the same level which a professional body can provide but which have a role to play in society?

Jonathan Rees: In terms of support I think the key area which we are looking at is the advice we give on what they have to do to comply with regulatory guidelines, so if I give you the example of noise. New noise regulations came into force last October. Our traditional approach (and as a relative newcomer to HSE I can say this) would have been to produce a 100-page guidance which would have been read with great interest by noise experts. What we actually produced was a two-page guidance which showed small organisations what they had to do. So I think in terms of advice we can help. Obviously in terms of direct handling then we do not have the resource to do that.

Q164 Mr Khabra: You will not discourage them from getting involved?

Jonathan Rees: No.

Colin Douglas: Quite the reverse. As I say, part of the thrust of the Sensible Risk initiative that we are very much behind is encouraging organisations that are engaged in very valuable undertakings to continue to do so and to do so by applying sensible and proportionate measures and not by drowning themselves in paperwork.

Q165 Jessica Morden: How often would you prosecute the voluntary organisations? Just give me an idea of how frequent it is.

Jonathan Rees: I can write to you on that. I think the answer is very, very rarely. In terms of our prosecutions we get other pressures that we do not prosecute people often enough. Very, very rare occasions, a handful.

Q166 Chairman: You can drop us a note if you like.

Jonathan Rees: We will drop you a note. We did not look at volunteering, we looked at education and the answer on education was it was a handful of individual teachers and schools.

Q167 Chairman: The reverse argument you have to be conscious of is if you are a parent of a child who is injured it is immaterial to you as to whether the organisation was large or small, as to whether it was voluntary or public sector; it is whether the risks had been properly looked at.

Jonathan Rees: I am sure you will have your own evidence on this. I think in many cases people are less worried about prosecution in those events and much more concerned to ensure that the lessons are learned and it does not happen again. That is one of the things that we obviously take into account.

Q168 James Brokenshire: Just one final point. I heard you make reference to the salmonella example. I heard another one this week which was fruit with stones being banned from schools, which I thought was an interesting one, for fear, I presume, that the pupils might swallow the stones so oranges being banned because of dangerous pips, from what I can understand. Clearly there is an educational issue on this. Do you perceive that as being addressed by clearer guidance or do you think that there needs to be a more proactive approach by the HSE to go out and really explain this whole area further? What practically are going to be then noise regulations came into force last October. Our traditional approach (and as a relative newcomer to HSE I can say this) would have been to produce a 100-page guidance which would have been read with great interest by noise experts. What we actually produced was a two-page guidance which showed small organisations what they had to do. So I think in terms of advice we can help. Obviously in terms of direct handling then we do not have the resource to do that.

Jonathan Rees: I think that was the Scottish incident the one you are referring to, which is immaterial, but the question is what we try and do when these stories come up is to write to the newspapers to make it perfectly clear what the position is. We are always therefore chasing after the event because there will be always be more scare stories or other stories that occur. What we tried to do with the sensible risk debate that we launched last July was to promote a discussion. What we will do over the next few months is to try and promote some general principles which we would like all regulators to sign up to which broadly say that we are only interested in major risks not trivial risks, and we are not interested in paperwork, and we are working on those. If we can get that message across to people alongside all the other regulators, because it is not just health and safety, then we can beginning to redress some of the issues, but I think it will be a slightly uphill task because it is always much more fun to write stories about oranges being banned because of the pips.

3 Note by witness: At most a handful over the last 10 years
Q169 David Howarth: Can I ask you one final question about risk assessment and then ask you a question about the Compensation Bill, clause 1, which you were not looking forward to, I gather. There is something about your prosecution policy that I do not quite understand. What happens in the following circumstances: that an organisation has done no risk assessment at all and an accident has occurred but the situation is that if they had done a risk assessment what they did would have been reasonable. In those circumstances do you prosecute or not?

Jonathan Rees: We have an enforcement policy statement which sets it out but the short answer is if they had taken all reasonable steps the fact they had not gone through the process would be immaterial and we would not prosecute.

Q170 David Howarth: What I am trying to get at is whether the risk assessment itself is one of the reasonable steps or do you just disregard that?

Jonathan Rees: If you are operating in a high-risk activity, let’s say you are running a machine plant, and you have taken no account of the sorts of risks that you might face in running that plant and an accident happened, yes, we would probably prosecute you. If on the other hand (and I am not sure if you are getting at this) you had failed to properly record it that you had addressed all of the risks and you had put the guards on your machine or whatever it might be, then we would not prosecute. It is difficult to comment on hypothetical situations but we are certainly not trigger happy in those that we prosecute.

Q171 David Howarth: I will not ask you to comment on the drafting of clause 1.

Jonathan Rees: Good.

Q172 David Howarth: Could I ask you to comment on what you might expect the effect of clause 1 to be, especially on public bodies?

Jonathan Rees: As you say, I was not particularly looking forward to the question because essentially our prosecutions are all done under criminal law rather than civil law. What we like about clause 1, and we do not really have a direct interest in it, is that it does try to bring out the point that you need to take into account the desirability of the activity and that is something that we think is important and something that guides us in our policy. I think getting that message across is quite important. Whether you need to do it in the way that the draughtsman has done it in the bill is obviously not a question for me.

Q173 Chairman: What about balancing risks, not so much risk versus desirability but risk versus risk? I remember I had a lengthy correspondence with HSE some time ago with the Railway Inspectorate section over their failure to balance the risk of not allowing a train to pick up passengers because the platform was a bit short and somebody might get out beyond the end of the platform and break their ankle with the likelihood that that person would expose themselves to the alternative risk of driving to work in a congested environment on an icy road. It seemed to me that the system gave you only the job of working out the risks from the platform being short and not balancing it against the alternative risk the person would take if they did not use the train. Is there any better way you could incorporate balancing risks into the system?

Jonathan Rees: I think you have put your finger on a good point. The other classic example which is always quoted is in Milford Haven where they closed a school because it was too close to one of the plants there and the children then had to walk two miles down a busy road so what is the nature of the risk. I have to say that the system at the moment does not make it easy because it tends to be focused on individual duty holders to look at the risks for which they are responsible (and that is what is in the 1974 Act) rather than trying to look at the nature of different risks. I think that is one of the things that we will want to bring out. It is one of the things that will inevitably come out at the macro level in the debate that we are going to have on energy policy because there are risks in building new nuclear power stations. There are equally very important risks to society of not building them or using alternative sorts of energy like having LNG plants in the M25 corridor and so on. I think people are beginning to understand that we do need to try and work out how you balance off different sorts of risk, but the system does not really enable us to at present.

Q174 Chairman: Does the process that was initiated by the debate which the Minister launched provide some scope for the balancing of risks at a perhaps slightly less dramatic level than the nuclear power option you have just talked about? Obviously there are means of assessing the alternative risk. You have got figures which we will show you of what will be the alternative risk if more people were travelling in cars as against using the railway station and there are risk management things that can be built in to alter that balance. Does the process that has been initiated by the Minister open up some prospect that we can make progress on this?

Jonathan Rees: I would say that it brings it into the open. I think it is quite difficult to balance out the sort of risks that you are saying because in one sense you have a duty holder who is clearly responsible for the risk of somebody falling off a platform and breaking their ankle and in another sense you have a whole series of individuals and people who are driving for work purposes. That is part of the debate that we have tried to engage in and the road and rail one is the classic but there are many others.

Chairman: Thank you very much indeed for your help this afternoon.
Witnesses: Dr Justin Davis-Smith, Deputy Chief Executive, Volunteering England, and Derek Twine, Chief Executive of the Scout Association, gave evidence.

Chairman: Dr Davis-Smith, Mr Twine, welcome. I am not sure whether I should have declared that I am the Vice President of the North Northumberland Scouts, but I suspect that everybody round the table has probably got an involvement in voluntary organisations in some way or other that we probably do not need to go into. Dr Davis-Smith, I think we have an address that you gave that raised some very interesting issues. Mr Twine, we all know that yours is one of a number of voluntary organisations working with young people. I think the Government must have had yours in mind when they drafted this phrase “desirable activity”, I certainly hope so. We would like to ask you some questions to help us with our work.

Q175 Jessica Morden: In the speech that he used as evidence Dr Davis-Smith talked about how volunteers were worried about risk issues and how that sometimes they were being put off volunteering. Would you both like to expand on that and explain a little bit what the problems are?

Dr Davis-Smith: A lot of what I have to say comes from some research that we have recently commissioned when we were asking voluntary organisations, both voluntary agencies and public bodies using volunteers, their attitudes to risk and what they felt the impact of a compensation culture was having on the willingness of people to volunteer and we also asked volunteers and non-volunteers about whether risk was having an impact on their decision and the evidence was quite disturbing. I do not think we should overstate it, but I think it is of enough concern that we do need to start to get to grips with this issue now if we are not going to be losing volunteers in quite considerable numbers in the future because the individuals were saying to us that current volunteers were worried about risk and about one in 20 said that they had considered giving up their volunteering because of fear of litigation. If we translate that into national figures, that is bringing potentially a million people who may be giving up volunteering because of their fear that they may be litigated against. Organisations were saying to us that they were becoming increasingly concerned about risk issues and they were either closing down some of the more risky opportunities available for people and for us within Volunteering England that is of huge concern because we would argue that an element of well-managed risk is absolutely crucial to volunteering, particularly for young people. Professor Heinz Woolf has talked about “vitamin R” or “vitamin Risk” being of huge importance to young people and how volunteering can provide that injection of “vitamin R”. When we see evidence from organisational surveys that suggests that organisations are beginning to become so concerned about the fear of litigation that they are closing down some of these risky activities for young people to develop themselves we are obviously concerned and we want to try at this stage, before it gets worse, to put in place some procedures to try and alleviate the situation.

Q176 Jessica Morden: Is that what you found, Mr Twine?

Derek Twine: Absolutely. In the past few weeks we have undertaken a much wider and up-to-date survey within our own organisation and we have identified the figures as being quite a concern to us in that 50% of our existing volunteers are concerned that fear of being sued for compensation is affecting the retention of themselves and their peers as volunteers. 70% of them are testifying that the fear of being sued is a deterrent to recruiting additional volunteers into the organisation because they see that as a very real pressure upon them. Taking into account the last point which you asked not just about the retention and recruitment of volunteers but the impact upon the activities, 94% of them in the past few weeks are identifying that fear of being sued for compensation is detrimentally impacting upon the nature and the range of activities which they are providing to young people.

Q177 Jessica Morden: Would you say that the fear of litigation was the main problem in terms of risk management or are there other problems to do with the provision of insurance or requirements to conduct risk assessments or whatever?

Derek Twine: Within the same survey it was quite clear that there is increasing confidence in their ability to respond to the training which we provide—it is obligatory training—in appropriate risk assessment and risk management, but that is common sense. Nonetheless, their concern is not about themselves doing something wrong, it is about account the last point which you asked not just about the retention and recruitment of volunteers but the impact upon the activities, 94% of them in the past few weeks are identifying that fear of being sued for compensation is detrimentally impacting upon the nature and the range of activities which they are providing to young people.

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considerably over the past few years, sometimes hugely; four-fold in six years was the experience of one organisation. It suggested some quite deep-seated issues that need to be sorted out in relation to communication between the insurance industry and the volunteering sector in that there did not appear to be any link between the existence of risk management procedures by voluntary organisations and levels of premiums. In terms of encouraging organisations to go through these proper risk procedures, I think there ought to be communication with the insurance industry to see whether there could be a better link between proportionate risk management practice being in place and insurance premiums because at the moment that does not seem to be the case. I think one of the problems is the language of risk management because it is very confusing for a lot of small voluntary organisations. The voluntary sector is hugely diverse; it is made up of multi-million pound organisations employing several thousand people at one level but then very small community groups without any paid staff on another. In many ways that is where the real problem lies. It is not so much with some of the larger organisations who have got professional risk managers in place and where you can negotiate reasonable insurance rates with insurance companies, it is at the small community sector end of the voluntary sector, which is the lifeblood of volunteering in this country, because for them negotiating insurance rates is a real problem and adds to the risk averse nature that we have been describing.

Q178 Jessica Morden: In the debate in the House of Lords on the Compensation Bill it was suggested that there could be a “pooled” approach to insurance and litigation. Do you think that would work?

Dr Davis-Smith: It is happening to some extent. Going back to our survey, about one in 10 organisations said they were currently operating some sort of grouped or pooled approach, but a significant number of additional organisations said they would be interested in that if they had heard about it or knew more about it. Volunteering England has an important role to play here as well, but the insurance companies equally have a role to play in terms of helping particularly the smaller community organisations to explore alternative forms of insurance provision.

Derek Twine: Each of the organisations even within similar sectors have their own differences, they have their own track records of past claim experience, they have their own approaches to the training of the volunteers, to the supervision of the volunteers, to the structures of risk management and to the nature and age ranges of the various people taking part. If I look at the voluntary sector, it is possible to explore that area, but we really would caution against that being seen as an immediate panacea. It may be appropriate for some organisations that have a very similar range of provision which they are offering and internal systems, but those variations really are more than just a few words, they really are affecting the liability of what the organisation is exposing itself to.

Q179 Jessica Morden: Can you just explain a bit more about the practical problems of getting insurance? Is it a problem with premiums and getting cover for particular events?

Dr Davis-Smith: I think at its root it is a lack of communication between the insurance industry and the voluntary and community sector in that the insurance industry does not understand all too often the nature of the sorts of activities that volunteers are engaged in. There was a high profile example with one of the big environmental agencies, BTCV, a couple of years ago when overnight the insurance company looked into exactly what they were engaged in and became concerned about it and they scrapped all the insurance to BTCV overnight. That situation has now been resolved but I think it highlights that issue of a lack of communication and a lack of understanding. In a sense perhaps it is not surprising given what I have said about the small nature of a lot of voluntary organisations because one of the ABI’s own reports Making the Market Work highlighted that one of the main problems of the insurance industry was getting a good understanding about risk assessment activities within small companies or small organisations and I think that is equally the case, if not more so, for voluntary organisations and the voluntary sector.

At its most basic level it is about the insurance sector and the volunteering world having a greater dialogue and therefore I am very pleased with what we heard earlier about the ABI and their recent report directed to the voluntary sector and certainly we are engaging with them in the work that we are doing around the risk of volunteering. I agree with Derek about the limitations of some of the pooled approaches, but the sports field is a good example of where pooled insurance is particularly well developed at the moment, they are engaged in similar types of activities and I think there are alternative mechanisms that we can look at.

Q180 David Howarth: One of the arguments that has been put forward for clause 1 of the Compensation Bill is that the public—and presumably that includes voluntary organisations—should be better informed about the way the law really works and that that in turn would lead to people and organisations being less risk averse and more realistic. Do you agree with that view? Do you think it might work?

Derek Twine: As an individual organisation we would support that not just on an educational basis but in giving confidence to those volunteers. Firstly, it would have the immediate impact of displaying to the voluntary sector confidence and understanding in the situation in which they find themselves. In organisations which are working with young people it would give some strong encouragement to the concept of enabling young people to encounter for themselves at a very low level, whether it be a Guide camp or a Scout expedition, a situation which for them feels like a risk and they learn as an adolescent
to assess and to manage that risk and to make a decision for themselves. They then become part of a community and a society which is better able to address risk management, far more so than if undertaken by volunteers who only had to implement legislation and law based upon risk aversion. So going straight back to clause 1 its existence and application would greatly enhance the situation immediately and in the long term.

Q181 David Howarth: Could I just put to you the sceptical view which is that no-one in the outside word outside these buildings is ever going to hear about section 1 when it becomes a law so it will not make any difference at all.

Derek Twine: I would equally be sceptical and say if whatever we did became just the media headlines then “Ministers crack down on frivolous claims and support education” expressed in that way may be having a more encouraging effect on tens of thousands of volunteers than yet again reading of the egg cartons or the pips in oranges, and the public concept that it is regulation and frivolous claims which are causing people to back off from volunteering.

Q182 David Howarth: Of course that headline is a one-off hit, is it not, and the question is we cannot have a Compensation Bill every year.

Derek Twine: Absolutely.

Q183 David Howarth: What else could be done in terms of education or advertising or guidance in the HSE or something which might bring this more realistic approach to public attention more often?

Derek Twine: Two issues immediately come to mind. One is the collaborative approach which I do believe is emerging in terms of a sensible approach to risk management. We are hearing what I would generally and therefore I think it is moving forward to e

Q184 Chairman: Do you not have to be aware of the danger that in the laudable attempt to give you the signals you want in clause 1 to demonstrate the value of activities which might be impaired by a (?) attitude to risk, the Government might in the process create a law which gives rise to cases which have the opposite effect where an activity is deemed not sufficiently desirable to justify the risk that the case is all about so the whole thing could descend into legal arguments that gave you the wrong signal, and maybe some of these other mechanisms we are looking at could be more reliable and useful signals for you?

Dr Davis-Smith: We do need to be careful about going down wholly the legislative route because if we look at the US/Australian examples, where both countries have introduced volunteering protection legislation to try and deal with this issue that we are dealing with today, that legislation has at best been proved to be of negligible benefit and in some instances it has been suggested it has been counterproductive because some organisations have pulled back from their responsibility to undergo proper risk assessment procedures because they fear they are immune from prosecution or their volunteers are immune from prosecution. I think we need to be careful, although I would not disagree that if the impact of clause 1 is to lead to better decisions being taken and balancing the public benefit of volunteering against the duty of care, then I think that is a good first step but I would not see the legislative approach as the main approach to dealing with this issue.

Derek Twine: To extend that, Chairman, I think we are saying that it is a multi-faceted approach which is required but one which is working with those facets working in synchrony, it is not that there is one solution and the other issues are not relevant, and therefore I think it is moving forward to effect that culture change which is more significant. It is not just one aspect or one piece of work that is necessary.

Chairman: You mentioned advertising. Dr Whitehead?

Q185 Dr Whitehead: In your speech, of which you kindly provided us with a copy, you mentioned the “ubiquitous advertising of claims management companies”. Do you think that has an impact and, if so, how substantial?

Dr Davis-Smith: I do not know how substantial but I am pretty sure it has an impact because nine out of 10 of the volunteering organisations that we surveyed when we asked them what had given rise to their perception of a compensation culture told us they believed they were operating within a compensation culture, despite what the figures are telling us perhaps to the contrary. When we asked them what were the reasons underpinning this perception of a compensation culture that was one of the reasons that they gave. They felt the advertising by claims farmers was one of the factors that was driving this.
Q186 Dr Whitehead: Other than observing that that is the case would you have any thoughts on whether that is a good public policy to have such widespread advertising or would you advocate any change in how that is carried out? Dr Davis-Smith: It is not my area of expertise at all but I would say that it seems to me that some of the advertising that has happened in the past is clearly not helpful and I would argue that there has been this perception of a compensation culture, and therefore some action does need to be taken in terms of regulating some of the most inappropriate forms of advertising. Derek Twine: If I could concur with what Justin has identified and then add that even within our organisation we hear from individual leaders, our volunteers, who have experienced claims being brought or even being considered being brought where the point of initiation of the claim was the advertising material placed in the hospital’s A&E waiting room at the time when the parent of the injured child was feeling most vulnerable as opposed to any piece of consideration, and likewise is that then saying that not only do the leaders feel fearful of that kind of environment but to extend that in terms of the place of advertising as well as the terms of advertising.

Chairman: Mr Brokenshire?

Q187 James Brokenshire: You were talking about existing leaders of the existing organisation. In my comments to the HSE I was trying to get across the opportunities lost. Perhaps you could comment on the impact that you perceive that this current culture is having on recruiting people in and what that means in terms of the number of people waiting on your books to become scouts or guides or other members of voluntary organisations just in a very practical sense? Derek Twine: In a very practical sense within our own organisation we have over 30,000 young people who would like to be scouts on our waiting lists. We do not have sufficient leaders to provide for cub scout packs or scout troops for those young people to join. That is 30,000. I put that with the figure that tells me that we have 70% of our leaders who have tried their damnedest to recruit other people to be leaders to open another pack in their group or to provide some more activities for young people, and those people whom they are approaching identify that a big factor inhibiting someone putting their hand up and saying “yes I will volunteer” is the fear of being sued for compensation in this arena that we are debating today. I do not pretend that there are not other factors as well but consistently this is one of the very strong factors and the fact it is coming back from 70% of them gives me cause for concern as an organisation and I believe gives the whole sector some concern because we are denied the opportunity to extend our provision to a wider reach within the community.

Dr Davis-Smith: Just to add a national statistic: 15% of people who were not volunteering gave fear of being sued as a reason for not volunteering.

Derek Twine: I wonder if I could just make a little clarification of definition here as well because I think it is important to the environment from which we are coming. This volunteering that we are talking about being impaired and severely damaged is volunteering for adults who are prepared to take responsibility for other people and for their actions in an engaged way. It is not a quick count of someone who did something for one hour once a month. I do wish to make that distinction because there is other data which could be quoted that says society in the UK has never had it so good for the number of people volunteering. However, scratch beneath the surface and look at the definition for various data and to volunteer for an hour or two once a month is not the same as the kind of volunteering we are looking at in terms of taking on responsibility for several hours each week for groups of young people or for groups of vulnerable or sick people within the community who need care and attention and therefore I do believe that what we are talking about is the challenge in that latter category where they feel a sense of on-going and deep commitment.

Q188 James Brokenshire: Again at a very practical level has the “compensation culture” given you reason to advise your scout or cub groups not to do certain things? For example, I remember from my days in scouts going camping in the pouring rain and canoeing and mountaineering. Have you actively advised groups not to do things for fear of lack of insurance or the risk of some sort of claim arising? Derek Twine: We have not advised people not to do something but we have advised them and indeed required them to follow on how to do it. I believe the approach which we and I think some of the other organisations as well have developed has been to take far greater account of sensible risk assessment and sensible behaviour in the light of those risks which have been assessed rather than organisationally to seek to cut out the activity or indeed every element of risk, but that is us as an organisation. What we have is the delivery of the experiences in the hands of hundreds and thousands of volunteers and they are the ones who will interpret what they see in their local media and among their peers and in advertising.

Q189 James Brokenshire: Do you therefore perceive that activities at a local level have been curtailed even though you have not given that specific guidance from on high that means that young people now are not getting the full benefit they might have done before? Derek Twine: Absolutely, and indeed when I referred earlier to 94% of the respondents to the survey saying that they experience that there has been a restriction to the range and nature of activities offered to young people as a result of fear of litigation and compensation, it is those very leaders who are in direct interaction with young people who are telling me and who are telling us here today that that is the impact. It is a detrimental impact. That is their perception. Regardless of what
a particular claims record might be like, that is the perception of volunteers who are delivering voluntary work for the benefit of their local community.

**Dr Davis-Smith:** One organisation said to us it is better to do nothing than take a risk. That is a voluntary organisation. If we are living in a climate of voluntary organisations moving into that sort of mind-set that really does cause concern for the future of volunteering and the societal benefit which we know it can deliver.

**Derek Twine:** I am glad that came across, Chairman. That is absolutely essential to what we do. If I may also reiterate a point from earlier, it is important for us as an educational organisation that that comes across in what we do for adolescent young people as well as what we do for our adult volunteers who are working with those young people. It is integral to the very education process.

**Q190 Chairman:** I think it is worth encouraging you to reiterate a point that you made earlier which quite struck me at the time you made it which is as an organisation, and admittedly you are a relatively large and well-established organisation, you do not have any fear about risk management because, if I understood you correctly, you train for it, you provide programmes so that people can understand what they have to do in risk management; it is more around compensation and litigation that you have anxieties. You gave me the impression that you took it in your stride and regard it as pretty essential to what you do.

**Derek Twine:** I am glad that came across. Thank you very much indeed and long may you continue the good work you do.

**Q191 Chairman:** Thank you very much indeed and long may you continue the good work you do.

**Derek Twine:** Thank you, Chairman.
Tuesday 17 January 2006

Members present:
Mr Alan Beith, in the Chair
James Brokenshire Mr Andrew Tyrie
David Howarth Keith Vaz
Jessica Morden Dr Alan Whitehead
Julie Morgan

Witnesses: Stephen Walker, Chief Executive, and John Mead, Technical Claims Director, National Health Service Litigation Authority, gave evidence.

Chairman: Mr Walker and Mr Mead from the National Health Service Litigation Authority, welcome. We are very glad to have you here this afternoon. We have one small job to do. We have to declare any interests that might be relevant to the inquiry.

David Howarth: I write and publish books on the law of tort.

Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial appointment.

Chairman: I am a consultant to a company which operates holiday parks.

James Brokenshire: I am a non-practising solicitor.

Chairman: That is the sum total, I think, of the relevant interests. Obviously, our inquiry is going on at the same time as discussion of the NHS Redress Bill, but that Bill and the principles behind it is highly relevant to the compensation culture issues that we are looking at.

Q192 David Howarth: Can we start with the Compensation Bill and clause 1 of that Bill, which, as you remember, attempts to offer a helpful definition of aspects of the law of negligence? Could you confirm your view of whether that clause is necessary or helpful?

Stephen Walker: Yes, I think there are probably lots of ways. It is always trite to say education and publicity, but that is how people learn about things. I think one of the big problems is that for almost everyone who comes into contact with the law their experience of the law is mediated through and by the lawyers they encounter, and in a world where there are litigation practices which are geared to handling litigation for a return, again entirely legitimately, I think it is inevitable that there are some conflicting messages given, accidentally or otherwise, about what might or might not transpire. I meet many claimants personally. I try to meet claimants face to face. It is not always easy, because claimant lawyers are not very keen on that process, but mediation has been a big break-through in that respect, for example, and I do not think expectations are terribly well-managed. Coming from a defendant, that is always going to sound like, “He would say that wouldn’t he”, but I have nothing to gain by telling this Committee that that is my view, and that is my view.

Chairman: Mr Walker and Mr Mead from the National Health Service Litigation Authority, welcome. We are very glad to have you here this afternoon. We have one small job to do. We have to declare any interests that might be relevant to the inquiry.

Q193 David Howarth: Do you see any risks in trying to put the Tomlinson rule into any sort of statutory form?

Stephen Walker: I am not sure it achieves a great deal, is the answer to that. I think it is a well-intentioned attempt to define the circumstances in which the courts might, as it were, look slightly differently on the application of the current law of negligence, but I do not think it adds anything to what has come before in Tomlinson in the House of Lords, for example.

Q194 David Howarth: One of the aims of that clause is apparently to help the public to understand what the existing law says. Are there any other ways in which that task might be carried out?

Stephen Walker: I do not think they should be exempt from any control whatsoever. I...
fact that we are always defendants, I think we recognise that many voluntary organisations and organisations such as trade unions actually do valuable work in providing legal advice, in pointing people in the right direction and in some cases, particularly with the unions, in funding it.

**Q196 David Howarth:** Are there any specific aspects of the regulation proposed that you would say trade unions ought to be exempt by far?

**Stephen Walker:** No, I think all we were trying to achieve was a distinction between those organisations which we see as doing good work for the right reasons and those which are pejoratively called "claims farmers", who are simply creating claims to make money regardless of merit (and again you might say, I would say this as a defendant) frequently not in the best interests of their clients.

**Q197 James Brokenshire:** I just wanted to follow up on something you put in the written submissions and the statements that you make that the impact of the compensation culture is largely reflected on the voluntary sector and the local authorities, but two points that you did highlight in terms of direct impact on the NHS were in the fields of pathology and paediatrics and the fact that it was becoming extremely difficult to recruit pathologists and that in the paediatric field to actually get paediatricians to take on child-abuse work was becoming quite difficult. In what ways would you seek to address these concerns of professionals working in the health service to try and meet those problems: because clearly there is a problem if we cannot get professionals to work in those two areas.

**Stephen Walker:** There is a limit to what a defendant organisation such as ours can achieve. We do not employ paediatricians or pathologists, we do not train them; we do not put them to work, as it were. We do not usually try to get the law changed generally speaking. What we try to do is use the law as it currently exists. What we did vis-à-vis pathologists, for example, was to defend the claims which were made against them. Primarily in everyone's mind will be the organ retention claims, I guess. We tried, with considerable success, to argue that what had happened hadn't happened as a result of malice or ill-will on the part of pathologists but that the overwhelming majority of pathologists who had been retaining organs had been retaining them within what they thought, for very good reasons, was a proper legal framework. They were acting within the guidelines of their own College and it was generally understood, before the matter went to the High Court and Mr Justice Gage, as he was then, said that retention could be actionable in certain very narrowly defined circumstances, that (the cliché phrase was) "there was no property in a body" and therefore simply retaining organs could not be an actionable wrong. We were largely successful in holding the line on the law, though there was some change, but I think that by then, attempting to resolve those claims by mediation as quickly as we possibly could, what we were able to do was deflect a lot of the, in my personal opinion, very ill-informed criticism of pathologists which appeared in the media. Coincidentally, of course, in settling those claims that had to be settled that way, we also, I hope, eased the burden, eased the stress for the claimants too. It is always a tightrope that has to be walked getting that particular balance right. In terms of paediatrics, we fought the cases, we defended the cases that were brought in the House of Lords last year—JD is the lead case, and I will happily give you the references later—I will test my memory on that please—where allegations of child-abuse had been made by paediatricians at first instance. We took the view, as did many within the medical profession, that if those early diagnoses were going to be actionable it would significantly discourage paediatricians from involving social services and whoever else needs to be involved when they merely suspected child-abuse in future. The cases were contested all the way, the claimants were legally aided, quite properly in my opinion, all the way, but we were successful in defending those actions, and I would hope that that, within the framework of what we can do, is an illustration of how we would try to help paediatricians, give them more confidence that they can make the decisions, that they would be defended, et cetera. As for change beyond that, it is beyond my remit, I am afraid.

**Q198 James Brokenshire:** In summary, you are talking more about a systemic type of issue. In other words, trying to resolve matters quickly and effectively rather than seeking a formal change in the law or a clarification of the law as is?

**Stephen Walker:** Yes, we are. We are in a very difficult position vis-à-vis changing the law. We are very obviously part of the public sector and we are not in the same position as, say, a commercial insurer defending similar claims who might argue for a change in the law, again, quite properly—there is no reason why they should not—to protect their shareholders interests. I think we have to walk the tightrope, to use that cliché again, I am afraid, between protecting the interests of the National Health Service but also respecting the interests of patients, and we try never to advocate change unless we think there is equity between those two interests.

**Q199 David Howarth:** You do see it as part of your role to inform the medical profession about the effects of particular cases and to produce a situation in which doctors follow adequate practice. I was wondering why it was that in these particular cases, when some of the cases have been won and presumably you are doing your normal role of putting information to trusts and to the medical profession, there was still some residual difficulty with those two areas of the profession. Is it because the profession does not understand what happened legally, or is it because there is some other risk that you are not taking into account?

**Stephen Walker:** I think in the two examples that I have given—we referred to them in our paper too—the law had not been defined. Most people in the law, I think, thought they knew or thought they had a fair idea. One of the great values, but it can present
problems, of the law of negligence is that it is quite flexible. I am not trying to teach my grandmother to suck eggs, forgive me, but it is always possible for a judge to distinguish between one case and the previous case. Amazingly, the issue of organ retention had never been fully considered by an English court—it had been considered, very rarely, in other jurisdictions—so once the organ retention issue became a big issue, post Bristol, post Alder Hay, it was almost inevitable it was going to be tested, and, although we were able to mediate the Liverpool cohort of claims without litigation, there was high court litigation, as you almost certainly know, in respect of the so-called “Nationwide group”, and even that was indeterminate. The judge concluded there could be a liability in the event of certain fairly complex causation rules being met. I guess that ruling illustrated just what a difficult area it was. The truth is both sides were on the steps of the high court saying, “We have won”, which was pretty unsatisfactory as well.

Q200 Chairman: Presumably any practitioner is influenced not just by the fear that he might come out on the wrong side in a case but by the sheer protracted nature of the proceedings into which he or she is drawn and the toll that takes on personal and professional life?

Stephen Walker: Absolutely so, yes. I cannot add to that, sir.

Q201 Jessica Morden: Do you think there should be restrictions placed on advertising by personal injury solicitors and claims management companies?

Stephen Walker: I may be unique around this table in remembering when there was no advertising allowed by solicitors. You have asked for my personal view. I think it was a bad move to allow advertising. I think the initial allowing of advertising—this is going to make me sound like a real reactionary, I realise—many of us thought it was going to be the thin end the wedge, and so it has proved. I think that advertising, except in specialist areas, is very dangerous, yes. I come back to my point about most people’s experience of the law being mediated by and through the first lawyer they meet, and he or she may not be the optimum person to be handling their particular problem at that time.

Q202 Jessica Morden: I expect I know the answer to this then, but is it acceptable that people can advertise in A & E departments in hospitals?

Stephen Walker: No, it is not and no-one in the Department of Health or National Health Service thinks it is. You will not be surprised to know that from where I sit, Department of Health or National Health Service the talking. You are all staring at me, it appears, Stephen Walker: No, it is not and no-one in the anything to this? I am very conscious I am doing all advertise in A & E departments in hospitals? convention rights of claimants. Do you want to add this then, but is it acceptable that people can damaging or a

Q203 Jessica Morden: How long will that take to happen?

Stephen Walker: I have no idea; I am sorry.

Q204 Chairman: This Committee recently recommended in the small claims report that we should raise the small claim for personal injury claims to two and a half thousand. Of course that does not address the problem of proportionality in the higher cost claims where it becomes much more surreal, and you have drawn attention to it in some of the examples you gave in your written evidence to us. What can be done to achieve or encourage greater proportionality without making solicitors likely to cherry-pick the cases with the best chance of success?

Stephen Walker: You cannot stop them cherry-picking, is the first thing to be said to that, sir. We believe quite strongly that it is possible to deal with claims of a lower value, particularly those which have no real complexities within a fixed price framework, a fixed cost framework. We have obviously seen your report. We think it is terrific. You have seen what is being proposed by the Department of Health in Redress, and I am sure that is likely to come up before the afternoon is out. It is possible to deal with what we currently consider to be litigation better and quicker. The problem is, and it may be only in perception, but there is the trade-off between the claimant who has one claim feeling that he or she has not had everything they are entitled to, by which I mean investigation, maybe a ruling by a judge, the whole works. A defendant will say, “Taken in the aggregate, we can win some, lose some.” I am very much aware that for the individual claimant that is a really tough call, but the truth is that it is possible to devise schemes. We ran a pilot scheme, for example, with clinical negligence, which is supposed to be fairly complex, whereby we were able to resolve disputes fast to the satisfaction of the claimants who all had legal advice, for the avoidance of doubt. It is possible to do it if there is good will on both sides, but there are many vested interests. There are many people who make a lot of money out of managing litigation, and it is not just the lawyers. Experts make a great deal of money out of it too, but we feel quite strongly that low-value claims can be dealt with within a structured framework without damaging or affecting the legal or, indeed, the convention rights of claimants. Do you want to add anything to this? I am very conscious I am doing all the talking. You are all staring at me, it appears, from where I sit.

John Mead: Do you want me to say something about cost care?

Stephen Walker: Yes, please.

John Mead: We find on the larger clinical negligence cases that claimant costs are vastly in excess of defence costs regularly. We would like the courts to have greater powers to impose cost caps. They do have those powers at present under the Civil
17 January 2006  Stephen Walker and John Mead

Procedure Rules, but they are rarely exercised, and we think there should be something built into the Civil Procedure Rules whereby cost caps are imposed automatically by the judges in larger cases. Going back to the late 1990s when Lord Woolf wrote his report on civil justice, most of his reforms have been implemented and most have been very successful in our view, but the one thing which he wanted to see, which has not come about, is greater proportionality of costs. Claimants’ lawyers will argue the mechanism for reducing or making costs more reasonable at the end of the case, which is called the “detailed assessment procedure” for those who are not involved in the law. It is a means whereby a costs judge can assess a bill and say, “I think this is reasonable, that is not reasonable. I am chopping that bit out”, but that is at the end of the case after the costs have already been incurred, and we think that the court should be much more proactive and impose cost caps towards the start, if not the very start, of cases in order to make costs more proportionate.

Q205 Mr Tyrie: Just on that, if you impose a more stringent cost cap, will you not just encourage cherry-picking.

John Mead: Possibly, but, as Mr Walker has said, you cannot prevent lawyers from cherry-picking.

Q206 Mr Tyrie: But, if you encourage it you will make it even more likely to happen?

John Mead: Lawyers are not going to take on cases which they think are losers.

Q207 Mr Tyrie: It is all a question of odds as each case goes by. They know they are not going to win every case, but if they are not going to cover their costs, then they are even more likely to try and identify the best cherries and leave the rest alone?

John Mead: I am not suggesting that claimant lawyers should not receive a fair remuneration for their work. It is not in our interests, it is not in claimants’ interests for claimant lawyers to go out of business—we are not suggesting that—but we see a large number of, frankly, disproportionate and unrealistic bills from claimant solicitors in clinical negligence cases particularly, and that is the ill that we think should be addressed.

Stephen Walker: Could I add something to that, please, Mr Chairman? Our biggest cases—you are aware of this I think—are those that arise from obstetric and midwifery practice, children with severe neurological disability who are going to require care for the rest of their lives. Those cases where a liability is established routinely cost seven figures and the first digit is now routinely two, three, four, possibly five per case. In those cases there is invariably legal aid protection for the claimant solicitors. Quite properly, in my opinion, any family with a child in those circumstances should have legal aid to enable them to pursue their claim, so in those cases the cherry-picking issue does not arise. In every other case, whether privately funded or funded by CFA, with or without insurance, without a doubt cherry-picking takes place. We see better presented at first instance new cases now as compared to when 90% of our claims were being funded by legal aid. Legal aid provides, if you like, the fall-back position, you know, beyond which they cannot make a loss. If they are so structured that they cannot break even on legal aid, that is their short-coming, I guess, but legal aid applies still to 50% or more of our cases and significantly towards the very high value cases, so I do not think cherry-picking becomes an issue there. You are absolutely right, it does further down the value scale, but are we trying to manage this system for the benefit of claimant lawyers or for the benefit of claimants? I feel quite strongly it ought to be for the benefit of claimants.

Q208 James Brokenshire: I wanted to come back on a couple of the issues that we have explored in outline, which is in essence the speed of dealing with complaints and also the NHS redress scheme. If we are to assume that the NHS Litigation Authority has some role in overseeing the NHS redress scheme, how do you see the issue of conflict between the scheme and the normal litigation route playing out and that if there is not a possibility of, or something goes through the redress scheme but does not settle, it obviously remains the opportunity to go for a contested case through the normal procedures. How do you see yourselves being involved in those sorts of circumstances?

Stephen Walker: Can I begin by saying thank you for pointing out that Redress is not ours yet. It is a Department of Health Bill and we have been named as the possible managers. It is really important that is on the record before I say anything. If we are asked to manage the Redress scheme, I really see no problem at all. In litigation management terms, there is much more to Redress than just claims, but in litigation or claims management terms it is a low value, fast-track claims handling scheme and we have done that before. We do it now to an extent, but this formalises it, make it of wider application, simplifies it and ought to just make life easier for patients; so I do not see any problem at all. When we ran a pilot, which was not identical but is a reasonable model, we found that people accepted the offers we were making, with legal advice—every claimant had legal advice; there was no question of our taking advantage of unrepresented people—we found that those who were told that there was no liability on the basis of evidence we had taken from an independent expert that we jointly agreed with their lawyers did not proceed to litigate, but there was always available, as there will be under Redress, the right to litigate if someone feels sufficiently strongly that the process has not delivered what they want. I think it may be worth saying—and this is going sound awfully trite, I apologise—when people make claims for compensation (and, I emphasise, Redress is about a lot more than that) the ones who get paid a reasonable amount reasonably quickly think the system is okay. They do not rave about it because they think they have been given what they are entitled to. No matter what system you devise and no matter which level of the courts you go to, if
someone ultimately loses and does not get that which they were after, whether it is money or anything else, they are disappointed and they think the system is inadequate, because by the time they reach that stage they truly believe that right is on their side; so no system is going to satisfy everyone. This system that would come about under Redress needs to be fine tuned yet. As you know, it is all going to be done by statutory instrument. It is not dramatically different to the way we handle low-value claims now.

Q209 James Brokenshire: I can perceive that there could be a situation where you can almost go through one process and someone might seek to take advantage of the initial process in terms of the latter process, and, following that logic, in part the redress scheme is intended to promote greater openness, to promote early settlement, to promote the avoidance of a contested case at end of the day?

Stephen Walker: Yes.

Q210 James Brokenshire: It is interesting what you said. You do not seem to appear to think that there is any potential problem, but how does it encourage that openness under the system if, effectively, it is part of the same process when you are seeking to defend the claim and you still have the barriers in terms of trying to ensure that any loss is mitigated?

Stephen Walker: I think the big change comes at trust level. I think if we can persuade trust staff—clinical and management—that we are operating a scheme here where claimants’, ie patients’, perfectly proper aspirations are going to be met as quickly as we can and that we want their help, their frankness, their candour as part of the process, there will be no blame attached as a result of this. There will be risk management and learning lessons from the claims, but no blame attaching to individuals. I honestly believe that we can change the culture within the National Health Service. It will not happen over night—I am not that naive—but I honestly believe that by formalising best practice, by (forgive the shorthand) “selling” it into the service as a system whereby we can deal with these issues in the same way that the complaints system is supposed to deal with many other issues, I honestly believe we can change the culture.

Q211 James Brokenshire: Because I think that the indication is that there is a culture of secrecy and a culture of not wanting to be blamed for things when they go wrong?

Stephen Walker: I do not think that is different in the NHS to anywhere else where people are employed in a professional capacity. It is human nature to say, “I did not do it”, or, “If I did, it was not my fault.” You will notice I am not saying, “Oh no, it is not”, because I have not come here to tell you lies, but I think that it is a culture that can be changed. I think it is a culture that is beginning to change now, but we need to somehow get away from the issuing of proceedings as a precursor to a proper investigation, because that is what puts people on their mettle, that is what worries people. They worry about it. They worry about prosecution; they worry about manslaughter charges nowadays; they worry about coming before the GMC. We want to encourage them to not worry about litigation. Worry about getting it wrong, of course: get it right, avoid the litigation, but just because something has gone wrong, we would like to create an environment in which, alongside our colleagues at the NPSA, for example, people can say, “Yes, got that one wrong”, or, “Hey, I did not realise that would happen.” We need to learn from it. I think that can be done.

Q212 James Brokenshire: You have emphasised the need for things to be dealt with quickly to ensure that there is not this protracted delay, and in part the redress scheme is seeking to achieve that?

Stephen Walker: Yes.

Q213 James Brokenshire: From your perspective (and I appreciate what you say about your role being not clear at the moment), do you see the scheme being able to deal with claims within six months?

Stephen Walker: All I can tell you is that that was the target we set in the small claims pilot that we ran a few years ago, and we pretty well achieved that. There was some slippage. A dozen claims, maybe, did not get done in the six months. That was awfully hard work for my staff; they really had to jump through hoops. We had to change the way we were working with independent experts, because they are not used to working that fast either, but we did it. I am talking about people owning up when they got things wrong. We might have to put our hands up and say we might need to slip to seven months, I do not know, but by and large, yes, we can, if the will is there, both at trust level and within the managing organisation, whoever it might be, I think the will is there.

Q214 James Brokenshire: Following on from that, should there be a statutory maximum time limit constructed in terms of the legislation?

Stephen Walker: That sounds like an invitation to tie a noose round my neck. I would be happier if the statute said that targets would be set. I would hate to think that, because we could not quite get that six-month date, I was going to be in breach of some statutory obligation, but the idea of targets came from us, so we are not averse to targets. That is an honest answer.

Q215 James Brokenshire: It sounds as if the need for speed is there, and also if you have got something to focus on in terms of achieving an income?

Stephen Walker: I would rather call it a target than see it written in statute. I am sure you understand.

Q216 James Brokenshire: No. It is interesting hearing your views on this more than anything else. You have talked about the pilot which has already taken place. Would you see it as a sensible step forward to have some further pilot before pushing forward with this, or is the existing pilot that you have alluded to sufficient?
Stephen Walker: We are still talking about whether we need one. It may be yes, it may be no. I do not have a strong view either way. There are pros and cons. It is awfully difficult, setting up pilots, to mimic wider scale practice. Do we pick a Strategic Health Authority and do it there, or do we say a fixed time, do we say everything that comes through the door next month, whatever it may be. How do we monitor it? None of this comes resource free either, of course, and so the debate continues.

Q217 James Brokenshire: And the cons if you do not, if they are the pros?
Stephen Walker: I thought they were all cons.

Q218 James Brokenshire: Tell me the pros then?
Stephen Walker: The pros would be that we might learn more lessons about how best to do it and whether or not we are able to set realistic targets, whether we can garner enough independent experts who are prepared to react very quickly for us at fixed fees, whether or not the legal profession is prepared to support this: because if the legal profession says “No, we will not do this for a fixed fee”, it will not happen.

Q219 Dr Whitehead: You have listed a number of advantages of the process in terms of transparency and change in the culture, and so on, do you think there will be any monetary savings as a result of this new process?
Stephen Walker: I do not think that anyone could say that there will be monetary savings. I think that what should happen is that money should be going to the right people, namely claimants instead of lawyers. I will repeat what I said to your colleague, it is not my Bill. The department have done a great deal of costing work, and they are not talking about saving money, they are talking about redirecting it to where it should be going. The honest answer is I do not know. I would not want to mislead you.

Q220 Dr Whitehead: Have you in your agency addressed any thought to the extent to which you might actually get additional claimants on the basis that some people who perhaps are not currently eligible for legal aid, who may have been deterred from bringing claims, will actually re-apply under the redress scheme and have you been able to assess what that additional claimant number might conceivably be?
Stephen Walker: No, we have considered it. That is the first answer. Under our pilot we believe that almost all of the claims were claims which would not have been made but for the existence of the scheme. We were told both by the independent assessor who looked at the scheme only halfway through—he did not look at the very end for various reasons—that was the case, but I was also personally told, and I believe John was too, by quite a number of claimant solicitors, that they used the scheme for cases that they would not otherwise have (to use their phrase) bothered with probably for economic reasons. I think it is probable that we will see more claimants, and that comes to the issue of striking a balance between on the one hand providing access to justice for damaged patients, because no-one will be paid unless they establish a legal liability, and on the other hand cost. That is always a balancing exercise. Fortunately, it is one for the department, not for my organisation, but, yes, there is always a risk that if you help people to gain access to justice it might cost you money.

Q221 Dr Whitehead: Is it not a concern for your organisation from the point of view of potentially reducing the overall level of damages to claimants and also, of course, the question of whether you will require additional staff to administer the scheme?
Stephen Walker: We anticipate that we will require, to begin with, very few additional staff because the hope is, obviously, that many of the claims that we currently deal with will transfer into this as it becomes more widely known and its availability becomes seen as the way to deal with these things. We are not making long-term plans at this stage, because, first of all, as we have said several times, no work has been given to the Authority at this stage, but, secondly, because it is impossible to guess what the shift in volumes might be. It might be an increase, it may not, so it would be premature to do that work at the moment.

Q222 Dr Whitehead: You could conceivably have a situation where this scheme would be entered into and all sorts of contingent funding will have to be sent your way subsequently, shall we say?
Stephen Walker: The costing work that has been done by the department has taken into account the possibility that there will be more claims, and the department is content that the matter proceed on that basis.

Q223 Dr Whitehead: In the overall scheme of things, you have mentioned that this perhaps does not save costs but puts costs into the right place, but we have received evidence from the Medical Defence Union about the extent to which the total liability for clinical negligence is concentrated in a small number of large claims, perhaps about two-thirds of total liability in a small number of large claims?
Stephen Walker: That is pretty much our experience too.

Q224 Dr Whitehead: Given the cap that is being suggested, what overall difference do you think the scheme would make?
Stephen Walker: I think that that is in itself evidence that what the department is saying in promoting the Redress Bill is true, namely that it is geared as much to a change in culture, improving the patient experience—forgive me using these quotes, but I genuinely believe that this is not just about saving money—this is about putting the patient at the centre of the process—all of those phrases. I believe that is what they are trying to achieve.

Q225 Chairman: You make those quotes sound more convincing than some I have heard make them.
Stephen Walker: You have almost certainly talked me into serious trouble with that, sir?

Q226 Keith Vaz: Mr Walker, clause 3 of the NHS Redress Bill gives power to impose upper limits on claims. Since these are unlikely to exceed current common law awards, what will preclude a patient awaiting an offer of redress carrying with it an acceptance of liability and then pursuing quantum in court?

Stephen Walker: I think I understand the question. If I answer the wrong question—

Q227 Keith Vaz: There are no full stops. That is the problem!

Stephen Walker:—I am sure you will come back to me. First of all, it is important to note that the limits are not caps on damages; the limit is a threshold below which we will deal with the claim. The claimant, on advice, if he thinks or she thinks her claim package is worth less than whatever the limit might be (£20,000), then we will deal with it under Redress. It is not a cap in any sense on what they are entitled to receive. They will be paid, in so far as we can achieve it, exactly what they will achieve in the court. The proof of the pudding, obviously, will be in the offers we make. They will either be accepted on legal advice or they will not be, but there is no question of costs being capped. Forgive me, there is no question of damages being capped. There is every question of costs being capped. What is to stop someone who has been made an offer of compensation under Redress going to the court? Absolutely nothing. That will be their absolute right.

We agree to be bound by the finding, the determination, made by the independent expert. We do not bind the claimant. That is part of the deal. There is nothing to stop someone moving sideways into the mainstream litigation system to try and achieve more than £20,000 if they change their mind about it being worth less than £20,000. You are absolutely right, that would just lengthen the process for them, of course. Why would they waste time coming into Redress in the first place?

Q228 Keith Vaz: Do you think that the Redress scheme will be seen as independent, bearing in mind that claimants do not have access to independent medical reports?

Stephen Walker: They will. I know that independence has exercised a great number of people. I will say something about that in a moment, if time allows. Mr Chairman, but the specific answer to your question is that there will be independent medical reports. If the trust concedes liability when they report to us in the first place, there is no issue, we would admit liability—that is what we do now. If the trust says, “Sorry, no liability”, or, “We do not think so”, or, “We are not sure”, then, with the claimants advisers, we will identify a suitably qualified independent medical expert and there will be joint instruction to avoid any question of a lack of independence, if you like. We will pay for that independent expert, but, as you know, sir, his or her duty is to the court, notwithstanding that we pay his fee. So that is an independent report. That will be received simultaneously by the claimant and the defendant and, on the basis of that report, we will make a liability decision and/or a causation decision if that is what is at issue, and it is that document which the claimant’s lawyer will have in assessing whether or not we have been fair about either repudiating liability or making an offer; and so, when we talk about transparency here (another terrible cliche for which I apologise), we do mean it.

Q229 Keith Vaz: Do you believe that there is a role for either the Bar law centres or Citizens Advice Bureaus in providing independent legal advice?

Stephen Walker: That is an extremely difficult question to answer. In its original conception it was hoped that Redress would have many access points, that people could come into it with or without lawyers, with or without legal advice. I think the consensus now is that clinical negligence is sufficiently complex and the levels of compensation, even at these low levels, is significantly significant for claimants for me to express the personal opinion that probably most claimants need legal advice, and the quality of legal advice from those sources varies enormously, as you probably know. Where it is good, it is very, very good and more than acceptable, but if we are prepared to pay for a solicitor, why would any of those sources not advise the claimant seeking their assistance to go and consult a solicitor?

Q230 Chairman: Thank you very much indeed. We are very grateful for your evidence this afternoon and for the frank way you have answered our questions. We always like frankness and we hope it does not get people into trouble! If it does come back and tell us. There are parliamentary powers in that respect.

Stephen Walker: Thank you.
**Witnesses:** Teresa Perchard, Director of Policy, and James Sandbach, Social Policy Officer (Legal Issues), Citizens Advice, and Adam Griffith, Policy Officer (Legal Services), Advice Services Alliance, gave evidence.

**Chairman:** Mr Griffith, Mr Sandbach, Ms Perchard, welcome. We are very glad to have you with us representing the customers, the people who actually experience the system.

**Q231 Jessica Morden:** What types of problems have you come across with conditional fee arrangements and what kind of advice do CABs and law centres provide to people seeking compensation claims?

**James Sandbach:** Predominantly the issues that bureaux have dealt with, conditional fee agreements, have been people coming in after they have been through the whole process — so it is actually the issues that have arisen upon their conditional fees: because quite often consumers have signed up to conditional fee agreements not really understanding what exactly they are getting themselves into in the whole process, the costs that are going to be incurred, the liabilities that they are taking on, and because of the British legal establishment’s normative way of funding PI cases and because we have had a new market involved in conditional fee agreements and industries have sort of grown up around it, there is a whole sort of class of consumers that have processed PI claims through conditional fees but have not necessarily got particularly good levels of redress. They have had a lot of problems on the way understanding conditional fee agreements, taking out loans for conditional fee agreements, to fund conditional fee agreements, and all in all over the past years we have seen about 130,000 of those cases.

**Teresa Perchard:** To add to what James has said, in the report that we published last Christmas on no win no fee agreements, we highlighted CAB evidence from around the country where we see people at every single stage of the process from the man who has been stopped in a windy shopping centre, he happens to have a bandage on his hand and some character in a mackintosh comes up to him and says, “Have you had an accident?” and, before he knows it, he has signed something just to get rid of this geezer and has entered into a really quite complicated contract for a loan, an insurance product and a claim coming into us trying to unravel the deal, to the people who come to us at the end of the process who find that they actually owe money because they have got locked into, as you have been discussing, quite an expensive process and the compensation they have received has not been sufficient to actually cover all of the costs and they are left with a debt and are quite surprised because that is not what they thought they were getting into.

In the middle of that people are not getting good advice, a whole chain of people making money out of the signature on the form that started it off and a system that is really not doing what it should do for the individual who, after all, has suffered an injury which may have lost them their job, or diminished their earnings, truncated their social life, made it difficult for them to act as normal, made them call on the public purse more through claims on benefits for example, so there may be public costs from not dealing with personal injury claims properly or quickly, and a system that does not really look at rehabilitation, helping someone to recover — it is only focused on money in a money chain — and does not get the lessons from accidents and events ploughed back into prevention. The system at the moment really is not working is what we see from all sorts of cases that come to CAB, which are illustrated graphically in the report we published last year.

**Q232 Chairman:** I was very interested in what you said about this. How could you build rehabilitation better into the system?

**Teresa Perchard:** We have very much supported the introduction of regulation of claims handlers, but that is really just scratching the surface, which is really just one of the problems caused by enabling this kind of business to grow up, and I am sure we will come back to that. In our report we said we need a thorough review of the whole system of compensation to look at all the different options for helping people get access to justice, perhaps take out more insurance before the event.

**Q233 Chairman:** That is not quite what I was asking. It is how you build into the system getting someone more readily back to work, rather than leaving them waiting for a bigger sum of money at the end of the day which turns out not to be very much. How do you build that in?

**Teresa Perchard:** There are many insurance companies who are not so much in the “no win no fee” area but who are looking at how they can offer rehabilitation services to people who are making claims on their insurance policies, which may make business sense for the insurer. If you are paying out mortgage payments to cover the cost of a mortgage because the person you have insured cannot work, it may be in your best interests as a firm, to help them get back to work, to cut your insurance payments more quickly, and there is a lot of interest in the insurance industry which collides with an individual interest in not being laid-up and excluded and unwell for long, protracted periods of time and also public sector interests in helping people rehabilitate which could come together in a better system for dealing with the effects of accidents and injuries of all kinds whether in public places or at work. We had hoped to see a much broader debate about how dealing with injuries could be put on a broader footing and was not just about claiming money one from the other, albeit we do need to protect people better in that system, we think.

**James Sandbach:** I would add that, because we have a tort system where the trigger is, I think, some legal proof of negligence, of fault, and a process that builds up towards that, there is a sort of stand-off culture until at least the two sides are sitting down talking, and there is a process of letters, and so forth, going back and forth, and so the claimant kind of gets left on the sidelines until that ball is rolling and has been rolling for some time, and so it is a matter of building in. The system started to do this with the
pre-action protocols that, before you start talking money, you actually start talking welfare and solutions.

Q234 Jessica Morden: What are the main kinds of complaints that you get? Are they about the claim farmers or are they about the solicitors? What types of complaint do you deal with?
James Sandbach: It is a mix, but it is particularly that the professionals involved are not really seeing the problem from the point of view of the consumer. There is a misunderstanding about where the consumer is in this process.

Q235 David Howarth: You mentioned the difficulty of winning a tort claim. I was wondering what level of understanding you find among your customers about the tort system, about the compensation system. Do people understand how it works?
James Sandbach: I do not think they do. I am not going to get into individual judgments, but there is a lot of evidence to suggest that the sort of concept that we are used to dealing in as legal professionals about tort law are simply alien concepts to the way the average person who sustains an injury thinks about these issues. When you are presented with something that says “no win no fee” you are going to take that literally—it is no win no fee—and, if you are approaching it at that angle, why should it be anything else?
Teresa Perchard: The language that is used in correspondence from insurance companies can be extremely confusing for people when the insurer starts talking about settling on a 50:50 basis. What on earth does that mean? This is the language that has built up between professionals and firms. Yes, there will be cases highlighted where people make it a practice to claim compensation, but that is very unusual. This is something that happens to somebody once in their lives, and very few of the people who have had an injury actually get involved in making a claim, so it is not something you learn about. You do not have classes in compensation law at school, and we do not cover pensions let alone the profession. And it is not something you are expected to learn as a schoolchild. We all accept that at school, and we do not cover pensions let alone the profession. And it is not something you are expected to learn as a schoolchild.

Q236 David Howarth: I think I know the answer to this already from what you have said, but what level of understanding is there of the basic concepts of the law that there has to be fault, you cannot get compensation just because you are injured, that only certain forms of injury entitle you to compensation, there has to be causation and it is difficult to cause causation. Are those types of things at all known in the public?
James Sandbach: No.
Adam Griffith: I think probably the exception to this is road traffic accidents. I think that most people do have a basic understanding that if you have an accident it is probably someone’s fault. Okay, usually they think it is the other person’s fault, but I think many people realise that some accidents are actually your fault and you have to put your hands up or figure out what you are going to say to your insurance companies, but I suspect that is the only sense in which there is a general understanding of that.

Q237 Mr Tyrie: One would worry if there was too much understanding, there would be nothing for lawyers to advise on. A moment ago you gave a pretty good description of what you felt was the downside of the new system. In fact, I think one of you said, that the system was not working. I think was the phrase. Is there any upside? Are there any cases which CFA’s are picking up which were ineligible for legal aid? Is there any silver lining to the cloud you have described?
Adam Griffith: There must be for people who are not financially eligible for Legal Aid. The best estimate is that eligibility for Legal Aid covers approximately 40% of the population, so the majority of the population is not eligible and therefore has the potential to bring claims and no doubt has done so.

Q238 Mr Tyrie: It is not only that, is it, it is also people who may have been denied Legal Aid who were eligible for it, but a decision was taken that their case was not worth pursuing, which was subsequently pursued and a claim made under a CFA?
Teresa Perchard: Yes. We all accept that the introduction of a system of conditional fee agreements has enabled many people to have a system for funding their cases, starting the case, without having to put money upfront which they would not necessarily have been able to do so before, either from their own cash or with help from Legal Aid. In a sense, with the legislation that is coming in to regulate the claims handling system, that is almost after the event. It could have been predicted really that you were unleashing the possibility for a whole new tribe of intermediary introducers to make some business here, coupled with advertising, which we have talked about, but also the introduction of referral fees as well. There were no measures taken to ensure consumer education, consumer protection from new market-based risks. You have opened up access to justice through a market solution, but you have not introduced the protections that might be needed to make sure that the market worked
effectively for consumers, and the legal services market for that matter as well. That has led to a reputational effect for the whole legal services market which we are now trying to fix up by introducing some regulation of claims handlers. It is a pity we are having to do that after the event with the introduction of regulation. The whole package of introducing CFAs was not accompanied by proper consumer protection measures in anticipation of some of the problems that we have seen.

James Sandbach: I would also add the CFAs are a product of the UK’s particular system of costs. The inquiry’s terms of reference referred to contingency fee agreements, they are not contingency fee agreements, we do not really have contingency fee agreements here because of the costs of rules in English courts, the cost of events and the indemnity principle and so forth. What you have in the CFA is this rather complex system of people indemnifying each other for different types of costs, but it is not very transparent from a consumer perspective. It is not really a straightforward contingency fee agreement, where you can see very clearly that the professional is taking X% of damages, it is rather a more complex and Byzantine type of system. I think it adds additional complexity for consumers.

Q239 Mr Tyrie: Nothing can be done about it?
James Sandbach: One could move to a system of contingency fees on the American model. We would not necessarily be big advocates for that. I think what you do have to look at though is really the whole system of costs in the English courts and the legal system and at how could costs be reformed so aid bill saving?

Adam Griffith: That is what can happen today.

James Sandbach: The savings from Legal Aid are fairly small because Legal Aid under the old system essentially was an insurance against losing and the vast majority of claims are won or settled, in fact the vast majority are settled and quite a few are won. Under the old system, Legal Aid was picking up a huge chunk of the claims or claims that are often described as cult claims, ones around 50%, those people have probably lost out. What is clear is whatever system you have, the lawyers are not going to be bringing the claims unless they think there is over 50% chance of success I would think. There may have been a slight demographic shift in terms of who is bringing the claims. Apart from all the problems with claims management companies, the main issue has been costs, and it does seem on the whole that the main winners have been the lawyers and there are lots of arguments about that. I think overall there has been a shift.

Q240 Mr Tyrie: So is the silver lining at least as effective for consumers, and the legal services market for that matter as well. That has led to a reputational effect for the whole legal services market which we are now trying to fix up by introducing some regulation of claims handlers. It is a pity we are having to do that after the event with the introduction of regulation. The whole package of introducing CFAs was not accompanied by proper consumer protection measures in anticipation of some of the problems that we have seen.

James Sandbach: The Treasury does not have a Legal Aid bill saving?

Adam Griffith: The savings from Legal Aid are fairly small because Legal Aid under the old system essentially was an insurance against losing and the vast majority of claims are won or settled, in fact the vast majority are settled and quite a few are won. Under the old system, Legal Aid was picking up a relatively small tab for having a system where some people would lose and essentially that whole cost has been shifted on to the insurance industry and ultimately on to people who buy insurance.

Q241 Chairman: You are talking about the Compensation Bill?
Teresa Perchard: Yes, in the sense that it introduces a power to create a specific regulatory system for claims handlers/introducers. That point of entry is the point at which you need competent advice, quality customer care and those people are currently outside any kind of professional boundary, although they are working closely with solicitors and insurers.

Q242 Mr Tyrie: So is the silver lining at least as bright as the cloud, provided we have a few more reforms?
Teresa Perchard: We do not think the regulatory system goes to the heart of the big questions about how you get a better system for dealing with compensation claims, especially in personal injury because it does not look at how you might control costs and charges between all of the parties in the chain, and it may not look properly at how you get competent advice at the front end. Often consumer protection regulations are concerned with transparency and disclosure and that is good, but it may not go as far as requiring a level of competence or knowledge, although we hope that it will. Anybody who is inviting anybody in this room to start a personal injury claim ought to be able to explain exactly how that system will work and what you might or might not get out at the end of it. If they cannot, they ought not to be taking any money from anybody in order to generate your business, I think. That is what can happen today.

Adam Griffith: What may have happened may have been a slight shift in terms of who is bringing the claims. People who are not financially eligible have come in at the higher end of the market. There are certainly concerns about people with lower value claims or claims that are often described as borderline, difficult claims, ones around 50%, those people have probably lost out. What is clear is whatever system you have, the lawyers are not going to be bringing the claims unless they think there is over 50% chance of success I would think. There may have been a slight demographic shift in terms of who is bringing the claims. Apart from all the problems with claims management companies, the main issue has been costs, and it does seem on the whole that the main winners have been the lawyers and there are lots of arguments about that. I think overall there has been a shift.

Q243 Mr Tyrie: The savings from Legal Aid are fairly small because Legal Aid under the old system essentially was an insurance against losing and the vast majority of claims are won or settled, in fact the vast majority are settled and quite a few are won. Under the old system, Legal Aid was picking up a relatively small tab for having a system where some people would lose and essentially that whole cost has been shifted on to the insurance industry and ultimately on to people who buy insurance.

Q244 Dr Whitehead: You mentioned that we do need better forms of regulation. What would they practically look like? How would the man in the van chasing the man in the van be regulated more easily in your view?
Teresa Perchard: There will be some questions about whether sole practitioners are permitted, but the essential thing is how do you authorise people to operate in a particular market sector? There is a lot of regulatory experience with regulating fairly disparate business sectors, such as debt collectors and insurance intermediaries; people who sell you cars are often selling you credit and insurance at the same time and will need consumer credit licences from the OFT and come within an authorisation regime run by the FSA. I would be looking for a system where you have to get prior permission or authorisation in order to be in the business of introducing people to a no win, no fee agreement.
And that you close off access to market by expecting or even requiring any receiving firms, whether solicitors or insurers, to deal with authorised intermediaries only. Then you have a question about what are your standards to let people into the market in the first place; are you just looking for absence of criminal convictions in terms of fitness, or do you require people to demonstrate some knowledge or commitment in terms of having complaints procedures and certain ways of practising? Do you regulate the forms that they use and do you even get on to regulating the price? Do you regulate the advertising beyond general concepts of what is misleading? The Bill does very little about describing what the system of regulation is going to look like. Those are certainly the sorts of things that we will be looking for and we have been talking to the Government about introducing. Alongside that, how do you make self-regulation work? Could self-regulation be a way of achieving some of those standards without introducing statutory regulations and can they come together? Essentially, we are looking for consumers at the start of the process to get a good service, good advice from somebody competent to advise up to the level, not go beyond and not mislead and some redress when they do and when they let the consumers down. That is what we would hope for.

Q246 Dr Whitehead: Could you have an easy elision of responsibility and the perhaps fairly widespread feeling that advertising tends to entice people into the process?
Teresa Perchard: I was interested you asked the question earlier about advertising, whether it is a good or bad thing. I do not think advertising in itself is a bad thing because many consumers learn about things through advertising and marketing, and that has a much bigger reach through broadcasts, direct mail than anything my organisation can achieve or afford. Given it is getting out there and has potential to tell consumers about their rights, the possibilities, how things can work, how we can make sure that consumers are not misled and advantage is not taken. Given it is getting out there and has potential to tell consumers about their rights, the possibilities, how things can work, how we can make sure that consumers are not misled and advantage is not taken. The oft-cited “Did the doctor or nurse make it worse?” advert is clearly in the area of inappropriate advertising and in the wrong place, but there would be other advertising about personal injury which would not be. How do you influence the market to make sure they do not do the wrong thing, but they can do the right thing? You need to be able to take action, take things off the market. There are lots of self-regulatory bodies that can do this; the premium phone line regulator is very effective at getting some of those premium rate phone lines stopped and closed down very quickly. I do not see why the claims industry cannot abide by a code of conduct on marketing and advertising as well. That will be good for business because ethical, good advertising, which is informative and communicates well with consumers, may well generate better business.

Q247 Dr Whitehead: Do you have any evidence in terms of regulation that there is a widespread, as it were, re-selling of insurance? That is after-the-event insurance arising from the emergence of no win, no fee arrangements, where people have before-the-event insurance already. Would a regulatory regime be able to deal with that?
James Sandbach: Yes, one thing often found is in some cases where insurance policies have been checked is there is before-the-event insurance that could have been claimed, but because the sales people from claims management companies are looking to achieve targets for after-the-event insurance, they are not going to check out all of those different insurance options. There has been a lot of what is effectively mis-selling, yes.

Q248 Mr Tyrie: What about asking the Law Society to do self-regulation? I was very interested in what you said about self-regulation; it seems eminently sensible.
Teresa Perchard: Self-regulation and claims handlers?

Q249 Mr Tyrie: Yes, you say to the solicitors “if you come through a claims handler who has not done the job properly, I am afraid you cannot have the business”.
Teresa Perchard: I think it was four years ago we started working with the Law Society and the claims handling bodies to try to develop a self-regulatory code of practice following the Law Society discussion forum with consumers, lawyers and claims handlers. That in a sense has led to the creation of the Claims Standards Council and the formulation of a code of practice which is still under development. We are talking about a self-regulatory organisation that needs some better capability than it has today, but we have all been working on trying to find a self-regulatory route and are pleased that the Government has come in and decided to introduce regulation because I think we would still be there in four years’ time if not.
James Sandbach: At the same time, it was also an issue of the Law Society’s own professional rules being pretty lax as to whose business they can take business from.

Q250 Mr Tyrie: That was my point.
James Sandbach: Certainly the Department for Constitutional Affairs is pressing the Law Society on this, I understand. Really the solicitors firms should only take referrals from claims companies that are signed up members of the Claims Standards Council.
and, the Law Society has had a big internal debate about the issue of referral fees and paying for business, essentially offer financial inducements for new business. That is where the whole market has been opened up a lot for case management companies because their business is generated referral fees.

Q251 Keith Vaz: Concern has been expressed about the number of minor claims of the “tripping and slipping” kind, being brought against public authorities and voluntary organisations. Do you have a view on these claims and to what extent do Citizens Advice or ASA and its client bodies represent clients of such claims through the small claims process?

James Sandbach: I think the public liability claims are going down which is what the statistics show us anyway.

Q252 Keith Vaz: Why is that?

James Sandbach: Where the figures have shown a big rise in so-called compensation culture is in the areas of employers’ liability rather than public liability. I think part of the problem of public liability has been stoked up a lot in the media. There have been particular instances, claims and cases that have been blown out of proportion in the media and there has been a powerful organisation of lobbying. In the public sector we have the problem of public liability. I do not think it is such a fundamentally big problem as it has been made out to be in some quarters.

Q253 Keith Vaz: It is going down anyway.

Teresa Perchard: Yes, in 2003–04 there were fewer public liability claims than in 2001. It was a fairly static figure in the number of claims.

Q254 Keith Vaz: What more can be done to ensure proportionality, so that people who have smaller claims do not incur more in legal costs than the damages that the claim is worth?

James Sandbach: I think it is very much a matter for the new regulatory regime to ensure it does not happen. What is often forgotten is that a large proportion of claims are settled out of court and so some of the CFA rules are not really applying. The CFA rules do not apply because the cost rules are not applying in the same way they are applying if a judgment is made, where insurers settle between themselves. The rules on settlement need to be looked at as well.

Q255 Chairman: It is too easy to carve up a generous cost settlement when you are not going into court?

James Sandbach: Yes.

Adam Griffith: Another part that is a problem generally with personal injury claims is the relationship between the value of the claim and how good the process is. You find that the amount of work done or how complicated a case is that is worth £1,000 or £2,000 is not very different from a case worth £4,000 or £5,000. This just seems to be the nature of the beast, and something that we have to take account of. Most claims we are talking about are road accident claims, and road accident claims are subject to an agreement brought about, as I understand it, by the Civil Justice Council which regulates the level of success fees you can recover at different stages. The question, which is still an open one, is whether or not some agreement can be reached between essentially the claimant lawyers and the insurance industry in relation to non-road traffic cases. It seems to me that the other question is whether or not the parties involved can scale down somehow what they are doing in relation to the lower value claims. For instance, it seems from the research that the Association of Personal Injury Lawyers did the same proportion of cases have liability being denied that are worth £1,000 as are worth £5,000. Insurance companies are fighting every case as if it was a big case. There needs to be some kind of change in culture essentially on both sides to say, “Look, this is a small claim. Let’s keep things in proportion”. I do not think that there are any easy answers to this. I think there are dangers of raising the small claims limit, as you have suggested previously, to sort out the lower end of the market because the problem is not one that relates directly to the value of claims.

Q256 Chairman: The ABI—the Association of British Insurers—has come up with its own scheme; I think £25,000 was the figure they suggested under which they would have time to make an offer of compensation, then there would be mediation and they would pay for legal advice and you would have to go through that before you went to court. Have you looked at that and what you do you make of it?

Adam Griffith: I have not looked at it at all. I was here last week and I heard it being put forward. I am afraid that my ultimate doubt about that is the suggestion that the insurance industry is in the business of making fair offers unprompted. I was a bit struck by Mr Howarth’s story of his wife. There is no obligation on the insurance companies to come right out and offer £4,000, of course they will offer £500 first, that is their job. There is nothing wrong with that. There are conflicting interests between what the insurers need to do, which is ultimately to keep the costs down and settle cases as economically as possible, and achieve justice for claimants. My worry then is that a system like the one they are proposing would lead to more claims being rejected and more low offers being made. Anything of that nature would have to have a really strong independent element in it, which is rather similar to the discussion that you were having earlier in relation to the redress scheme.

Q257 Chairman: Small claims courts have that of course in relation to the smallest claims, but then we have the personal injury lawyers and perhaps you were hinting at “Oh, well, if people simply went to the small claims court by keeping their claim down, say, to £2,500, they might not realise they can get twice that if they go to the court system”. Is it a case of the best being the enemy of the good here? Are we
not producing an obstacle to at least some of the methods to get around, as you described, the possibility that people could have got more money if they had gone through a more complicated, more expensive and possibly more risky process?

Adam Griffith: It is a balance that we have to strike somewhere, I am not denying that.

Teresa Perchard: I think the key is it should not be painted as a hunt for money. Money is at stake here, but there should be other issues as well. If, as a result of an accident, you have lost substantial earnings, you may have paid for physiotherapy if your doctor advised you to do that and having funded that yourself, you may have had to make significant lifestyle changes as a result of the accident. The money may help people with the very real cost of the impact of the injury on them, rehabilitation and change in lifestyle, so it is not just something to stash away in a tin or go off to Brazil with really. It is about putting things right, but there should be other actions that put things right as well. The concern about simply saying “Let’s put them all through small claims because they are all small value money”, perhaps ignores the fact they have a significant impact. It is for the accident and the injury that is caused that you have to offer a system that helps the individual feel that is what has been taken into account and they are getting good advice at the start of it. They may not get quality legal advice if they are going through a simple process where their lawyers would not feel it was desirable or affordable to become involved. In our report last year we raised a lot of possible alternatives to look at this vexed question of how do you keep the cost down but get people the right sort of process? There are all sorts of things like possibly increasing small claims, setting case budgets, capping costs, regulating the costs limit, looking at more ADR processes, setting up a special tribunal which is basically what we are looking at with NHS redress, dealing with things in a specialist way because they are special. People have concerns the small claims process might not have the expertise needed to deal with some injury cases. Then wider things like helping people take out insurance before the event as well to avoid the CFA system, using that as a strategy so people protect themselves against unexpected legal costs. We very much want to see the Government have a wider debate about how to make the whole system work. That might mean having a range of solutions for different types of cases—value, type and sector—but that debate is not happening. There is no single bullet here; there are pros and cons of different things you could do, and you certainly need to do something about consumer education and understanding and quality of advice and make sure that gets into whatever system you have got.

Q258 Chairman: The starting point for our inquiry is partly “Is there a compensation culture?” You advise people who feel they have some case to take, some grievance to pursue, but presumably you are also involved with individuals who are part of providing public services and public activities who are worried from the other angle, people who may believe that there is a compensation culture and they cannot undertake the activities they want to undertake. Do you see that side of the picture in your advisory work?

James Sandbach: We do tend to think that the whole compensation culture debate has been misrepresented, particularly in the public sphere because it is not supported by the evidence of the number of claims going through the system. It has become a shorthand for a lot of different issues, an increasing welfare dependency and an increasing tendency to blame other people for misfortunes. I think a lot of different issues have come together to form this phrase “compensation culture” but every objective study that has looked at this. For example, the Better Regulation Task Force report a couple of years ago, when the Government charged them with looking at the overall costs of the economy in the public sector of so-called compensation culture, came out very firmly with the conclusion that there was no such thing as compensation culture. It was simply an invention of the media and political classes, if you like.

Adam Griffith: I think part of the problem is if we are talking about the kinds of things you were discussing last week, people volunteering or being scoutmasters, people think “maybe I will not do that”, but they do not go and get advice. It would be very difficult for any of us, if somebody came in here and said, “Look, I am thinking of volunteering to be a scoutmaster. What is my chance of being sued?”, we cannot answer that question. We can only say, “As long as you are careful, you will probably be all right”. I do not think people get advice on things like that. I think it would be very difficult to give them advice on that.

Teresa Perchard: I think part of the problem is if we have suffered a devastating accident in a public place or in the workplace, what it is saying is it is almost wrong to think about compensation, but raising a complaint and seeking compensation is not done by the majority of people these things have happened to. It is a very important way of finding out how safe or unsafe our workplaces are and identifying where there are problems which really do need addressing. If there are other ways of getting at some of that evidence, that is good. But it should be seen as very important to find out what the problems are and look at investing that intelligence in longer term solutions. I think what the compensation culture idea does create perhaps is fear in the public and voluntary sector about being able to afford the cost of claims and maybe that is one of the things that is being addressed by clause 1 of the Bill. Really if you are going to be taking a group of young children on a very dangerous outward bound course in the middle of winter involving contact in an overflowing, fast-moving stream, you should take care of them and not take the view that “it was going to be good for them so we bunged them in the water” with no regard to the safety and risks. It is very important that duty of care is not forgotten or put aside because it is overall better to be offering those
17 January 2006  Teresa Perchard, James Sandbach and Adam Griffith

sorts of opportunities than to not do so. I hope that will not be the consequence of that bit of legislation. The less we can talk about compensation culture and more about how do we put problems right, perhaps we will reduce the fear in the voluntary and public sectors about these issues. Claims handlers hanging around playgrounds is a bad thing and maybe the legislation will clean up that market and stop that happening; it should do if the system gets up and running quickly and is good. **Chairman:** Thank you very much indeed. We are very grateful for your help this afternoon.
Tuesday 31 January 2006

Members present:

Mr Alan Beith, in the Chair

David Howarth
Barbara Keeley
Mr Piara S Khabra
Julie Morgan

Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Witnesses: Baroness Ashton of Upholland, a Member of the House of Lords, Under Secretary of State, Department for Constitutional Affairs and Rt Hon Jane Kennedy MP, Minister of State for Quality and Patient Safety, Department of Health, gave evidence.

Chairman: Baroness Ashton, Jane Kennedy, Minister of State, we are delighted to have you both with us this afternoon, Baroness Ashton being no stranger to us, but it is good to have a Minister from the Department of Health with us, particularly, of course, in relation to the NHS Redress Bill. We have to declare any interests we might have around the table.

Jeremy Wright: I am a non-practising criminal barrister, though never did any negligence I am glad to say.

Chairman: I am a consultant to a company which owns holiday parks and therefore may have an interest in some of theses matters.

Barbara Keeley: I was involved in a car accident and the insurance claim is still unresolved.

Q259 Jeremy Wright: Can we start with the Compensation Bill and particularly clause 1 of the Bill. You may or may not know that we have taken a substantial amount of evidence on clause 1 in particular, the reasoning behind it and, of course, on the possible synergies or conflicts between clause 1 and the case of Tomlinson, of which I know you are well aware. In your view, is clause 1 entirely on all fours with Tomlinson? If it is not, is that going to cause problems? Having considered all of that, is it still the Government’s view that clause 1 should stay in the Bill?

Baroness Ashton of Upholland: First of all, I have tried to read all of the evidence that we have received, so I am aware and, of course, as you would expect, Mr Wright, I have had quite a lot of representation in all directions on clause 1. If I start with the last question you asked me. It is our intention to keep clause 1 in the Bill. We do believe it is compatible with current case law, but because we believe there is a perception out there that somehow the law is not in the right place, we think it is appropriate, and, indeed, we are supported in this with our parliamentary counsel, to make sure that we make it clear on the face of legislation. If I can add, you will probably be aware that there are two different lobbies in a sense and I have described my role as being on a see-saw. There are those who feel very passionately that activities have declined in our culture in this country but we tackle the perception of compensation because of people’s fear of compensation, which is particularly true around Outward Bound, Scouts, Girl Guides and so on, the kind of adventure activities that people might have. They want to see something in the legislation that at least seeks to recognise that the courts have a role in making sure that these activities continue. At an equal other end of the see-saw, there are many of the lawyers involved who feel understandably that case law is perfectly adequate, therefore why are we, in this sense, putting this into statute. I hope I have sat with the case law in the middle of the see-saw. The Government has also said, and I have made it clear at the Committee Stage of the Bill, that I am not wedded to the wording and I am perfectly willing to look to see if we can make the clause more effective but not to change the law.

Q260 Jeremy Wright: Would I be right if I were to paraphrase you and say you are happy that clause 1 is consistent with case law but you do not think that case law is adequate? You would rather have the additional impact that primary legislation brings to this debate by setting it out in this clause?

Baroness Ashton of Upholland: I would not say case law is inadequate. I think there is a perception that somehow the law does not quite do what it does do and it is appropriate and proper within statute to seek to try and correct that perception.

Q261 Jeremy Wright: That brings me to my next question. You clearly concluded that it is necessary to have primary legislation to deal with that perception. What else did the Government consider? What else is the Government considering, perhaps on the basis of what you said in addition to primary legislation, to address that misconception?

Baroness Ashton of Upholland: We have got a ministerial steering group—which my colleague Rt Hon Jane Kennedy sits on, there are nine ministers involved—in order to look right across the Government and through Government through particularly the public and voluntary sectors to see how we can support organisations to deal with a particular problem of misperception which might be affecting the way in which, for example, activities take place or do not take place and the anxieties that particularly those involved in volunteering feel about the potential to be taken to court or have some kind of action taken against them. The Bill is a very small part of a much broader package of activity to seek to ensure that we do not get a compensation culture in this country but we tackle the perception that we already have one.

Q262 Chairman: Can I stop you for a moment before we go through the alternatives to establish what perception I might have if I was a school teacher or
a Scout leader. Am I going to go scurrying to the statute and get out this law and say, “I have now read this law and it seems to me that if an activity is desirable then any negligence on my part, or any failure to take proper precautions, will not be counted so heavily because what I am doing is obviously desirable”? Is that the conclusion I am supposed to draw?

**Baroness Ashton of Upholland:** The conclusion you are supposed to draw is that we expect you to do proper assessments of risk and take appropriate action in so doing. That is pretty well laid out if you are a school teacher in terms of the advice you will get both from the Department for Education and Skills and your local education authority. Equally for most voluntary organisations, clearly they have very clear assessment rules and so on to give confidence to the participants, or the parents of the participants, that those individuals will be well cared for and looked after. In any activity there is a recognition that there is the potential for an accident to occur, there is the potential for things to go wrong and, therefore, it is about making sure that one understands the way in which risk is assessed and looked at on the one hand and an understanding that there is a recognition that just because something has gone wrong or an accident has happened that there is an automatic claim to be made. That is what we are seeking to try and address. Of course, an average person is not going to be rushing out to read the statutes, I am not sure I would ever have done so had I not been doing this role, but we are hoping that through the work we are doing with organisations, and through our Members of Parliament in both Houses, we are able to get the message across that we do understand and take this have captured that without saying to the courts, we are defining it. We think it is much better that issue quite seriously and have sought to address it not just with clause 1, by any means, but by the work we are doing generally.

**Q263 Chairman:** Mr Wright is going to come on and explore the alternatives, but I am still a bit puzzled. If the problem now is that people do not really understand what the law is, and I think that must be the case, then how likely is it that they will understand what the law is simply because an additional piece of wording has been put in clause 1 of the Compensation Bill?

**Baroness Ashton of Upholland:** They will not just because an additional piece of wording has been put in the Compensation Bill, that is the response to people feeling that they wanted to see this erroneous perception addressed. As I hope I have already said, but clearly not well enough, it is a tiny part of a much bigger picture which is about working with organisations, schools and so on through both the ministerial group and beyond it to make sure that people understand that we do want them to have good activities, we do want them to provide opportunities, particularly for our young people but not only for them, and we do recognise, within properly addressed risk assessment and properly worked out procedures, that we want people to have a good time and enjoy themselves and recognise that not everything in life is risk free.

**Q264 Jeremy Wright:** Of course there is also the issue of whether or not we have really brought any more certainty to the situation here because, as you will also appreciate, the concept of desirability is an extremely subjective one. We know, of course, that what will happen is the courts will define in their own way what is desirable and what is not and as we build up a further body of case law on the back of this Bill on this Act, if that is what it becomes, it will become even more obvious what is desirable and what is not. At the moment, you could argue, could you not, that saying, “We want it to be a desirable activity and we want the courts to take that into account” does not take us very much further until we know what the courts see as desirable?

**Baroness Ashton of Upholland:** First of all, of course it will become an Act, I noticed a sort of slight hesitation in your voice as to rather maybe it would not, so when it becomes an Act. We chose the words quite carefully because we wanted to use an expression which has got a lot of meaning but not to seek to define it precisely because we thought the courts should define it. I have already indicated, I think, at Committee stage and beyond to those who are interested in this that I am not particularly wedded to that form of word, if people can come up with another form of words which captures the essence of what we are seeking to do. What we are seeking to do is to say something about the kind of activities that we would all agree are good things to happen, particularly, as I have indicated, because I am conscious of those around the voluntary sector who provide opportunities or those in the leisure industry who feel very strongly about this, this is something which needs to be addressed. We think we have captured that without saying to the courts, “We are defining it”. We think it is much better that they do and over time, of course, they can look at the definition in the context of what is happening as well.

**Q265 Jeremy Wright:** Can I invite you to deal with what else might have been done because certainly you will be aware, and as constituency Members of Parliament we are all aware that when people talk about the compensation culture or they talk about risk aversion, what they quite often say is, “The Health and Safety Executive will not let me do X” or “The Health and Safety Executive’s attitude is unduly prescriptive in this regard”. Did you consider, or are you still considering, asking the Health and Safety Executive to review their attitudes, their procedures, the communications that they have with the various institutions and bodies they supervise, to see whether or not they can change the perception of what they do so that people do not feel as risk averse as perhaps they do now blaming, perhaps unfairly, the attitude of the Health and Safety Executive?

**Baroness Ashton of Upholland:** I think the Health and Safety Executive would agree with you that there is a real issue about perception, as I think Jane from her previous existence would be aware.
Jane Kennedy: When I was their Minister.

Baroness Ashton of Upholland: Indeed. They are working with us very closely, in fact, they will be at the next ministerial group and, of course, the Department for Work and Pensions, in the shape of Lord Hunt who has responsibility in this area, is working very closely with them. They agree there is an issue that people assume it is them and people say it is them, when it is not, and they are trying to look at how best they can address that, both by explaining the issues that concern them, which are real issues and need to be addressed properly, but not allowing themselves to be used as the scapegoat, which we know happens on occasion, or we have been told and, indeed, books on tort, though I cannot claim to have read one myself, then I would agree with you MPs are working who feel very strongly that they need to be addressed properly and, therefore, I am not prepared to let my child run over in both directions because, on the one hand, there are those who say, “We cannot do that because of the Health and Safety Executive” or “... the health and safety rules”. They are very much part of this whole process, in a sense a much broader process, to try and tackle that for precisely the reasons you have quite rightly indicated.

Q266 David Howarth: Minister, I should apologise for not being here at the start of your remarks. Can I go through a number of points about clause 1 which have been bothering us as we have gone through the evidence session. The first is colleagues have already referred to the lack of any great benefit of clause 1, that is not many people will hear about it and it will not clarify the law very much. On the other side there is the cost of clause 1, which is that its very existence will produce satellite litigation, it will produce litigation to find out what it means. It will provide opportunities for lawyers to get to court to try to explore the different possibilities of the wording of the clause in question. Ho would you respond to the conclusion that some people come to hearing this evidence, that the benefits of the clause which exist are very small and the costs have been quite large and, therefore, it should not be part of the Bill at all?

Baroness Ashton of Upholland: I have considered the issue of satellite litigation and the advice I have is that we do not believe there will be satellite litigation in any real sense. Of course you are right that the courts will be seeking to define the term we have used, if that is the term that finally ends up in the Act. As I have already indicated, I am quite open to looking at other forms of words to capture what I think we would all agree we would probably find a way of describing but not defining because we think it is important that the courts have the ability to continue to define and work through these issues appropriately. I do not expect it to be costly. The difficulty—and I do not know if you were here for my see-saw analogy—is to try and recognise that there is a genuine problem of an erroneous perception that the law is not in the right place and that the courts are not doing their job effectively, which, in my view, they are. It needs to be addressed and we are fully aware, talking to many of your colleagues in the House of Commons, that there are a lot of MPs and organisations with whom those MPs are working who feel very strongly that they want to see something within this Bill that recognises the particular problem. It is always difficult to find a way of so doing that does not, in this particular instance, affect the law adversely or seek to change the way the law is working well but, in a sense, to try and tackle that erroneous perception. All the advice I have is that it is quite legitimate to try and do that within statute. It is a case, Mr Howarth, that I get run over in both directions because, on the one hand, there are those who say, “This does not go far enough, we want to see a much stronger clause which basically says that activities, such as Outward Bound, sporting and so on, should be considered to always be desirable and there should be a much stronger and further recognition of the risk involved in that”. That unfortunately takes us, in my view, too far for the potential for people not to take the issue of addressing risk seriously and you would end up, in my view, seeing those activities potentially wither because parents or others may say, “I am not sure the risk assessments are being done properly and I am not sure they need to be done properly and, therefore, I am not prepared to let my child participate in those activities”. That is one of my problems. On the other equal and opposite side are those obviously involved in the law who say, “The law is working perfectly well, what on earth are you doing fiddling around with it? You do not need clause 1 because all clause 1 does is reaffirm what we already know”. What we have sought to do, by making this kind of affirmation and trying to tackle the perception, is to say, “We feel very strongly that it is important and the courts do take into account, as one of the factors they may take into account, the question of a desirable activity”. It is a tiny part of a much bigger piece of work across Government, which I am privileged to chair, trying to tackle this more general issue about ensuring we do not get the compensation culture which we currently do not have but there is perception that we do.

Q267 David Howarth: I think the problem we have is seeing any causal link between passing clause 1 and changing public perceptions at all. Members of the public do not read statutes and do not read books on tort, sadly; that is the problem we have there. On the other side, the problem with the drafting is that I started out with a view that this could be drafted better and solved that way and perhaps you should put in “for the avoidance of doubt” because that is what normally appears in statutes which are reaffirming the law rather than changing it, and that is not there, and you should use the words “social utility”, which are the words used by the courts and the academic commentators on this part of the law. I thought that would be a better way forward, but then the evidence we had from lawyers was that even that would cause some confusion and would lead to further litigation. I still cannot see why we need this clause in terms of its marginal cost and its marginal benefits?

Baroness Ashton of Upholland: To take your first point, if I was expecting people to read statute or, indeed, books on tort, through my see-saw analogy—I am privileged to chair, trying to tackle this more general issue about ensuring we do not get the compensation culture which we currently do not have but there is perception that we do.
bigger picture, then the ambition is that by doing something about clause 1 and working with all the organisations, not least because, as you will appreciate, there are many, many conversations I have had with those who say it is not far enough or it is too far and so on, the debate about trying to address this has been wider than it would otherwise. What we want to do is work with all the organisations, particularly those who work with volunteers who they say that volunteers are worried in this area particularly, but also my colleagues in Health, the Home Office, in the Department for Education, and so on, the nine ministers involved, to be able to get the messages out. It is no more than seeking to say, “There is a perception” and, Mr Howarth, you will probably know from colleagues in the House of Commons, there are many MPs who when you say, “but the law does a good job” will say, “That is not what I hear, I hear there is a real problem with the courts” and so and so forth, it is to try and tackle that. If it was the only thing we were doing then of course it would be of itself inadequate, it is not, it is part of a much broader picture. The ambition is that it seeks to do something small but positive without damaging the way the law and the courts operate but to send a message out. I am not wedded to the wording. I take on board lots and lots of suggestions on a daily basis, more or less, about the use of the wording. You will know that when you take that wording and look at it with parliamentary counsel sometimes there are unintended consequences or there are particular meanings that the courts have given to particular phrases or there are organisations that say, “That is not what we are. We want you to think about us because we are sporting and because we are this . . .” and so on. We came up with desirable activity because we thought it had a pretty clear plain English feel to it but allowed the courts to define it; I am not wedded to it. If there is a better phrase or there are others things we could add in, I am perfectly willing to look at that. I have said that throughout the Committee, we will continue to do that and continue as it goes into the House of Commons too. The principle we are trying to establish is simply to try and tackle an erroneous perception in a small and simple way as part of a much bigger picture.

Chairman: Before I call Mr Howarth, I think you might need to declare an interest.

Q268 David Howarth: Yes, I will declare an interest, I do write books on tort. Can I raise one final point on the Health and Safety Executive. I accept, as we all do, that there are examples of other organisations using health and safety, as it is called, as an excuse to do something that they want to do for other reasons. One problem did arise in the evidence that was put to us about the operation of the HSE. They started by telling us that their aim was to make sure that people acted reasonably, that people did not undertake disproportionate risk assessments and did not pay too much attention to small risks. The trouble was when we got on to the subject of the targets that they were being set, in fact, the targets they had agreed for themselves, those targets were not in terms of reasonable behaviour, as you might expect, they were in terms of the absolute number of accidents. I think there is some concern that the HSE, in following an absolute target of always reducing the number of accidents, is, in fact, following a policy of reducing the number of accidents even where people have behaved reasonably. I heard you talk about this as I came in, and I would fully agree with you that accidents can happen even where no one is to blame, where everyone has acted reasonably, but that the target structure the HSE has imposed on itself was accepted seems to go against that very reasonable point.

Baroness Ashton of Upholland: That is an interesting point and one that obviously is part of the discussions which the HSE is thinking around, making sure that it is tackling these issues appropriately. I do not see it in that way. Apart from anything else, I think it is absolutely right that the HSE has a view on thinking through how does it measure success, and obviously one of the measures of success is that there are fewer accidents. I do not think that is contradictory to saying when people behave reasonably in lots of really good circumstances, nonetheless an accident could happen. I do not see them as contradictory. I do not think the HSE would see itself as being so focused on that target that it could not work, and does work, as I know Jane would say, with employers to make sure that people are behaving reasonably and to eliminate unnecessary risk where that is appropriate but not, as you heard me say, to do anything other than recognise that things will go wrong and things will happen. I think one of the great advantages of having the Health and Safety Executive is their ability to go in and look at what happened and to see what could have been done differently, or what could be done differently in the future, to tackle particular problems which arise from time to time that you cannot necessarily predict, though sometimes you can, where we can do something to prevent them happening in the future.

Q269 David Howarth: Perhaps the target should be to reduce the number of accidents where someone had acted unreasonably as opposed to simply to reduce the number of accidents and that might capture what they are trying to do better.

Baroness Ashton of Upholland: I do not disagree with you except to say that even when everybody acts reasonably and something happens it is always worth looking at whether you could prevent that happening again.

Q270 David Howarth: You always can but the trouble is can that only happen at excessive cost, especially cost to other people’s activities, like people enjoying a day out in a royal park, which was one of the examples that we heard?

Baroness Ashton of Upholland: That would not be, obviously. Again, you are into the issue for the organisations who are providing activities to be able to give people the comfort and security that they have done proper risk assessments and that risk has
been reduced. Inevitably in some activities there is an element of risk, that is what you are doing, but it has got to be risk that you have got a real sense of what you have taken on as opposed to it being risk that has been forced upon you or put upon you because somebody has not thought through the implications of the activity. That is particularly true with children who cannot make those assessments and judgments for themselves. Anyone who has ever, as I have, taken a group of school children on a trip will know there is always an element that one is conscious of what could happen. What matters in circumstances even where there has been good risk assessment, people have behaved reasonably, is it is always the builder says, “I cannot remove that overhanging coping stone which may any minute fall on people have behaving reasonably, it would prevent them doing the really good work they are doing to somebody has patently not done it. It would prevent the problem is that sometimes the two get confused. Is thinking about how many accidents occur and where they occur, even if they are doing everything that at that time appears to be reasonable, then you would never have improvements in working practice.

David Howarth: This is probably a question of separating two aspects of their work, is it not? It is the blame aspect, the legal aspect, of bringing prosecutions, which is what we have been talking about in this Committee, and the further research, improving standards over all work, which I think really should be seen as a separate activity. Perhaps the problem is that sometimes the two get confused.

Q272 Chairman: It does impinge in just that way. If the builder says, “I cannot remove that overhanging coping stone which may any minute fall on someone because I need scaffolding to do that under the Health and Safety Executive’ rules, based on previous accidents, so I have got to leave it hanging there until I can get another builder to come who has got the scaffolding equipment to enable me to do it”, you are not balancing risk against desirable activity, you are balancing one risk against another risk. The capacity to make those judgments is what the system seems to lack. The clause does not help you with that because the clause simply puts together risk on the one hand and desirable activity on the other, not one risk and another risk.

Baroness Ashton of Upholland: No, and it does not claim to. With the coping stone, you would have somebody standing underneath it saying, “Watch out, this stone might fall at any minute”. You can avoid both risks, in that sense, until the builder arrives with the scaffolding.

Q273 Chairman: It is based on plain common sense. The anxiety that people have is that the application of common sense is not what is now being asked of.

Baroness Ashton of Upholland: Common sense is a critical part in all of this.

Q274 Dr Whitehead: If we can go to part two of the Compensation Bill. That predominately deals with the regulation of claims management services but does not appear to say very much other than creating a regulator and ensuring that people do not practise claims management without being regulated. It does not say what those regulations might consist of practically. What does the Government have in mind in terms of practical applications of regulation?

Baroness Ashton of Upholland: The purpose of this Bill, as you know, is to create quite a lot of the regulation through secondary legislation.

The Committee resumed from 4.40 pm to 4.55 pm

Chairman: As everybody is back we will resume. Mr Vaz has an interest to declare.

Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial appointment.

Q275 Dr Whitehead: Baroness Ashton, I had just asked you a very well crafted and exact question.
Baroness Ashton of Upholland: I will seek to address it. You were asking about the regulation. I have indicated that, of course, one of the great joys of this particular piece of legislation is our ability to use it to capture other areas in the future. For example, had we already had it, endowment mis-selling might well have been captured by it, but I say that as an aside. That is why so much of it is set out in regulation and we will be preparing draft regulations very shortly. The kinds of areas we want to cover, of course, are ensuring that there are proper systems in place for handling clients' money, for the way in which individuals are approached, for the way in which cold calling is done, for advertising. Those are the kinds of areas that we want to seek to address when we have decided how best we move forward on finding the appropriate regulator.

Q276 Dr Whitehead: Do you think your regulations might include some form of restrictions on advertising and, if so, how far might that go?

Baroness Ashton of Upholland: We are looking at advertising in a number of ways. The particular piece of work that is going on between ourselves and the Advertising Standards Authority, which is a jointly funded piece of work which I think I will get first sight of towards the end of February, is looking to ensure that the advertisements that exist fit within the ASA’s rules and procedures and for them then to consider whether there is anything further that needs to be done to ensure that those who advertise do so appropriately. That is the first piece of work and that is very much us working closely with the ASA to make sure that the rules they have fit the bill while recognising the legitimacy of advertising, of course. The other piece of work on advertising is done with our colleagues in the other departments looking at advertisements within the public sector. The principle behind that is that where somebody sees an advertisement, perhaps in a hospital, as Jane can talk further about, or in a police station or in a local authority building, there may be a question that somehow we have given it an additional credibility that perhaps does not really fit the bill in terms of that particular advertisement. What we have been doing is working with colleagues across Government to see whether there is appropriate advice that can go out, for example, in the case of the Department of Health to hospitals, in the case of the Home Office through the Association of Chief Police Officers to police stations and so on to remind them about the key questions about advertisements and how they might be perceived. The final thing I would say on that is that it is very important to make the public get to know that they can make legitimate claims. Part of the work we are doing is ensuring that legitimate claims are pursued and we are trying to streamline the process (and work is just beginning on that) to make sure that can happen. We do not want to stop people getting information but we want to make sure that it is appropriate information.

Q277 Dr Whitehead: On the face of the Bill it is strongly implied, for example, that there are penalties for people pretending to be claims managers because they are not within the regulated conditions. That seems to imply that there will be some form of compulsory training or minimum standards to be met in order for people to ply their trade as claims managers. Is that in the mind of the Government as well?

Baroness Ashton of Upholland: Indeed. We want the regulator to be very clear about the standards to be followed. I am quite sure that, as we get the regulator in place and as time goes on, looking at the whole question of training will be an important part of that to make sure that not only do we have the right standards but that we keep them right across this whole sector.

Q278 Dr Whitehead: Will there be a code of practice along with that?

Baroness Ashton of Upholland: Indeed. The ambition is that we have the regulations and that the regulator will have his or her rules and code of practice which will enable those involved in this area to be completely clear about what the requirements are, but appropriately for Government in a sense to set the overview of that and then for the regulator to be clear about what is expected in a more narrowly defined way of those involved in claims management in order to make sure that they do comply.

Q279 Mr Khabra: May I draw your attention to a proposal in the Bill? The Bill establishes a statutory framework for the regulation of claims management companies and the Government has indicated at this stage that the regulation of claims management services will in due course be integrated into the proposed new regulatory framework for legal services. Given that the Government is proposing less self-regulation for lawyers, is it reasonable to expect the Claims Standards Council to look after both the interests of consumers and claims management companies? If not, who should regulate claims management companies?

Baroness Ashton of Upholland: We are looking at a number of options for the regulator at the present time. The Claims Standards Council is one possibility. We have a report done by a consultant, Mr Boleat, to see whether that would be appropriate and I am waiting presently for the Claims Standards Council to respond to that report. When they have responded I propose to put much of the report and the response in the public domain so that members of the committee in the House of Lords currently looking at the legislation but, as importantly, those who have an interest more broadly can see what is being suggested. There are other possibilities that we also want to look at. One is the potential for the Lord Chancellor through some form of delegation to be the regulator himself, and the third option is to give it to an existing regulator. The criteria that I am looking at include the cost of setting up and maintaining regulation based on experience in other fields, a recognition that, though we think there are about 500 companies presently in this field, there could potentially be quite a drop or a change in the number of companies once regulation comes in, and experience in areas like, for example, gangmasters
Chairman: They would automatically fall within the investigation to be referred to the Litigation organisation would be subject to the regulations. organisations back in if there was a need to do so much I believe this scheme will enable healthcare legislation does allow that we could bring but I cannot emphasise to you strongly enough how them to have regard to the code of practice. The made. I know that is a long and roundabout answer current consideration is whether we should expect a local level to learn from mistakes that they have mistake to be made very early on at a local level. The things change we might want in a sense to recapture their treatment and therefore redress is necessary; it otherwise from commercial claims to the purpose of the scheme, I thought Steve Walkermanagement companies? You have to ... However, that does not reallyby that. What is your thinking on that?Baroness Ashton of Upholland: The approach the Bill takes is to seek to capture everybody and then to exempt people. That enables us to make sure that we exempt appropriately but also to recognise that as things change we might want in a sense to recapture later on, perhaps because the legislation is used to capture other areas, or because shifting and changing activities by organisations may result in them wanting to pick up a particular aspect of claims management which would then require them to be taken forward. Our plan at the moment, because I do recognise the cases that you have identified, Chairman, is to exempt trade unions and voluntary organisations which do claims handling and which may feel that they ought to be treated differently from commercial claims management companies? You have to remember that we have major cases going on at the moment about the handling by trade unions of the miners' compensation scheme. Very serious issues are raised by that. What is your thinking on that?Baroness Ashton of Upholland: Our plan at the moment, because I will certainly check who we have had discussions with if you like and I can provide that information to the committee but, with regard to the purpose of the scheme, I thought Steve Walker put it really succinctly and well when he said that this is a low value, fast track claims handling scheme. That is what he called it when he came to speak to you on 17 January. However, that does not really give you the full flavour of why we are doing the scheme. Why I am particularly pleased to be the sponsoring Minister for the Bill is that this scheme is not just about improving access to justice for people who believe that something has gone wrong with their treatment and therefore redress is necessary; it is also about providing a scheme which allows for determination of liability and assessment of a mistake to be made very early on at a local level. The reason why I am really pleased about that, wearing the hat that I have as Minister with responsibility for patient safety and quality, is that the process of this scheme will cause a change in culture in the Health Service; I am absolutely confident of that, and you will see a greater willingness of the Health Service at a local level to learn from mistakes that they have made. I know that is a long and roundabout answer but I cannot emphasise to you strongly enough how much I believe this scheme will enable healthcare professionals to stand up and say when a mistake has happened, to involve the patient in that mistake, to draw the attention of the patient to the scheme, to have the incident investigated by their own organisation and then for the outcome of that investigation to be referred to the Litigation Authority. I know the concerns and I have been
following the debates in the Lords and I am aware of the concerns around the independence of the process, but I really do feel very strongly that what we need to get to is a system which delivers what patients tell us they want, which is an acknowledgement that something has gone wrong, an apology from the organisation and, where necessary, some redress (where that is appropriate), but one of the most often stated reasons for pursuing a complaint is to be reassured that the organisation has learnt from the mistake so that future patients should not have the same experience. We believe therefore that having a totally independent process that allowed an independent investigator, for example, to undertake it and independent processes that would lift the whole thing at quite an early stage out of the local organisation would stifle the sort of learning that we want to promote. This scheme is potentially very valuable to us in the Health Service and we want to promote that aspect of the scheme, whilst at the same time we do accept that those people who are taking a claim forward or who have made a complaint and for whom there has been a mistake or an accident need to have the best possible advice available to them. That is why we have been listening to the arguments that have been made in the Lords and we have, I think, reinforced the commitment to providing independent legal advice. When there is an offer of redress made it an offer will be made alongside the offer of redress for that to be independently assessed by a legal firm that has expertise in that field.

**Q286 Julie Morgan:** So the independent legal advice would be offered at the point you were offering redress?

**Jane Kennedy:** It will always be offered at that point but that is not to say that an individual who doubted what they were being told at an earlier point could not at that stage say, “Could I have an independent legal opinion on that?”.

**Q287 Julie Morgan:** So you could have that earlier in the scheme?

**Jane Kennedy:** What we are looking for is flexibility in the way that we will be operating the scheme to allow individuals, if they need it, to seek that kind of reassurance, but the scheme itself is designed to give a very quick response to people who believe that something has gone wrong with the treatment that they have received.

**Q288 Julie Morgan:** Does the Department envisage that doctors and lawyers would have fixed fees?

**Jane Kennedy:** Yes. I have seen figures that we anticipate of between £200 and £500 for the cost of different reports. This is not a new field that we are operating in. There are already given costs but we expect that the operation of this scheme will reduce the amount of money paid in legal fees. We expect it will increase the amount paid in compensation but we anticipate there will be a reduction in the amount that we pay in fees.

**Q289 Julie Morgan:** What if, during the process, it was decided that the claim was worth more than £20,000? Will it be possible to extend the threshold in particular circumstances?

**Jane Kennedy:** If it becomes clear that this is a serious case that goes through the £20,000 ceiling the redress scheme will not deal with it. It will be dealt with as any other scheme of a greater amount would be. Anything that is estimated to be above the value of £20,000 would be taken out of the scheme and dealt with separately.

**Q290 Julie Morgan:** So if, during the process, it emerged that £20,000 was too low a limit it would then come out of the scheme completely?

**Jane Kennedy:** Yes. It would go through the normal route that applies at the moment.

**Q291 Julie Morgan:** Talking about the costings again, if you are paying for an independent medical report, independent legal advice and setting up a system to investigate claims, would there be any savings at all on the existing model?

**Jane Kennedy:** We did not go into this with the view that we were creating a cost saving scheme. We estimate that overall costs may increase. Because we anticipate there will be more cases dealt with under the scheme we think the costs may be around £48 million in the first year, which is a small increase in the context of the huge investment that we have seen in the Health Service over the past five years. As I have said, we think the scheme will result in higher costs overall but we think we will achieve a saving of around £7.6 million on claimant lawyer costs. There will be more spent but more of it will be going to patients.

**Q292 Julie Morgan:** So you do not anticipate any reduction in the amount of compensation to victims?

**Jane Kennedy:** No; not as a global figure, that is.

**Q293 Julie Morgan:** How much do the current non-legal complaints procedures cost that are in the Health Service at the moment and do you see them being affected by this scheme coming in?

**Jane Kennedy:** I have not got that figure. I will get that figure for you and write to the committee with it.

**Q294 Julie Morgan:** Would you see those complaints being scaled back when this comes in?

**Jane Kennedy:** If the scheme operates as I hope it will, the Healthcare Commission process, which is a complaint process at the moment, would, I hope, see fewer cases going to it. What we want to achieve is a scheme whereby the healthcare organisation itself, so the hospital trust or the service provider locally, will say, “Hands up. A mistake has been made. This should be referred. We will investigate it”, and then it should be referred to the NHS Litigation Authority for the purposes of the scheme. I think that, because more cases will go that way and there will be, I hope, a greater openness and a willingness to give the apology that I referred to earlier, there...
ought to be fewer complaints failing to be resolved locally and ending up at the door of the Healthcare Commission, which is what happens at the moment.

Q295 Barbara Keeley: More questions really about the operation of the scheme. You have touched on, I think, the fact that you feel there would be an increase, so it is just another question about that. We heard from the NHS Litigation Authority that when they ran a pilot similar to the new scheme, most of the claimants were people who would not claim under existing processes, so in fact they were additional and new claimants. I think you said there would be more cases. Have there been estimates made of the number of additional claims which you think will be generated under the redress scheme?

Jane Kennedy: At the moment the number of claims is going down. I have not got a figure of estimates of the number of cases that we might get immediately in front of me, but if there are specific questions like that, that I have not been able to answer because I do not have the data, I will certainly get them for you. As I have said, we are trying to guesstimate what might happen. I have got some figures here that say we expect between 3,900 and 10,700 cases to be eligible. If you compare that with the current figures, which I think you have had—if you have not, again I can include those for you—the current numbers of claims that the NHS Litigation Authority is dealing with have come down from 7,798 in 2002 to 5,609 now, so we anticipate straddling that number.

Q296 Barbara Keeley: In fact, the next question links to it in a way. Do you intend to pilot the scheme so that you can assess its impact? Will you pilot it in part of the country perhaps?

Jane Kennedy: The NHSLA has been doing some piloting. We do not anticipate that we will further pilot the scheme. We are going to extend it to the whole of secondary level care, including some elements of secondary care that are moving out into the community. I suppose you could say we regard that as the pilot because we are then going to see how that works before we decide whether or not we should extend the scheme to primary care.

Q297 Barbara Keeley: You have talked in terms of some aspects of what you would like to see in the scheme, but we are interested in how you would measure the success of the scheme. Will you have targets and what will they measure? One of the things you talked about which might be quite difficult to measure is whether or not an organisation learns from its mistakes.

Jane Kennedy: We would not set targets as such; however, the Healthcare Commission will have a role to play in this. As part of its annual health check will consider claims against the organisation; where those claims have originated, what the organisation has done to respond to those claims and it will be part of the process by which healthcare organisations—and I keep using that phrase because we are not just talking about the NHS hospitals, we are talking about the whole range of organisations that provides secondary level services—the Healthcare Commission will consider whether or not the organisation has responded adequately to the claims made against it. We are not going to set them targets and say, “This number of cases should be had”, I think that will stifle the operation of the scheme. We want to let the scheme run and let it be responsive to what patients experience at the local level. I said we are talking about between 3,910 and 10,000 cases roughly. That is in the context of a health service which has something like 1.6 million people receiving treatment every day from the Health Service. The figures are amazing: 44,000 people every day attend an A&E department in England and 120,000 attend outpatient appointments every day. The context of the claims and the incidents that are actually recorded seen against that are very small. What I would hope to see, and one of the reasons why in Government we are relatively relaxed about an increase in the number of cases, given that large scale of work the Health Service is engaged in, is the more people can say, “I think something has gone wrong” and an acknowledgement of that, the faster the services will improve and the better the experience the patients will have of the Health Service. I am absolutely convinced of that.

Q298 Barbara Keeley: On the last point I raised about whether or not there is a perception the organisation has learned from its mistakes, I know in my time as an MP that is very important to people if there has been some tragic mistake or something has gone wrong. Will the patient or the patient’s family be involved in that?

Jane Kennedy: Very much. One of the benefits of the scheme will be instead of assuming the position, which is what happens at the moment, where you have a patient who believes something has gone wrong, they make a complaint, they are not satisfied with the complaint, they go to a lawyer, and within the organisation there is a closing of ranks and a defensive response, if instead of that, you have an organisation which says, “Something has gone wrong here, we need to learn from it. Before we apportion blame, let us see what lessons we can learn, acknowledge we have made a mistake”, and give the apologies I have referred to which is very important, particularly if there has been a serious mistake in somebody’s treatment, that will go a long way to improving patient experience. I am sure.

Q299 Barbara Keeley: Just a couple more things. You made the point that a claim of more than £20,000 would be taken out of the scheme. If the scheme proves to be successful, which clearly we hope it will do, do you expect that it will be extended at some point to cover claims of larger amounts over £20,000?

Jane Kennedy: One of the beauties of doing regulation by secondary level legislation which we do in Parliament—which when you are in government you love, when you are not in government, you get very frustrated by—is that you can quickly and relatively easily make amendments
of that kind to legislation of this nature, so we think that we will be able to do that because of the way we set up the legislation.

**Q300 Barbara Keeley:** Finally, clearly there is a tension between the need for a culture of openness. The possibility that doctors whose actions have been complained of will feel vulnerable to professional discipline is a major tension of trying to arrive at the learning culture you talked about. How will the redress scheme deal with that?

**Jane Kennedy:** There will still be the normal rules and the normal procedures for dealing with medical competence. I would not anticipate that this scheme will in any way reduce the authority of various professional bodies which oversee the conduct of professionals. I think that as we run the scheme and confidence in the scheme grows, clinicians will feel less concerned about them becoming the scapegoat for a mistake having been made, a wrong procedure or a mistake with equipment having occurred. I think they will join with us. I know that there is an appetite out there amongst health professionals to make sure they say, “There is a mistake here. I have made a mistake and this is what has happened as a result. I have made a mistake because of these factors”. Then I know there will be willingness to sign up to that on the part of the professionals.

**Q301 Keith Vaz:** Minister, I just have one question. I think the approach that you set out if something has gone wrong that the complaint is dealt with firstly at a local level must be the right one but in many cases—you must have this in your surgeries, and I have it when people come to see me with problems about the local health service—the letter that they get back, that initial letter from the health authority is not as transparent and helpful, as you have pointed out, that it should be. Is there any guidance coming from your Department to teach chief executives of hospitals how they should deal with the complaints in the open and transparent way that you have just described?

**Jane Kennedy:** There is already guidance on that and the Healthcare Commission would take an active interest, particularly if they were receiving a lot of referrals from a particular trust, in why that was happening, so there is already guidance in place. I feel as if I keep repeating myself in that I think that once this scheme is operating and we begin to see the benefits of it at a local level there will be a real enthusiasm for it that we have not seen before. The National Patient Safety Agency at the moment collects and counts referrals to it of adverse incidents in the Health Service. They do it on an anonymised basis and they gather the data and then look at areas of concern, procedures that are causing concern, and then can go back with advice to organisations through their safety alert process which can say, “There is something going wrong in this procedure. You need all to be aware of it”. I think there are such a lot of benefits that can flow from a greater culture of openness. I understand the point you are making about the letter. I have been on the receiving end myself. If you have a process which is involving the patient much more closely at a local level in the process of resolution so you do not have just the cold, “We are investigating your complaint”, and then a letter to say, “We have investigated your complaint. Yes, we failed to meet the high standards we would normally expect. We apologise for that and we are taking steps to redress it”. You and I have seen those letters. It leaves the patient cold because they have to accept on trust that what the organisation is telling them has happened. This process should be much more open at a local level and would allow the patient greater assurance that not only has that been said but that it has actually happened.

**Q302 Keith Vaz:** Do you have any centrally held statistics as to how many complaints officers there are in local health authorities? If I give you an example, in Leicestershire, the authority of the Secretary of State, Leicester Royal Infirmary has seven press officers to deal with the press and I am not sure how many complaints officers they have. Do you have any of those statistics on a national basis?

**Jane Kennedy:** I do not have them with me. I can get them for you. An organisation may not have somebody who is solely designated as a complaints officer, depending on the size of the organisation, but certainly there will be people who are designated as such and if I can get that I will provide that to the committee.

**Q303 Chairman:** There was a statement which was signed by 16 charities, including some of the patient groups, and certainly you are familiar with it, which expressed concern about the Bill and sought to get more assurance that, where there was a dispute, independent assessment was guaranteed and also referred to what you have just referred to, namely, learning from mistakes and having robust systems in place to do that. Have you delivered any sort of answer to that statement?

**Jane Kennedy:** We are considering very carefully, and I think Lord Warner may already have tabled a number of amendments in response to some of the concerns that have been raised. We want to respond to the concern in a way which preserves what I have said for such an important element of the Bill, which is the impetus to change or influence the culture in the Health Service. We need to provide those safeguards and I think the Bill does that, but we obviously need to work hard to make sure we explain that, not only in the Lords but in the Commons too when it comes to the Commons. We need to balance having the right safeguards for the individual who is making the complaint and ensure they get independent advice and guidance when they need it with the need to try and resolve it locally wherever possible.

**Q304 Chairman:** I would also like to ask a question about care contracts under the Bill, as to whether they could be used more widely, for example, in relation to elderly people, where the financial amount involved is not large but the care need may
be significant, whether the private sector should not be an option that is available when care contracts are used to provide redress in these circumstances. Are you still working on that and are you ambitious to make more use of care contracts?

Jane Kennedy: I think so and we would not want to be prescriptive as to how that could be organised locally.

Q305 Chairman: Up to a quarter of NHS liability payments are spent on remedial care, so there clearly is scope for relating these things.

Jane Kennedy: And we want to look at it carefully.

Q306 Mr Khabra: Evidence which has been available to the committee suggests that since the introduction of conditional fee agreements there has not been a substantial increase in claims in spite of the funding mechanism. Is there any evidence as to whether lawyers are more prone to cherry-pick certain types of work?

Jane Kennedy: I am delighted to say that is an area which I am completely in the dark about and Baroness Ashton is not.

Baroness Ashton of Upholland: There is no hard evidence that lawyers cherry-pick. Of course, from time to time there is anecdotal evidence and we are mindful of keeping an eye on this area, but there is nothing that would suggest that that is happening currently.

Q307 Mr Khabra: If the answer is yes, do you accept that if there has not been an increase in claims this means that certain claimants are being disadvantaged and will find it hard to get representation?

Baroness Ashton of Upholland: I do not necessarily accept that. I think that the way in which we have done this will enable a huge swathe of people who did not qualify for legal aid and were not wealthy enough to consider pursuing matters to do so, and I think that is the advantage of CFAs. As far as I can see, what the legal professions do and seem to do is well is identify claims that have a chance of success and to enable those to go forward. I do not personally get—although I probably will as a result of saying this, of course,—issues being raised that suggest that there are people who are being disadvantaged in a particular way. There will, of course, be individual cases, I am sure, where people feel that that is the case, or indeed where, because of the way in which the legal profession approach it, they feel they would have had a better chance. Nonetheless, there is nothing to suggest that at the present time.

Q308 Mr Khabra: Has there been enough publicity given to these conditional fee agreements as far as the ordinary public is concerned? Are they aware that there are changes so that they can have the facility if they need to?

Baroness Ashton of Upholland: That is an interesting question to ask: has there been enough publicity? Certainly those who feel they wish to make a claim will be guided by this because if they go and see a legal representative or the Citizens’ Advice Bureau or whoever they will be told about it. I cannot say that there has been a national campaign that I am aware of to try and identify that because it has not been perceived to be necessary.

Q309 Dr Whitehead: There has, however, been evidence of uplifts in court once CFAs came in and, as it were, lawyers seeking substantial uplifts in order to deal with the consequences of the new cost terrain of CFAs. Do you think the control of those uplifts can be sufficiently maintained within the power of case management that the courts presently have, and particularly, say, the objective of the Civil Procedure Rules, or do you think perhaps there are further things that ought to be looked at in that respect?

Baroness Ashton of Upholland: You mean success fees, which is the term that encapsulates what you are seeking to address, Dr Whitehead. Certainly the courts do have the power to look at costs and see whether costs are appropriate and proportionate, and they do. There are issues that have been raised with me about whether there is more to be done in assessing whether we have any impact that is adverse, and certainly media organisations, for example, have raised this as recently as today with me as to whether we ought to look at that and certainly the impact of that is something we need to consider. Generally, however, the courts do have the appropriate powers once a case has come to court to be able to look at it and do so if they feel that is appropriate.

Q310 Dr Whitehead: I think the Civil Procedure Rules relate to proportionality as far as those uplifts and success fees are concerned. Is that an area that perhaps might be pursued in terms of some of these issues where there is not protection against potential uplifts within the system at the moment?

Baroness Ashton of Upholland: The way the system works presently is that the courts will look at whether the costs involved are appropriate and they will also look at the level of the success fee. Those who feel very strongly that this needs to be addressed will argue that what the courts ought to do is add one to the other and then see whether it is proportionate and, of course, the courts can look at this if they wish to, but the way it is dealt with is to look at one and then look at the success fee. Of course, success fees are important in enabling the professionals to take on cases that may not be successful. There is an issue about access to justice within that. One of the areas that the Civil Justice Council might look at is the question of whether this needs to be looked at again, and certainly, again because of representation from media organisations, my officials will be meeting with the Master of the Rolls and Lord Justice Dyson to look at a number of issues that have been raised where it might be appropriate for them to consider it, as well as, of course, the House of Lords judgment in the Campbell case.
31 January 2006 Baroness Ashton of Upholland and Rt Hon Jane Kennedy MP

Q311 Chairman: I do not think we can let you out of the room without asking you in the most general terms whether you think there is a compensation culture in this country.

Baroness Ashton of Upholland: There is not a statistically the evidence that we have is that we do not see growing numbers of claims, I am pleased to compensation culture. There is a perception that we have a compensation culture that has the potential to damage the kinds of activities and occupations that people participate in or potentially to affect the number of people who want to be involved in those activities or to support and help run them. Therefore, what we are seeking to do is to make sure we do not end up with a compensation culture. Statistically the evidence that we have is that we do not see growing numbers of claims, I am pleased to say, but I am much concerned in the work we do to make sure that we tackle the perception.

Chairman: Thank you very much indeed.
Written evidence

Evidence submitted by the Association of District Judges

1. The Association is aware that there is concern as to whether there is now a “Compensation culture” in England and Wales. We also recognise that, at least in part, it is thought that this culture, if it exists, is fuelled by “claims farmers”.

2. To address these concerns, the government has recently introduced a Compensation Bill. This evidence presents the Association’s views on the Bill.

3. We also comment on the NHS Redress Bill, and on the effect that Conditional Fee Agreements have had on the civil justice system.

Compensation Bill

4. Clause 1 of the Bill contains a provision relating to the law of negligence. The explanatory notes to the Bill set out, at paragraph 8, the current common law test which a claimant must satisfy to establish negligence, namely a duty of care owed to the claimant by the defendant, a breach of that duty of care, and loss or damage (including injury) arising from the breach.

5. Paragraph 10 of the explanatory notes states that the provision (clause 1) “is not concerned with, and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. It is solely concerned with the court’s assessment of what must be done to satisfy the standard of reasonable care in the case before it.”

6. Subject to the outcome of legal argument when cases start to come before the courts, the initial view of the Association is that clause 1 is unnecessary. It does not appear to add anything to the existing common law, and we can see no need for any form of statutory provision to remind judges of the tests to be applied.

7. We do not believe that there is any evidence that judges have been coming to decisions which might fuel any form of “compensation culture”. Indeed, our researches show the opposite to be the case. We append as Annex 1 a summary of some recent cases, all of which, in our view, demonstrate that the courts are well able to identify cases where it would not be appropriate to allow a claimant to succeed in a claim for negligence by finding a duty of care to exist or by finding a breach to have occurred in unreasonable circumstances.

8. Clause 1 of the Bill refers to “an activity which is desirable”, but the Bill does not contain any definition of what constitutes a “desirable activity”. We are aware that this provision comes in the light of a number of reports in the press of schools, local authorities and other organisations cancelling activities, apparently concerned about the risk of being sued in the event of an accident.

9. In our view this concern, though understandable, is misplaced. We believe that courts are well able to distinguish genuine valid claims from those which seek to place an unreasonably high standard on event organisers. We accept that not all claims reach court, and it may well be the case that insurers have been too ready to settle claims without proceedings, perhaps fearing the costs that might be incurred in defending claims. In turn, this may then affect insurance premiums, and make it more difficult to obtain suitable insurance cover. This is an issue for the insurance industry.

10. In short, we believe clause 1 adds nothing to the existing law, and we can see no advantage in seeking to add statutory force to the existing common law. However, it could engender argument as to what constitutes a “desirable activity”, and as to how the provisions of the clause should be interpreted. This would clearly have an impact on the court system, by introducing new litigation which, in our view, is unnecessary and undesirable.

11. As far as the remaining provisions of the Bill are concerned, we would generally support the regulation of Claims Management Services. We are concerned that the activities of some such companies have fuelled an unreasonable expectation of obtaining compensation in the minds of the public.

NHS Redress Bill

12. When the Chief Medical Officer published his consultation paper, Making Amends, we supported the proposals for two Redress schemes proposed in the paper. The NHS Redress Bill seeks to establish only one of these schemes, for low value claims, and we think it is unfortunate that it is not proposed, at least at present, to introduce a Redress scheme for babies with severe neurological impairment.

13. However, we welcome the proposal to establish a scheme to resolve lower value disputes arising out of mistakes by Health Service professionals in hospitals. We note that the Bill simply provides a framework, and the detail will be contained in Regulations yet to be published. As always, the precise detail will be important.
14. The CMO’s original proposal was for claims of up to £30,000 to be dealt with under such a scheme. The current proposal is limited to £20,000. We are not clear why this figure has been chosen, although we note that this is the proposed limit on financial compensation, and would not include other forms of care or assistance that might be offered.

15. We recognise that, in many cases, those who have suffered a medical incident are more anxious to have an explanation and, if appropriate, an apology, rather than necessarily compensation. The scheme under the Bill seeks to deal with this.

16. There may be a perception that any body set up to administer such a scheme may lack impartiality. This is essentially a matter of policy, but care needs to be taken to seek to ensure that the body is perceived as impartial.

17. It is important that those offered some form of redress under the proposed scheme, whether financial compensation or some other remedy, have the opportunity to obtain independent legal advice before deciding whether to accept. £20,000 is a substantial sum. We accept that the Bill seeks to provide for this. We believe that any list of independent solicitors able to offer such advice should be accredited as having experience and expertise in dealing with clinical negligence claims.

18. We remain concerned that such a scheme may lead to substantial numbers of claims from people who would not currently claim. The scheme will need to be administered carefully to identify frivolous claims.

**Conditional Fee Agreements**

19. The terms of reference for the Committee’s inquiry refer to “contingency fee agreements”. Strictly, contingency fees (where the lawyer takes a percentage of the damages) are largely illegal in England and Wales. Our comments therefore relate to Conditional Fee Agreements (CFAs), where a solicitor takes on a case on a “no win, no fee” basis, but, if successful, can claim a “success fee” in addition to the base fees and disbursements. Such fees are normally recovered from the other party.

20. Since legal aid has largely been removed in civil claims, most claimants now have no option other than to enter into a CFA. We believe that this has had two important consequences.

21. First, solicitors will only take on cases they expect to win. This may mean that claimants whose claims do not have a chance of success of well over 50% are denied access to justice, unless they are in a position to fund the case privately.

22. The second consequence is that, where claims are successful, solicitors’ costs have increased substantially. This is in part because of the application of a success fee, which may be as much as 100% of the base costs. The effect of this is most obvious in smaller claims, where it is by no means uncommon for the costs claimed to be two or three times the amount of damages awarded to the claimant.

23. Not surprisingly, defendants seek to obtain a reduction in the costs they have to pay. This has led to a huge increase in the number of claims coming before the courts relating only to costs. The majority of such claims are heard by District Judges, so our members are particularly affected by this.

24. We are aware of the recent paper on funding from the Civil Justice Council. We support their proposals for the introduction in fast track cases of a predictable costs structure. We believe that this will ensure that costs in such claims are proportionate to the amounts in issue. For personal injury claims, the fast track involves claims in the band of £1,000-£15,000.

25. Referring specifically to the inquiry’s terms of reference, we would comment as follows:

**Does the “compensation culture” exist?**

We believe that there is a widespread perception that, when an accident occurs, someone must always be to blame. This has been fostered by the activities of “claims farmers”, and by reports in the press. People who might not have thought of pursuing a claim are encouraged to do so. It is, of course, important that people who have suffered a genuine injury as a result of negligence or breach of duty should have the opportunity to seek redress. We believe that the existing law deals effectively with the resolution of such claims, but it is important that the costs of seeking redress are not disproportionate. Various forms of Alternative Dispute Resolution, and schemes such as the proposed scheme under the NHS Redress Bill, should assist.

It is equally important that the courts are able to identify cases where it would be unreasonable to impose liability on a defendant, because to do so might stifle legitimate and useful activities. We believe that courts are well able to do this under the existing law.
What has been the effect of the move to “no-win-no-fee” contingency fee agreements?

As indicated above (paragraphs 20ff), we believe that this has led to disproportionate costs, and to a risk of some claimants being denied access to justice.

Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

From reports in the Press, this may be the case. As we have said above, this may be linked with the cost of insurance.

Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

We support the principle of regulating claims management companies. How this should be done is essentially a matter of policy, on which we have no comment.

Should any changes be made to the current laws relating to negligence?

For the reasons set out above, we do not think that any changes are necessary.

Annex

Cases

Babbings v Kirklees Metropolitan Borough Council [2004] EWCA Civ 1431

Claimant, a child, sustained injury in a school PE class when performing an exercise whereby she had to run up to a springboard, take off, grab hold of a bar and then drop to the floor and land on her feet. She jumped from the springboard, missed the bar and landed awkwardly. Claim dismissed at first instance as not foreseeable that claimant would land as she did. Permission to appeal refused as no real prospect of success. Likelihood of injury which was more than minimal was extremely small. Perfectly reasonable for exercise to be performed, and the courts would be doing gym teachers no service if they were to hold that they were in breach of their duty of care when an unhappy accident occurred.

Elliott v Townfoot Stables (Unreported)

The defendant stables were not liable for injuries sustained by the claimant in a fall during a riding lesson as the pony was suitable, the lesson was properly supervised and the damage sustained was not of a kind which a pony was likely to cause.

Singh v Libra Holidays [2003] EWHK 276 (QB)

A holidaymaker who was severely injured when he dived into the shallow end of a hotel swimming pool whilst under the influence of alcohol failed to establish that the tour operator was responsible for the accident. Claimant the author of his own misfortune.

Rhind v Astbury Water Park Limited [2003] EWHC 1029

A swimmer who ignored signs forbidding swimming and dived into shallow water had no claims for personal injury against the companies occupying the lake, despite the fact that he was a visitor rather than a trespasser. The true effective cause of claimant’s tragic accident was his foolhardy action in doing a running dive into shallow water.

Tomlinson v Congleton Borough Council and another [2003] UKHL 47

There was no liability under the Occupiers’ Liability Act 1984 for the claimant’s injuries from diving into a shallow lake as the risk was obvious. It did not arise from the state of the premises or anything done or not done on them and accordingly no duty of care was owed.

Higgs v WH Foster (t/a Avalon Coaches) [2004] EWCA Civ 843

An occupier owed no duty of care to a trespasser who had fallen into an uncovered inspection pit on his land since he did not know or have reasonable grounds for believing that a trespasser would enter his premises and come into the vicinity of the pit.
Kidd v Portsmouth City Council (Unreported) [2004]

Claimant, a child, was playing in a community garden occupied and controlled by the defendant, when she tripped on a stone in a gravel path leading from a gate to the garden. Sustained injury resulting in the loss of her left eye. Judge at first instance found no negligence or breach of duty in the construction of the path. Appeal dismissed.

Simonds v Isle of Wight Council [2003] EWHC 2303 (QB)

A council responsible for a school was not liable in negligence for an injury sustained by a student after jumping from a swing. It was not reasonable to impose on the school any legal duty to immobilise the swings.

Blake v Galloway [2004] EWCA Civ 814

Claimant aged 15 suffered serious eye injury when struck by a piece of tree bark thrown by a friend during horseplay. Held that this was just an unfortunate accident. Young persons will always want to play vigorous games and indulge in horseplay, and from time to time accidents will occur and injuries will be caused. But, broadly speaking, the victims of such accidents will usually not be able to recover damages unless they can show that the injury has been caused by a failure to take care which amounts to recklessness or a very high degree of carelessness, or that it was caused deliberately (ie, with intent to cause harm).

District Judge David Oldham
Chairman, Civil Committee
Association of District Judges
November 2005

Evidence submitted by The Law Society

1. *Does the compensation culture exist?*

There is a general perception that we live in a society that has developed a compensation culture. For some time now this theory has been fuelled by reports in the media.

In reality accident claims have remained static for some years and in 2003–04 accident claims fell by 10%. It is a fact that many potential claimants never pursue a claim. Research by the Legal Services Research Centre, an independent arm of the Legal Services Commission, found that 38% of personal injury clients did not seek advice. This figure was higher than most other categories of law, the exceptions being mental health and actions against the police.

Over the last three years reports published by Datamonitor, an independent organisation which provides information solutions to businesses, on overviews of the development of personal injury claims in the UK have concluded:

- 2002—70% of valid claims were not being made and the claims rate was envisaged to rise by a mere 2% during the next five years;
- 2003—Accident claims had remained largely static increasing by only 0.2% to 0.3% in the previous year. The report also concluded that the stability in claims levels showed that “fears of a UK compensation culture, insofar as they pertain to rapid growth in overall claims numbers, were unfounded,”;
- 2004—In 2003–04 the number of accident claims fell by almost 10%.

Figures published by the DCA show that there has been a decrease in the number of claims issued in both the High Court Queens Bench Division and the County Courts. The latest available figures show that claims issued in the County Court fell by 3% during 2003.

Department of Work and Pensions figures show that in 2002–03 the number of disease claims fell by 26% and employers’ liability claims went down by 16%. Figures published by the Compensation Recovery Unit show that the total number of accident claims decreased between 2000 and 2004.

The Tillinghast-Towers Perrin actuaries report in February 2002 showed that the UK had the lowest “tort cost expressed as a percentage of a GDP” (0.6%) in the industrialised world, compared to the US (1.9%), France (0.8%), Japan (0.8%), Canada (0.8%), Australia (1.1%), Germany (1.3%) and Italy (1.7%). In 1994 Tillinghast found that the UK percentage was 0.8% so that the comparable UK figure had in fact fallen in those eight years.

In May 2004, the Better Regulation Task Force released its report Better Routes to Redress which examined the “compensation culture” in the United Kingdom. Reports in the media, and advertising by claims management company, are cited as creating an inaccurate perception that large sums of money are available for those who have been injured regardless of whether someone else was at fault. The report argues that it is this perception that is at issue. The fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims. The report examined the causes of the perception of a “compensation
culture”; how that perception is fuelled and the damage that the perception will do for the prosperity and well-being of the UK. The Better Regulation Task Force concluded that “the compensation culture is a myth”.

2. What has been the effect of the move to no-win-no-fee contingency arrangements?

Since their inception, conditional fee agreements (“CFA’s”) have grown in popularity and are also being used in union and other third party funded cases which reduces liability for costs in unsuccessful matters. They meet a very long expressed concern that for all but the wealthiest, litigation on the traditional basis—whereby clients must pay their lawyers win or lose—is simply unaffordable.

When the CFA scheme was introduced in 1995 conditional fees were permitted primarily for personal injury cases. In 1998 this was extended to all cases except for family and criminal matters, where conditional fees remain prohibited. In the 1995 scheme only the solicitor’s basic charges could be recovered from the losing paying party.

Following the Government’s decision to remove legal aid from personal injury cases, the scheme was amended in April 2000 to introduce the recovery of the success fee and insurance premium from the paying party. This measure was introduced so that people did not have their damages reduced by lawyers’ fees, and to place them in the same position as they would have been if they were legally aided.

The advent of CFAs has been met with a very mixed reception. Solicitors cannot afford to take a case on a CFA unless it has a good chance of success. Clearly the presumption is that if the solicitor considers the risk worthwhile then the client is likely to have a more than reasonable prospect of success. However, since their inception CFAs have been, and continue to be, the cause of criticism and an abundant source of satellite litigation. This arises partly from simple conservatism on the part of some elements of the legal profession; partly because of the unfortunate association between CFAs and disreputable claims management companies, and partly because of insurers’ strong opposition to their newly acquired liability to pay success fees and insurance premiums.

It does appear that the cost of claims has risen since the inception of conditional fee agreement, although that appears to be as much a result of the Woolf reforms as of conditional fees themselves. Conditional fees do involve a greater cost to the defendant (usually the insurance industry) than legal aid. This is because the losing defendant pays the cost of the insurance premium and success fee as well as base line legal costs. Under legal aid the losing defendant only had to pay base line costs.

Last year consideration was given by the Legal Services Commission to restricting legal aid in clinical negligence cases to the investigative stage only on the assumption that solicitors would then proceed if appropriate on a conditional fee for any subsequent proceedings. The impact assessment found that the saving to the legal aid fund by restricting legal aid would be exceeded by the additional cost to the NHS LA under conditional fee funding arrangements.

Conditional fees have dominated the personal injury market but they are not restricted to that type of work and neither are they restricted to claimants only. Despite criticism and complaints by insurers and other compensators and the amount of satellite litigation about them, CFA’s have been largely successful in their main objective of improving access to justice. There are very many genuine claimants who, had it not been for a CFA, would not have succeeded in obtaining compensation for genuine claims.

3. Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

The Law Society has not conducted its own research into how public bodies manage risk. However, the Better Regulation Taskforce looked at this issue in some detail in 2004.

The Better Regulation Taskforce found that:

“the public sector, such as schools, rather than cancelling trips and activities, as the media would have us believe, have become much better at assessing and managing risks. Local Authorities have put sophisticated systems in place to manage, for example, repairs to their pathways and highways.”

However, the Better Regulation Taskforce criticised senior commentators and the media for misleading people into thinking it was easy to claim by perpetuating the compensation culture myth. They also expressed concerns about the activities of unregulated claims companies.

“Fear of litigation does change behaviour. Reporting . . . urban myths will encourage others to change their behaviour . . . Excessive risk aversion is not helpful to the UK’s prosperity nor wellbeing.”

The BRTF highlighted that irresponsible and erroneous media reporting and the activities of unregulated claims companies had created a perception in the public mind that getting compensation payouts was easier than it is, which had encouraged some frivolous claiming. This, together with the increased cost of claims brought by conditional fees, had placed additional financial burdens on public bodies. However the BRTF was careful to point out that the perception that getting compensation payouts was easy in the UK was not true.
There is one factor the Law Society believes may have been overlooked in the debate on the notion of risk averseness by public bodies. In the 1990s “Turnbull” risk assessments became for the first time commonplace in the workplace as a means of reducing unnecessary risks and allowing better planning for risks which cannot be avoided. Public bodies are not covered by the Code but many choose to subject themselves to the same standards of best practice (the Law Society included). This means that public authorities now carry out detailed risk assessments for every activity which were not undertaken prior to 1999. Such risk assessments have—rightly—created a much more “risk-aware” environment. However, unless very carefully managed, there may be a tendency for people with health and safety responsibilities to identify and seek to eliminate every possible risk, without bringing to bear a sensible approach to proportionality. The purpose of risk assessment procedures, is to encourage those with responsibility for risk to identify potential risks and then assess how risky an activity is, how damaging the risk might be, what will be lost by taking action to eliminate the risk and then to weigh up the danger posed by the risk, and compare it with the cost (or loss) entailed by risk avoidance action. In some cases, the last step is overlooked and risk avoidance action is taken wherever a risk is identified.

We are generally living in a more risk averse culture then we did in the past. It is not the case that people avoid risk simply because they fear litigation. We believe that people responsible for managing risk fear blame as much if not more than they fear litigation.

We believe that one way forward is to focus on encouraging public bodies, particularly schools, to adopt sensible risk management and to ensure that those responsible for making risk management decisions are not taking excessive action to avoid the risk of highly unlikely events, and are weighing up the cost of taking avoidance action before making a decision to cease or ban an activity. We welcome the steps the Government is taking to do that.

4. Should firms which refer people, manage or advertise conditional fee arrangements be subject to regulation?

The Law Society believes that claims handling is part of the litigation process, and that all those involved in it should be subject to regulation, just as they would be if undertaking litigation itself.

Conditional Fee Agreements themselves are well regulated. New regulations for CFAs have just been implemented which are designed to introduce regulation which is clear, sensible and robust, but without the technical tripwires in the previous regulations.

Problems continue to arise with the behaviour of unregulated firms handling claims. It is those firms—rather than the funding arrangement—which needs now to be properly regulated.

There has been widespread evidence of claims companies engaging in unacceptable practices including cold calling, aggressive selling, insurance mis-selling and encouragement of frivolous claims. Regulation of these companies is essential to protect vulnerable consumers. Such consumers were left high and dry when Claims Direct and The Accident Group went into receivership. The Citizens Advice Bureaux have expressed concerns about the effect that such practices have on consumers who often end up coming to them for advice when things go wrong.

5. Should any changes be made to the current law relating to negligence?

In May 2004 the Better Regulation Taskforce looked in detail at the current law of negligence and to what extent it was stifling or placing unnecessary restrictions on Society, and in particular on public bodies.

The Better Regulation Taskforce found that:

“Litigating is not easy . . . For a claimant to succeed they have to prove that, first someone else owed them a duty of care, and then that the same person was negligent . . . This is the tort of negligence. Three principal elements determine whether a duty of care exists between two parties [proximity, reasonable foreseeability and fault] . . . Proving each of these factors is not easy . . . New legal cases are always setting precedents as to how the three concepts might be interpreted . . . Whole new types of claims that were simply not considered by lawyers 20 or 30 years ago are now being pursued. However, despite what the media would have us believe such claims do not always succeed”.

The Better Regulation Taskforce were very encouraged by the direction that court decisions were taking in recent years in encouraging individuals to take personal responsibility for their own actions. They used the following case to highlight how the higher courts are dealing with this issue.

In the case of Tomlinson v Congleton Borough Council [2004] 1 AC, where Mr Tomlinson suffered severe injuries by making a shallow dive into a lake. The House of Lords eventually found in favour of the Borough Council. Their Lordships found that although the Borough Council had a duty of care to both visitors and trespassers to its property, it was not, on the facts of the case, reasonable to expect the council to protect Mr Tomlinson from his own actions. [He ignored prominent warning signs].

The approach in this case has already been followed in a number of other cases in which a similar approach was taken.
We have concerns about proposed changes to the law of negligence. The current law allows the courts to take a flexible approach depending on the facts of the individual case. Currently, a court decides whether a person or body is negligent by looking at whether they owed a duty of care to the injured party, whether the injury was reasonably foreseeable and whether they took reasonable care to avoid the injury. This test allows the courts flexibility in dealing with individual cases. In practice, the standard of “reasonable care” expected of a large corporation will be different from that expected of a small voluntary organisation. We believe this leads to a sensible balance being struck.

As currently drafted we believe clause 1 may encourage courts to take a different approach. We are concerned that courts may find an organisation to be negligent using the reasonable care test, but then go on to make a finding that the organisation should not be liable because the organisation has made it clear that a finding of negligence will lead to them ceasing to undertake the activity in question. We believe this may encourage poor safety standards and deny redress to people who have been injured by negligence.

The Law Society

November 2005

Supplementary evidence submitted by the Law Society

NHS Redress Bill

The Law Society welcomes the basic aim of the Bill, which is to make the process of receiving redress following a medical accident more accessible and effective. The Society has long supported the principle that there should be more openness between patients and the medical establishment when things go wrong as well as greater encouragement to use mediation to resolve clinical disputes.

The Bill itself gives the Secretary of State the power to establish, by regulation, a scheme for the victims of medical accidents to obtain redress without recourse to legal proceedings. The Society supports the proposed scheme providing there is access to free legal advice for victims and that the right to go to Court is not compromised. While the Bill is light on the detail of the scheme, these requirements appear to have been met, subject to clarification of some areas as the Bill passes through its later stages.

Access to the courts and legal advice

For the new scheme to protect the interests of victims effectively, it is vital that victims must retain access to the Courts. The Society is pleased to note that the Bill does not appear to restrict this (see Clause 6(4)). We note that there is a “waiver” requirement against bringing subsequent legal proceedings where there has been a settlement under the scheme. This is logical, provided that the victim has received proper legal advice. Furthermore, such a waiver should not preclude any applicant from taking further action in the event there is a significant change in his/her condition which was not originally foreseen (eg an injury which has deteriorated far beyond that originally anticipated or an injury which had not originally been diagnosed). This must be made clear in the Bill.

With regard to legal advice, the Law Society welcomes the proposal in Clause 8(1)(a) that any victim of a medical accident, or person representing that victim, will be able to obtain appropriate legal advice without charge. Presumably the intention is that the responsible body will reimburse any reasonable legal expenses incurred in obtaining advice, or that funding will be available from the Legal Services Commission. If any funding is to come from the legal aid fund, a full Assessment should be undertaken to ascertain the extent of the effect on the fund, and if this is in excess of the current spend on clinical negligence, annual reimbursement should be made to the legal aid fund.

Victims must be given the opportunity to exercise their fundamental right of freedom of choice of solicitor. The Society does, however, recognise that due to the special nature of these cases, only those solicitors who have sufficient and relevant expertise in dealing with clinical negligence matters should undertake such work. The Society maintains a panel of suitable solicitors.

Whilst the Society agrees that every effort should be made to reduce the costs of resolving clinical disputes so far as is reasonably possible, this should not result in victims of medical accidents having their rights to access to justice eroded. Any proposed allowance for legal costs, if that is what is intended, should therefore be reasonable and take into account all relevant factors involved in any proceedings brought in accordance with the proposed scheme on an individual claim basis.

There appears to be a provision in Clause 9(1) for the Secretary of State to be given the power to appoint a representative to assist an applicant “by way of representation or otherwise”. The Society is not clear what the intention of this clause is. Any applicant under the scheme, if he or she so wishes, must have the freedom to make their own choice of a person or organisation (“ie adviser”) to assist with any claim. In the absence of freedom of choice, there would be bound to be doubts about the impartiality of the adviser.
Details of the scheme

The Bill should include full details of eligibility criteria and awards available, including any proposed financial limits and/or benefits and/or treatment arrangements. We have a particular concern that if the claim value limit is initially set too high, then the scheme would not operate efficiently in its infancy stages due to the possible number of claims that would be made. Any financial limit could more sensibly be increased at a later date when the scheme has become fully operational.

The Society’s major concern at this stage is that the Bill does not go into sufficient detail as to how the scheme will operate. Whilst the Society supports the general intention of the Bill, the Bill should include much more detail as to how the scheme will actually operate on a day to day basis and who will make particular decisions. The Bill should provide for a panel of experts to assess each case, and for those experts to be competent and totally impartial.

Additionally, legal advisers will not be in a position to assess the appropriateness of an offer made by the Redress Scheme without access to documentation including an independent medical report and an independent report on the evidence on which the claim is based. The Society believes that these are fundamental requirements to the success of any scheme. Anything less will not have the trust or confidence of potential applicants.

The Law Society

November 2005

Evidence submitted by the Association of Personal Injury Lawyers (APIL)

The Association of Personal Injury Lawyers (APIL) was set up 15 years ago to protect the rights of people injured through negligence. Members comprise solicitors, barristers and academics. Our campaigning activity leads to regular discussions with the insurance industry, consumer groups, employers’ representatives, unions, the Government and other parliamentarians. APIL’s work aims to ensure that injured people gain full and fair redress for their injuries.

Executive summary

— Independent statistics show that the total number of personal injury claims are falling.

— The National Health Service Litigation Authority reports that the number of claims against the NHS has not been rising.

— The UK has the lowest tort costs of all developed nations, except Denmark.

— The downward trend in claims suggests “no win, no fee” agreements may be preventing people from bringing claims.

— Personal injury claims against local authorities, schools and volunteering organisations have fallen.

— Risk aversion must be addressed through education, rather than legislation.

— Government proposals to regulate claims management companies are welcome, and long overdue.

— Changing current negligence laws is unnecessary as the law has worked efficiently in this area for years.

— The attempt to clarify the laws of negligence in the Compensation Bill will cause confusion and so fail to reassure those at whom it is aimed.

Q1: Does the “compensation culture” exist?

1. The evidence that there is no compensation culture is overwhelming, and now widely recognised by various organisations and individuals—including the Prime Minister and the Lord Chancellor. For example, in its report into the regulatory aspects of litigation and compensation in May 2004, the Better Regulation Task Force (now the Better Regulation Commission) stated that “the compensation culture is a myth”. This conclusion is largely based on evidence from the Compensation Recovery Unit (CRU). Every time a claim is made against an insurance company, the CRU must be informed, regardless of whether the claim results in a trial. CRU figures indicate that the total number of claims registered fell by almost 2% between 2003–04 and 2004–05. Earlier this year, the Prime Minister stated that “between 2000 and 2005 the overall number of accident claims fell by 5.3%”. Clinical negligence claims have fallen from over 10,000 in 2000–01 to a little over 7,000 in 2004–05.

2. In addition, it is worth noting that Datamonitor—an independent business-information company—has also come to the same conclusion. For instance, in its most recent report—“UK Personal Injury Litigation 2004”—it concludes “that the anecdotal stories of a growing compensation culture in terms of claims numbers are outweighed by the statistical evidence indicating otherwise”.
3. The National Health Service Litigation Authority (NHSLA) is responsible for handling negligence claims made against NHS bodies. In its Report and Accounts, 2004, the NHSLA states: “Despite the much vaunted ‘compensation culture’, the number of claims made against the NHS has not been rising.” This conclusion is clearly borne out by statistics.

4. The current clinical negligence system is funded to a large extent by legal aid through the Legal Services Commission (LSC). There has been a steady decline in the number of certificates issued for clinical negligence cases in recent years, with 6,064 certificates issued in 2003–04 (down 3.9% from 2002–03). In total there has been a 50% decrease in the volume of certificates from 1995–96 to date.

5. A recent National Audit Office (NAO) report found that at least 500,000 adverse incidents in NHS hospitals could be avoided every year, and that there may be as many as 34,000 avoidable deaths in NHS hospitals a year. These figures are even more alarming when you consider a further 300,000 patients suffer from hospital-acquired infections every year. The NAO estimates that one in 10 patients suffers an adverse event in hospital, ranging from a fall to a fatal error involving drugs or surgery. Yet only a very small percentage of these adverse incidents leads to claims for compensation. In the most recent figures, only 7,205 claims for clinical negligence were registered between April 2004 and March 2005. This suggests that less than 1% (0.74%) of the patients injured in the NHS each year actually makes a claim.

6. While it is clear, then, that there is no compensation culture in the NHS, it is also clear that there is an urgent need to protect vulnerable patients, by preventing the negligence which is causing such a high number of avoidable deaths and injuries. APIL also supports, in principle, the Government’s aim of creating a more efficient system for lower value claims against the NHS to be pursued through the NHS Redress Bill. APIL has been committed to the review of the clinical negligence system from the start and we believe the primary focus of any reforms must be full and fair redress for patients injured through negligence, and the need to reduce adverse incidents from happening in the first place.

7. Some commentators make a comparison between the current UK system of compensation and the US system of compensation. Yet what is often not recognised is that the UK’s system of compensation is very different from the system used in the US. The UK, for instance, does not have a system of punitive damages (ie large awards designed to punish the wrongdoer). Another key factor of the UK system is that awards are very tightly controlled, with the sole purpose of returning the injured person back to as normal a life as possible. In order to achieve this, every penny of the funds needed to pay for things such as the claimant’s future medical care, loss of earnings, special adaptations needed in the home etc, is carefully calculated.

8. At the core of many arguments that there is a compensation culture, is the often-quoted figure that the compensation culture is “costing £10 billion a year”. This figure was first mentioned in “The cost of compensation culture”, a paper published by a working group of the actuarial profession in December 2002. It is disappointing that this misleading figure is rarely challenged. It includes, for example, the exceptional cost of the Government-run BSE compensation scheme, a scheme which has nothing to do with personal injury costs at all. The Lord Chancellor has publicly queried some of the statistics used by the actuaries, saying that “some of their assumptions were not just heroic, but heroically wrong”.

9. The reality is that the UK has the lowest tort costs (ie a combination of the legal costs involved in pursuing the case and the damages paid out) of all developed nations except Denmark. As a percentage of gross domestic product, the UK’s tort costs are 0.6%—lower than the USA (1.9%); Italy (1.7%); Germany (1.3%); Switzerland (0.9%); Canada, Japan and France (all 0.8%).

Q2: What has been the effect of the move to “no-win no-fee” contingency fee agreements?

10. APIL presumes this is actually a reference by the committee to conditional fee agreements (CFAs) rather than contingency fee agreements, which are illegal in the UK for personal injury cases issued in court.

11. APIL argued consistently against the removal of legal aid from personal injury litigation, in favour of “no win no fee” conditional fee agreements (CFAs). Since CFAs were introduced in 2000, however, we have been working with both the Government and other stakeholders to try to ensure the effective working of CFAs, which were designed to make access to justice more widely available. The fact that personal injury claims are clearly on a downward trend, however, suggests there is a possibility that CFAs may actually be preventing injured people from bringing claims.

12. Another difficulty linked with CFAs is that the expression “no win, no fee” suggests the system is far simpler than it actually is in practice. If a claimant loses his case, his solicitor is not entitled to claim a fee for the conduct of his case, but the claimant is liable to pay the costs of the winning side. In order to do this, he is required to take out an “after-the-event” (ATE) insurance policy to ensure these costs will be paid. If the claimant wins his case, although the claimant remains primarily liable (because of the operation of the indemnity principle) in practice his costs are paid by the losing defendant and, under the system, his solicitor is entitled to claim a “success fee”. This success fee represents a percentage of the solicitor’s original fee (not a percentage of the claimant’s compensation award) and is designed to off-set the risk of the solicitor not being paid if the case is lost. This provides the solicitor with a financial “cushion” which can be called upon to pay for those cases which are equally worthy but ultimately lost, for whatever reason. Without this success
fee “cushion” there is a risk that the solicitor would “cherry-pick” easier cases to avoid the risk of losing and this would have a serious impact on access to justice for many claimants who may otherwise never be able to claim the compensation they may desperately need.

13. This system has to be explained in full to claimants by their solicitors at the very outset of the case. One of the problems which has arisen, however, since legal aid was abolished for most personal injury cases in favour of CFAs, has been the increase in the number of so-called claims management companies (CMCs).

14. These organisations, which are currently unregulated, have not always represented the nature of CFAs clearly to claimants and have exploited the system by arranging loans and charging fees direct to claimants which in most cases are unnecessary. The results have often been well-publicised, with many claimants ultimately under-compensated, and some CMCs (such as Claims Direct and The Accident Group) going out of business.

Q3: Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

15. In the Prime Minister’s speech at the University College, London, in May this year, he said that, between 2000 and 2005, accident claims against local authorities, schools, volunteering organisations and other public sector bodies fell by 7.5%. There are, however, many examples, reported in the press, which suggest that some public bodies are still risk averse due to an irrational fear of being sued, despite the statistics. APIL believes this is a misconception which must be addressed through the proper education of organisations and individuals about the nature of the law and their responsibilities to other people. It is not, we submit, a situation which is best dealt with by legislation.

Q4: Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

16. APIL welcomes Government proposals to regulate claims management companies, a move which is, we feel, long overdue. The association has always been concerned about the continued growth of claims management companies whose practices are, at best, opaque and who frequently generate extra, unnecessary, costs for a claimant.

17. There is clearly a considerable amount of detail still to be established in relation to this aspect (part two) of the Compensation Bill and we look forward to full participation in further discussions. At this stage, however, we welcome the fact that it appears the legislation is likely to provide robust protection for injured people. We would caution, though, that the bill should include regulation of the fees which regulated bodies including, but not limited to, claims management companies are able to charge to provide further protection for claimants.

Q5: Should any changes be made to the current laws relating to negligence?

18. APIL believes that changing the current laws relating to negligence is both unnecessary and impractical, as the law has worked very efficiently in this area for many years. What is certainly necessary, however, is education to help people understand how the laws of negligence are applied.

19. The association also believes that any attempt to clarify the current laws on negligence through legislation—rather than education—is unnecessary.

20. For this reason, APIL does not support clause 1 of the Compensation Bill (reproduced below, for ease of reference):

“1 Deterrent effect of potential liability

A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.”

21. APIL’s key concern is that this clause creates confusion and so will do nothing to reassure those at whom it is aimed. This result is the inevitable outcome of any attempt to replicate 75 years of the common law, about which whole text books are written, in a single clause.

22. The fundamental problem with this clause is the reference to a “desirable activity”. While this expression has certainly been used in the higher courts on at least one occasion in the past, to attempt to enshrine such a subjective yardstick in statute will inevitably lead to litigation for decades to come, with endless legal argument about how a “desirable activity” can be defined. Such litigation may be to the advantage of lawyers, but it certainly is not in the interest of injured people, who deserve a speedy resolution to their claims.
23. It will also be deeply unjust to people, injured through no fault of their own, whose right to full and fair compensation will depend on whether the judge feels that the defendant’s activities at the time the injury is caused could be considered “desirable”.

24. What must be avoided (and what could easily be the result of clause 1) is a situation in which two separate incidents, arising from the same set of circumstances, causing the same injuries to two claimants, will result in one claimant receiving full redress, while the other fails to receive the compensation to which he is entitled simply because the defendant is considered by the judge to be engaging in a “desirable activity”. Such a situation would be totally iniquitous and contrary to the current common law.

25. Neither can it be fair or just for a judge only to be required to consider the desirability of the defendant’s activities—the claimant may be injured while participating in a desirable activity yet, according to clause 1, this cannot be a factor for deciding an issue of negligence.

26. If, for example, the defendant is a volunteer who is driving a group of boy scouts to scout camp and he negligently injures a cyclist, the extent of the defendant’s liability may well be reduced, according to clause 1 of the bill, simply because driving scouts to camp could be considered by the judge to be a “desirable activity”. There is no facility in clause 1, however, for the judge to decide that the injured person is engaging in a “desirable activity” by cycling rather than driving. This is very obviously an inequality between the parties which must be addressed.

27. Further confusion is caused by the contradictory nature of paragraph 10 of the explanatory notes: “This provision is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. It is solely concerned with the court’s assessment of what must be done to satisfy the standard of reasonable care in the case before it.”

28. It is evident from the previous arguments that if the court is assessing what must be done to satisfy the standard of reasonable care by applying the test of desirability, the standard of care and the circumstances in which a duty to take that care will be owed has, in fact, been altered by clause 1 of this bill.

29. It is clear, then, that clause 1 of this bill has an obvious potential to generate confusion, litigation and to act as a serious impediment to access to justice for people who have suffered avoidable injuries, caused by negligence, who may be prevented from gaining the full redress to which they are entitled.

30. We also believe that the courts have been astute in avoiding making decisions which could inhibit whatever “desirable activity” is in this context, and should be trusted to continue to do so. If there is a difficulty of perception, we suggest the proper way to address it is through education, in particular of those who have a responsibility to manage risk. We believe education about the virtues of proper risk assessment would act to enable such “desirable activity” to happen.

31. Staff at Hay Lane school in London, for example, were devastated by the death of a pupil on a school trip. The staff, who were exonerated in the coroner’s enquiry, were, nevertheless, determined to prevent another tragedy. The school's unions called for the creation of a health and safety committee, with equal representation from management and the unions, NUT, UNISON and ATL. Improvements were made to safety procedures as a result of this collaboration and their efforts were rewarded when an OFSTED inspection highlighted the “health and safety culture” as a strength of the school.

Association of Personal Injury Lawyers (APIL)

November 2005

Evidence submitted by the Motor Accident Solicitors Society (MASS)

MASS

— Is a national association of Solicitors who specialise in representing Claimants in their pursuit of compensation arising from road traffic accidents.

— Has a membership of 160 solicitor offices in England, Wales, Scotland and Northern Ireland dedicated to representing Claimants.

— Represents the experience of approximately 2,000 claims handlers pursuing some 400,000 RTA claims, the majority of which involve a personal injury. Most of these claims are dealt with under the Fast Track regime. MASS therefore represents concerns affecting the majority of personal injury claimants in the United Kingdom.

— Members firms range in size from the Sole Principal to firms with large personal injury departments.

— Membership is by office, generally represented by the Senior Partner, Owner or Manager.

— Our response consequently concentrates on issues pertinent to road traffic accident victims, their representatives and their Access to Justice.

We note with interest that the Constitutional Affairs Committee are launching an inquiry into the “compensation culture” and contingency fees, and that this coincides with the publication of the Government’s Compensation Bill and NHS Redress Bill.
In response, the Motor Accident Solicitors Society (MASS) draws the Committees attention to our position paper issued in March 2005 and sent to the Committee on 27 October 2005 (not printed). We would however, like to submit further comments following changes in the complexion of the issues at stake since the publication of the Better Regulation Task Force report in May 2004.

MASS has a number of concerns:

DCA Action Group—Whilst being a member of this group, we have concerns that the various areas being looked at will be given the time and opportunity for considered recommendations to mature.

Civil Justice Council paper “Improving Access to Justice”. This is a considered report, recently published, and raises a number of issues that merit attention—one being that of contingency fees.

Contingency Fees—There have been background rumblings for a number of years that contingency fees may provide an important part in the funding of personal injury claims. Fresh life is breathed into the discussion by the Civil Justice Council; it is certainly an area MASS would suggest be further researched. MASS would urge that considerable consultation and thought be exercised upon funding of claims. The regulations on Conditional Fee Agreements and more particularly the recovery of success fees and ATE premiums from third party insurers, has caused considerable problems for all stakeholders in the claims process, not least the consumer. The current attempt to address the fall-out from such funding solutions has merely shifted the burden onto the Law Society and Professional Rules. Claimant lawyers anticipate a new series of challenges from the insurance industry.

Lessons must be learnt from past errors and any further proposals on funding solutions must only be considered after widespread consultation and discussion. MASS will study the various proposals in detail.

Compensation culture—After fully agreeing with the BRTF that the compensation culture was in fact a “myth”, the Government has potentially added fuel to the fire by introducing a Compensation Bill. Following the publication of the Compensation Bill by Lord Falconer on Thursday 3rd November, the initial response from MASS is one of cautious welcome with regard to the regulation of Claims Management Companies. We will be scrutinising the detail before giving considered feedback.

However, with regard to the proposals to avoid deterrent effects on “desirable activities” (s1), MASS are less impressed. Despite the notes to the Bill suggesting otherwise, the effect of such a provision is to allow evidence to be brought by the defendant to seek to persuade the court to apply a lesser standard of care where a claim would discourage that activity. So, where evidence can be brought to bear that an activity may have to cease, then the court may find this persuasive in determining that a legal claim (which otherwise would be successful), is not made out.

MASS refers to the following points leading to the myth of a compensation culture in the UK today:

1. **Conditional Fee Agreements**

The removal of Legal Aid and the need for alternative methods for funding litigation costs, led to After the Event (ATE) insurance policies, the premium becoming recoverable from insurers. This new market place created conditions for:

(i) entrepreneurs to create business models that encouraged submission of claims regardless of merit; and

(ii) large additional liabilities to the insurance industry, namely the recoverability of very sizeable ATE insurance premiums, for routine claims.

This in turn led to a huge wave of satellite litigation which still rumbles on today, both between claimant representatives and the insurers and between the policy underwriters and the entrepreneurs and their panel solicitors.

2. **Social Awareness**

Today the Consumer is generally far better informed than 10 years ago and is therefore inclined to enforce rights even where there may be little merit in doing so. This is not the fault of the lawyers who are now being targeted with many of the criticisms. Society today is less prepared to assume the “stiff upper lip” of previous generations.

3. **Media**

The media must take a high percentage of the criticism for fuelling the myth of a compensation culture in the UK. The media is delighted to have a topic that provides perfect “tabloid fodder”, namely the ridiculous claim being pursued and the reaction of public authorities to such (eg children wearing safety-goggles when playing conkers at school). The media have shown little or no balance in their reporting, a disinterest in providing the details of the background of such cases or their subsequent outcome; the majority of which if spurious have no prospects of success. As yet, there are no clear proposals to impose restrictions or regulations on the media to prevent further fuelling of our growing “have a go” culture.
4. INSURER CONDUCT

Insurers are also seeking to make mileage from the handful of unreasonable claims to suit their political agenda. By making it more difficult for claims to be pursued and ultimately squeezing out lawyers from the process, the insurance industry seeks to increase yet further the multi-million pounds in profits it makes at present. The population of the UK is legally bound to have to take out insurance against the risk of causing injury on our roads and in our work and other public places. This is because as a matter of deeply imbedded social and political policy, those who are injured should be re-assured that they will have access to funds to meet their legitimate claims for injury and losses and expenses. MASS finds it reprehensible that the insurance industry takes the premiums with one hand but seeks to wriggle out of its obligations to meet the claims with the other.

MASS believes it imperative to recognise the fact that in any fair-minded system of justice there will be a proportion of claims with little or no merit. Generally speaking claimant lawyers sift out these claims and they never see the light of day.

Some claims without merit are presented in good faith. But to surgically exclude the bringing of unmeritorious claims is neither practical nor desirable without so adjusting the system of justice that legitimate claims are deterred. MASS fears that the zealous interest now being shown by the government in the area of personal injury litigation, will result in active management of the process when in fact many of the ills are working their way from the system.

Jane Loney
Executive Director
MASS
November 2005

Evidence submitted by the Bar Council

INTRODUCTION

1. The Bar Council Working Party on the Compensation Bill comprises a number of barristers nominated by the Law Reform Committee of the Bar Council, the Circuits and a number of specialist Bar associations, including the Personal Injury Bar Association and the Professional Negligence Bar Association. The Working Party was set up following the desire of the Bar Council to provide a response on behalf of the Bar as such to the Compensation Bill when published. Some of the specialist Bar associations may formulate their own responses to the Bill.

2. Following an invitation to the Bar Council from the House of Commons Constitutional Affairs Committee to provide written evidence in the context of its investigation of the Compensation Bill, this document has been produced as the Bar’s written evidence. The Bar will be glad to offer further assistance (possibly by providing a team of practitioners who could elaborate on the issues) if called upon to do so by the Committee.

3. This submission addresses the five questions which are being considered by that Committee.

DOES THE “COMPENSATION CULTURE” EXIST?

4. The existence of a system by which those who have suffered injury as the result of the fault of another can claim compensation is a fundamental part of the UK legal system. The fact that many thousands of injured people obtain compensation each year through that system does not, of course, evidence the existence of a “compensation culture”. Similar jurisdictions exist worldwide and the need to establish “fault” to secure compensation is usually seen as both “fair” and sensible economically.

5. The expression “compensation culture” is used as a label (a) for what some believe is a recent increase in claims based on greed or fraud or (b) to characterise claims for compensation considered to be frivolous or detrimental to the public purse or some socially beneficial activity. The Secretary of State for Constitutional Affairs has described it as follows:1

“It’s the idea that for every accident someone is at fault. For every injury, someone to blame. And, perhaps most damaging, for every accident, there is someone to pay.”

6. There seems little doubt that the public has become increasingly aware of the avenues open for claiming compensation. This may be due partly to the existence of advertisements about how compensation can be claimed.2 However, that is a relatively recent phenomenon and the increased awareness of rights to compensation probably pre-dates the development of this kind of advertising.3 Whilst there may be

1 Speech to Health and Safety Executive on 22 March 2005
2 The role of the internet in this regard cannot be overlooked. A “Google” search for the word “accident” will lead immediately to a number of avenues for advice
3 The role of “ambulance-chasers”, a pejorative expression used to describe lawyers who turned up at the scene of an accident shortly after it occurred, or who sought out the victims of a significant accident and provided them with visiting cards, has been known for many years
legitimate concerns about certain types of advertising and “touting” for business in this area (see paragraph 19 below), the fact that the public is better educated concerning its legal rights and how to pursue them is generally to be welcomed and not condemned. Moreover there appears to be no substantive evidence to support the contention that (a) increased awareness of the availability of compensation or (b) a “compensation culture” is increasing the level of claims.

7. Our understanding of the Government’s view is that there is not in fact a “compensation culture” in the UK. This reflects the conclusion reached by the Better Regulation Task Force in its May 2004 report entitled ‘Better Routes to Redress’, namely, that the existence of a compensation culture is “a myth”. For the reasons summarised in paragraphs 8–9 below, it is our view that that conclusion is indeed correct. The problem, it is said, is the “perception” that a compensation culture exists. The Better Regulation Task Force said that its “report looks at what has created the perception of a compensation culture; how that perception is fuelled; and the damage that the perception, unless tackled, will do . . . ”. We will deal below with the question of whether any amendment or clarification of the law of negligence is necessary to deal with this “perception”.

8. The statistics contained in Table 1 of the Better Regulation Task Force report indicates that the number of accident claims had remained stable during the period 2000–03 and had actually declined in 2003–04 thus yielding an overall reduction over the period. The Report suggested that those statistics might not provide an accurate picture because many compensation claims are settled out of court. We are not convinced that this is a valid criticism since the figures from which Table 1 was compiled came from the Compensation Recovery Unit and there is a statutory obligation to notify the Unit of a personal injury claim even if that claim is subsequently settled.

9. However, there is further evidence in the form of the Annual Judicial Statistics (published by the DCA) that reinforces the view that there is far less litigation about compensation claims generally now than there was a few years ago. The statistics for the Queen’s Bench Division of the High Court (where many of the more substantial personal injury claims, including clinical negligence claims, are commenced and, in default of settlement, are tried) show an enormous diminution in the general number of claims instituted as between 1995 and 2004. A lesser (about 35%) reduction in “money claims” (which will include a significant number of personal injury and clinical negligence claims) instituted in County Courts over a similar period also evidences a reduction in the volume of litigation in these areas. The Queen’s Bench Division statistics show a particularly significant drop after 1999, when the Civil Procedure Rules were implemented and Conditional Fee Agreements came to replace Legal Aid in most ordinary personal injury claims.

10. Although the Better Regulation Taskforce spoke of “the apparent explosion of litigation in the latter half of the 1990s and the early years of the 21st century”, we do not believe overall that there has been such an explosion: in fact the evidence is very much the other way. We do not have any hard evidence that particular types of claims, such as claims against doctors or teachers, are on the increase. There is anecdotal evidence of school activities being curtailed and of widespread risk aversion because of the fear of being sued, but some firmer evidence than we have as yet seen needs to exist before any significant reform in the present compensation system is required. Anecdotal evidence of the type mentioned is, of course, newsworthy and excites comment, but isolated incidents which receive publicity do not assist in assessing the reality of the problem.

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4 In his speech to the Institute of Public Policy and Research on 26 May 2005 (see footnote 6) the Prime Minister referred to the “so-called compensation culture” and the Secretary of State for Constitutional Affairs said in a speech on the issue on 17 November 2005 that “...we, in Government, want to show that we are committed to preventing a compensation culture from developing”.

5 “Here in Britain, whatever the actual state of the so-called compensation culture, the perception of it and the effects of that perception are real. In England in 2003 there were between 7 and 10 million pupil visits on school trips. Sadly, there was one fatality. But only one. Between 2000 and 2005 the overall number of accident claims fell by 5.3%. Over the same period, accident claims against local authorities, schools, volunteering organisations and other public sector bodies fell by 7.5%. In 2000, the cost of litigation in the UK as a percentage of GDP was less than a third of that in the US. Tort costs in the UK in 2000 were 0.6% of GDP. This is the lowest of any developed nation except Denmark. But the facts too often do not prevail. You may recall the stories of the girl who sued the Girl Guides Association because she burnt her leg on a sausage or the man who was injured when he failed to apply the brake on a toboggan run in an amusement park. Neither of these cases produced big compensation awards in the courts. But this is not the impression that is left. The headlines have an after-life. They leave behind the sense that, not only are such cases being brought all the time, but that huge sums of money are being wasted. This impression, in turn, has genuine effects. Public bodies, in fear of litigation, act in highly risk-averse and peculiar ways.”—the Prime Minister, speech to the Institute of Public Policy and Research on 26 May 2005. “... the problem is not about legal niceties: the notion that people are ‘having a go’ is hindering organisations from going about their normal business. Some people, wrongly, think the law has shifted into a new territory—a territory that favours spurious claims. This is a misperception and a damaging one at that.”—the Secretary of State for Constitutional Affairs on 22 March 2005. “However often we point out that claims are not in fact going up, people still believe they are. The reality of a compensation culture gains credence by this misperception.”—the Secretary of State for Constitutional Affairs on 17 November 2005

6 In the Prime Minister’s speech on 26 May 2005, quoted in footnote 5, it will be noted that he drew attention to the fact that between 2000 and 2005 the overall number of accident claims fell by 5.3% and that “...we, in Government, want to show that we are committed to preventing a compensation culture from developing”.

7 Judicial Statistics Annual Report 2004, Pie Chart at p. 32

8 Judicial Statistics Annual Report 2004, Table 4.1
11. It is also the experience of those involved in the litigation process that a headline concerning a particular case may appear on the first day of a trial, but the fact that the claim is subsequently dismissed is not reported, or is reported in a much less obvious way. This can give a distorted impression of what is going on in the legal system. There is, of course, little, if any, reporting of cases that are abandoned or settled.

**WHAT HAS BEEN THE EFFECT OF THE "NO-WIN-NO-FEE" CONTINGENCY FEE AGREEMENTS?**

12. We would correct one feature of the terminology in the question, namely, that what are now described generally as “no-win-no-fee” agreements are conditional (not contingency) fee agreements and are referred to as “CFA’s” for short. “Contingency fees are where the fee paid is a percentage of the damages. It can either be a percentage taken from the damages, or a percentage of the damages but paid in addition to the damages.”—Better Regulation Task Force report, p 29. Contingency fees are illegal.

13. At the time of their introduction as the means of financing the bulk of personal injury litigation following the withdrawal of Legal Aid, there were differing views about the extent to which CFAs would in fact increase access to justice. That debate continues, but there is a strong feeling amongst practitioners experienced in the field of personal injury litigation, in particular, that the removal of Legal Aid and its replacement with a system of CFAs has precluded the bringing now of claims which are difficult, but which are nonetheless potentially valuable and meritorious. However, we recognise that CFAs are now a permanent feature of the funding landscape in this field.

14. Although CFA’s have become a more significant vehicle for funding compensation claims since 2000, and indeed the number of providers of appropriate insurance cover has also increased, the evidence to which we have referred above does not suggest that they have led to an increase in the overall number of accident claims. We do not claim to have detailed evidence about their effect in terms of increasing or decreasing the number of claims, but if, as we think, they may have had an effect in reducing the number of claims, it is probably because responsible litigation practitioners will only take on a case on a CFA basis if the claim has a reasonable prospect of success because otherwise those practitioners will not be paid for the work done. It follows, therefore, that the use of CFA’s may well be discouraging frivolous or unmeritorious cases—but also, unfortunately, those in the “difficult but viable” category referred to in paragraph 12.

15. If, contrary to our perception, CFA’s are producing a greater number of fraudulent or suspect claims and that “outing” for business in hospitals by claims management organisations is generating compensation claims from those who would not otherwise have claimed, then that would be a reason for regulation of the claims management industry (which we would support: see paragraphs 19-20 below), not a ground for criticism of the CFA system as such or for any amendment or clarification of the law of negligence.

**IS THE NOTION OF A “COMPENSATION CULTURE” LEADING TO UNNECESSARY RISK AVERSENESS IN PUBLIC BODIES?**

16. We have referred above to the view that there is within the UK a “perception” of a “compensation culture” rather than “compensation culture” as such.

17. Others may be in a better position to judge this than us, but there is, in our view, little concrete evidence to support the contention that this perception is widespread, that the current state of the law of negligence has led to it or that there is unnecessary risk averseness in public bodies as a result. Local authorities carry out numerous activities which inevitably expose them to the risk of claims for compensation. There is no compelling evidence that they refrain from any of those activities from fear of being sued. On the contrary, the possibility that local highway authorities may be the subject of tripping and slipping claims tends to lead to better systems of inspection and maintenance of roads and pavements so that those claims can be defeated. This is a benefit to society not a disadvantage. This “public benefit” aspect to the existence of the right to redress by means of a negligence claim has also led, for example, to improved hospital and clinical practice. The introduction of hospital protocols (reflecting good practice, not defensive practice) probably occurred at least partly because of deficiencies in the then existing practices highlighted in certain cases. The abandonment of outmoded clinical practices will have come about largely through knowledge that pursuing them could lead to a negligence claim. Other examples could doubtless be given.

18. The extent to which doctors, teachers and other professionals or groups are truly concerned about a growth in compensation claims is not clear. Whilst no-one would wish to be the target of a claim for negligence, (a) any such claim is invariably covered by insurance and (b) there are far stronger suggestions that the concerns of professional people relate to being the subject of criminal prosecution for the consequences of their ordinary work activities rather than having to deal with a compensation claim. For example, a teacher who supervises an out-of-school activity in which a child dies could easily be the subject of a manslaughter charge. The words of the Secretary of State for Constitutional Affairs quoted in paragraph 5 above could so easily be read to embrace the possibility of criminal proceedings against the person said to be at fault.

19. We believe that if it is the case that public bodies and other organisations are more risk averse than in the past, then that is as likely to be a consequence of the prevailing statutory regulatory regime than any perceived “compensation culture”. There are a large number of health and safety regulations which require employers to carry out risk assessments and to reduce risks to a minimum (see, for example, regulation 4 of...
the Manual Handling Regulations 1992 and regulation 3 of the Management of Health and Safety at Work Regulations 1999). Where an employer has assessed an activity as carrying a risk and then has reduced or eliminated the risk to protect his employees, the activity will have been modified accordingly. That is not a consequence of the current state of the law of negligence.

SHOULD FIRMS WHICH REFER PEOPLE, MANAGE OR ADVERTISE CONDITIONAL FEE AGREEMENTS BE SUBJECT TO REGULATIONS?

20. Given the evidence contained in the Better Regulation Taskforce report of some of the practices engaged in to date, the answer is plainly “yes”. There would, we believe, be strong support for appropriate regulation in this context.

21. The object of the proposed regulations should be to maintain an open market for the provision of CFA’s to the public whilst ensuring that the organisations which provide them do so in a proper manner.

SHOULD ANY CHANGES BE MADE TO THE CURRENT LAWS RELATING TO NEGLIGENCE?

22. The modern law of negligence is founded in Lord Atkin’s statement of principle in Donoghue v Stevenson [1932] AC 562, the famous case about the snail in the bottle of ginger beer: “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”

23. However, this bald statement of common law principle has been modified and developed over the years. The setting of the boundaries of the law of negligence and the scope and content of duty and standard of care (and indeed causation of damage) have evolved to meet the needs of society. This is one of the advantages of a flexible common law system as opposed to that of a codified system of law.

24. As Lord Oliver said in Caparo Industries plc v Dickman [1990] 2 AC 605, 633:

“. . . the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a “relationship of proximity” between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be “just and reasonable”. “

25. In Watson v British Boxing Board of Control Ltd [2001] QB 1134, Lord Phillips said that the House of Lords in Caparo and the Court of Appeal in other cases had approved the approach to the development of the law of negligence recommended by Brennan J in the High Court of Australia in Sutherland Shire Council v Heyman (1985) 157 CLR 424, 481, where he said:

“It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed’. “

26. It follows from this that the development of the law of negligence by the courts follows an incremental approach, one of the essential ingredients in any new situation under consideration being whether it is “fair, just and reasonable” to impose liability. However, the latter consideration tends to narrow the ambit of potential claims than to widen it. As Sedley LJ put it in Dean v Allin & Watts [2001] PNLR 921, 927:

“After a century and a half of development of the law of negligence, we know there is no universal legal formula by which the presence or absence of liability can be determined and policy has correspondingly come to fill some of the places. What is not always understood in this context is that the ‘fair, just and reasonable’ test is not a gate opening on to a limitless terrain of liability but a filter by which otherwise tenable cases of liability in negligence may be excluded.”

27. As will be apparent from the foregoing, it is necessary for a court, when faced with a new situation in which a breach of duty is alleged, to consider the general “policy issue” of whether it is “fair, just and reasonable” to impose a duty of care. This has not infrequently involved questions concerning the social utility of the activity under scrutiny. Our supporting documents demonstrate the attitude of the courts to “public policy” arguments. The dividing line between what a court will feel able to take into account and what it will not may be difficult to draw. However, our view is that the courts have largely struck the right balance in ensuring that the imposition of a duty of care does not impede ordinary, desirable activities.

28. This view also appears to coincide with the Government’s view. In the first place, the Better Regulation Taskforce itself said that:

“the judicial process is very good at sorting the wheat from the chaff.”

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9 Lord Bridge of Harwich said this in the same case at pp 617-618: “...in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”
The Secretary of State for Constitutional Affairs took up this line in his speech on 22 March 2005 when he said this:

“In reality, the way the courts look at claims is well-established and broadly consistent. The Better Regulation Taskforce report . . . was quite clear on this point.”

He went on to say, however, that—

“the consequence of people thinking the courts are awarding compensation in new ways is causing problems.”

29. We will not extend this submission by substantial reference to past cases, but two relatively recent cases will, we believe, demonstrate that the courts are alive to the need to balance the social importance and utility of an activity or sphere of life when considering whether to impose a duty of care or whether, when such a duty is to be imposed, care needs to be shown by the courts in finding that there has been a breach of that duty.

30. In Tomlinson v Congleton Borough Council [2004] 1 AC 46 the House of Lords had to consider whether a local authority was in breach of a duty of care as occupier of a lake formed in a disused quarry when it failed to prevent swimming or warn against the possibility of danger. A young man dived in and broke his neck. The claim failed and it is plain from the speeches of the Law Lords that they were well aware of the issues of social utility and free will when determining whether there had been a breach of duty of care. Lord Hoffman was of the opinion that there were two particularly important considerations:

“41 . . . the first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the council should be entitled to allow people of full capacity to decide for themselves whether to take the risk.

42 . . . the majority of people who went to the beaches to sunbathe, paddle and play with their children were enjoying themselves in a way which gave them pleasure and caused no risk to themselves or anyone else. This must be something to take into account in deciding whether it was reasonable to expect the council to destroy the beaches.

45 . . . the majority of people who want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities . . . . But the law does not require him to do so.”

31. In Phelps v Hillingdon LBC [2001] 2 AC 619 the broad issue was whether a claim in “educational negligence” could be brought as a result of the alleged failure of various education professionals to identify the dyslexia of the various claimants. Although the House of Lords felt that, in principle, a claim based on such an allegation could be made, caution about it should be shown. Lord Slynn of Hadley said this:

“The difficulties of the tasks involved and of the circumstances under which people have to work in this area must also be borne fully in mind. The professionalism, dedication and standards of those engaged in the provision of educational services are such that cases of liability for negligence will be exceptional. But though claims should not be encouraged and the courts should not find negligence too readily, the fact that some claims may be without foundation or exaggerated does not mean that valid claims should necessarily be excluded.”

The proposed change in/clarification of the law

32. The change or clarification of the law of negligence proposed in clause 1 of the Compensation Bill is entitled “Deterrent effect of potential liability”. The proposed wording is as follows:

“A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might:

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way; or

(b) discourage persons from undertaking functions in connection with a desirable activity.”

The intention is that a court considering whether a person is in breach of the standard of care in a negligence action may take into account the desirability of the activity which gave rise to the alleged breach.

The proposal is unnecessary and undesirable

33. The intention behind the clause is, of course, entirely legitimate. The essential question, however, is whether it is necessary to enact legislation to achieve what is desired. Our position is that legislation is neither necessary nor desirable.

34. In paragraph 12 of the Explanatory Notes the draftsman of clause 1 of the Bill explains that:

“This provision reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts.”
35. For reasons which will be apparent from what has been stated above, we agree with that statement and do not see the need to enact legislation which merely reflects the current law, particularly if there is a risk that legislation might be the subject of difficulties of interpretation.

36. The expression “desirable activity” is an elusive concept and introduces a significant subjective element into the law of negligence which is founded on the objective criterion of what is “reasonable”. What may be regarded as “desirable” by one judge may not coincide with the view of another. And by what standards, and on what evidence, is the decision to be made in any case? Whilst, of course, it might be said that in determining what is “reasonable” some degree of subjectivity is involved, the word “reasonable” itself connotes the need to take an overview of what the ordinary, reasonable person might think of a situation. The use of the word “desirable” does not necessarily carry the same message.

37. There are other potential problems with the clause.

(i) It applies only to claims framed in negligence. Many compensation claims are capable of being presented on the basis of a breach of statutory duty as well as negligence. Indeed in some cases (for example, claims against tour and holiday companies) the claim may also be framed as a breach of contract. It is plainly undesirable that a court faced with a claim based both in negligence and on breach of statutory duty (and/or a breach of contract) would be required to consider the application of the clause to one cause of action but not the other(s) in respect of the same accident.

(ii) It introduces the prospect of there being a higher standard of care for activities that are not “desirable” and a lower standard for those that are. That cannot be right.

38. Moreover the clause is permissive rather than mandatory, yet there is no indication of the circumstances in which a court should or might choose to disregard the desirability of an activity when determining liability in negligence.

39. In conclusion we do not consider that there is any need for statutory change to the law of negligence in this area and believe that clause 1 of the Compensation Bill is unnecessary. We think that the courts should be allowed to continue both to develop and at the same time “rein in” the law of negligence as they have done (by common consent, successfully) over the years without having to face a super-added statutory gloss on the process.

40. If there is a need to ensure that a court has all the necessary information before it to assess the “social value” of an activity (and lack of information is cited by judges as one of the reasons for not being able to take this kind of factor into account), then (a) it is open to any party (particularly in this context, the Defendant) to invite the court to consider suitable evidence and/or (b) the court has all the necessary case management powers under the Civil Procedure Rules to ensure that evidence from appropriate sources can be given or other parties added to the proceedings to ensure that the fullest possible information is available. None of this requires statutory authority; it is merely requires the party who wants the relevant information and evidence before the court to ensure that it is available and for the court to be ready to receive it.

Evidence submitted by the Association of British Insurers (ABI)

Reforming the personal injury compensation system and tackling the compensation culture

1. Introduction

1.1 This is the Association of British Insurers’ (ABI) response to the House of Commons’ Constitutional Affairs Select Committee call for written evidence on the compensation culture in the UK.

1.2 The ABI represents the collective interests of the UK’s insurance industry. The Association has around 400 member companies. Between them, they provide 94% of domestic insurance services sold in the UK. In 2003, ABI members paid out £4.5 billion in compensation for personal injuries sustained either on the road, in the workplace or in public places.

1.3 The personal injury compensation system is not working effectively: it is failing both genuine claimants and insurance customers. It can take too long for compensation to reach claimants; too much money is paid to claimant representatives; and rehabilitation is not sufficiently promoted. For example, for every £1 insurers pay out in personal injury compensation, an additional 40p goes to claimants’ representatives: this amounts to over £2 billion in transactional costs every year. Furthermore, there is a danger that the system discourages legitimate claimants from coming forward at the same time as rewarding those who know how to “play the system” fraudulently.

1.4 The ABI therefore proposes radical reforms to the compensation system to follow the first steps proposed in the Compensation Bill. The ABI’s proposals would create a new compensation process that puts claimants’ needs at the heart of the system, introduce new measures against fraudulent exaggerated
claims, and introduce a new package of measures to promote rehabilitation. As a result, claimants would receive their compensation more quickly and efficiently, more people would benefit from rehabilitation, access to compensation would be simplified and fraud would be reduced.

2. Does a compensation culture exist?

2.1 The number of claims made for injury and illness caused by work has fallen in recent years, as would be expected given welcome improvements in health and safety. The insurance industry has itself contributed towards this reduction in the number of personal injuries through risk surveys, advice and financial support for risk management measures.

2.2 However, the same trend is not apparent in motor personal injury claims. Despite improvements in road safety, there was a 3% annual increase in motor personal injury claims between 1991 and 2000. This suggests an increasing propensity to claim in this area.

2.3 Regardless of the number of claims, the cost of an average personal injury claim continues to rise. For example, the average cost of a motor personal injury claim rose by 6.7% per year between 1991 and 2000. There are two main factors driving an increase in the cost of individual claims:

- increases in the transactional costs of settling personal injury claims. This is the cost of the legal and other fees associated with reaching compensation settlements. For example, in low value employers’ liability claims, claimant legal costs and disbursements increased by 40% between 2000 and 2002. In low value motor claims, these costs increased by approximately 25% during 2001;
- increases in the amount of personal injury compensation payable. As long as society is content to fund higher levels of compensation over time through increases in insurance premiums, then this is not a cause of concern.

2.4 The increase in transactional costs has arisen due to the move to “no win, no fee” contingency fee arrangements and the Woolf reforms that were intended to regulate how claims are handled prior to litigation and reduce the delays and costs in litigated cases. In particular, these reforms have enabled claimants’ representatives to incur large costs before giving the insurer the chance to accept liability and offer compensation (known as the “front-loading” of costs).

2.5 This front-loading of costs is often disproportionate and unnecessary. The current system, based on market principles but without an effective market of informed consumers shopping around to get the best price, is allowing claimants’ representatives to set their prices and commission reports without sufficient checks and balances. For example, in many cases, insurers would accept liability without requiring all of the research undertaken by claimants’ representatives. In other cases, claimant representatives are not effectively checking if their client had “Before The Event” (BTE) insurance that could be used to finance the claim and instead too readily sell additional “After the Event” (ATE) insurance.

2.6 In many ways, the ultimate criticism of the behaviours that have resulted from the contingency fee arrangements and Woolf reforms is that the claimant has become a commodity whose case is bought and sold by the different claimant service providers, many paying large referral fees for the right to provide services to the claimant because the costs flowing round the system enable each service provider to make money on top of any referral fees paid.

3. Does the compensation system need reforming?

3.1 It might be argued that if there has been no increase in the number of claims coming forward, there is no compensation culture and the compensation system does not need reforming. However, there are fundamental flaws in the current personal injury compensation system that require tackling.

3.2 A compensation system fit for purpose in the 21st century would:

- be easy for claimants to access;
- deliver redress fairly, quickly and transparently;
- focus on helping the claimant get back to the condition that they were in before the incident as soon as possible through the provision of the most appropriate treatment, including rehabilitation;
- ensure high quality advice and representation is available for claimants when appropriate;
- involve proportionate processes which are cost effective and transparent for both sides, to keep insurance premiums low for customers and cost risks minimal for claimants;
- ensure that fraudulent claimants are prevented, or else detected and penalised;
- help draw out the key causes of injuries to enable preventative measures to be taken in future.

3.3 However, the current system is failing:

- it is complex and adversarial, and there is evidence to suggest that this may be deterring some people from making legitimate claims and driving others into the arms of unscrupulous claims management companies or solicitors. For example, the TUC point out that fewer than one in 10 people injured in the workplace currently receive compensation from their employer or the State.
While many injuries may not be due to negligence and therefore not entitled to compensation under our fault-based personal injury compensation system, both the TUC and the Citizens Advice Bureau argue that there are at least some legitimate claimants not coming forward because the current system does deter them from making a claim:

— it takes far too long for the claimant to receive compensation. For example, in employers’ liability claims, it takes on average over 400 days from the incident occurring to the insurer being informed, and then a further 600 days for a settlement to be reached;

— the system encourages too much focus on securing a big lump sum payment instead of ensuring that the claimant is rehabilitated as quickly as possible. For example, research suggests that rehabilitation provision should more than double to ensure that everyone who could benefit from rehabilitation after an accident at work actually receives it;

— some claimants receive inappropriate advice from claims management companies, and legal advice may sometimes not be available or be offered at inappropriate times. For example, some claimants are subject to high-pressure sales tactics by unqualified intermediaries in some claims management companies who sell complex products without proper advice and treat the claimant as a commodity to be sold on to other service providers. Many solicitors may refuse to take on good small claims or higher risk claims as they “cherry pick” claims to benefit most from the complex legal financing rules around conditional fee agreements and success fees;

— the costs in settling claims are disproportionate. For every £1 insurers pay out in personal injury compensation, an additional 40p goes to claimants’ representatives. This amounts to over £2 billion every year. This in turn is paid for by employers, motorists and others in their insurance premiums;

— too many claims are exaggerated. For example, 12% of employees are aware of exaggerated claims for genuine injuries and illnesses within their own organisation in the last two years, and 8% of employees think that it is acceptable to exaggerate a claim;

— the real causes of injuries are often overlooked in the media, which instead tends to focus on frivolous and catastrophic claims. This can lead to inappropriate risk aversion rather than focusing on effective risk management against more common risks.

3.4 The ABI is therefore proposing further areas for reform and these are summarised below.

4. **ABI proposals to reform the compensation system**

4.1 Our proposals would rebalance the compensation system to ensure that it meets the objectives set out in paragraph 3.2 above. In particular, we have focused on three key areas:

— improving the claims process to facilitate easy access to compensation, quick resolution, access to high quality legal advice at the right time and proportionate costs;

— more effective deterrents against fraudulent claims to ensure that, in parallel to improving access for legitimate claimants, improved measures are in place to deter and penalise fraudsters;

— promoting rehabilitation to help get the claimant back to work and good health as quickly as possible.

**IMPROVING THE CLAIMS PROCESS**

4.2 To create a compensation system that is easy for claimants to access, fair and quick, with high quality legal advice available when appropriate, the ABI proposes a new compensation process for personal injury claims under £25,000. This would allow people making smaller claims to seek compensation without having to go through the long and costly process of litigation. To introduce this new system, some primary legislation would be required.

4.3 The key steps in the system would be:

— if someone suffers an injury that they believe is due to the negligence of someone else, they should inform whoever they believe to be at fault as soon as possible;

— the claimant should then be given a new universal claim form that is easy to complete with some basic details about the incident and its impact and this should be sent to the compensator;

— once the claim form is received, the compensator should have a fixed time in which to respond to the claimant with either an offer of compensation, a full explanation as to why the claim has been rejected, or details of any alleged contributory negligence. Any offer would be based on a proposed new publicly available compensation tariff that would help demystify the process for claimants;

— the claimant should at this stage have the option of free legal advice on the fairness of the insurer’s response and, if there is a dispute, the claim should be referred to a mediation process;
only if mediation fails should the claim resort to the courts and, if either side were found by the courts to have litigated inappropriately, they should be penalised for wasting court time. The “track” limits for claims that determine how they are handled through the courts should be increased to £5,000 and £25,000 for small and fast track cases respectively, to reflect trends in compensation levels.

4.4 Under our proposals, the need for advice at the start of the process to make a claim would be reduced: this should make the system easier to access and avoid people being put off making legitimate claims. However, the claimant would still be entitled to seek advice if they wish to do so. The ABI supports the proposal in the Compensation Bill to ensure that any organisation providing claims management services is regulated. This would act as a form of quality assurance for claimants; ensure transparency about fees, earnings and spending; and ensure that there is an effective and independent complaints procedure accessible to all parties.

More effective deterrents against fraud

4.5 To ensure more effective deterrents against fraud, the ABI proposes:

— if a claim is found to be exaggerated, the compensation due on the legitimate part of the claim should be reduced, in addition to no compensation being paid for the exaggerated part of the claim, and there should be cost penalties when apportioning costs;
— the Police and Crown Prosecution Service should be set specific targets for tackling fraud;
— greater data exchange between the private and public sector to enable better detection of organised fraud, building on the insurance industry’s decision to create a new Insurance Fraud Bureau to share data more effectively within the industry.

Promoting rehabilitation

4.6 To promote rehabilitation, the ABI proposes to build a coalition of stakeholders to improve the “return-to-work” culture and occupational health more generally. Specifically, the ABI proposes:

— the remit of the Health and Safety Executive (HSE) should be changed by the Government so that it can play a more effective role in promoting rehabilitation after occupational injuries;
— the Government should ensure clarity and consistency in the tax system so that employers are encouraged to provide rehabilitation for injured or ill employees. For example there is uncertainty among employers and insurers about whether the provision of rehabilitation regardless of fault is taxed as a benefit-in-kind;
— a new requirement in the personal injury compensation system should be introduced for the claimant to receive and undergo rehabilitation where there is a clinical need to do so;
— the NHS and benefits system should recognise the importance of rehabilitation in improving the health of the working population. For example, GPs should be able to recommend a phased return to work for patients, with lighter duties if necessary, rather than having to make a binary decision of either work or no work;
— to ensure that purchasers of rehabilitation services can be assured of the quality of service provision, the rehabilitation industry should complete its development of industry-wide standards for rehabilitation qualifications, with the support of the Healthcare Commission if necessary.

4.7 The insurance industry is playing its full part in promoting the benefits of rehabilitation, in particular through:

— a new ABI initiative to promote a code of best practice for employers and employees on how to respond in the immediate aftermath of an accident at work;
— ensuring that insurance products are available that offer rehabilitation, either through employers’ liability or health insurance;
— existing financial sponsorship to train rehabilitation providers.

5. Is the fear of a compensation culture leading to disproportionate risk management?

5.1 Increasing awareness about potential liabilities is in itself welcome: it can help ensure that organisations take their responsibilities to manage risks seriously.

5.2 The ABI and the insurance industry has played a major role in helping organisations improve risk management. For example:

— the ABI recently published a guide to effective risk management in the voluntary and community sector, Living with Risk;
the ABI operates a scheme called Making the Market Work, under which trade associations are invited to submit their health and safety standards for their members to the ABI for comments. This helps drive up safety standards and ensure access to the insurance market;

— the ABI worked extensively with the Health and Safety Executive on the design of its new risk assessment tool for SMEs;

— insurers visit many of their customers to provide advice on minimising risk, produce literature and help-lines to promote risk management, and provide financial support towards the purchase of risks management services.

5.3 However, there are some well-documented examples where risk aversion has become excessive. It would therefore seem appropriate for the Government to increase understanding about proportionate risk management and the boundary between negligence and not being at fault, particularly in the public sector. The ABI notes that the Government has sought to do this through clarifying the law of negligence. It is important that great care is taken to ensure that this does clarify the issue rather than further cloud it and risk the uncertainty possible from future test cases probing the new law. The insurance industry will continue to promote effective risk management while ensuring that insurance remains available for effectively managed risks.

Association of British Insurers

November 2005

Evidence submitted by Norwich Union

About Norwich Union

1. Norwich Union is the UK’s largest insurer with a market share of around 14%. With a focus on insurance for individuals and small businesses, Norwich Union insures one in five households, one in seven motor vehicles and around 800,000 businesses.

2. Norwich Union receives around 80,000 bodily injury claims per year with the vast majority of them being low value (less than £5,000).

3. Norwich Union products are available through a variety of distribution channels including brokers, corporate partners such as banks and building societies and Norwich Union Direct.

4. Norwich Union General Insurance has been a key contributor to debate on Compensation reform in the UK and has participated in a range of Government consultations and workshops.

Executive Summary

5. Norwich Union welcomes, in principle, the Compensation Bill. We support Baroness Ashton’s stated intention that the Bill will prevent the development of a compensation culture, discourage bad claims, reduce the fear of litigation, and improve the system for genuine claimants.

6. In 2004, Norwich Union conducted a Public Attitudes Survey, the results of which indicated that many respondents believed there is a developing culture of compensation seeking in the UK and that it is having a negative impact on many areas of both public and private life.

7. Respondents identified changes in society values, together with increasing advertising, as creating the expectation and a climate that compensation seeking was both normal and easy.

8. Legal costs associated with managing compensation claims are too high, accounting for 40% of the overall value of payouts in personal injury.

9. Access to Justice was theoretically a positive step towards a fairer, more democratic system, offering the right to justice through representation for everyone, but the practical implementation has been somewhat different. There are changes that could be made, however, which would protect these benefits whilst reducing the transactional costs associated with them.

10. The Compensation Bill is welcome in its intention to better regulate claims management companies.

11. Much more detail is required on the specific regulation the Government proposes. The current Bill needs to go further than simply paving the way for change.

12. Norwich Union believes that the current common law is both clear and well established, and questions whether new legislation on negligence is necessary.

13. The Government has proposed alternative mechanisms for dealing with compensation claims within the NHS Redress Bill. Norwich Union is disappointed that similar consensual mechanisms have not been promoted within the Compensation Bill.

14. Norwich Union believes that in situations where negligence has been admitted, and the value of the claim is modest, there needs to be agreed protocols for redress that require less, if any, involvement by the legal profession. At present more than 80 per cent of all injury claims have a value below £5,000.
15. Norwich Union believes greater emphasis should be placed on rehabilitation—giving real help to injured people in the immediate aftermath of an accident. We would encourage far greater co-operation between Government departments in this respect.

**Does the “compensation culture” exist?**

16. Research carried out by Norwich Union reveals that 96% of people believe claiming compensation is more prevalent now than 10 years ago.

17. The research also confirms that, whilst as a society we are more aware of our rights and now have better access to justice, the desire to seek compensation is in danger of becoming an outlet for an “every man for himself” or “have a go” culture.

18. Respondents identified “No-win no-fee” adverts as fuelling a belief that compensation seeking is both normal and easy, and provides people with “guidelines” and support for how they can legitimately act.

19. Norwich Union does not believe that we are anywhere near a US culture of litigation and compensation, however the figures on costs demonstrate that pursuit of compensation is costing the UK economy significant amounts. Excessive risk aversion is a threat to the economy and to volunteer activity.

20. The compensation bill for the UK is estimated by the Institute of Actuaries to be £10 billion with legal costs accounting for £4 billion within that overall sum.

21. Inflation on personal injury claims is running at 12% per annum.

22. However, an estimated one in 10 of those claims are alleged to be bogus. Norwich Union strongly believes that compensation claims should fail entirely if they are fraudulent.

**What has been the effect of the move to “no-win no-fee” contingency fee agreements?**

23. The Access to Justice Act was theoretically a positive step towards a fairer, more democratic system, offering the right to justice through representation for everyone. It also sought to cut the Legal Aid bill of approximately £60 million paid from the public purse and transfer this to the private sector. Although this has been successful, costs have escalated by as much as ten-fold. Even the uncontested cases Norwich Union deals with (where liability and the sum in question are rarely questioned) incur costs of up to 65% of the damages paid and can be greater than the damages themselves. This has applied a significant pressure on defendants to settle claims even if they are debatable. The penalty for contesting a claim and losing is now normally a doubling of legal costs.

24. Following the removal of Legal Aid as a method of funding personal injury claims in the UK the Government changed the rules in respect of cases run on a conditional fee agreement or “No-Win No-Fee” basis.

25. The old rules allowed for cases to be conducted by solicitors on the basis of no-win no-fee and allowed them to charge the claimant a Success Fee which was capped by the Law Society at 25% of the damages awarded. In addition the claimant could insure themselves against the risk of having to pay their opponents costs by taking out an After The Event (ATE) policy.

26. The removal of Legal Aid resulted in the rules on recoverability of these additional liabilities changing so that these could now be recovered from the paying party which in the majority of PI cases are insurers and the NHS Litigation Authority.

27. The 25% cap on the Success Fee was subsequently removed and replaced by a cap of 100%. There was no capping or guidance as to the level of the ATE premium.

28. The last few years has seen considerable litigation and mediated agreements under the auspices of the Civil Justice Council to clarify what represents a reasonable level of Success Fee claimable in respect of different levels of injury claims.

29. No major cases have been brought before the Court of Appeal as to the reasonable level of an ATE premium. The paying parties are facing ever increasing levels of ATE premiums and have little control over the premiums being claimed.

30. It had been anticipated that a competitive controlled market place would be created. This has not happened. The OFT have recognised this, and the Civil Justice Council is at the early stages of attempting to mediate reasonable premium levels.

31. There are many different underwriting models in use. Some providers are claiming modest levels of premium on a “many pay for the few” basis at an early pre-proceedings stage and then, if proceedings are started, claiming a further substantial top ups.

32. This typically results in increases from £400 pre-proceedings to £1,000 on issue of proceedings and then increases to £5000 or more as the case progresses.

33. Norwich Union believes that claims management companies and solicitors have exploited claimant expectations in terms of what can be compensated, what it might cost them and the amounts that might be achieved. This is a consumer protection issue.
34. There has been much debate about volumes of claims remaining static over the past few years. The source quoted to support this is the Compensation Recovery Unit (CRU). However, the CRU only records actual claims as opposed to attempts to claim, that is to say that the claims farmers might present 10 claims to their panel solicitors for consideration but only two are actually pursued.

35. The inevitable consequences have been an increase in frivolous and vexatious claims and an explosion of claimant costs. The latter now represents 40% of all payouts. These cost issues have spawned much satellite litigation.

36. The so-called “low level” compensation cases rose from 101,000 in 2002 to 110,000 in 2003.

Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

37. Norwich Union predominantly insures private individuals and SME business customers, and does not have a customer base in the field of local authorities or public utilities, who appear to be most affected by the fear of litigation. From talking to those involved in this area, however, it is our sense that risk averseness is becoming more prevalent. Although many of the cases reported in the media are exceptional, rather than regular occurrences, there is no doubt that the fear of compensation seeking is having an impact.

Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

38. If we are to avoid a repeat of the fallout experienced following the demise of the Accident Group, then it is Norwich Union’s view that firms which refer people, manage or advertise conditional fee agreements should be subject to regulations.

39. Norwich Union believes that a Regulator has to promote consumer awareness and protection, and without doubt needs to have clear objectives and be targeted.

40. In addition, we believe that there needs to be regulations dealing with issues of transparency of charges, fees or commissions received for the services which are being regulated. It is these fees that have driven the behaviour that has generated much satellite litigation.

41. Whilst regulation of claims management companies will help, we believe a more significant reform programme is needed to reduce the need for the intervention of the legal profession in the first place. Current reform proposals are too based on regulating the intervention rather than questioning whether the intervention is necessary.

42. It is for this reason that we believe a different formula for legal intervention should be made according to the size of the claim. We do not believe legal costs should be recoverable up to £5,000, where negligence has been admitted. Between £5,000 and £50,000 we believe that protocols should be developed which mirror the NHS Redress Bill. There should be greater emphasis on rehabilitation and best advice. Legal costs should be limited as per the NHS Redress Bill or via an extension of the Predictable Fee regime to £50,000 and into Employers Liability.

Should any changes be made to the current laws relating to negligence?

43. Norwich Union believes that the current common law is both clear and well established, and questions whether new legislation on negligence is necessary.

44. The provision on negligence, as currently drafted in the Bill, states:

“A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precaution against a risk or otherwise), have regard to whether a requirement to take these steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.”

45. Norwich Union believes that the use of the word may makes the application of the Bill discretionary. Furthermore, no legal definition or explanation of what is considered to be a desirable activity has been given.

46. There needs to be clarity around the claims in negligence affected. The debate has been around injury claims but potentially all negligence claims are affected. If the intention is to curb excesses in one area (for example in the educational, sporting or volunteer sectors), the Government needs to introduce words which limit the potential reach of the Bill. Norwich Union also believes that there needs to be further consideration of statutory liability and align the provisions of statutes governing similar liabilities with the Bill’s intent.

47. The intention to allow the Common Law to determine what is meant by desirable activity is not satisfactory. It will lead to satellite litigation and increased costs as a result of the issue being determined in cases as a preliminary issue. Potential meanings are available for import from other Acts.
48. There is merit in the proposal in terms of the intent but there has to be a balance between de minimis cases and the more serious injuries. The Bill does not make a distinction.

Norwich Union General Insurance  
November 2005

Evidence submitted by Allianz Cornhill Legal Protection (ACLP)

Allianz Cornhill Legal Protection (ACLP) are a trading division of Allianz Cornhill. ACLP specialises in underwriting Legal expenses insurance. ACLP have underwritten “before the event” insurance since the late 1980’s and in April 2000 started underwriting “after the event” insurance for personal injury cases.

ACLP are arm deal with approximately 700 solicitors practices of varying size. We are the underwriter for the National Accident Helpline scheme, and have other intermediaries who promote our policies to their solicitors on a delegated authority basis. The solicitors who use our ATE policies are obliged, by the terms of their contract with ACLP to only use our policies for all their clients so as to prevent selection against us.

We would like to respond to the following terms of reference:-

Q1. Does the “compensation culture” exist?
— Our view is that the press have coined the phrase “compensation culture” as a headline. There have been abuses of the system by certain claims management companies whose business models have been sustained through encouraging people, who relied on the advice provided by the CMC, to bring a claim.
— As in all walks of life there will be those who are clearly fraudulent. And of course this must be prevented. On the other hand it is right that people who are injured through the negligence of another party know that they can claim compensation.
— We have no statistics on this tranche of business prior to 2000. There were the spikes in 2000 (caused by new access to justice and the mopping up of claims still within limitation); and in 2001–03 caused by TAG and CD activity. But 2004—05 shows a more “normal” level of cases insured. This experience is supported by independent research companies such as Datamonitor.

Q2. What has been the effect of the move to “no win no-fee” Contingency Fee Agreements?
— Please note that the word used above should be “conditional” not contingency.
— There have been a number of technical challenges brought by liability insurers which has caused some unrest amongst ate underwriters. The removal of the CFA regulations from Statute to the Law Society Rules should create more certainty provided clear guidance is provided by the Law Society to their members.
— Market research carried out by us earlier in the year indicated that customers were uncomfortable with the level of paperwork involved to enable them to bring a claim and were not aware of the need to have insurance unless the solicitor discussed this with them.
— ACLP would like it to be a requirement that all CFA’s are backed up by an ate insurance policy which indemnifies the client for 3rd party costs and un-recovered disbursements should they lose their case.

Q3. Is the notion of a compensation culture leading to unnecessary risk averseness in public bodies?
— ACLP is not in a position to answer this.

Q4. Should firms which refer people, manage or advertise Conditional Fee Agreements be subject to regulation?
— Yes
— The regulator should be entirely independent and not partly a trade body.
— Regulation should not allow those who do not want to be regulated to avoid this by having their business registered and operating outside the UK jurisdiction.
— In addition to requirements outlined in the bill it should include a requirement for:
— the CMC remuneration method to be transparent.
— The full trading address to be available on the internet and on all paperwork—a lot of CMC’s operate on a “virtual” basis; and
— if they do offer “insurance” full details of the provider should be given and with their credit rating, solvency and where they are located.
Q5. Should any changes be made to the current laws relating to negligence?

— The definition of negligence should remain as it is—the wording of the compensation bill which refers to widening the terms for negligence will just open up another can of worms which will need interpretation in the courts. The clause “desirable activity” could refer to one wanting to go to work!

Phil Ruse
Divisional Manager

November 2005

Evidence submitted by the Health and Safety Executive (HSE)

1. SUMMARY

1.1 This memorandum concentrates upon two of the five questions identified in the terms of reference issued by the House of Commons Select Committee on Constitutional Affairs for its inquiry into the “Compensation Culture”.

1.2 First the memorandum responds to the question “does the compensation culture exist?” There is certainly a widespread perception of a compensation culture, as well as the existence of what the Better Regulation Task Force described as a “have-a-go” culture amongst a minority of people. However we do not believe the evidence supports the existence of a compensation culture in the sense of dramatically rising levels of claims. HSE believes the priority should be to ensure good access to redress for those who are seriously harmed as a result of another person’s clear negligence, while discouraging frivolous and vexations claims.

1.3 Second, the memorandum addresses the link between the notion of a compensation culture and unnecessary risk aversion in public bodies. HSE believes that the perception of a compensation culture is one of the factors that promotes examples of excessive risk aversion and unnecessary bureaucracy in both public and private sectors. We have commissioned research on the subject that is due to report in March 2006.

1.4 HSE is working with its stakeholders to promote its message of “sensible risk management”. This aims to build a common understanding of what it means to manage risk effectively and efficiently, and to promote a culture in which risk managers (and others with responsibilities) become increasingly competent and confident to concentrate on those risks that really matter.

2. INTRODUCTION

2.1 The independent enforcement of health and safety has been a feature of the regulatory system in Great Britain for more than 150 years. The modern system owes its origins to the Robens Committee of Inquiry and the subsequent passing of the Health and Safety at Work Etc Act 1974. This established HSC and HSE as two separate non-Departmental Public Bodies accountable to the Secretary of State. It also confirmed an important role for LAs in health and safety enforcement.

2.2 HSC has overall responsibility for policy on health and safety, and advises Ministers on relevant standards and regulations. It also conducts research and provides information and advice. The Chair and members of the Commission are appointed by the Secretary of State for Work and Pensions following consultation, advertisement and open competition.

2.3 HSE advises and assists HSC and has a statutory responsibility to make adequate arrangements for the enforcement of the Act and other relevant statutory provisions in Great Britain. Since the establishment of the Executive, enforcement activities have been shared between HSE and 2nd tier Local Authorities. HSE has responsibility for enforcement in some premises (eg factories, construction sites, Crown premises), whilst local authorities have responsibility in others (eg offices, shops and warehouses). Enforcement of the Act is carried out in accordance with the Enforcement Policy Statement (www.hse.gov.uk/pubns/hsc15.pdf), set by HSC after full consultation with stakeholders.

2.4 Although legislative responsibility for occupational health and safety is reserved to Westminster, health more generally has been devolved to the Scottish Parliament and Welsh Assembly. HSE has evolved its structure to enable the development of close working relationships with the devolved administrations.

3. THE EXISTENCE OF A “COMPENSATION CULTURE”

3.1 HSE is keenly interested in research into the existence of a compensation culture. Given the range and depth of the published research, we have not believed it necessary for us to carry out our own study. Our analysis of the evidence aligns with with the findings of the Better Regulation Executive’s 2004 report “Better Routes to Redress”. Our main conclusions are outlined below in paras 3.2 and 3.3.
3.2 We are not persuaded that there is a rise in the number of health and safety claims. Statistics from the DWP Recovery Unit suggest that the number of claims have in fact fallen over the past five years. Whilst some claims will inevitably not be reported, we have seen no evidence to suggest that there is a significant or rising trend. The average value of a claim does appear to have risen slowly in recent years, but this is somewhat offset by the lower number of claims. We therefore believe that the figures indicate a relatively steady picture of claims.

3.3 Neither is HSE persuaded that the UK is following the US into a litigation and compensation culture. The level of settlements remains steady at around one third the level in the US, juries are seldom used and punitive damages can be awarded only in very restricted circumstance. We therefore do not agree with some commentators that it is only a matter of time before litigation in the UK catches up with the US.

3.4 There does however appear to be a widespread belief that a compensation culture exists. This is supported by research carried out on our behalf by MORI.

Figure 1: Views expressed on health and safety compensation (MORI 2005).

<table>
<thead>
<tr>
<th>Q</th>
<th>Please tell me if you agree or disagree . . . . health and safety compensation claims have gone too far.</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Strongly agree</td>
<td>% tend to agree</td>
</tr>
<tr>
<td>Citizens</td>
<td>47</td>
</tr>
<tr>
<td>Employees</td>
<td>38</td>
</tr>
<tr>
<td>Employers</td>
<td>39</td>
</tr>
<tr>
<td>CEOs</td>
<td>38</td>
</tr>
</tbody>
</table>

3.5 The research is based on interviews with 1,000 citizens, 2,000 employees, 500 employers and 200 CEOs. The fieldwork was carried out in January 2005 and repeats a similar survey (except for the specific inclusion of CEOs) from January 2004. When asked whether health and safety compensation claims have gone too far, the majority indicated that they have, as shown in figure 1 above. The survey reports are published on our web site at: http://www.hse.gov.uk/sensiblehealthandsafety/morimar05.htm

3.6 We also agree with the Better Regulation Task Force’s conclusion that a “have-a-go” culture is the best description of the current situation. Anecdotal evidence does suggest that, particularly where public authorities are concerned, a relatively small minority of people believe that it is worth their while to make trivial and/or spurious claims on the basis that the authorities will settle as the easy option rather than fight. Often it is these claims unfortunately that get sensationalist media coverage despite being atypical of the great majority of genuine and justified civil claims.

3.7 On the other extreme, we are aware of concerns that many workers who could justifiably claim compensation do not in fact do so. For example the TUC’s paper “The compensation myth” suggests that only around 10% of people injured at work receive compensation. Whilst we have not reviewed the figures in detail, HSE is concerned that those who suffer serious harm due to the negligence of another party should have good access to redress.

3.8 There is a need to change perceptions of a compensation culture, whilst at the same time ensuring that those who suffer serious harm due to the negligence of others have quick and effective access to redress.
4. PEERCEPTION OF A COMPENSATION CULTURE AND THE LINK TO EXCESSIVE RISK AVERTION

4.1 HSE is concerned that the perception of a compensation culture contributes to excessive risk aversion and unnecessary bureaucracy. Whilst a degree of risk aversion, proportionate to the level of risk, is very healthy, real problems develop when this balance gets lost. HSE’s mission is to protect people’s health and safety by ensuring that risks arising from work, are properly controlled. These risks change as the nature of work changes. HSE regulates a very wide spectrum of risk from nuclear power stations, high hazard chemical plants through to the different risks found in Government offices. We do not want to see time and resources diverted away from tackling serious risks onto trivial risks that could not realistically result in significant harm or on paperwork that does not make a difference in practice.

4.2 HSE believes that excessive risk aversion causes damage in three ways:

— It damages organisational efficiency and limits room for innovation in both the private and public sectors. It has the potential to erode the competence and confidence of managers.

— It limits personal freedoms and opportunities to learn and develop, particularly where children’s freedom to play is concerned.

— It tarnishes the reputation of “health and safety” and makes it harder to get action taken to control the risks that cause significant harm and suffering.

The perception of a compensation culture does not appear to be the only reason that excessively risk-averse decisions are made in relation to health and safety management. It is our view that a number of other factors play a part, ranging from a desire not to breach health and safety law to pressure from clients and customers. Our MORI survey suggested that liability to pay compensation is not the main consideration as illustrated in figure 2 below.

Figure 2: Views expressed on importance of considerations to health and safety.

<table>
<thead>
<tr>
<th>Q</th>
<th>Which are the two are the most important considerations for you as an employer?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Employers</td>
</tr>
<tr>
<td>Compliance with laws and regulations</td>
<td></td>
</tr>
<tr>
<td>Caring for our employees</td>
<td></td>
</tr>
<tr>
<td>Company policy and procedures</td>
<td></td>
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<tr>
<td>Maintaining staff productivity</td>
<td></td>
</tr>
<tr>
<td>Pressure from clients and customers</td>
<td></td>
</tr>
<tr>
<td>Liability to pay compensation</td>
<td></td>
</tr>
</tbody>
</table>

4.3 We have identified three types of story on excessive risk aversion.

— First there are examples where an excessively risk averse decision has indeed been taken by a manager, organisation or individual, often with the best of intentions. They may believe that the measures are required to protect the organisation or themselves from compensation claims, prosecution under health and safety legislation or some other form of sanction. The belief may be derived from media stories, overly-cautious advice from a health and safety professional or indeed insufficiently clear guidance from the regulator—HSE or its Local Authority partners. We have commissioned research to better identify the specific sources.

— Second we regularly come across stories of excessive risk aversion or form-filling that when checked have no basis in fact whatsoever. Urban myths, may be very effective in building belief in a compensation culture—or an overly-zealous regulatory system and regulator. In practice they prove very difficult to stop.

— Third there appear to be increasing instances where health and safety is used as an excuse to justify an unpopular decision taken for other, often financial, reasons. Closure of leisure facilities is a typical example.
4.4 HSE believes that it is vital that we better understand the reasons behind such excessive risk aversion if we are to be effective in tackling the issue. Therefore we have commissioned research to investigate further the root causes of excessive risk aversion and unnecessary bureaucracy.

4.5 Greenstreet Berman Ltd have been contracted to conduct the research, which began in October 2005 and is due to deliver its final report in March 2006. Following a literature review, the researchers will examine specific instances of apparently poor or unreasonable decisions which have been made in the name of health and safety and will “unpick” them to uncover the real causes and motivations. Fieldwork is being undertaken at the time of writing. This research will provide important evidence to, enable us (and our partners in the health and safety system) to target better actions against excessive risk aversion. We would be happy to share findings of the research with the Committee when available.

5. Actions being led by HSE

5.1 HSE is working with its partners and stakeholders to take forward a “sensible risk campaign”. This provides a significant contribution to the wider debate across government for which the Prime Minister called in May 2005. It aims to develop understanding for what is meant by sensible health and safety—managing risk, rather than trying to eliminate it. This is likely to impact on the perception of a health and safety compensation culture as well as on understanding of risk and risk manager.

5.2 The campaign was launched on 13 July 2005 in the House of Lords by the Minister with responsibility for health and safety, the Chair of the Health and Safety Commission and the Deputy Director General of HSE. Actions to date have included continuing active participation in the DCA led “Compensation Culture” initiative, a range of keynote presentations and dedicated sessions at high profile conferences and seminars, a web forum, initiation of research and various articles. Proposed actions over the coming six months include:

— publication of a set of principles of sensible risk management;
— review/revision of critical guidance on risk management and assessment;
— engagement of HSE’s own staff to ensure that we are exemplars for sensible risk based decision-making; and
— continued work with health and safety practitioners to ensure they are supported in giving balanced advice.

6. Conclusion

6.1 HSE believes that whilst there is not a compensation culture per se, there is a widespread perception that such a culture exists. This perception, together with a number of other factors contribute to some degree of excessive risk aversion and unnecessary bureaucracy in both private and public sectors. These practices disempower managers in both public and private sectors. They are also damaging and counter-productive to protecting people from serious injury and ill-health. HSE is taking action to tackle excessive risk aversion, including conducting research into the root causes; we would be happy to share the findings and our wider achievements through the campaign with the committee in due course.

Health and Safety Executive

November 2005

Supplementary evidence submitted by the Health and Safety Executive

*How targets for accident reduction are formed; how they are applied; and, who (at the HSE) is made aware of them? (relates to Q155–156 of original oral evidence)*

The current conventional health and safety PSA targets (to reduce the incidence rates of work-related fatal and major injuries, work-related ill health and the number of days lost as a result) stem from the Revitalising Health and Safety (RHS) strategy (published in 2000).¹

RHS was the result of an extensive public consultation exercise, the work of an inter-departmental steering group and considerable discussion between the Chair of the Commission, the then Director-General and the Deputy Prime Minister. The fatal and major injury target was informed by:

— HSE’s statistical analysis of numbers of injuries;
— A projection of trends in some workforce characteristics over the 10-year period from 1996 to 2006 (based on research commissioned by HSE from the Institute of Employment Research at Warwick University); and
— HSE’s experience in developing outcome targets for particular industry sectors (such as paper and rubber).

¹ [http://www.hse.gov.uk/revitalising/strategy.htm](http://www.hse.gov.uk/revitalising/strategy.htm)
The RHS targets cover a 10-year period (1999–2000—2009–10). For Spending Review 2000 we adopted the RHS mid-point targets (to 2004–05) as the workplace health and safety PSA. For Spending Review 2004 (to 2007–08), we retained the RHS indicators and set targets (from a new 2004–05 baseline) to deliver reductions consistent with the 10-year RHS targets. The SR2004 PSA also includes targets for key major hazard industries (nuclear, chemical offshore) where workplace accidents can lead to multiple fatalities.

The detail and supporting data for the RHS and PSA targets is freely available on HSE’s website. We make extensive reference to the targets internally and externally, particularly in each of our business plans and annual reports. HSC publishes annual health and safety statistics, which include data on progress towards the targets. The 2004/05 statistics were published last November.

HSE has organised itself around Strategic Programmes, aimed specifically at delivering the targets and there is a continuing drive to redirect resources into work that directly contributes to delivery. At the same time, we are continually working to develop the evidence base for our interventions and try new approaches to improving health and safety outcomes. The HSE Board, managers and all staff are aware of the targets and how their particular areas of work contribute to delivery. There is a regular stream of communication on the targets to managers and staff, via the Intranet, e-mail, briefings and other published documents.

The targets are well known throughout health and safety world (nationally and internationally) and are recognised as helping drive improvements in specific sectors (eg in Construction where injury incidence has reduced by 25% over the last five years). HSC/E believes that outcome targets encourage focus on priorities and what is achievable, and does not encourage risk aversion. It has promoted more effective ways of working, and better evidence of what works and what does not. It is precisely this process that led HSC to advise Ministers that a new strategic approach was required to continue improving work-related health and safety outcomes in Great Britain. The Government accepted that advice, and supported HSC in developing its Strategy to 2010 and beyond.

Health and Safety Executive

February 2006

Evidence submitted by the Scout Association

Summary and key points

1. Scouting is the world’s largest coeducational youth organisation for girls and boys, with 28 million members worldwide and half-a-million members here in the UK.

2. In the UK, there are over 70,000 men and women regular volunteer adult leaders. There are also a further 100,000 adult other volunteers and helpers who assist those leaders.

3. Scouting is provided by these adult volunteers in some 8,000 local Scout Groups across diverse communities. They meet in a wide variety of settings including community centres, church halls and mosques, schools, and premises owned by local Scout Groups themselves.

4. Scouting warmly supports the concepts behind the proposed Compensation Bill.

5. Scouting’s experience is that the increasing burden of regulatory legislation, trustees’ compliance and the threat of litigation does have a negative impact on its efforts to recruit and retain the adult volunteers vital to its activities.

6. Much of Scouting’s educational programme is based on introducing young people to learning through adventure in the outdoors, whilst the organisation is experiencing an increasing detrimental impact of an anti-risk culture.

7. Currently, 30,000 girls and boys are on the waiting list to join Scouting. They are denied the opportunity because it is proving increasingly difficult to recruit enough volunteer adult leaders.

8. This is not occasional “volunteering” of just a few hours each month without responsibility; this is committed volunteering of free time by adults on a regular weekly, formal and responsible basis, and with acceptance of undertaking training.

9. Scouting has identified that its most efficient and effective approach to managing its insurance arrangements is through its own insurance captive, and its own insurance subsidiary regulated by the FSA.

10. Provision of insurance cover costs The Scout Association £3-million per annum, more than 10% of the charity’s expenditure

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2 http://www.hse.gov.uk/statistics/targets.htm
Volunteers’ experience: myth or reality

11. Regardless of any statistics from the insurance industry on trends in numbers or size of claims made or claims settled, there is no doubt that for the volunteers who give freely of their time then the “compensation culture” is a reality.

12. In a survey of over 1,100 volunteer youth leaders undertaken only in December 2005, the responses were very clear:

- 49% agree or strongly agree that retention of existing volunteer leaders is made more difficult because of fears of being sued.
- 69% agree or strongly agree that recruitment of new volunteer leaders is made more difficult because of fears of being sued.

13. Even more significantly:

- 92% agree or strongly agree that risk-aversion is affecting the range and nature of activities being offered to young people.

14. The areas of greatest concern about being sued for compensation are:

- Health and Safety 94%.
- Adventurous activities 94%.

Impact on volunteer retention and recruitment

15. The data evidences the extent of the genuine perceptions of volunteers who are reasonable members of our community. These perceptions form the reality and the fears that are driving them away from committed volunteering at the same time as there is an increasing demand by the parents and the young people themselves for the activities they are seeking to provide.

16. On the one hand, we have increasing numbers and waiting lists; on the other, we have a culture that is increasing fear, concerns and recruitment challenges regarding litigation and compensation.

Impact on the nature of activities

17. The level of 92% agreement or strong agreement that risk-aversion is affecting the range and nature of activities being offered to young people is particularly worrying.

18. An educational organisation cannot make life totally risk free, and should not try to nor be expected to try to. Young people need to be helped to identify risk and to learn to manage risk for themselves.

19. With a view to the development of enterprising individuals and an enterprising society, it is important for young people to learn for themselves how to assess risks and manage risks. Of course this is in the context of assessed parameters, but the experience needs to be real in order to be developmental. “It is better for young people to take responsibility for low level risk activities on their own than high risk activities necessitating all decision being taken by adults” (John Huskins).

20. That is part of what Scouting offers, and this needs to be acknowledged by parents, by the courts and by the wider community.

Risk management

21. Scouting’s adult volunteer training over the past 10 years has included a significant focus on risk-assessment and risk-management.

22. Through training sessions and through specially targeted resource material (that is freely available on the web at www.scouts.org.uk as well as in hard copy), volunteer leaders are provided with simple yet effective tools and practices to help them make informed judgements about the nature and suitability of all proposed activities.

23. This applies not only to the obvious areas of adventurous activities and expeditions, but also to what is seen as the routine programme of green-field camps, weekly meetings and low-level hikes.

24. Scouting’s rules and procedures reflect this approach.

25. If a volunteer leader in Scouting properly follows the rules, procedures and risk-management guidance, then they can expect to be supported by the organisation.

26. For those few occasions where there is genuine failure of leadership, then the Association provides insurance cover for its members, and is also able to employ its own organisational sanctions.
LEGAL LIABILITY INSURANCE

27. The cost of liability insurance remains a key issue facing the organisation. More than 10% of The Scout Association’s expenditure is to provide insurance cover; this amounts to £3 million per annum.

28. The Association has only been able to maintain appropriate cover because it has its own captive insurance company, which it set up several years ago. Without this company it is very likely that the Association could not have afforded the huge increases in insurance premiums in the last few years, and particularly following the change in the market after the events of 9/11, without dramatic curtailment of its educational activities.

29. The challenge appears to be that society is slipping into the realms of absolute legal liability, where the claimant no longer has to prove negligence—the fact of their injury is taken as de facto evidence of that. The defendant is increasingly being required to prove innocence against an assumption of guilt.

30. Given that there is (usually) an insurance scheme with what is seen as a “deep pocket”, it appears that claims are often brought too speedily, motivated often by pecuniary gain and accelerated by specialist claims companies anxious to market their services for their own profit objectives.

31. This inevitably impacts on an organisation’s ability to obtain affordable cover for liability risks that they could not possibly take on themselves.

COMPENSATION BILL

32. The Scout Association welcomes the proposals for legislation to relieve the burden of the “compensation culture” on adult volunteers, and sincerely hopes that the legislation will address its subject matter strongly and effectively, to the greater benefit of the voluntary sector as a whole.

33. Hopefully, the Bill will discourage trivial, nuisance and frivolous claims, and reduce the sense of this (often-unfounded) fear whilst still acknowledging that genuine claims need genuine and sensitive responses, and that all stakeholders need to address risk-management with an informed constructive attitude.

34. Scouting firmly supports Clause One of the Compensation Bill as published (namely the reference to courts considering a claim of negligence having regard to the desirability or public benefit of the activity), and would have supported three of the amendments that were proposed and discussed at the Grand Committee of the House of Lords, namely that:

(a) this be amended from “may” to “shall” do this;
(b) “public benefit” be defined so as to include “for the advancement of education”; and
(c) there be inclusion of reference to where the defendant is a volunteer leader with parental permission acting as a reasonable parent.

35. Scouting would offer support for the judiciary and any other interested party to undertake awareness training to understand the risks and risk-management associated with educational adventurous activities.

Derek Twine
Chief Executive
The Scout Association
January 2006

Evidence submitted by Volunteering England

These observations are based on a programme of research conducted in 2005 by the Institute for Volunteering Research at Volunteering England. The research reviewed literature on the current situation of risk, risk management and volunteering, and analysed responses to surveys of volunteer-involving organisations and of individuals, both volunteers and non-volunteers. These comments address the Committee’s terms of reference.

1. Does the “compensation culture” exist?

The compensation culture is a reality for many people and organisations. Our survey of volunteer-involving organisations shows that more than 90% of respondents believe it exists. It is recognised that it originated in the United States, but has been promoted here by the abolition of legal aid for most personal injury claims and the introduction of “no win no fee” arrangements; the growth of claims management companies and their ubiquitous advertising; media coverage of claims; social change which places greater emphasis on rights; and cultural change towards an individualistic, atomised society in which people feel a diminished sense of personal responsibility and are inclined to blame others for their misfortunes.

The belief that we now live in a more litigious society has had a major impact on voluntary and community organisations and on volunteering. It has created a climate of anxiety, if not fear, in the voluntary (as well as public) sector, and has impacted on volunteer-involving organisations through increased insurance costs.
and exclusions, as the insurance industry itself reacted to the “compensation culture”. A large majority of organisations have experienced steep premium rises in the past few years, causing them to increase charges for activities, restrict services and, in some cases, close down completely.

2. What has been the effect of the move to “no win no fee” contingency fee arrangements?

This is identified as a key reason for the growth of the compensation culture in this country, largely because it stimulated the rise of “claims farmers”. However, it should be noted that while it has encouraged the perception that anyone can claim and has apparently opened access to claimants because they do not have to pay legal fees, personal injury lawyers have a vested interest in screening out claims they are unlikely to win, and therefore it has not prompted the free-for-all which some allege.

The Citizens Advice Bureau reports that less than one third of accident victims actually make a legal claim for compensation and that the “no win no fee” system creates complex financial and legal barriers for consumers who are often vulnerable, disadvantaged and socially excluded. It maintains that conditional fee arrangements provide perverse incentives for the legal profession to “cherry-pick” high value cases with high chances of success. Therefore CAB argues that we have a “compensation deficit” rather than a “compensation culture” and that the present system is not meeting the needs of many who have suffered injury or loss.

There has not been a large number of claims against volunteer-involving organisations but since these were virtually non-existent until quite recently, any increase in claims has attracted attention. In our survey, we found that nearly 5% of the organisations had been involved in litigation against them.

The much-quoted fact that the actual number of personal injury claims has declined in this country ignores the disproportionate impact that a few well-publicised cases can have, as well as the alleged fact that the bare court statistics do not accurately reflect the scale of complaints and claims, many of which are dealt with through quasi-legal and other mechanisms, and never reach court.

A major umbrella organisation in the voluntary sector cites the experience of its members that litigation, even when dismissed, is an enormous drain on resources. Many organisations which are innocent of wrongdoing choose to make settlements rather than face the additional costs of pursuing cases through the courts and the consequent publicity and damage to their reputation. The need to budget for litigation-related costs is placing a sizeable burden on both public and voluntary sector bodies and taking resources away from service development.

3. Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

Yes. While the compensation culture climate has stimulated awareness and in some situations improved services and safety, it has also led to excessive risk aversion. This has affected both the perception of what constitutes “risk” and the process of assessing and managing risk. In our survey, 20% of volunteer-involving organisations were public bodies and 60% of the voluntary organisations were delivering services under contract to statutory authorities. Many felt heavily constrained by the excessive caution and bureaucracy that characterises the public sector. The risk aversion of the public sector is, in the words of one health charity, “seeping through into voluntary organisations”. Another organisation commented that in the area of risk management “the public sector has imposed its values on the voluntary and community sector”.

Certainly our evidence is that the volunteer-involving sector has become increasingly risk-averse. A significant minority of organisations have had to cancel or limit activities (which have operated without incident or accident for a decade or more) and find the task of completing risk assessment paperwork, often for several local authority departments, a major burden on their resources and a limitation on delivering a full range of services.

Risk aversion is threatening the involvement of volunteers, with evidence that fear of risk and risk management ‘red tape’ are deterring people from volunteering and causing existing volunteers to leave. One in five organisations in our survey reported losing volunteers for these reasons and more than a quarter reported that volunteer involvement had been deterred from volunteering with them. And one in twenty volunteers responding to our survey had considered stopping volunteering because of their concern about risk and liability—totalled up this amounts to some one million volunteers across the country as a whole.

Risk aversion is also threatening the entrepreneurial nature of organisations. The sector’s much-praised ability to innovate and explore new ways of solving or reducing social problems is seriously at risk if it dare not push the boundaries of care and action. Risk aversion in the public sector is therefore not only of concern for public services but also for the knock-on effects it is having on the voluntary and community sector and volunteering.

4. Should firms which refer people, manage or advertise conditional fee arrangements be subject to regulations?

Yes. There is a firm consensus on this among major stakeholders including volunteer-involving organisations, consumer bodies and the legal profession. The very public trawl for clients by companies
which then refer claims to lawyers (many being dismissed in the process) promotes a widespread perception that compensation cash is up for grabs and generates fear of being sued, even when organisations have blemish-free safety records.

5. **Should any changes be made to the current laws relating to negligence?**

This needs very careful consideration, with a wide range of expert opinion being brought to bear on the question. Responses to the proposed Compensation Bill’s change to the law of negligence are still in the early stages, but views have been expressed both for and against. Some voluntary bodies welcome the attempt to contextualise ‘reasonable care’ in determining whether negligence has taken place; in sports, adventure and recreation, for example, excessive caution in interpreting “duty of care” can change the essential nature of the activity—or even stop it completely—and therefore deprive people of these kinds of opportunities for fitness, challenge and enjoyment.

However, some legal bodies are concerned that primary legislation is not the most appropriate way of tackling the compensation culture. In their view, the Compensation Bill’s attempt to replicate 75 years of common law in a single statute is a questionable strategy, and one which will lead to many years of satellite litigation to determine whether and how the law has changed. It will therefore have little immediate effect on halting the compensation culture and may even raise its profile through placing key concepts under public scrutiny.

They advocate instead, along with regulation of claims farmers, better consumer advice and public education campaigns, education of the judiciary to inform its judgements on volunteer-related cases, and alternative non-litigious routes to compensation (as proposed in the NHS Redress Bill) with greater emphasis on mediation and rehabilitation.

Our research showed that the legislative route taken in the United States and Australia has not been notably successful. The passing of Volunteer Protection Acts which attempt to ‘immunise’ volunteers against liability has had some undesirable consequences and failed to clarify the situation.

**Concluding Remarks**

“`Mythical`” it may be but the compensation culture and associated attitudes are in danger of taking a real hold in this country, with potentially disastrous effects on the provision of services, both by public and voluntary bodies.

The deterrent effect on the willingness of people to volunteer, whether for statutory bodies or voluntary organisations, is of grave concern. It threatens not only the health of the volunteer-involving sector but also government’s targets for strengthening and expanding civic engagement. The limitations risk aversion places on innovation and the sector’s entrepreneurial role may have serious consequences for the future.

Our research commends the advisability of a programme of action which tackles the situation on several fronts and involves a variety of stakeholders. Legislation may be a part of this but needs to be carefully targeted and assessed for potential unplanned consequences.

Dr Justin Davis Smith
Deputy Chief Executive
Volunteering England
Director
Institute for Volunteering Research

November 2005

**Evidence submitted by the NHS Litigation Authority**

This is the response of the NHS Litigation Authority to an invitation from the Constitutional Affairs Committee to make a submission on this subject.

Our response concentrates on the perspective of the National Health Service and does not cover the public or voluntary sectors generally, although it makes reference to them. It addresses the five terms of reference of the enquiry:

1. **Does the “Compensation Culture” exist?**

   1.1 Numbers of new clinical negligence claims received by NHSLA are actually diminishing rather than increasing, and so too are the numbers of such cases being issued in the Royal Courts of Justice. To that extent, therefore, the answer to the question is “no”. Indeed, that was the conclusion reached by the Better Regulation Taskforce, chaired by David Arculus, in their report *Better Routes to Redress* in May 2004.

   1.2 However, there is unquestionably a widely-held perception in the country that such a culture exists. That perception is created by newspaper reports of speculative personal injury claims and of the activities of “claims farmers”. It is fanned by widespread advertising of claims services. Indeed, personal injury solicitors
frequently advertise in the Accident and Emergency Departments of NHS hospitals and even on the backs of appointment cards.

1.3 Whilst we do not agree that a compensation culture in its broadest sense exists, there are certain trends in cases seen by the Litigation Authority which are worrying. These include:

- Schedules of damages in personal injury cases which are grossly inflated.
- Severe constraints imposed on public bodies by the Regulation of Investigatory Powers Act in ordering surveillance of possibly fraudulent claimants.
- Unsustainable claims under the Human Rights Act, particularly in relation to deaths in hospitals.
- Excessive bills from claimants’ solicitors, both in cases which are backed by Legal Aid and also in CFAs (see below).

What has been the effect of the move to “No-Win No-Fee” contingency fee agreements?

2.1 We assume that the phrase “Contingency Fee Agreements” should actually read “Conditional Fee Agreements”, because the former are illegal in England other than in non-contentious business.

2.2 Conditional Fee Agreements (CFAs) are not widely seen in clinical negligence litigation, owing to the continuing availability of Legal Aid. However, where they do occur, they create numerous difficulties as outlined below. We encounter them extensively in Employers’ Liability and Public Liability claims.

2.3 CFAs tend to have the effect of reducing the number of unmeritorious claims, owing to the risk assessments which solicitors and other undertake prior to supporting any case. However, our main criticism of the effect of CFAs is that they can create severe disproportionality between damages and costs. In small personal injury claims worth less than £10,000, it is very common for costs to exceed damages. This can also arise even in claims of medium value. For example, we know of one case involving a mental health trust where damages were agreed at £100,000 but opposing costs were claimed at nearly £250,000 (which we reduced to £150,000 by negotiation). Whilst this second example is extreme, it is by no means uncommon to encounter insurance premiums, backing CFAs in clinical negligence cases, which are of the order of £50,000 or even higher.

2.4 To this extent, therefore, the CFA régime militates strongly against proportionality as between costs and damages urged by Lord Woolf in his reports in the late 1990s. Arguably, this is the main remaining evil of civil litigation which the Civil Procedure Rules have not adequately addressed.

2.5 The House of Lords recently considered Campbell-v-MGN, in which a defamation claim was brought by a wealthy claimant under a CFA with a 100% uplift. The House decided that such an arrangement was legal, and therefore permitted it, but their Lordships were clearly worried about the implications for such arrangements upon freedom of expression by defendants. The NHS could easily find itself in a similar situation, being sued (for example) by someone who objected to a report on the running of a treatment centre or obstetric unit.

2.6 We consider that the courts need to have greater power to regulate the percentage uplifts in CFAs, and that a protocol should be devised to establish maximum permissible uplifts in particular types of case and circumstances. We also consider that there should be an increase in the small claims jurisdiction to at least £5,000 for personal injury matters. That would eliminate disproportionality in the lowest band of personal injury cases, because costs would not be recoverable by the successful party.

2.7 We believe that costs capping should be built into the Civil Procedure rules, and that it should not be left to defendants to make applications on individual cases because that constitutes satellite litigation.

2.8 We also believe that costs penalties should be imposed upon those making manifestly inflated claims. At present, all that occurs in most such cases is that the judge reduces the level of damages to reasonable proportions and does not penalise the claimant or his advisers on costs.

Is the notion of a “Compensation Culture” leading to unnecessary risk averseness in public bodies?

3.1 We do not believe that this is the case in the National Health Service. We consider it to be much more of a problem for local authorities and also in the voluntary sector.

3.2 Arguably the reason this is not so in the NHS is that those who treat patients are not exposed to personal financial risk, because there are no excesses under the clinical negligence schemes run by NHS LA. In other words, if a physician or surgeon makes an error, he or she will not have to pay part of the claim personally.

3.3 In terms of Employers’ Liability, we consider that the 1992 Regulations and their successors have been the main drivers behind improving practice rather than the existence of a compensation culture.

3.4 The only areas in which the NHS is probably being affected in this context are pathology and paediatrics. We understand that recruitment of pathologists has almost dried up recently because no-one wishes to join the profession owing to the organ retention affair and the opprobrium which was (unjustly) heaped upon pathologists as a consequence. Paediatricians are very reluctant to take on child abuse work, as noted recently by the House of Lords in JD and Others-v-East Berkshire Community Health NHS Trust and Others (2005), owing to the likelihood of being sued for negligence.
**Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?**

4.1 Our answer is unhesitatingly “Yes”. We support the aims of the Compensation Bill in this regard. There is, however, a need to exempt the voluntary sector and trade unions from the full effects of the proposed legislation, because regulation would unnecessarily hamper their activities.

**Should any changes be made to the current laws relating to negligence?**

5. Our view is that the existing laws of negligence represent a fair balance between claimants and defendants, and therefore require little if any amendment. We are not wholly convinced that Section 1 of the Compensation Bill is necessary, because these issues were highlighted very strongly by Lord Hoffmann in his speech in Tomlinson-v-Congleton Borough Council (2003), and in particular in paragraph 34 onwards, where he stated that the question of whether or not the defendant had exercised such care as in all the circumstances was reasonable depended, amongst other things, upon assessing “the social value of the activity which gives rise to the risk and the cost of preventative measures”. That ruling is, of course, binding on lower courts and probably renders Section 1 unnecessary.

NHS Litigation Authority

December 2005

**Evidence submitted by the Advice Services Alliance (ASA)**

*What role would you envisage Citizens Advice Bureaux and Law Centres playing in the proposed NHS Redress scheme? In particular, would they consider offering the “independent legal advice” which the scheme provides for?*

*Do you have any practical concerns over the operation of the proposed NHS Redress Scheme?*

**Response from the Advice Services Alliance [ASA]**

1. ASA agrees with many other advice and patients’ organisations that the proposed NHS Redress Scheme needs to include:
   - An independent means of deciding upon the merits of cases, rather than decisions being made by the NHS Trusts or the NHS Litigation Authority themselves.
   - The provision of advice and assistance to patients and their families which is sufficiently expert in medico-legal matters and clinical negligence.
   - Robust measures to ensure that lessons are learnt from medical errors identified through the scheme and that action is taken to improve patient safety.

2. The problem with the proposed scheme at the moment is the almost complete lack of detail as to how the scheme would operate.

3. The “Statement of Policy” published by the Department of Health in November 2005 suggests that the scheme would essentially be run by scheme members, who would identify eligible cases, investigate them, and propose redress where they consider it appropriate, the scheme being overseen and monitored by the NHS Litigation Authority. In our view, such a scheme would represent little improvement on the present position, would fail to meet the key concerns outlined above, and would attract little public confidence.

4. We were however extremely encouraged by the evidence given to the Committee by Stephen Walker, Chief Executive of the NHS Litigation Authority, on 17 January 2006. Mr Walker made it clear that, where liability or [we assume] the amount of compensation is in issue, then under a scheme administered by his Authority, there would be a joint referral to an independent expert by the Authority in conjunction with the claimant’s solicitor. This follows the procedure adopted in the “Resolve” Pilot scheme, which was considered by an independent evaluation to have been largely successful.1

5. It is our view that a scheme administered along the lines of the “Resolve” pilot could go a long way towards meeting the concerns outlined above.

6. It is our view that clinical negligence is a highly complicated field of law. This is also the position taken by the Legal Services Commission. Clinical negligence cases under the legal aid scheme can only be handled by solicitors who are members of the clinical negligence panel. (Other solicitors are barred from doing clinical negligence cases as “tolerance” work.)

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1 Evaluation of the Resolve Pilot Scheme: Final Report, by Professor John Posnett and Tracy Land, York Health Economics Consortium, October 2002
7. We note that this view is largely supported by Stephen Walker, who was asked by the Committee for his views as to the role of the Bar, law centres or Citizens Advice Bureaux in providing independent legal advice. He stated as follows:

“I think the consensus now is that clinical negligence is sufficiently complex and the levels of compensation, even at these low levels, is significantly significant for claimants for me to express the personal opinion that probably most claimants need legal advice, and the quality of legal advice from those sources varies enormously, as you probably know. Where it is good, it is very, very good and more than acceptable, but if we are prepared to pay for a solicitor, why would any of those sources not advise the claimant seeking their assistance to go and consult a solicitor?”

8. While all Law Centres and some Citizens Advice Bureaux employ solicitors, clinical negligence is a complex and specialist area in which such solicitors are unlikely to have much, if any, experience. We do not consider that they would be able to provide the “independent legal advice” referred to in the proposed NHS Redress Scheme. In our view, such advice can only properly be given by solicitors who specialise in this area. There may indeed be a strong argument in favour of such advice only being provided by accredited members of a specialist panel.

9. We have consulted the Law Centres Federation, who agree with the views set out above. We understand that Citizens Advice will be responding to the Committee directly.

Adam Griffith
Advice Services Alliance

February 2006

Evidence submitted by the Department for Constitutional Affairs (DCA)

1. INTRODUCTION

1.1 This memorandum provides background information and details of the initiatives that the Government is taking forward with stakeholders to tackle perceptions of a “compensation culture” and to improve the system for those with a valid claim for compensation.

1.2 The memorandum covers the areas set out in the terms of reference for the inquiry:

- Section 2 deals with the issue of compensation culture.
- Section 3 summarises the development of conditional fee agreements, their impact and recent steps taken to simplify the regime.
- Section 4 looks at unnecessary risk averseness in public bodies.
- Section 5 considers the need for the regulation of claims management companies.
- Section 6 deals with the law of negligence.

2. “COMPENSATION CULTURE”

Background

2.1 In its 2004 report “Better Routes to Redress”, the Better Regulation Task Force found that the compensation culture is a myth (because the number of claims and litigation is not in fact rising), but that it is a damaging myth that needs to be tackled (because the widespread belief that claims are rising leads to a disproportionate fear of litigation and risk averse behaviour).

What Government is doing?

2.2 In its response to the Task Force’s report in November 2004, the Government made clear its determination to tackle the issue and announced a wide programme of work. The core objectives are to:

- Prevent a compensation culture from developing.
- Tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour.
- Find ways to discourage and resist bad claims.
- Improve the system for those with a valid claim for compensation.

2.3 A Ministerial Steering Group has been established to drive forward and deliver this programme of work across Government. The Group is chaired by Baroness Ashton and includes Ministers from DWP, DH, HO, ODPM, DfES, DCMS, HMT and DTI. The Ministerial Steering Group is supported by an Action Group, including members of the legal profession, insurers, trade unions, consumer groups, business, local authorities and the judiciary.

2.4 The programme of work is being taken forward in six key strands:
Public Awareness and Communication
— Finding ways to tackle misperceptions that can lead to risk-averse behaviour or a disproportionate fear of litigation.
— Promoting confidence that the compensation system is fair and proportionate.
— Providing consumer guidance and increasing people’s awareness of their rights and responsibilities.

Risk Management and Affordable Insurance
— Promoting effective and sensible health and safety measures and appropriate and proportionate risk management procedures.
— Reducing accidents and providing better information, both to those responsible for delivering services and activities and to those using them or taking part.
— Promoting affordable insurance and encouraging insurers to incentivise health and safety performance through the setting of premiums.

Regulation of Claims Management Services
— Delivering better consumer safeguards and tackling current abuses in the claims management sector.

Advertising
— Tackling irresponsible and inappropriate claims advertising that raises false hopes of compensation and encourages people to bring weak claims.
— Ensuring consumers, especially those who may be vulnerable, have appropriate protection.

Rehabilitation
— Promoting earlier and fuller recovery through access to earlier and better rehabilitation, by identifying how more effective access to rehabilitation can be achieved and the structures needed to deliver it. Baroness Ashton and Lord Hunt of Kings Heath are jointly leading the work on rehabilitation.

Improving the Claims Process
— Making the compensation system more timely, proportionate and cost-effective for valid claims and more effective at weeding out weak claims.

2.5 Stakeholder groups have been established to develop initiatives on each strand, other than claims management regulation, where the remit of the Consumer Panel set up to advise the Secretary of State on legal services reform has been extended to cover this.

2.6 A conference was held on 17 November 2005 involving six Ministers and a wide range of stakeholders to take stock of progress, set out the future direction of the Government’s work, and to share information and promote discussion.

2.7 Lord Falconer said “It is vital compensation claims continue to play their part in improving health and safety. But we must be clear that our continued commitment to legitimate compensation claims is entirely consistent with rejecting a culture which says for every injury there must be someone liable to pay. That culture stultifies reasonable risk taking, it hits organisational efficiency and competitiveness and it prevents worthwhile activity”.

3. CONDITIONAL FEE AGREEMENTS

The development of conditional fee arrangements

3.1 Conditional Fee Agreements (CFAs) are the primary form of contingent fee agreements (no win no fee) used in England and Wales between solicitors and clients. CFAs were introduced by the Courts and Legal Services Act 1990. This made provision for agreements in which it was explicit that part or all of the solicitor’s fees were payable only in the event of success.

3.2 CFAs allow a solicitor to take a case on the understanding that, if the case is lost, he will not charge his client for the work he has done (or he will charge at a lower rate). However, if the case is successful, the solicitor can charge a success fee on top of his normal fee, to compensate him for the risk of not being paid. That success fee is calculated as a percentage of his normal fee and the level at which the success fee is set reflects the risk involved. The success fee is recoverable from the losing side. Prior to the changes under the Access to Justice Act 1999, any success fee was payable by the client.

3.3 The definition of a CFA is limited to agreements specified by Order made by the Lord Chancellor. The first Order was brought into force on 5 July 1995 which limited CFAs to personal injury cases, insolvency cases and cases before the European Court of Human Rights. In July 1998 the range of proceedings was extended as far as possible under the 1990 Act to all civil proceedings other than family. CFAs are not permitted in criminal proceedings.
Access to Justice reforms

3.4 The Access to Justice Act 1999 (the Act) gave effect to Parliament’s intention to increase access to justice by making it easier and more affordable to use CFAs, insurance policies and equivalent forms of funding. The Act permitted success fees, after the event insurance premiums and the self-insurance costs of membership organisations to be recovered from the losing side. The Act also removed public funding for most personal injury cases. The reforms were designed to make justice affordable for all, encourage early settlement, discourage weak claims and help ensure those with genuine claims retain more of their awards. CFAs make the lawyer share in risk of taking the case on, so should encourage them to pursue only those claims which they think have a genuine chance of success. Under legal aid, claimants are protected from liability for their opponent’s costs and the fact that their lawyers get paid win or lose. Under a CFA the lawyer does not get paid and the winning defendant can recover their costs.

3.5 The funding reforms introduced by the Access to Justice Act were significant. It was anticipated that there would be a normal settling in period and that there may be some legal challenges to the new regime. However, the scale of challenges to the legislation and to claimant solicitors’ individual CFAs, brought mainly by the liability insurance industry, was unprecedented. This litigation included a number of “technical” challenges aimed at exploiting minor omissions and mistakes in individual CFAs and trying to render the agreements unenforceable and hence the solicitor would not be able to recover any costs from the defendant. These challenges probably delayed the settlement of the legal costs on many thousands of cases.

3.6 This litigation on costs prompted the launch of a cross industry initiative by the Civil Justice Council (CJC) to try to resolve the costs arguments. DCA supported the CJC’s attempts to bring together representatives of the claimant and defendant parties to help broker solutions to the difficulties. This initiative led to a range of measures including introducing fixed recoverable success fees for many personal injury cases run on a CFA basis. These measures have helped tackle the costs litigation and the main concerns of the claimant and defendant sides and deliver a more effective system for consumers.

3.7 The Courts have also played a significant role in helping to bring more stability to the costs regime and maintain access to justice—some of the key judgments are listed in the footnote.

Research

3.8 The Department is working to build up a better knowledge and evidence base on how CFAs are working. An extensive range of research has already been conducted to support the development of practical measures to simplify the assessment of success fees in personal injury cases and to analyse the impact of CFAs. The key research funded by the Department is in the footnote.

3.9 Research has been completed into the costs of low value motor accident and employers’ liability claims and into the failure rates in road traffic accidents (RTAs), employer and public liability claims. The latter has formed the basis for calculating fixed recoverable success fee as mentioned above and which are now provided for in the Civil Procedure Rules.

3.10 The Department also commissioned a comprehensive research study by Paul Fenn, Alistair Gray, Neil Rickman and Yasmeen Mansur to evaluate the effect on personal injury claims of the Access to Justice funding reforms that made success fees and after the event insurance premiums recoverable. In addition, the research looked at the funding arrangements in clinical negligence claims and collected information on the funding of personal injury litigation in other European jurisdictions. Some comparisons are made with findings from an earlier study for the Department. The report—“The funding of personal injury litigation: comparisons over time and across jurisdictions”—is currently being finalised for publication in December and copies will be made available to the Committee.

3.12 An OFT fact finding study of the liability insurance market concluded it was unlikely that the cost of individual claims has risen substantially as a result of the funding reforms and it was unclear whether they have had a significant impact on the frequency of claims. The OFT said that it had frequently been suggested that the number of claims (especially for trivial injuries) has risen because the reforms have made the claiming process easier and the associated publicity has drawn more attention to the availability of compensation for accident victims, but the evidence for this is largely anecdotal.

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1 Hollins v Russell [2003] EWCA Civ 718 (22 May 2003)
Callery v Gray [2001] EWCA Civ 1117 (17 July 2001)
Sarwar v Alam [2001] EWCA Civ 1401 (19 September 2001)
3 Civil Procedures Rules Part 45 Sections III–V
4 Liability insurance—A report on an OFT fact finding study (August 2003)
The UK liability market—a follow-up to the OFT’s 2003 market study (June 2005)
Simplifying the regulation of CFAs

3.13 The litigation over costs referred to above helped to highlight concerns over the complexity of the secondary legislation governing CFAs. The Department recently completed a review of the way in which CFAs are regulated and brought into effect a new regulatory environment for CFAs from 1 November. After extensive consultations the Department concluded that the secondary legislation governing CFAs had become too complex, had contributed to some of satellite litigation between liability insurers and claimant firms, was hard for many solicitors to use and too difficult for most consumers to understand.

3.14 The consultations confirmed that the CFA regulations were unnecessary and better regulation could be achieved through the providers—solicitors. Effective consumer protection is best delivered by regulating effectively the providers of services. The Department worked with the Law Society to design a package of regulatory changes to the regulations and to professional rules and associated guidance.

3.15 The key change is the repeal of the existing CFA regulations and focusing of regulation on the simple provisions in the primary legislation and the amended professional rules. The amendments to professional rules will make clearer solicitor’s responsibilities to their clients. In particular that they must explain to the client the terms of the agreement and in what circumstances, if any, the client will be required to pay anything. It will also make it much easier for the individual client to understand what it is they are being asked to agree to and to shop around if they want to find a better deal. Removing unnecessary regulation will apply to all CFAs that are used across a range of civil cases and will put into place the Government’s commitment to introduce better regulation and strip out unnecessary legislation.

Contingency Fees

3.16 The BRTF recommended that Department should consider researching the potential impact and effectiveness of contingency fees in securing access to justice. The Government rejected this because it was felt that CFAs should remain the principal form of private contingent funding available in the civil justice system and that the simplification of regulation proposed at that time would remove much of the complexity from CFAs. The Department still believes there is no need for the extension of contingency fees beyond their current use in helping people bring cases where limited or no costs recovery is provided and in non-contentious business. The extension of contingency fees would be an unnecessary change to the funding system and would contribute little to dispelling the perception of a compensation culture.

4. UNNECESSARY RISK AVERSENESS IN PUBLIC BODIES

4.1 As indicated above, the Better Regulation Task Force concluded that the perception that exists of a compensation culture was leading to a fear of litigation and risk-averse behaviour in organisations and public bodies involved in providing activities and services. For that reason, the Government has identified promoting better risk management and improving public awareness as two of the key strands of work to take forward.

4.2 The aim of this work is to promote effective and sensible health and safety measures and appropriate and proportionate risk management procedures. Initiatives are being taken forward across Government and by stakeholders to develop good risk management practices and guidance, and to provide better information on risk and the role of risk management so that people have confidence that if they adopt reasonable standards and procedures they will not be found liable. Part 1 of the Compensation Bill reinforces this message.

5. REGULATING CLAIMS MANAGEMENT COMPANIES

Background

5.1 Concerns have been raised about the growth of a compensation culture and the role of claims management companies. Claims management companies are perceived as encouraging spurious claims and promoting a “have a go” agenda. While some claims management companies provide an ethical and honest service to their clients, dubious actions on the part of others are widely reported. These include high pressure selling and offering inducements such as cash advances, if claims are taken up, and plasma televisions. Some companies do not inform consumers of the risks and additional costs of taking out loans to cover the cost of insurance premiums to fund conditional fee agreements. These activities have badly damaged the reputation of all claims management companies, even those who want to provide a high standard of service.

5.2 Solicitors also provide advice and guidance on using conditional fee agreements in personal injury cases. Unlike claims management companies, solicitors who are regulated by the Law Society, have to abide by rules in the Guide for the Professional Conduct of Solicitors. A breach of the rules could result in disciplinary action.
The growth of the industry

5.3 The 1999 Access to Justice Act removed public funding for most personal injury cases. It also enabled recovery of a success fee and after the event insurance fees from the losing party, so removing what had previously been seen as a barrier to accessing the courts and helping those with genuine claims retain more of their award. These changes altered the make up of the sector to a private market supported by a range of providers and triggered the growth of the claims management industry.

5.4 Claims managers gather cases either by advertising or direct approach. The claims manager then either acts for the client to pursue a claim or as an intermediary between the claimant and the lawyers who may represent them.

5.5 Claims managers make money from several sources—referral fees from solicitors, commission on auxiliary services, after the event insurance and sometimes on loans to the client. Their remit has broadened to include areas other than personal injury including employment, mortgage mis-selling and housing disrepair.

The Problems

5.6 The collapse of two of the largest claims management companies—Claims Direct and the Accident Group—in 2003 and the recent investigation into the management of coal health claims have focussed public attention on the sector. Media reports of “ambulance chasers”, the approach of potential claimants at the site of an accident and the encouragement of claimants to magnify the extent of damage or injury have also helped reinforce a dubious image for such companies.

5.7 Currently solicitors and claims management companies do not compete on a level regulatory playing field. The Law Society regulates solicitors, while claims intermediaries remain relatively unregulated and can give advice with little quality control and no requirement to provide an independent complaints procedure if things go wrong.

5.8 In personal injury cases solicitors “buy in” referrals from claims managers. They have a responsibility under Law Society rules to advise those making the claim on its viability, effectively filtering out spurious claims or ones with little chance of success. Should they fail to do this clients may have redress under Law Society rules. Such regulation will not be affected by the Compensation Bill as business areas that are already covered by the oversight of other regulators will continue to be subject to that regulation, but it will bring claims management services under similar obligations.

Statutory Regulation

5.9 Regulation of claims management services was recommended by the Better Regulation Task Force Report (BRTF) in its report “Better Routes to Redress”. While the report rebutted the idea of a compensation culture (and made the point that claims have fallen in recent years) they recommended that, to safeguard genuine claims and provide reassurance for consumers, the industry should be regulated. The BRTF recommended the industry should attempt self-regulation on a voluntary basis in the first instance and if this did not prove to be successful then the Government should bring forward statutory regulation. The Government accepted the recommendations.

5.10 The Claims Standards Council (CSC), was established by in 2004 to provide voluntary regulation of the claims management industry and now has some 150 members including the AA and MGN Group. The CSC has produced a draft code of practice, currently with the Office of Fair Trading for approval. Whilst many claims management companies have become members there are many others that have not supported this attempt at self-regulation. Without total support from the industry and the “teeth” to enforce regulation it is clear that in order to raise standards statutory regulation is urgently needed.

5.11 The Compensation Bill recommends that the Secretary of State have the power to create such regulation, and make it an offence to offer claims management services without the approval of the regulator. DCA has consulted with key stakeholders including the consumer, legal, insurance and finance sectors in the development of this legislation.
5.12 The Secretary of State will be required to ensure that any body designated is fit for purpose. The Department has commissioned an independent regulatory expert to help assess the appropriate requirements and the position of the current claims industry body—the Claims Standards Council.

5.13 The Bill provides the power for the Secretary of State to designate or establish a body or in exceptional circumstances for the Secretary of State, Department for Constitutional Affairs to regulate directly, for example, if the designated body failed as regulator. It is envisaged that oversight of the regulator will be transferred to the Legal Services Board once established.

5.14 Regulating the sector will re-assure the public, giving them confidence in using such services. We propose to establish a front line regulator with clear rules, a code of practice and a complaint process to offer redress when things go wrong. Statutory regulation will protect consumer’s interests and will also be of benefit to those intermediaries who want to provide genuine customer services. It will curb inappropriate and misleading information and those trying to operate outside this mechanism will be subject to prosecution.

6. THE LAW OF NEGLIGENCE

Background

6.1 Most claims for damages, including those for personal injuries, are brought as claims in negligence. In deciding a claim in negligence, the court has to consider whether the defendant owed a duty of care to the claimant; if so, whether the duty of care was breached; and whether the claimant suffered loss or injury as a result.

6.2 In considering the second of these, whether the duty of care was breached, the court has to consider the standard of care, and whether the defendant fell short of that standard. The ordinary standard of care in negligence is “reasonable care” and the question whether the defendant has met that is a question of fact for the court to decide, having regard to all the circumstances of the case.

The provision on negligence in the Compensation Bill

6.3 Clause 1 of the Bill makes clear that a court considering a claim, when deciding what is required to meet the standard of care in particular circumstances, is able to consider the wider social value of the activity in the context of which the injury or damage occurred. It does this by providing that the court can have regard to whether a requirement that the defendant should have taken particular steps to meet the standard of care might prevent or obstruct a desirable activity from being undertaken or might discourage people involved in providing the activity from doing so.

6.4 This reflects the existing law and guidance given by the higher courts over a considerable period and renewed in recent cases. The provision is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take care will be owed. It is solely concerned with the court’s assessment of what constitutes reasonable care in the case before it.

6.5 The provision is intended to reassure those concerned about possible litigation that the law takes the social value of activities into account and that they will not be found liable if they adopt reasonable standards and procedures; to influence settlements and help reduce the number of ill-conceived claims by bringing this to the attention of potential parties to litigation; and to support other initiatives to improve public awareness and promote better risk management, which are integral parts of the Government’s wider programme of work.

The Department for Constitutional Affairs

November 2005

Evidence submitted by the Department of Health (DoH)

OBJECTIVE

1. The Government’s objective is to reform the way lower value clinical negligence cases are handled in the NHS to provide appropriate redress, including investigations, explanations, apologies and financial redress where appropriate, without the need to go to court, thereby improving the experience of patients using the NHS. The bill does not amend the law relating to liability for clinical negligence but provides an alternative mechanism for resolving claims relating to such liabilities in qualifying cases.

5 The white paper on legal services reform proposes the establishment of a Legal Services Board who will oversight of the designated legal bodies including the Law Society, General Council of the Bar and Institute of Licensed Executives
BACKGROUND

2. The NHS Plan stated that the Department of Health would examine ways to improve the system of handling and responding to clinical negligence claims that are made against the NHS. A commitment in the Government’s 2001 manifesto to reform the approach to handling clinical negligence claims in the NHS reinforced this approach. In August 2001, the Chief Medical Officer (CMO), published a paper, “Call for Ideas”, inviting patients, NHS staff, the public and other key stakeholders to give their views on how the NHS of the future should handle clinical negligence incidents. The CMO also led a series of meetings with an expert advisory group to develop thinking in this area. In June 2003, the CMO published his consultation document Making Amends, which set out recommendations for reform. The key recommendation in Making Amends (Recommendation 1) is that:

“An NHS Redress Scheme should be introduced to provide investigations when things go wrong; remedial treatment, rehabilitation and care when needed; explanations and apologies; and financial compensation in certain circumstances.”

3. The current arrangements for dealing with clinical negligence cases:

— are perceived to be complex, unfair (as apparently similar cases may have different outcomes) and slow;
— are costly both in terms of legal fees and in diverting clinical staff from clinical care;
— have a negative effect on NHS staff, morale and on public confidence;
— lead to patient dissatisfaction with the lack of explanations and apologies or reassurance they receive that action has been taken to prevent the same incident happening to another patient; and
— encourage defensiveness and secrecy in the NHS, which stands in the way of learning and improvement in the health service.

4. We intend that an NHS redress scheme will:

— provide a real alternative to litigation for the cases that fall within the scheme, including addressing the delays and legal costs that are part of the current system;
— lead to a more consistent response to patients when things go wrong, providing them with an explanation of what went wrong and what is proposed to be done to prevent it happening again, leading to more positive patient experience when things go wrong;
— place the emphasis on putting things right, with patients offered appropriate remedial healthcare and, where appropriate, financial compensation;
— provide speedier access to redress; and
— provide a real alternative for those patients unwilling or unable to take their cases to court.

CURRENT POSITION

5. In any healthcare system, things sometimes go wrong. When this happens now in NHS provided healthcare, the main route to compensation for a patient who considers that they have been harmed during the course of NHS clinical treatment administered by a health care professional, is to bring a claim for negligence—although most cases are settled before the court hearing.

6. The legal system is adversarial. It makes the staff in the NHS who are complained about defensive. Furthermore, some patients cannot use this route to get the justice they deserve. They may not satisfy the means testing criteria for legal aid and may not then be able or willing to take the financial risks involved in taking the legal route.

7. In a MORI survey, commissioned in 2002 for Making Amends, respondents were asked about the kind of response from the NHS they considered would have been most appropriate for their medical injury. The most common response considered appropriate was an apology or explanation (34%), followed by an inquiry into the causes (23%), and support in coping with the consequences (16%). 11% of respondents indicated that financial compensation would have been the most appropriate response.

8. The Department’s most recent figures for 2001 show that 78% of claims valued between £10,000 and £15,000 cost more to settle than the amount awarded compared to only 18% of claims valued at over £50,000. Money diverted into legal and litigation costs is diverted away from NHS medical care, whilst clinical time diverted into court proceedings is time diverted from the treatment of NHS patients.

PROPOSALS

9. Much discussion of the scheme has focussed around compensation. Where appropriate, compensation will be an important element, but it is only one element of a more wide-ranging reform. Where something has gone wrong and an NHS patient has a sub-optimal clinical outcome, the first response of the NHS must be to put the problem right, regardless of whether there is an issue of fault. After investigation, it is important to provide explanations to the patient and, where appropriate a meaningful apology.
10. The scheme aims to provide redress in its widest form in cases to which it applies, including apologies, explanations and investigations. It puts patients at the heart of the process of responding when things go wrong and learning from mistakes. The significant local involvement in identifying and investigating cases will give opportunities both for learning at an early stage and for that learning to drive culture change within organisations. The improved approach will ensure a simpler and more effective approach to “making things right” for patients and ensuring that where there has been clinical negligence, the approach supports proper resolution within a non-adversarial environment.

11. There will also be a change of emphasis. Under the current systems of NHS complaints and claims for clinical negligence, the onus is on the patient to identify that something has gone wrong and to decide how they would like the organisation concerned to respond. We believe that not all patients or their relatives currently raise their concerns. This means not all appropriate cases are identified and organisations lose the opportunity to learn from the incident and improve services in the future.

12. We intend that an NHS redress scheme will take a different approach. The organisation delivering NHS care will identify incidents falling within the scheme and respond in a much more open and transparent way when concerns are raised. This meets patient expectation of what should happen if something goes wrong with their care. There will, however, be cases where the NHS is not able or has failed to identify cases potentially falling within the scheme, and it is therefore intended that patients will also be able to apply for their cases to be considered.

13. The scheme will seek to ensure that those patients who have received clinically negligent treatment from a health care professional should receive an appropriate response without having to suffer the strain of an adversarial system. Many patients have neither the time nor the desire to go through a long drawn out process at an already difficult time. They find themselves up against entrenched attitudes and systems that are not designed around their needs. NHS staff often feel that openness goes unrewarded in the current defensive climate.

14. The scheme will support a new emphasis on learning from mistakes to improve future care. We intend that each member of the scheme will have someone at Board level designated with responsibility for identifying learning opportunities and following these up with action to deliver improved services.

15. The Department of Health believes that the scheme will provide a further driver for the cultural and organisational shift that is needed to deliver improved hospital services to patients. The scheme will enable the scheme authority and the National Patient Safety Agency to identify patterns of errors and to help formulate and introduce changes to procedures to prevent recurrence, thereby reducing future adverse incidents. In the longer term, this should reduce the burden on Trusts both in financial terms and in terms of the stress placed on individual staff members when there are adverse outcomes for patients. Such improvements will deliver significant benefits for patients.

PROPOSALS—LEGAL ISSUES

16. The NHS Redress Bill takes powers to enable the Secretary of State for Health to set up a redress scheme by regulations to apply to cases involving qualifying liabilities in tort arising out of hospital care provided as part of the NHS in England (wherever that care is provided) and to set out the detailed rules governing the operation of the scheme in secondary legislation.

17. The proposed primary powers enable the scheme to be set out within a single framework of regulations as a real alternative to litigation; one that will be more readily understood by patients and NHS staff alike. New primary powers will enable the Scheme Authority to seek financial contributions from participating local bodies and enable these to be used to fund the Redress Scheme. Duties could not be imposed on FTs and independent providers other than by primary legislation. Using primary legislation ensures that regardless of which type of organisation provides the care, any hospital service provider within England can be required to operate the scheme.

18. Placing detailed rules in secondary legislation will allow the scheme to be more easily amended. It also ensures that there is the necessary flexibility to adapt the scheme in order to reflect the changing ways in which NHS services are delivered, and limits the technical and administrative detail that appears in primary legislation. In doing this, the NHS Redress Bill follows the traditional structure of NHS legislation in setting out the overall framework in the provisions of the Act but being less prescriptive in primary legislation as to the detail of what the Secretary of State or NHS bodies must do or, indeed, how they must do it.

19. The NHS Redress Bill does not make any fundamental amendments to the existing law relating to clinical negligence, but augments it by providing patients with the option of an additional mechanism for obtaining redress. The scheme does not remove a person’s right to litigate if that is what they want to do. If a person rejects an offer under the scheme or refuses to participate in it, it will be open to them to go to court and pursue a claim for negligence in the normal way.

20. It is intended that an NHS redress scheme will provide a mechanism for the swift resolution of qualifying lower monetary value claims in tort arising out of hospital services provided as part of the NHS in England (wherever those services are provided), without the need to go to court. Higher value, more complex cases, will continue to be dealt with exclusively through the current legal arrangements. While the
maximum level of financial compensation payable under the scheme will be reviewable, the initial upper limit is proposed at £20,000. This is because lower-value cases tend to have higher proportional legal and administrative costs under the current system.

21. Only cases involving liabilities in tort in respect of personal injury or loss arising out of a breach of a duty of care and arising as a consequence of any act or omission by a health care professional will be covered by the scheme. The intention is not to create new rights, but to improve access to justice for those with rights that already exist under current law. Claims without merit will be rejected.

22. The liabilities covered by the scheme are those of the organisation that is providing (or commissioning) the care. The scheme does not cover any personal liabilities of individual healthcare professionals who provide services under a contract of employment. Hospital services provided by individuals under such contracts will be covered by the scheme as a result of the liability of the organisation providing the services. The scheme covers vicarious liability: the most common ground upon which a hospital authority may be held responsible for injury to patients is by virtue of an employer’s vicarious liability for the torts of an employee committed during the course of employment.

23. The same tests for negligence will be applied to cases under the NHS Redress Scheme as are applied under current tort law. The test of negligence will therefore be the same as that currently applied in clinical negligence cases: presently the “Bolam test”, which provides that a professional is not negligent if their practice was in accordance with that accepted as proper at the time of treatment by a responsible body of medical opinion, even though other doctors adopt a different practice, and the “Bolitho test”, which provides that in applying the “Bolam test” it will only be in rare cases that a court determines that a practice considered appropriate by a responsible body of medical opinion is negligent. Only if it can be shown that the professional opinion is not capable of withstanding logical analysis, is the judge entitled to hold that the body of opinion offered is not reasonable or responsible and hence the action is negligent.

24. It would not be appropriate for the Bill to set out that the “Bolam” and “Bolitho” tests will be applied to cases under the redress scheme. The Bill makes it absolutely clear that the redress scheme only applies to qualifying liability in tort under the law of England and Wales. It is important to emphasise that the law of tort in England and Wales is not a static creature: the tests that are used today such as “Bolam” and “Bolitho” may change as the case law develops. Being specific about the tests to be applied on the face of the Bill would prevent the redress scheme from evolving with the law of tort in England and Wales, and would therefore inhibit the necessary flexibility for the tests applied to cases under the scheme to match those applied by the courts in civil proceedings.

25. Where compensation is appropriate, the NHS Redress Scheme will provide a real alternative to litigation for the less severe cases, removing the lottery and risks of litigation, whilst reducing the general burden of unnecessary legal costs. It will provide a fair, equitable and appropriate response to people who have been harmed in the course of their health care. In this respect, the scheme will be consistent with wider Government policy on improving access to justice.

SUPPORT FOR PATIENTS

26. It is intended that where an offer of redress is to be made, appropriate support will be provided to the patient. We intend to ensure patients are able to make a genuine, informed choice when presented with options and clause 8 of the Bill seeks to do just that.

27. Clause 8 sets out that a scheme may make provision for free legal advice to be provided in connection with proceedings under the scheme. It is intended that the scheme will provide for legal advice to be given free of charge to the patient or other person eligible for redress under the scheme, for the purpose of assessing whether or not an offer of financial compensation under the scheme is reasonable and equivalent to what the patient would have received through the courts.

28. The scheme may also provide that free legal advice has to be supplied by a provider included in a list held by a particular body. To ensure independence, it is envisaged that the scheme might, for example, provide that a body such as the Legal Services Commission will compile and maintain a list of independent providers of legal advice, with whom the scheme authority will have made arrangements for the provision of such advice at a flat rate.

29. Clause 8(1)(b) provides flexibility for the provision of other services that may help to reach an agreement to settle. It is intended that further consultation with stakeholders will take place to identify what services might be most appropriate and effective for these cases. However, options may include mediation services or the services of a jointly instructed independent medical expert.

30. It is essential that patients have appropriate support throughout proceedings under the scheme to be able to make a positive contribution to resolution and to raise any concerns they may have with the appropriate body. Clause 9 of the Bill requires the Secretary of State to arrange for the provision of assistance to individuals seeking redress, or who intend to seek redress under the scheme, to the extent that she thinks that it is necessary to meet reasonable requirements; we intend to consult further on this aspect when drafting secondary legislation. This assistance may take the form of representation or some other form of assistance.
31. In making any arrangements pursuant to clause 9, the Secretary of State is required to have regard to the principle that arrangements for the provision of assistance should, in so far as is practicable, be independent of persons to whose conduct the case relates or who are involved in dealing with the case.

32. It is intended that patients and appropriate representatives whose cases are being considered under the scheme will be able to access support at any time during the process from Patient Advice and Liaison Services (PALS) and Independent Complaints Advocacy Service (ICAS) type arrangements. It is intended that these arrangements will resemble those currently in place to support patients through the NHS complaints process.

33. Until the point at which an offer of redress is accepted under the scheme, the patient will retain the right to litigate. However, we want to place the emphasis on getting things right before litigation is initiated. The assistance this clause offers, coupled with the free legal advice that patients will receive in relation to their offer under clause 8, will assist in ensuring patients receive the best possible outcome.

Department of Health

December 2005

Evidence submitted by Associated Newspapers

EXECUTIVE SUMMARY

In this submission we make the case for the reform of Conditional Fee Arrangements (CFAs) in libel cases. Associated Newspapers is one of the largest media groups in the UK. Our interests include the Daily Mail, The Mail on Sunday, the Evening Standard and Metro. However, we believe that our submission echoes the views of many media organisations from small independent publications to those of the largest media groups.

Associated Newspapers is committed to the principle of access to justice for any Claimant who is justified in bringing a defamation case.

CFAs were introduced to promote such access, particularly for Claimants who could not afford the potential cost of bringing such an action. Essentially a Claimant no longer need carry any financial risk. If their case is unsuccessful any costs awarded to the Defendant can be protected through After the Event Insurance (ATEI) though this is not compulsory. If the case is successful, the Defendant bears its own costs, plus the Claimant’s costs times a success multiplier as well as any damages awarded. If the case is unsuccessful the Defendant can have difficulty in recovering costs from the Claimant even when ATEI has been taken since the policy may be worthless if the Claimant has misled the insurer.

In practice, the CFA regime has produced perverse outcomes. Among these are that:

— Wealthy litigants such as publicity attracting celebrities who could well afford to pay for litigation, instead opt for a no risk CFA. But the unsuccessful Defendant might incur substantial costs at double the normal rate even where damages awarded are negligible. Subsidising wealthy litigants in this way was not the intended purpose of CFAs.

— The combination of an absence of risk to the Claimant and the potential for high success fees for the lawyer appears to encourage claims which should not otherwise be brought.

— The lack of any CFA client pressure to contain legal costs to reasonable levels leads to exceptionally high lawyers’ fees in CFA cases. These are then increased by a success multiplier to a point that to lose a case could be so unaffordable that it could close down any but the most financially robust of publications. This is recognised as the “chilling” or “blackmailing” effect.

— The fear in such CFA cases of exceptionally high and largely unconstrained litigation costs risks deterring free speech in a way which far exceeds the deterrent effect of any likely award of damages. So CFAs restrict the Article 10 right to freedom of expression.

— CFAs costs are not being rigorously controlled.

— CFAs are unbalanced in their impact as between Claimant and Defendant.

1. INTRODUCTION

Lord Hoffmann in paragraph 36 of the judgement in Campbell v MGN drew a distinction between CFAs in personal injury and defamation litigation.

He made the point that the former is characterised by a very large number of small claims which are met by liability insurers who are able to pass on those costs to their road user customers.

In contrast, in defamation cases, which are typically few in number but with disproportionately high costs, there are no market forces restraining the levels of success fees and ATE insurance premiums. The last line of defence is the costs judge.

Yet, in defamation cases, important Article 10 rights are engaged. The current system is translating into costs claims approaching £900 an hour in an area in which Article 10 rights are engaged.
We believe that such costs are excessive by any measure and the threat of such costs is already forcing changes in decision making.

There is therefore a clear case for reform of CFAs in libel cases.

2. The Current Problem in Context

To put the costs of a recent action in context, the cost of defending one article (had the case been lost) would have been equivalent to the annual salaries of over 100 journalists, which is enough to wipe out many publishers. Even for publishers who may be strong enough to absorb such costs, they can have serious effects upon their financial position.

The annual number of London defamation writs over the last 5 years has ranged from 128 to 267. There are however, approaching, 150 solicitors, possibly more, practising in the defamation field. There is not enough defamation work to go round.

Whereas in a “normal” market situation such an “excess supply” of defamation solicitors would exert a downward pressure on rates charged, the opposite is true with CFAs. This is a perverse outcome of the CFA regime in which the market for such services is distorted due to the absence of control over rates by clients and the introduction of an incentive to behave in a way which can increase the number of hours worked/charged.

In practice a big CFA case can represent a windfall of unhealthy importance to the practice in question.

The system for assessing costs requires minimal accountability to a CFA client in key areas. This was commented on in the House of Lords in Callery v Gray and by Lord Hoffmann in Campbell v MGN. There is no incentive on Claimants to challenge fees or the uplift or the After the Event insurance arrangements (“ATEI”). Furthermore, there is no incentive to question the allocation of resources to a case or indeed the case management by their lawyers.

Lord Bingham in Callery v Gray drew attention to the risk of abuse. He said,

“I would not wish to discount either the risk of abuse or the need to check any practices which may undermine the fairness of the new funding regime. This should operate so as to promote access to justice but not so as to confer disproportionate benefits on legal practitioners . . . or impose unfair burdens on Defendants . . . .”

It is quite clear that in some cases Claimant lawyers recognise the “power” of an impecunious client. Recently, Turcu v News Group Newspapers Ltd went all the way to trial at great expense despite the fact that solicitor and client had largely lost touch. Mr Turcu had not even provided a witness statement and did not appear at the trial. Whilst not questioning the Claimant’s solicitor’s motives in bringing the case, the fact that News Group would inevitably face irrecoverable costs approaching half a million pounds for the privilege of winning cannot be ignored.

Lord Hoffmann referred to the Turcu case, which he said “vividly illustrated” the problems that CFAs are currently causing in defamation cases and which he said gives rise to concern that freedom of expression may be seriously inhibited. At paragraph 31 he said:

“The blackmailing effect of such litigation appears to arise from two factors. First, the use of CFAs by impecunious Claimants who do not take out ATE insurance. That, of course, is not a feature of the present case. If MGN are right about Ms Campbell’s means she would have been able to pay their costs if she had lost. The second factor is the conduct of the case by the Claimant’s solicitors in a way which not only runs up substantial costs but requires the Defendants to do so as well. Faced with a free spending Claimant’s solicitor and being at risk not only as to liability but also as to twice the Claimant’s costs, the Defendant is faced with an arms race which makes it particularly unfair for the Claimant afterwards to justify his conduct of the litigation on the ground that the Defendant’s own costs were equally high.”

Furthermore, in CFA cases there is an inbuilt conflict between lawyer and client which places a special responsibility on the lawyer.

Miller v Associated Newspapers Limited came to trial in March of this year. DCI Miller sued over articles suggesting that his handling of the Hamilton rape investigation and another serious rape case had been incompetent.

He was initially represented by Carter-Ruck on a CFA (although the case moved to another firm with the partner concerned some months before trial) and he was also supported by the Police Federation.

Four days before trial, we received a letter confirming that, if successful, Miller would be looking to us to pay £3.3 million. This included a £615,000 insurance “premium” payable to the Police Federation who were in fact carrying the risk themselves and had not taken out insurance.

Mr Justice Eady in his Judgment recognised the “enormous risk on costs” that Associated faced in spite of “Associated’s best efforts to settle”.

Miller v Associated Newspapers Limited
Associated won after a three week trial and in awarding indemnity costs plus interest on our own costs paid to our solicitors, the Judge said “the Claimant’s conduct . . . in pressing on beyond the offer that was made to him in December 2003, was unreasonable”.

Some limited progress has been made in addressing the enormous costs burden of these actions, for example by the imposition of “costs capping” orders. But, as Lord Hoffmann recognised, this is only a palliative. He said at paragraph 34,

“I would certainly endorse the sentiments expressed by Brooke LJ in Musa King v Telegraph Group and hope that judges in lower courts will put his suggestions into practice. It is, however, only a palliative. It does not deal with the problem of a newspaper being faced with the prospect of incurring substantial and irrecoverable costs. In the Turcu case, News Group Newspapers Limited was financially strong enough not to submit to pressure. But smaller publishers may not be able to afford to take such a stand. Furthermore, neither capping costs at an early stage nor assessing them later deals with the threat of having to pay the Claimant’s costs at a level which is, by definition, up to twice the amount which would be reasonable and proportionate.”

The Court of Appeal gave guidance in Musa King v Telegraph on the need for proportionality and recognised that “something has gone seriously wrong”. Brooke LJ acknowledged that a libel Claimant brings an action “not only to recover damages but also to vindicate his reputation”. He went on to say, “. . . that consideration cannot go far to bridge the gulf between the value of this action to the Claimant and the value to the lawyers”.

He also commented in some detail on the “extravagant way” in which the Claimant’s solicitors had conducted the litigation and pointed out that equality of arms and/or the need to get vindication does not mean that a Claimant should have access to the most expensive lawyers. He said:

“If this means, now that the amount at stake in defamation cases has been so greatly reduced, that it will not be open to a CFA Claimant to receive the benefit of advocate instructed at anything more than a modest fee or to receive the help of a litigation partner in a very expensive firm who is not willing to curtail his fees, then his/her fate will be no different from that of a conventionally legally aided litigant in modern times”.

In the case brought against The Times by Lance Armstrong, Mr Justice Eady acknowledged that the power existed to impose a cap but refused to do it because there is no evidence that The Times would, as the Judge put it, “have to whistle for their costs” on a retrospective costs assessment.

The difficulty with this, as is recognised by Lord Hoffmann, is that the prospect of retrospective costs recovery does not remove the risk that a CFA funded case will be managed in an unreasonable and disproportionate manner. If successful, only a proportion of costs are recovered on taxation, so even after winning and recovering costs the Defendant can be very substantially out of pocket. Retrospective costs assessment can amount to expensive satellite litigation that a prospective cost capping order would avoid.

Associated Newspapers Limited has an ongoing case brought against them by Alberta Matadeen over an article criticising the treatment of old people in the home she owned. A costs cap was imposed in the face of base costs in the Allocation Questionnaire of £558,000 plus VAT, which with a success fee of 100% (solicitors but not Counsel were on a CFA) would have increased to almost £1million. Master Eyre recognised that the need for vindication may well include a more liberal approach on costs but scarcely an approach so liberal as to ratify costs on this “giant scale”. He said that a CFA with no ATEI cover, as was the case in this action, is precisely the kind of case in which a capping order is appropriate.

Lord Justice Brooke in Musa King and Master Eyre in Matadeen v Associated Newspapers Limited when imposing cost capping orders were influenced by the lack of an ATEI policy. A more recent decision, however demonstrates why costs capping is just as appropriate where ATEI is, apparently, in place.

A former Sudanese diplomat, Mr Al-Koronky, is suing Time Life in relation to allegations that he and his wife kept a woman in their London home as a slave. Mr Justice Eady held that the Defendants were entitled to security for costs, the Claimants being resident in Sudan. The Claimant had taken out an ATEI policy. When this was eventually provided by Carter-Ruck to Time Life’s solicitors under threat of an application to Court, it turned out that the policy contained an express exclusion that where false information had been supplied to insurers they would not be liable. So, if the Defendants’ justification defence succeeds, the ATEI policy, as Carter-Ruck conceded, will not be worth the paper it is written on. The same problem has arisen again very recently in relation to another ATEI insurance policy against other media Defendants which, aside from possibly not being available if the justification defence succeeds, also contains a limit on liability of £100,000.
3. DEVELOPING A SOLUTION

In relation to the level of costs recoverable from unsuccessful media Defendants, a radical change is needed.

While the media should have no objection to famous firms charging their Hollywood style clients £450 per hour base costs (or whatever the client is prepared to pay), a different issue arises, with Article 10 rights engaged, when it comes to costs recoverable from Defendants.

A regime is required that will comply with convention obligations in relation to access to justice, whilst not unnecessarily impacting on article 10 rights freedom of expression.

COSTS

A starting point to deal with all of these points would be to overhaul the system of assessment of costs.

1. Dealing first of all with a “post code lottery”—the hourly guideline rates for solicitors are found in the official guide to the summary assessment of costs and depend entirely upon the post code. The current guideline rate for a Grade A solicitor in EC4 is £359. If the firm was in WC1, with possibly a slightly shorter walk to court, the guideline rate instead of £359 would be £276. If they were a 20 minute bus or tube ride away in say Camden Town, instead of £359 the rate would be somewhere between £198 and £232. Even crossing from one side of Chancery Lane (WC) to the other (EC) can make an £83 per hour difference to the guideline rate (doubled to £166 in a 100% uplift CFA case).

2. Under this system, a small niche practice in EC1 is able to benefit from the City of London guideline rates which are largely based on the costs of Magic Circle and other large firms.

There is another aspect of the system which has the effect of inflating the guideline rates. The figures are produced from surveys of firms in each area which are carried out by the relevant local Law Society. Each participating firm provides details of its costs, which are then averaged and divided by 1,200 chargeable hours per year in the City, Holborn and Westminster and 1,100 chargeable hours a year everywhere else. This works out at around 5 chargeable hours per day, certainly less than most firms achieve, and has the effect of inflating the guideline rates because the costs have been divided into a lower number of hours.

3. The chilling effect of exorbitant base costs on CFA media litigation where Article 10 rights are engaged could be reduced by applying a special scale of costs recoverable from the losing party which would not equate Article 10 litigation with multimillion pound commercial shipping and property disputes and would not depend on a postcode lottery.

Recoverable costs in Article 10 CFA cases should be set at a level that would ensure that competent representation and access to justice exists, but with no incentives to go beyond that level.

4. The most expensive senior partners and QCs referred to by Brooke LJ in Musa King would have a choice in CFA cases, to take a case on “scale rates” that is scale rates recoverable from Defendants, subject of course to uplift, or turn the case down and let the Claimant choose a competent lawyer who is prepared to work on this basis. We believe that there would be no shortage of willing solicitors and barristers keen to participate.

5. As far as solicitors are concerned, market forces would ensure that there would be a range of firms prepared to take on this work, some already in the market and others would move in.

6. Senior publicly funded criminal lawyers dealing with for example, serious rape cases, are usually paid in the region of £140 per hour. There is no reason why, with the assistance of specialist counsel, lawyers capable of handling serious criminal cases should not be able to handle libel cases. When the Sunday Mirror ran a story headed “On the loose, £7 million lotto rapist at the seaside” and carried a picture of the wrong man, a retired security guard, a local firm of Weymouth solicitors was consulted. With the help of Joanne Cash of 1 Brick Court, they recovered £100,000 damages plus costs.

Mr Justice Eady made the same point in the Gazley case when he said:

“It is important to recognise that in order to have the necessary or the proportionate expertise available one does not always need to instruct London specialist solicitors. An important factor is that any competent litigation solicitor in the country can call upon specialist members of the bar at very short notice. Indeed, as I have already said, Carter-Ruck themselves took advice from counsel”.

7. Lawyers should be required to certify that their costs are “reasonable” and “proportionate” and there should be meaningful sanctions where such certification is shown to be unjustified. Although these points apply primarily to CFA cases this approach to recoverability where Article 10 rights are engaged should apply equally to non-CFA cases. In the Miller case, this would still have left a potential downside of approaching £2million all in.

There is a clear case for reform. We acknowledge that the level of rates recoverable need to be sufficient to ensure that deserving impecunious Claimants obtain access to justice with the help of competent legal representation. These rates may or may not be in line with Legal Aid rates. However, these changes, along
with the need for reasonableness and proportionality, with the back up of costs capping, would go a long way to preventing pre-trial letters which seek to deter Defendants by warning of Claimant’s costs of £3.3million resulting from defending one article.

The examples of France and Germany

France and Germany have Article 6 obligations too but do not have systems where costs dominate media litigation.

In France the current position is that the loser pays a proportion of the winning party’s costs which are assessed by the Judge. A reform is currently being proposed in the French Parliament that a fixed cost regime should be introduced, as in Germany.

Costs awards by Judges in France are relatively small, €10,000 to €20,000 after a first instance trial. This is no doubt because the system in France for bringing a case to trial is far more streamlined.

Germany too has a fixed cost regime. The winning party can recover costs from the losing party in accordance with a scale of fees fixed by the courts. The scale depends on the state the case has reached, the value of the claim, the importance of the case and the size of the distribution of the offending publication. The average cost of a case taken to a first instance trial is approximately €20,000 and again, the procedure in Germany is far more streamlined.

4. NEXT STEPS

This paper has set out the problem and indicated possible avenues for exploring a solution to this problem. There may well be others that could work effectively.

Associated Newspapers would welcome an opportunity to respond to any queries and to give oral evidence to the Committee.

Associated Newspapers
November 2005

Evidence submitted by Guardian Newspapers

1. EXECUTIVE SUMMARY AND INTRODUCTION

1.1 The Conditional Fee Agreement (CFA) system is inherently flawed in its application to defamation and other cases that engage Article 10 of the Convention for the Protection of Human Rights (“publication cases”).

1.2 This submission will begin with an overview of the social policy considerations in relation to CFAs and a basic explanation of how they operate in publication cases.

1.3 The entitlement to success fees in CFA cases ignores important Article 10 considerations and fails to distinguish publication cases from other types of CFA litigation.

1.4 The courts have identified problems with the CFA system in a number of cases such as Campbell v MGN Ltd (2005)1, Callery v Gray (2002)2 and Musa King v Telegraph Group Ltd (2004)3.

1.5 A legislative solution should be considered to reform the present system.

2. THE SOCIAL POLICY CONSIDERATIONS

2.1 As Lord Hoffmann noted in Campbell Parliament’s intention, in the Access to Justice Act 1999, was to impose the cost of all conditional fee litigation (successful and unsuccessful) on unsuccessful defendants. The underlying principle is that the losing publisher in one case should pay a success fee to the winning claimant lawyer firm so that it can take on other cases against the losing publisher defendant and other publishers in the future.

2.2 The purpose of the legislation is to provide access to justice for people who would not otherwise be able to afford to sue. There is no suggestion in the legislation or in the judgments of the House of Lords in Campbell and Callery v Gray that CFAs are intended to punish media defendants for getting things wrong and although this populist view prevails it has no part to play in a debate about CFAs.

2.3 Our objection to the CFA system is not intended as an attack on the principle of access to justice. Similarly, we are in favour of equality of arms in litigation. The reforms proposed in this submission are not intended to create anything other than a level playing field for both defendants and claimants.

3 EWCA (Civ) 613.
4 paragraph 16.
3. CFAs in operation

3.1 The usual rule in litigation is that the loser pays the other party’s costs as well as his own. There is therefore a built-in risk to each party involved in litigation.

3.2 CFAs allow claimant lawyers to enter into arrangements under which claimants will not have to pay their own lawyers’ costs if they win the case because these will be recovered from the defendant. Part of the risk in litigation therefore transfers from the claimant to his lawyers and the defendant.

3.3 The claimant remains liable to pay the defendant’s costs if he loses and may (but is not required to) take out insurance called “after the event” (ATE) insurance against such liability. The insurance premium is a “funding arrangement” which is recoverable from the defendant. If the claimant takes out ATE insurance he does not bear any risk in the litigation. The risk passes to his lawyer and the ATE insurer.

3.4 Often insurance is taken out even before a media defendant has had an opportunity to respond to an initial letter of claim. In May this year the Guardian settled a claim brought against it by an army officer within seven days of receiving a letter before action. The newspaper paid substantial damages, published an apology and agreed to pay costs. Despite the fact that a settlement was reached promptly and the newspaper did not attempt to defend the claim, the claimant’s lawyers sought costs of over £9,000, including a 25% success fee and an insurance premium of £2,400. The claimant’s lawyers took out insurance notwithstanding that the newspaper had recently been ordered to pay damages of £58,500 in connection with an identical claim about the same article brought by another army officer. In such circumstances it is difficult to understand what risk could have been identified in the second case, which justified a success fee, and what justification there can have been for taking out insurance. The newspaper had no appetite to enter into litigation about the costs given that the claimant’s lawyer would also have been entitled to a success fee in relation to the costs assessment, so it settled the costs claim for £8,500.

3.5 In CFA cases insurance premiums can be “deferred”. This means that they will never fall to be paid by the claimant or his lawyers. They only become payable by the defendant if it loses the case.

3.6 In return for taking on the litigation under a CFA the claimant’s lawyers are entitled to charge a “success fee”. “Success” means any positive outcome (not just a win at a trial) and includes settlement of the case on any terms. The success fee is calculated as a percentage of the claimant lawyers’ costs charged on an hourly basis and is paid by the defendant if the claimant is successful.

3.7 As the claimant’s liability to pay the success fee is theoretical he has no interest in the level at which this is set.

3.8 As the claimant is not paying the (“deferred”) insurance premium he has no interest in how much the premium costs. There is no limit to the cost of the insurance premium. The maximum success fee allowed by the regulations is set at 100%.9

3.9 The maximum success fee

3.10 At present claimant lawyers charge a success fee of between 95% and 100% if a case goes to trial and this applies retrospectively to the whole case.

3.11 Publication cases are very expensive. Costs are commonly more than ten times the amount of damages. In 2001 the Guardian paid damages of £10,000 in settlement of a libel case that settled at an early stage following an application for summary disposal. The claimant’s lawyers claimed costs of £135,000. In 2002 the Observer newspaper made an offer of amends in a case involving an allegation of terrorism: the newspaper paid damages of only £5,000; the claimant’s lawyers claimed costs of £61,000.

3.12 The fact that claimant lawyers’ base (hourly) rates are very high contributes to the high expense of publication cases. Carter Ruck’s base (hourly) rates are £400 per hour and Schillings are closer to £500 per hour. When a success fee of 100% is applied the media defendant faces claimant lawyer fees of between £800–£1000 per hour, throughout the case, in addition to its own costs.13 It is worth noting that defendants would not contemplate paying their own media lawyers (even in city firms) these sorts of rates for publication cases.

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5 Introduced by the Courts and Legal Services Act 1990 and developed further in the Access to Justice Act 1999.
6 Part 44 Civil Procedure Rules
7 Although he may be responsible for disbursements
8 Colonel Campbell-James v Guardian Newspapers Ltd 2005 EWHC 893. In that case the newspaper made an offer of amends and the court was asked to adjudicate on the question of damages.
9 Conditional Fee Agreements Order SI/2000/823
10 Carter Ruck will say that they offer claimants staged success fees in line with staged insurance premiums. According to their CFA agreements dated 2004 these staged success fees are as follows: 25% if the case settles before proceedings are issued; 50% if proceedings are issued but the case settles within 28 days of service of a defence; 100% thereafter. At each stage when the success fee increases the increased rate applies retrospectively to the entire case. So that if a case settles 4 months after a defence is served the success fee of 100% applies throughout the case.
4. PARLIAMENT’S FAILURE TO CONSIDER THE EFFECT OF CFAS ON MEDIA ORGANISATIONS

4.1 A system whereby media defendants are required to fund successful and unsuccessful litigation against themselves is questionable in circumstances where the funding of very expensive cases is borne by few media defendant organisations. The situation is revealed to be even more inequitable when one considers that there are only a handful of claimant firms, notably: Carter Ruck, Schillings, David Price, Russell Jones & Walker and Simons Muirhead and Burton, benefiting from the system. The CFA system fails the test of necessity and proportionality as required by Article 10.

4.2 The effect of CFAs in publication cases has been to eliminate market forces from the field of claimant libel work and from the insurance sector insofar as it relates to ATE insurance. While claimant firms compete with each other for claimants they do not need to compete on price because their CFA clients will, in reality, never have to pay their fees or the “deferred” ATE insurance premium. These items only ever fall to be paid by the defendant.

4.3 In some cases a commercial settlement has been agreed after taking into account the success fees and insurance premiums likely to be claimed by the claimant’s lawyers in the event that the defence does not succeed.11 If individual claimant firms are not losing cases then the success fee ceases to compensate them for cases they lose and becomes a windfall profit.

4.4 Media defendants do not usually win libel actions. Claimant lawyers’ losses are few and far between.12 Although ATE insurance is seen by the courts as a panacea, because it may enable a media defendant to recover costs if he wins against an impecunious defendant13 the insurance is, in reality, of limited benefit to media defendants who hardly ever win cases against claimant lawyers. Moreover, as discussed above, the premiums themselves are so high as to have the potential to make litigation prohibitive for media defendants and they are punitive when cases settle at an early stage and the defendant has indicated no intention to defend.14

5. WHY ARE PUBLICATION CASES ANY DIFFERENT?

5.1 Media defendants are often told that CFAs are working in other areas; in particular the success of CFAs in road traffic accident cases is trumpeted. But media cases have distinguishing features—Lord Hoffmann noted two of them:

(1) Media cases, unlike road traffic accident cases, engage a human right:

There is no human right to drive a vehicle upon the road free of the cost of litigation arising from road accidents. But there is a human right to free expression with which the imposition of an excessive cost burden may interfere.15

(2) In road traffic accident cases a large number of low value, low cost claims are funded by a very large sector of the population (effectively the public) through insurance premiums. By contrast, in media cases the burden of extremely high costs is spread across a small number of businesses and individual defendants cannot pass the cost to the public:

There are substantial differences between the costs in personal injury litigation . . . and costs in defamation proceedings. In personal injury litigation one is for the most part dealing with very large numbers of small claims. The liability insurers are able to pass these costs on to their road user customers. Their own solvency is not threatened . . .16

In defamation cases on the other hand . . . [o]ne is dealing with a very small number of claims to payment of relatively large sums of costs which some publishers may be strong enough to absorb or insure against but which can have serious effects upon their financial position. The publishers do not have the same negotiating strength as the liability insurers because there are few assessments to be contested and disputing them involves considerable additional costs.17

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11 See, for example, the statement in open court in *Griffin v Guardian Newspapers Ltd*, Lawtel, 04/05/2005 (unreported elsewhere)—where the newspaper made a payment into court of £50,000 which was accepted by the claimant who made a unilateral statement in open court.

12 In the last 5 years Carter Ruck have not “lost” (in the sense of failing to obtain a favourable settlement) a claim against Guardian Newspapers. Nor has Guardian Newspapers had any “wins” against Schillings or Russell Jones and Walker. In September 2004 Russell Jones and Walker admitted that they had never lost a CFA case.

13 Although there is some doubt about whether an insurance policy would pay out if a claimant loses a case where the media defendant pleads justification (truth) as this would suggest that the claimant had lied to the insurer and so invalidated his policy.

14 For example by making an unqualified Offer of Amends

15 Lord Hoffmann at paragraph 19, *Campbell v MGN* [2005] UKHL 61

16 at paragraphs 36 *Campbell v MGN* [2005] UKHL 61

17 at paragraphs 37 *Campbell v MGN* [2005] UKHL 61
6. Problems with the CFA system that have troubled the judiciary

6.1 The Ransom Factor: this is the enormous incentive for a media defendant to buy out of litigation when faced with the prospect of bearing not only its own costs and those of the claimant’s lawyer if it loses at trial, but, in addition an uplift of 100% on the claimant’s lawyers’ costs. In Campbell Lord Hoffmann cited,18 by way of example, the Turcu case19 which featured a claimant who had commenced proceedings using a false identity, had lied about his age to the immigration authorities and had spent at least three periods of imprisonment in Romania. The claimant did not appear at the trial and did not even give a witness statement. His solicitor told the court at the beginning of the trial that he was out of touch with the claimant and could only proceed on the basis of past instructions (although telephone contact was resumed at some time during the first week of the trial). The claimant sought a large award of damages against the News of the World. Eady J dismissed the case commenting at paragraphs 6 and 7 of his judgment:

[The claimant] is able to pursue his claim purely because [his lawyer] has been prepared to act on his behalf on the basis of a conditional fee agreement. This means, of course, that significant costs can be run up for the defendant without any prospect of recovery if they are successful, since one of the matters on which [his lawyer] does apparently have instructions is that his client is without funds. On the other hand, if a defendant is unsuccessful it may be ordered to pay, quite apart from any damages, the cost of the claimant’s solicitors including a substantial mark-up in respect of a success fee. The defendant’s position is thus wholly unenviable.

Faced with these circumstances there must be a significant temptation to media defendants to pay up something, to be rid of litigation for purely commercial reasons and without regard to the true merits of any pleaded defence. This is the so-called “chilling effect” or “ransom factor” inherent in the conditional fee system . . . . This is a situation which could not have arisen in the past and is very much a modern development.

6.2 Chilling Effect: it was recognised by the Brooke LJ in the Musa King case20 that CFAs, inevitably, have an effect on the information media organisations are willing to risk putting into the public domain:

What is in issue in this case . . . is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant if he loses or concedes liability . . . . The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression . . . and to lead to the danger of self-imposed restraints on publication.21

6.3 Blackmailing Effect: in Campbell Lord Hoffmann, elaborating on the themes explored in Turcu and Musa King talked about the “blackmailing effect” of CFA litigation in media cases which he suggested arises from two factors:

First the use of CFAs by impecunious claimants who do not take out ATE insurance . . . . The second factor is the conduct of the case by the claimant’s solicitors in a way which runs up substantial costs but requires the defendant to do so as well. Faced with the free-spending claimant’s solicitor and being at risk not only as to liability but also to twice the claimant’s costs the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of litigation on the ground that the defendant’s own costs were equally high.21

7. Other problems

7.1 Very few cases get to court—the vast majority settle at an early stage. In many cases Guardian Newspapers offers a correction or apology at the outset (without the need for the claimant to issue proceedings) and we suggest that in circumstances, where the defendant has evinced no intention to defend the claim, there can be no justification for the imposition of either a success fee or an ATE insurance premium as the claimant has secured a positive outcome and the only remaining issues between the parties are the wording of the correction or apology, damages (if appropriate) and costs.22

7.2 In many libel cases media defendants use the Offer of Amends procedure23 under which the defendant is able, at any time up to the date for service of the defence, to call a halt to the litigation (or prevent proceedings being issued).24 An offer of amends is a written offer to:

18 At paragraphs 29–30
19 Turcu v News Group Newspapers Ltd [2005] EWHC 799 QB
20 Brooke LJ at paragraph 99 of Musa King v Telegraph Group Ltd [2004] EWCA (Civ) 613
21 At paragraph 31
22 In July 2000 the Observer newspaper offered an apology to a complainant. She did not accept the apology and appeared to have gone away. Almost a year after the article was published the claimant’s lawyers, acting on a CFA basis, issued proceedings without warning. An apology and damages of £2000 were agreed. The claimants lawyers sought costs of over £19,000 on assessment these were reduced to £14,500—still an excessive sum in the circumstances.
23 Sections 2-4 Defamation Act 1996
24 It is open to a claimant to refuse to accept an Offer of amends but the fact that the Offer has been made can be pleaded in defence. In reality the only time this is likely to happen is if the claimant asserts that the defendant acted maliciously—see section 4 Defamation Act 1996
(a) make a suitable correction of the statement complained of and a sufficient apology to the claimant;
(b) publish the correction and apology in a manner that is reasonable and practicable in the circumstances; and
(c) pay the complainant such compensation (if any) and such costs as may be agreed or determined to be payable.25

7.3 The Offer of Amends procedure is not cost-effective in CFA cases where claimant lawyers seek to recover substantial success fees and hefty insurance premiums as if the action were being defended. It is especially difficult to understand the justification for success fees and insurance premiums in Offer of Amends cases as liability is effectively admitted by the defendant. The only issues between the parties are; the wording of an apology, the level of damages and costs, all of which fall to be resolved by the court if the parties fail to reach agreement. For what risk then does the success fee compensate the claimant lawyer in such cases? And what risk is the insurer insuring against?

7.4 It is worth remembering that there are a number of defences available to defendants in media cases. In the case of libel the 3 main defences are:
— Justification—that the allegations complained of are true
— Fair comment—opinion
— Reynolds qualified privilege—put simply this is the right to get things wrong provided that certain conditions prevail at the time the article is published.

We submit that is neither necessary nor desirable that a CFA system should operate so as to make the threat of success fees and ATE insurance premiums in publications cases so severe as to provide a serious disincentive for publishers to avail themselves of defences created by the courts in order to protect freedom of expression.

8. JUDICIAL SOLUTIONS

8.1 In Musa King the Court of Appeal suggested a cost[en rule]capping regime (alongside assessment of costs at the end of the case and wasted costs orders) as a solution to the problems posed by CFAs.

The only way to square the circle is to say that when making any cost capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where there freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win.26

8.2 In Campbell Lord Hoffmann endorsed this approach but also acknowledged that cost capping is not a complete answer to the problems posed by CFAs. Cost capping does not deal with the problem of a newspaper faced with substantial and irrecoverable costs and nor does it deal with “the threat of having to pay the claimant’s costs at a level twice the amount which would be reasonable and proportionate”.27 He concluded that “finding ways of moderating the costs of defamation cases would . . . be in the best interests of all concerned . . . In the end . . . it may be that a legislative solution will be needed to comply with Article 10”.28

8.3 The reluctance of the judiciary to interfere with a system created by Parliament is understandable. One has to have some sympathy with the extremely short judgment of Baroness Hale in Campbell. It is a separate question whether a legislative solution may be needed to comply with Article 10 . . . this is a complex issue involving a delicate balance between competing rights upon which I would prefer not to express my opinion.29

8.4 There are no signs that a legislative solution is on its way30 and we suggest that a legislative solution should be considered as a matter of urgency.

9. PROPOSED SOLUTIONS

9.1 It is worth noting (as Lord Hope did in Campbell31) that a different legislative solution to the problem of access to justice has been found for Scotland where a “speculative fee”, payable if the claimant is successful, is not recoverable from the losing party. This begs the question of why a different legislative solution could not be adopted in England so as to exclude success fees in media cases.

25 Sections 3 (4) Defamation Act 1996
26 Brooke LJ at paragraph 101—105 Musa King v Telegraph Group Ltd[2004] EWCA (Civ) 613
27 at paragraph 34
28 At paragraph 37
29 At paragraph 48
30 Indeed in its paper Making simple CFAs a reality, published on 29 June 2004, which discussed the impact of costs and CFAs in defamation cases the DCA stated that it did not propose to legislate to restrict the use of CFAs in media cases. Instead it supports the vigorous use of existing and alternative case management and cost control powers in the Civil Procedure Rules.
31 At paragraph 39
9.2 A legislative solution would not involve amending primary legislation. Section 58 of the Courts and Legal Services Act 1990, as amended by section 27 of the Access to Justice Act 1999, confers on the Lord Chancellor the power to exclude success fees in certain cases and we suggest that publication cases should be excluded from the legislation.

9.3 We submit that the elimination of success fees in defamation and other media cases would not be a barrier to claimant lawyers taking on cases on a no-win no-fee basis. If ATE insurance is available for a case then the claimant is protected. Separately, we submit that it must be open to claimant lawyers to insure their own businesses against the risk of losing publication cases.

9.4 Whether or not a legislative solution is decided upon success fees and ATE insurance premiums should not be recoverable in Offer of Amends cases or when the media defendant evinces no intention to defend a claim. In such cases fixed costs should be considered.

9.5 Success fees should not be recoverable in relation to assessment of costs.

9.6 The market for ATE insurance is currently very small and appears to be restricted to a handful of insurers and law firms handling claimant defamation work. Transparency is required to ensure that this aspect of funding CFAs is not open to abuse.

Guardian Newspapers
November 2005

Evidence submitted by the Trades Union Congress (TUC)

Summary

— The TUC does not believe there is a compensation culture.
— The number of claims is falling.
— Nine in every 10 workers who are injured or made ill through work do not claim.
— Compensation payments could be cut were more employers to offer early access to rehabilitation.
— Costs could be cut were insurance companies to admit liability at an early stage.
— There is no evidence of a “risk averse” culture.
— The TUC would welcome regulation of commercial Claims Management Companies.
— The proposed change to the law of compensation is unnecessary and could be unhelpful.

The myth of the compensation culture

1. The TUC would wish to give evidence in relation to compensation for claims of personal injury against employees following an accident or occupational disease.

2. It is the TUC’s contention that there is no compensation culture within the UK and, in fact, the reverse is the case, with most people reluctant to claim compensation, or unable to do so.

3. The number of civil claims for compensation against employers as a result of accidents have fallen every year for the last five years. In fact, according to a recent report by the Better regulation Task Force, despite the introduction of “no win—no fee” claims, the total cost of compensation cases in Britain has remained, in real terms, static since 1989.

4. Britain also pays out much less out on civil compensation, as a proportion of its GDP, than any other major European country apart from Denmark, and a third that of the USA.

5. Each year over 850,000 people are injured or made ill as a result of their job. The most common injuries are musculoskeletal disorders such as back injury or RSI, injuries from slips and falls, skin diseases, and deafness. Many people will get better, some will not. Over 25,000 people are forced to give up work every year as a result of work-related injuries or illness.

6. However the number who gain compensation from their employer is, according to the Association of British Insurers, around 60,000 a year. A further 20,000 will make a successful claim for industrial injuries benefit, which is a government funded “no fault” scheme.

7. This means that 9 out of every 10 workers who are injured or made ill through work get no compensation.

1 Compensation Recovery Unit, 2005.
5 ABI, quoted in Hazards magazine, May 2005.
6 DWP Industrial Injuries Disablement Benefit statistics, September 2004.
PAYMENTS

8. The TUC would also challenge the idea that compensation payments are too high. Exact figures are difficult to come by because in excess of 95% of cases are settled out of court. Figures from the leading solicitors companies give an average personal injury settlement of around £7,500. However, because there are a small number of large payments, the vast majority of claimants receive less than £5,000. Over three quarters of cases taken by trade unions result in a settlement of under this amount.

9. Payments are made based on decided cases and independent medical evidence compensating actual loss and even where there is a debilitating and life destroying disease the compensation is never more than those guidelines. An example is mesothelioma caused by asbestos exposure. This is invariably fatal. The guidelines for pain and suffering are £45,000—£70,000, however if the case is settled after death, the payment is often lower, with a standard tariff for bereavement damages of £10,000.

10. There have been reports of individuals getting large settlements for occupational diseases, sometimes in excess of £100,000. These cases, which are very rare, are relatively young workers who, because of their employers’ admitted or proven negligence, will no longer be able to work again in their chosen profession as a result of their illness. This level simply reflects the loss in their income over their remaining working life.

11. Very occasionally there are settlements of over £1,000,000. These invariably relate to people who have been so badly injured that they require permanent care and will never work again. Often they will have lost the use of their limbs and/or are significantly brain-damaged.

12. The TUC would contend that, in reality, the levels of compensation in Personal Injury cases are too low. It is now seven years since the Law Commission recommended raising the damages for non-pecuniary loss in PL cases by increasing them to up to double the current rate but that has never been implemented.

ROLE OF THE INSURANCE INDUSTRY

13. Concern has been raised in the past about the effect of Personal Injury settlements on the insurance industry, especially where asbestos related diseases are concerned. The insurance market is about assessing risk, pricing premiums accordingly, investing premiums collected, and hoping that the risks don’t become a reality. To win compensation in a civil claim against an employer, the claimant has to show negligence. This means that the employer knew or ought to have known that they were putting you at risk. If the employer can show that they could not have known that there was a risk then they will not be liable for damages. For example claims for hearing loss can only be brought for damage caused after the HSE produced guidance on this in 1963.

14. The dangers of asbestos have been documented since the 19th century, there have been health and safety controls on its use since 1931, and the risks were known across the industry since the 1940s. Despite the known dangers many employers continued to use it and to expose their workers right up to the 1970s. Even now too many fail to take any adequate care with asbestos present in their workplaces. As a result over 2,000 people die every year from exposure often 30 or 40 years ago.

15. All these deaths were avoidable if the industry had protected its workforce. The insurers insured these companies, and took their premiums, despite the knowledge that exposure was occurring and that many would die. There is no reason why these workers should be denied compensation just because the exposure took place many years ago. The insurers were happy to take the risk and should meet their obligations. There is no justification for the taxpayer having to pay the bill.

16. The total cost of claims for occupational diseases is actually only a quarter of the total amount paid out in compensation to workers by insurance companies and the number of claims are falling.

17. Nor should these claims and settlements be seen as putting an undue burden on business. It is a legal requirement for employers who have staff working for them to have insurance cover in case they injure or kill someone through their negligence, or an employee develops an avoidable disease through work. The average cost of EL insurance is 0.25% of total payroll costs and is the lowest in Europe. Average damages for an ELCI claim are £7,500.

18. Unfortunately the way the insurance market works there is little economic incentive for employers to take action to reduce the number of injuries and illnesses they cause, as premiums within each sector vary only marginally between the good and bad employers.

19. It is true that premiums have gone up considerably in the last few years, but this is nothing to do with the number of claims. The main reason is that insurance companies were using Employers Liability Insurance as a “loss leader”.

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7 APIL. July 2005.
8 TUC survey July 2005.
9 Judicial studies Board Guidelines.
11 DWP Review of ELCI. First Stage Report.
20. In 1999 the cost of claims and insurance companies costs was 54% higher than the amount that the insurance companies were charging\textsuperscript{12}. Following the stock market crash and the attack on the World Trade Centre, the companies decided they could no longer afford to subsidise Employers Liability Insurance so premiums have gone up. However this is not because of higher compensation or more claims.

Costs

21. Another factor is that legal and medical costs have been rising much faster than inflation. Between 1997 and 2002 medical and legal costs increased by 50%\textsuperscript{13}. This is simply because insurance companies are failing to follow protocols which oblige them to respond to claims within certain time limits and to admit liability early on, if the employer is liable. All too often liability is not admitted until a claim is about to go to court, and unnecessary costs have been run up.

22. The TUC is however concerned about the costs incurred in many Personal Injury cases. In part these seem disproportionate because of the low settlements in most cases, however the TUC would welcome any action to speed up cases and reduce costs, so long as such measures did not reduce the access of claimants to justice. There is no evidence that costs are being incurred by solicitors dragging out cases unnecessarily. Costs must be reasonable, necessary and proportionate. Costs however could be reduced if employers, or their insurance companies, admitted liability early, according to the protocols, rather than waiting until the last minute when the claimant’s lawyer will already have had to get medical and other reports and spend, perhaps months, preparing a case.

23. The failure by employers and insurers to admit liability early has another effect as well. It means that often no attempt is made to provide access to early treatment and proper rehabilitation for the victim. This means that the condition may become worse and their chance of a recovery is greatly reduced. This is particularly a problem in injuries that respond best to early treatment, such as back pain.

Risk aversion

24. The TUC does not believe that there is any evidence of “risk aversion” within the workplace. The death of 220 workers last year shows that, as do the high rates of occupational ill health and injury.

25. The statutory basis under which employers must act is to reduce risk “as far as reasonably practical”. This means removing those hazards which lead to risk where possible and otherwise reducing the risk to the lowest practical level. Unfortunately the focus on “risk averse behaviour” may send the wrong message to employers that it is acceptable to take greater risks with the health or safety of their employees.

26. We do accept that health and safety has been used by some employers and public bodies as an excuse for cutting back activities, often where the real grounds are cost. In addition restrictions imposed by the insurance industry have often been interpreted as being a result of regulation, or risk averse employers.

27. The TUC would like a separation of the risks faced by those who have no choice, such as workers, the young and those with learning disabilities or special needs, from those who choose as part of a lifestyle decision, to undertake an element of risky behaviour. However we believe that this distinction was already make in the judgement of Tomlinson v Congleton BC.

Claims management activities

28. The TUC has seen a range of cases which show that some claims management companies are acting in a way which is against the interests of both the individual concerned and society. These include taking extortionate premiums, encouraging frivolous claims, inappropriate advertising and considerable lapses in professional conduct.

29. These should not be seen as a reflection on either the legal profession, or the voluntary organisations and trade unions who refer members or clients to solicitors as a part of their broad support services. Trade union legal services refer around 65,000 new cases every year to solicitors. Last year they achieved compensation settlements to the value of over £300 million. This is part of the overall support work that unions undertake and is closely aligned to their work on prevention. Many local support groups provide a similar service.

30. The TUC would welcome the regulation of those Claims Management Companies who operate commercially and where their role is simply to find and pass on claims. We could not support the inclusion of non-commercial organisations under the same regulations, which will be developed to counter a specific issue and will not be appropriate to regulate trade unions, or legal firms, who are already regulated by other means.

\textsuperscript{12} DWP Review of ELCI First Stage Report.

\textsuperscript{13} Workplace Compensation, Greenspan Bergman, 2002.
LAW OF NEGLIGENCE

31. The TUC is concerned that the government proposals on negligence means that the current common law (which is both clear and well established) will now have to be read in conjunction with this new provision. This will lead to a period of uncertainty. In addition the TUC is concerned that the proposed wording will mean that any worker injured in a “desirable activity” will have to show a higher degree of negligence than a worker suffering the same injury in any other activity. It is unclear what constitutes a “desirable activity”. It may be interpreted by the courts as including areas such as school excursions, and volunteer work, but could also be interpreted as covering many public or essential services.

32. The Government has indicated that its intention is simply to clarify the existing law to make it clear that there is no liability and negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill. The TUC does not believe that the proposed wording within the bill does that. Instead the provision will lead to a two-tier civil compensation system with workers in occupations deemed a “desirable activity” being denied access to the civil courts.

33. There have been indications that the proposed wording is meant to reflect the judgement in Tomlinson v Congleton BC, which looked at the issue of liability in a case where a youth seriously injured himself after diving into a lake where diving was prohibited. However there are at least two significant differences between the Bill and the judgement given in the Court of Appeal. The first is that this judgement referred to “social value” and not “social activity”. These are very different and the latter is much wider.

34. Secondly, the judgement was never intended to cover those who undertake an activity as part of their work. It related to those who choose to take risky activities. This was made quite clear in the judgement, where Lord Hoffman commented “a duty to protect against obvious risks . . . exists only in cases where there is no genuine informed choice, as in the case of employees.” This clear distinction is not made in the Bill.

35. Whether any new legislation is necessary is highly doubtful. The Tomlinson judgement stands regardless of any legislation. In addition the TUC believes it has demonstrated that there is no compensation culture within the UK. Personal injury claims are falling and the real scandal is the low levels of compensation awarded to those few workers who are successful.

36. The TUC therefore believes that the proposal for a clause intended to deter compensation claims is not only unnecessary, but does not even meet the aims the Government had claimed for it.

CONCLUSIONS

37. In workers’ personal injury cases, claims arise because employers act negligently. There is no evidence of frivolous or unnecessary litigation, most workers do not claim and settlements are modest.

38. The insurance companies can help reduce negligence by linking the premiums much more closely to the actual risk within that employer. Insurance companies should more readily offer risk based premiums that reflect an employer’s health and safety history. Good health and safety should be rewarded. However when a claim does arise, costly medical and legal bills would be less likely to arise if insurance companies were more ready to admit liability where justified early and follow court rules.

39. When someone is injured or made ill through work they should have early access to proper rehabilitation. This means the worker would be more likely to make a full or early recovery. Rehabilitation must not however be used as a stick to beat the claimant with, to force them to accept an offer or return to work early. It must only be used as a means of enabling an injured person to cope again either with work, or with family, domestic life and society.

40. The TUC does not believe that there is a risk averse culture within the workplace, and the current debate should be used to strengthen awareness of the legal requirements on employers. However “health and safety” should not be used as an excuse not to take actions which an organisation does not wish to do on cost grounds.

41. The TUC would welcome regulation of Claims Management Companies operating commercially.

42. The Government proposals to alter the law of negligence would be unhelpful and confusing. They may lead to some workers being unable to seek redress against their employer where negligence has taken place.

Trades Union Congress

November 2005
Evidence submitted by the Medical Defence Union

1. The Medical Defence Union (MDU) is the UK’s largest provider of medico-legal services to doctors and dentists. Our members include over 50% of the UK’s hospital doctors and general practitioners, and over 30% of the UK’s dentists.

2. Among the MDU’s benefits of membership, doctor and dentist members are provided with insurance policies which indemnify them against compensation payments and legal costs for clinical negligence claims.

3. Doctors working in the NHS and community are indemnified by the NHS, while MDU members in the primary care and independent sectors are indemnified by the MDU for clinical negligence claims.

4. The MDU’s concern about the current system of compensation relates not to the number of clinical negligence cases, where we have seen no significant rise in number over the last five years; but to the increasing cost of high value claims which is borne either by the NHS or by individual doctors and dentists in terms of increasing indemnity costs. We set out our concerns below.

5. Over the last five years, the MDU has not seen a significant rise in the number of clinical negligence claims made against our members. This is the result of various legal changes which include:
   
   (a) Introduction of a limited panel of specialist claimant’s solicitors.
   
   (b) Introduction of the Legal Services Commission, providing central funding for clinical negligence claims, with the application of a stronger merits test and a proportionality test.
   
   (c) Changes to the civil justice system in England and Wales, under the Civil Procedure Rules, which followed the 1996 report on “Access to Justice” by Lord Woolf.

6. Although the number of claims is not rising, costs and damages payments are rising well above the rate of inflation. The MDU is now paying significantly more claims over £1 million on behalf of its doctor members than 10 years ago.

7. The MDU’s analysis of the 20 highest settlements from medical negligence claims involving GPs and hospital doctors in private practice since 1995, reveals claims costs are rising by around 13–15% each year. In 1995 the 20 highest awards involving MDU doctors totalled £5.4 million, but by 2004 this figure had risen to £23.3 million. The largest award paid out by the MDU on behalf of a GP member was in 2003 when it paid nearly £4 million to compensate a child who had sustained severe brain damage as a baby after a failure to refer to hospital. In 2004 the MDU paid £4.3 million, the highest settlement made on behalf of a hospital doctor member, to a patient who sustained brain damage due to complications of surgery.

8. Corresponding NHS payments are set out in the Annual Reports of the NHS Litigation Authority. The NHLSA’s most recent accounts show that compensation payments for 2004/5 were £502 million and that liability for known and incurred but not reported clinical negligence could potentially amount to £6.8bn. In our experience about 2/3 of total liability for clinical negligence resides in a small number of large claims in which as much as 75% of the damages may be awarded for future care.

9. The high cost of these clinical negligence claims reflects the severity of the injury and the amount of care a severely damaged patient, often a baby who is neurologically-damaged at birth or in early life, needs for the rest of his or her life.

10. Currently, the legal requirement is that all compensation awards must be calculated on the basis that future care will be provided in the independent sector, and not the NHS. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 provides that: “In an action for damages for personal injuries (including any future care a severely damaged patient, often a baby who is neurologically-damaged at birth or in early life, needs for the rest of his or her life.

11. The MDU suggest that this provision should be repealed. It substantially inflates damages paid in clinical negligence cases by the NHS and others. Funds, which could otherwise go to NHS services, are being awarded on the basis that the money will be spent on setting up individual private care arrangements. Available NHS treatments must be ignored, diverting resources from NHS care, where many could benefit, to private care, where only the individual can benefit to the detriment of state services.

12. For every patient who can show his injuries are a result of negligent care, there are many more who have similar injuries and the same requirements for future care who cannot. For example, there are about 1500 children born with cerebral palsy each year. The overwhelming majority do not have an injury attributable to negligent events. Current arrangements mean millions of pounds are diverted from the NHS to set up care and rehabilitation arrangements for a tiny number of individuals at public expense.

13. The high cost of compensating neurologically-damaged babies and the need to repeal Section 2(4) of the Law Reform (Personal Injuries) Act 1948 was addressed in the Chief Medical Officer’s recommendations for clinical negligence reform, contained in the report “Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS” published in June 2003. At the time it was proposed to include neurologically-damaged babies in an NHS redress scheme and to consider repeal of Section 2(4) of the Law Reform (Personal Injuries) Act 1948.
14. However, the Redress Bill does not address these important matters. We understand that the Department of Constitutional Affairs is considering the issue of repeal of Section 2(4) of the Law Reform (Personal Injuries) Act 1948, but no further information is available.

15. The MDU believes that the size of compensation awards and their adverse effect on the NHS is a pressing problem that needs to be addressed. We believe that it is an important aspect of the current compensation procedure and suggest that the Committee may wish to consider it as part of its investigation into the compensation culture.

Dr Christine Tomkins
Deputy Chief Executive
Medical Defence Union

November 2005

Evidence submitted by Ken Oliphant, Cardiff Law School

1. I am a senior lecturer at Cardiff Law School, Cardiff University and a widely-published author on the law of tort. I am also national reporter for the Yearbook of European Tort Law, UK correspondent for the Torts Law Journal, and convenor of the Tort Section of the Society of Legal Scholars, but I write here in a personal capacity.

2. One preliminary observation is warranted. There is a great deal of uncertainty as to how the system of compensation through the law of tort actually works in this country. There has been no in-depth study of its operation for more than 20 years, and the empirical information that is available is fragmented, limited in scope (including temporal scope), frequently contestable, and open to widely differing interpretations. There is a pressing need for further empirical work in this area. In the meantime, it is possible to glean some information about claims numbers, costs and trends from such material as is publicly-available, and this is the subject of a research project that I am currently conducting with my Cardiff colleagues Richard Lewis and Annette Morris under the provisional title, “Statistics Concerning Tort Claims: Is There a Compensation Culture in the United Kingdom?” Much of the evidence cited below, and the analysis of it, comes from that research.

I. Does the “compensation culture” exist?

3. The term “compensation culture” is too often employed uncritically, without any real effort to explain the negative connotations that are clearly intended. That there has been a rise in the number of compensation claims in (say) the last 30 years is easy to establish. The Pearson Report estimated that in 1973 approximately 250,000 personal injury claims were pursued through the tort system. Compensation Recovery Unit (CRU) figures now demonstrate that, in four of the last five years, new personal injury claims have numbered in excess of 700,000. But the mere rise in claims numbers does not itself provide evidence of a debilitating compensation culture—it could be, for example, that there was very significant under-claiming in the past. It is frequently suggested in the media that much of the increase is accounted for by claims that are in some sense unworthy, but this seems to reflect urban myth rather than fact (consider, for example, the case of “Winnebago man” that has been reported as fact in British newspapers), and it should be noted that successful tort claims must satisfy a number of stringent requirements which have not (in my opinion) been significantly watered down in recent years. In the personal injury context, it is particularly worth noting that claimants must prove that they have suffered an injury, and that feelings of grievance, unhappiness, distress, etc, are insufficient basis on which to claim.

4. I am, however, prepared to accept the analysis of the Better Regulation Taskforce (Better Routes to Redress, 2004) that the perception that there is a compensation culture has in itself a number of negative consequences, though I believe that these should not be overstated.

II. What has been the effect of the move to “no-win no-fee”?

5. It is often suggested that the effect of the move to conditional fee arrangements (CFAs) has been to fuel the compensation culture. But in fact the number of tort claims shows no real sign of having been affected either by the introduction of CFAs in 1995, primarily because their take-up was at first so low, or by their becoming the principal mechanism for funding personal injury litigation from April 2000 on (as a consequence of the Access to Justice Act 1999). The number of tort claims for accidental personal injury has remained remarkably constant over the period for which CRU figures are available, and in fact was lower in 2003–04 and 2004–05 than in any of the preceding three years. (By the way, this proposition does not, as


2 The two principal studies that have been conducted are Report of the Royal Commission on Compensation for Personal Injury (Chairman: Lord Pearson), 3 vols, Cmdnd 7054, 1978 (“the Pearson Report”), and D Harris et al, Compensation and Support for Personal Injury (1984) (“the Harris survey”).
Better Routes to Redress has it, “ignore . . . the fact that many claims are settled out of court” (p 11): the figures are for claims notified to CRU, and includes the vast—in fact, the overwhelming—majority of all claims that are made, whether they are subsequently resolved in or out of court.) There has, it must be admitted, been a dramatic rise in disease claims in 2003–04 and 2004–05, with consequent impact on the total personal injury claims figures for those years, but this seems to have been wholly the result of the closing of the British Coal compensation schemes for respiratory diseases and vibration white finger (with a reporting time-lag likely to have been responsible for the inflated figures in 2004–05 after the closure of the schemes, though I cannot be certain of this.) It seems therefore that “the apparent explosion of litigation in the latter half of the 1990s and the early years of the 21st century”, contrary to the statement in Better Routes to Redress (p 11), was not attributable to the rise of CFAs and the growth of claims management companies. This is one of the key messages of the research I am engaged in with Lewis and Morris, and has been more fully considered by Morris in a forthcoming article (“The Compensation Culture Debate and Tort ‘Lore’: Lies, Damned Lies and Statistics”). The rise in claims numbers is, in my opinion, most likely to have occurred over the 1980s and early 1990s, though this is the precise period for which reliable statistics are unavailable.

III. Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

6. I have no expertise in this area, though I would note that—if there is such risk averseness—it is more attributable to the perception that there is a compensation culture (and, more specifically, that unworthy claims are likely to be upheld, or at least to require substantial pay-offs), than to the reality (namely, that the courts will actually uphold such claims). The decision of the House of Lords in Tomlinson v Congleton Borough Council (2003) has sent a clear message to public bodies that the courts are “on their side”, though the facts of the case (destruction of a valuable public amenity) illustrate how some public bodies have responded in a detrimentally defensive fashion to the prospect of litigation against them.

IV. Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

7. Again, I have no expertise in this area.

V. Should any changes be made to the current laws relating to negligence?

8. I would be opposed to changes in the current laws relation to negligence, at least for the time being. I am rather sceptical of the claim that is sometimes made that the courts, by adopting an over-lenient attitude to “unworthy” claims, have contributed to the rise of a compensation culture. Even if this contains a grain of truth, however, the Tomlinson decision—followed up by Gorringe v Calderdale Metropolitan Borough Council (2004)—has shown the House of Lords taking the lead in calming undue fears connected with the potential liabilities of public bodies. In my view, the Government has got it about right in its current Compensation Bill, which reinforces the (reassuring) message of the House of Lords decisions whilst not actually effecting any change in the substantive law.

Ken Oliphant
Senior Lecturer
Cardiff Law School

November 2005

Evidence submitted by St John Ambulance

This Memorandum contains the views of St John Ambulance within the terms of reference of the Constitutional Affairs Committee’s Inquiry into Compensation Culture. St John Ambulance welcomes the opportunity to assist the Committee in its Inquiry.

BACKGROUND

The Inquiry is considering whether there is a growing “Compensation Culture” in Britain, whether new legislation is justified to help deal with this and whether existing law provides sufficient protection. The question is asked as to whether new legislation can address the apparent risk averse culture, particularly in public bodies, stemming from fear of litigation. In this context the Government’s new Compensation Bill, currently before Parliament, may provide an opportunity to address some of these issues.

St John Ambulance

St John Ambulance is a leading First Aid, transport and care charity. Its mission is to provide, upon a voluntary basis, First Aid and medical support services, caring services in support of Community needs and education, training and development to young people.
I
mpact on first aid volunteers

1. St John Ambulance has some 45,000 members, over 50% of whom are youth members (eg Cadets). All these members are trained in first aid to a varying degree.

2. In addition we provide first aid training to the general public either as individuals or as employees of organisations who wish to meet First Aid at Work Regulations.

3. These activities have created a pool of trained first aiders which, (just taking the last five years into account) could amount to some one million people.

4. We see this pool of first aiders as providing substantial public benefit, and in terms of Clause 1 of the Compensation Bill, we see providing first aid as a “Desirable Activity”.

5. Our concern is that, if one of these first aiders witnesses an accident in the street, they are, these days, faced with a dilemma: do they just walk on by or do they provide first aid.

6. In general the first course of action exposes them to no risk. However the second course presents substantial risk ie that if due to their intervention the outcome for the “victim” is adversely affected, then they are likely to be sued. There are many incidents of this kind eg the injured motorcyclist whose crash helmet is removed, perhaps to provide resuscitation, but who as a result suffers damage to his neck.

7. We would therefore look for a change in our legal system so that it protects such a volunteer first aider, and generally encourages them to intervene rather than walk away.

8. This is, of course, the “Good Samaritan” situation, and in the absence of a Good Samaritan law in the UK (unlike, say the USA or Canada or Germany), we believe that there is an opportunity for Clause I to fill the gap in some way.

9. It is not clear whether the draughtsman of Clause 1 has first aid volunteers in mind at all, and we think he should. The Committee seems to have heard evidence from a number of quarters where the key element in dealing with the situation appears to be good risk management. The problem for first aiders is that they are generally reacting to emergencies which do not provide the opportunity for a pre-meditated risk analysis to be undertaken.

10. One of the difficulties we see with the currently drafted Clause 1 is that there seems to be no attempt to define “desirable activity”, with the matter being left to the courts. However we do feel that it would be helpful if the Bill made an attempt to provide a “non-exhaustive” list of the particular “desirable activities” that were contemplated (we would like to see “voluntary provision of first aid” as a prominent example on such a list).

11. We recognise that if first aiders were to have some immunity from potential claims for damages, then the question remains as to who will compensate a victim (whose injuries may have been severely exacerbated). We believe that in such cases there should be a safety net comprised of a no fault compensation scheme. However, we have not as yet considered how such a scheme might be funded.

Gary Maydon
Company Secretary and Legal Counsel
St John Ambulance
January 2006

Evidence submitted by All Party Group on Adventure and Recreation in Society (A RISc)

On behalf of the All Party Group on Adventure and Recreation in Society (A RISc), I am writing to say how much I welcome your committee’s enquiry into the “Compensation Culture”. I also enclose this submission, made by officers of the A RISc APG, with some disturbing examples of court cases that, in our opinion, should never have been brought. They illustrate that whether or not a wider compensation culture exists, a number of very bad decisions in the Courts are causing great harm to the sport and adventure sector in the UK. I hope this submission will be of use to you and your committee in its deliberations.

Tensions exist in sport and adventure training with respect to the inherent risks that are associated with these aspirations. If these tensions are not resolved then the good work of hundreds of thousands of volunteers will be progressively undermined. Such a failure would have a profound impact on young people and our wider communities across the UK.

Thus we welcome this opportunity to explain our conviction that the compensation culture is not a myth and that changes in the law are needed to prevent the slow strangulation of risk taking and adventure in sport and recreation.

Adventure training and recreation groups have already gone well beyond the sensible process of establishing good safety procedures. They have abolished whole areas of activity and many have withdrawn from providing opportunities for young people to take responsibility. To take just two examples, many Sea Cadets no longer sail on the sea and the second biggest teaching union has advised teachers not to participate in school trips. Yet instructors continue to lose cases, as the courts have repeatedly produced unfair findings of negligence, especially where young people have been allowed to take responsibility for themselves and suffered or caused accidents. The six attached cases are a small sample of those brought to our attention.
Today 80,000 youngsters are on waiting lists for the Scouts and Guides alone. Statistical evidence that fear of litigation is the top barrier to volunteering comes from the much-quoted CCPR survey. The Scouts and Guides make the point, however, that it is not just about rising insurance premia, dire as those are; a scoutmaster who is accused by lawyers in court of being incompetent is very unlikely to return to scouting even if he wins.

We believe that the problem is the repeated failure of the courts to recognise the inherent risk in giving people the opportunity for adventure and taking responsibility. The steady growth in insurance premia and large numbers of out of court payments often simply reflect genuine appraisals by legal advisers of the attitudes of the courts in recent years, rather than their pandering to urban myths.

A “safety first” culture in other areas of life is possible, at the price of extra cost and time. In adventure and sport, however, elements of risk are essential, if young people are to learn to take responsibility; risk helps us to learn our limitations and build confidence in our abilities. Experiences from hillwalking to rugby develop character, teaching leadership and teamwork. For children and young people such experiences are particularly important.

**The Solution**

If we are to encourage volunteering in the sport, adventure and recreational sectors and provide children, young people and adults with worthwhile experiences, we must raise the burden of proof and re-establish the legal principle of “reckless disregard” in this sector. Several American states have done this for sport and adventure training, by statute. In effect, it means that a higher burden of proof is needed to establish negligence. There is also a case for making a parallel change in the (criminal) health and safety laws, to recognise the special position of sport, adventure training and recreation. By doing this the courts would be forced to recognise that certain activities carry certain risks and that accidents—even, rarely, fatal accidents—can happen without contributory negligence by instructors.

It is important that those participating in adventure and sport accept a level of responsibility for their own safety and have this recognised by law. Of course, whilst the law may recognise these factors it is also important that Judiciary have an adequate knowledge of the inherent dangers of adventure sport and the risks they are supposed to pass judgment upon. To that end the Judicial Studies Board should incorporate teaching about risks and responsibility in adventure training context into their curriculum for those judges likely to handle such cases.

**Annex**

(1) **Hedley v Cuthbertson, QB DIVISION, DYSON J (20 JUNE 1997) SUPPLIED BY ROY AMLOT QC**

A professional mountain guide was held liable for the death of his fellow climber because of his failure to take adequate safety precautions when proceeding with a manoeuvre. This was not based on any dispute about facts. It was based on the judge’s decision that he believed the mountain guide overestimated the potential danger posed by a rock fall, in a split second decision, taken on the mountain face.

The decision was received with considerable dismay in the worlds of mountain/rock climbing and other inherently dangerous sports.

(2) **Joseph Morrison v The Scout Association, Date of Accident 8 August 2000, Litigation commenced 6 September 2000, Judgement given by HH Judge Brownlee at Newtownards 6 November 2002. SUPPLIED BY JOHN GRANTHAM INSURANCE MANAGER, THE SCOUT ASSOCIATION.**

A Scout Campsite had created a water slide on a gentle slope, by laying a length of heavy duty polythene on the ground which was then covered with soapy water. The supervising adults explained that people should not run and “dive” onto the sheet but that they should simply sit at the top. For safety, the participants were provided with lightweight, plastic, canoeing helmets and were instructed to fasten these securely before descending.

A youth leader with a party of non scout-children decided to have a go. He selected a helmet without reference to the supervising Scout Leaders (who were checking that the helmets were secure) and dived headlong down the slope. The loosely fitted helmet struck the ground and the front slipped down cutting the bridge of his nose.

This was a relatively minor injury. However, a claim was brought and the matter proceeded to trial. The Scouts lost and the Judge held that the Scout Leaders should have ensured that people could not get on to the slide without the helmets being checked.
(3) Richards v Wanstall, High Court, QB Division, Admiralty Division, (10 April 1995). Supplied by Edmund Whelan, Barrister, Head of Legal & Government Affairs, The Royal Yachting Association

The skipper of a lightweight 25ft racing yacht was successfully sued by one of the experienced crew members after manoeuvring to leave a marina. The skipper realising that the yacht had been caught by a gust of wind and might hit an adjacent moored yacht asked an experienced adult crew member to run forward with a fender. The crew member stumbled going forward and three months later successfully sued the Skipper for damages claiming he had injured his leg.

After a five day trial the Court found the skipper liable on the grounds that a reasonably careful skipper should have pre-briefed the crew on this manoeuvre and had a crew member pre-placed.

The sailing fraternity was amazed at this decision as sailing is a rough and tumble sport and experienced crew are frequently asked to hurry forward or aft to deal with an emergency. It is up to the crew member to decide whether to obey the skipper on grounds of safety and how best to carry out that instruction.

(4) Case supplied by the British Canoe Union

At the BCU marathon last year crews were competing over a 30 mile course in racing kayaks. Part of the course passed through a narrow, half-mile long cutting. A volunteer marshal was positioned at each end of the cutting to warn crews entering it about any powered craft which could present a danger to it.

A power boat entered the cutting and four minutes later a kayak arrived at the cutting travelling in the same direction. The marshal allowed it to enter on the strict understanding that there was a powered craft in the cutting and that they should not try to overtake it. The kayak crew ignored the instruction and overtook the boat causing damage to it.

A claim was made against the volunteer marshal alleging he should have assumed the crew would have ignored his instruction and he was therefore negligent.

The claim was settled via the BCU insurance after taking legal advice, but the race organisers now face increased insurance costs and the volunteer will not be offering his services again.


A Scout Group had organised a trip to visit the popular show cave at Gaping Ghyll. Some parents had gone along as additional supervising adults.

The party decided to eat their picnic lunch before undertaking the guided tour and walked a short distance up a footpath to some open land. One of the Scouts noticed a small cave opening across a stream and asked the Scout Leader for permission to explore it. The Leader refused permission, pointing out that caves could be dangerous. The Scout then moved away to where his father stood and repeated the request. His father, who had heard the leader’s ruling, gave permission, provided his son with a cigarette lighter for illumination and accompanied him into the cave. A short distance inside, the Scout slipped and fell down a “chimney” leading into the main chamber of Gaping Ghyll. He fell 300 feet to his death.

The Father sued the Scout Association. His action was defended but the Judge found in favour of the claimant, stating that, as he was born in a city, he could not have been expected to recognise the dangers. He held that the Scout Leader should have prevented the father from entering the cave with his son and in failing to do so he breached his duty of care.

The Craddocks’ older son continued as a member of the same Group for two years after the accident leaving when he reached 18 with his Chief Scout Award. The litigation did not commence until after he left.


Six years ago Woodbridge School permitted three senior boys to join junior pupils on a ski trip. It did so on terms agreed with parents and purely as a favour to the three boys. The boys, while under overall control of the supervising teacher and his colleagues as to their conduct on the trip, were to be permitted to ski unsupervised on all the slopes at Kuhtai and as they were older than the other pupils were to be treated as such. But they were to remember they were representatives of the school and expected to behave as such. The parents agreed to these conditions.

Simon Paul Chittock one of the 16 year-old senior boys on the school trip behaved so badly on the ski slope that he had to be repeatedly reproved by the teachers who were giving their time to escort him. Twice he skied off-piste. Finally he had a serious accident and broke his back. The parents sued the school and
won the case in the lower courts, on the grounds that their son should have been prevented from skiing once he proved irresponsible. This would have meant either leaving him unsupervised in the resort or an instructor staying with him, denying other youngsters the opportunity to ski.

This case was overturned on Appeal but not because the higher court denied the premise that Chittock should have been left at the hotel. The grounds for the appeal were that he was on-piste, skiing normally when the accident happened.

Julian Brazier 
TD MP
Derek Wyatt MP
Lembit Opik MP
Co-Chairmen
Ian Lewis
Clerk
All Party Group on Adventure and Recreation in Society (A RISc)
November 2005

Evidence submitted by Brian Raincock, Managing Director, Resolve Services Ltd

I am the Managing Director of Resolve Services Limited, part of the Access to Justice Group, which has pioneered ATE Insurance and radical solutions to resolving low value claims in particular, those involving clinical negligence.

I recently read with very keen interest the Oral evidence given to the Constitutional A
V
airs Committee on Tuesday 17 January 2006 and was considerably shocked at the many inaccuracies in Mr Stephen Walker’s evidence to the Committee. In short, you were severely misled.

In Q208 James Brokenshire raised the issue of the NHS Redress Scheme and issues of conflict. Mr Walker responded and made this statement: “When we ran a pilot, which was not identical but is a reasonable model, we found that people accepted the offers we were making, with legal advice, every claimant had legal advice, there was no question of our taking advantage of unrepresented people...” The RESOLVE pilot was designed, organized and run by Resolve Services Ltd (RSL) with the reluctant co-operation of the Chief Executive of the NHSLA, Mr Stephen Walker—I attach two letters by way of explanation.

It was not true that all offers made by the NHSLA were accepted as a number required mediation by Resolve Services Limited.

In Q213 James Brokenshire drew attention to Mr Walker’s “emphasis for things to be dealt with quickly”.

In his response, Mr Walker replied: “All I can tell you is that that was the target we had in the small claims pilot that we ran a few years ago, and we pretty well achieved that. There was some slippage. A dozen claims maybe did not get done in the six months. That was awfully hard work for my staff; they really had to jump through hoops. We had to change the way we were working with independent experts, because they are not used to working that fast either, but we did it. I am talking about people owning up when they get things wrong. We might have to put our hands up and say we might need to slip to seven months. I do not know, but by and large, yes, we can, if the will is there, and both at trust level and within the managing organization, whoever it might be, I think the will is there.”

This is a totally misleading statement:

(a) The targets set for the RESOLVE pilot were those set by (RSL). The NHSLA was obliged to comply by the standards set for the Scheme.

(b) The only reason why the NHSLA staff had to jump through hoops to comply was because RSL maintained the pressure to complete claims within the six month timeframe set by RSL.

(c) The relationship with the independent experts was established by RSL, and the fact that the service standards were met was entirely due to RSL, much to the surprise of the NHSLA, and the fact that it worked had nothing whatsoever to do with the NHSLA.

The reality was that the managing organization was RSL and we did make it work, as well as maintaining legal representation and independence for the claimant.

It was disappointing therefore that, in reply to Q214, Stephen Walker rejected the idea of a statutory obligation and then, to add insult to injury, claimed that the idea of targets “came from us (the NHSLA) as we are not averse to targets. That is an honest answer.”

Regrettably, that answer is open to considerable question!

The debate continued and the Committee—Q216 thereon—attempted to obtain answers to a number of penetrating questions. Stephen Walker at no time referred you to the Evaluation of the Resolve Pilot Scheme Report prepared by Professor Posnett of the York Health Economics Consortium (attached)

Stephen Walker: “No, we have considered it. That is the first answer. Under our pilot we believe that almost all of the claims were claims which would not have been made but for the existence of the scheme. We were told both by the independent assessor who looked at the scheme only halfway through—he did not look at the very end for various reasons—that was the case, but I was also personally told, and I believe John was too, by quite
a number of claimant solicitors, that they used the scheme for cases that they would not otherwise have (to use their phrase) bothered with probably for economic reasons. I think it is probable that we will see more claimants, and that comes to the issue of striking a balance between on the one hand providing access to justice for damaged patients, because no-one will be paid unless they establish a legal liability, and on the other hand cost, and that is always a balancing exercise. Fortunately, it is one for the department, not for my organization, but, yet, there is always a risk that if you help people to gain access to justice it might cost you money.”

Q221 Dr Whitehead: “It is not a concern for your organization from the point of view of potentially reducing the overall level of damages to claimants and also, of course, the question of whether you will require additional staff to administer the scheme?”

Stephen Walker: “We anticipate that we will require, to begin with, very few additional staff because the hope is, obviously, that many of the claims that we currently deal with will transfer into this as it becomes more widely known and its availability becomes seen as the way to deal with these things. We are not making long-term plans at this stage, because, first of all, as we have said several times, no work has been given to the authority at this stage, but, secondly, because it is impossible to guess what the shift in volumes might be. It might be an increase, it may not, so it would be premature to do that work at the moment.”

Q222 Dr Whitehead: “You could conceivably have a situation where this scheme would be entered into and all sorts of contingent funding will have to be sent your way subsequently, shall we say?”

Stephen Walker: “The cost work that has been done by the department has taken into account the possibility that there will be more claims, and the department is content that the matter proceed on that basis.”

Had Stephen Walker referred you and your Committee to the report you would all have been better advised on the outcomes of the Pilot and the predications as to the staffing and costs. Your own Question 225 seems to have been a very much more realistic summary of the facts.

You moved on to A227 and 228 where the answers provided by Stephen Walker are without foundation. The simple fact is that no lawyer can provide independent advice when presented with a case so late in the day. Stephen Walker’s answer to Q228 defies belief and shows only too clearly that the NHSLA cannot and will not provide an independent decision on the matter of damages to be awarded under the Redress Scheme.

In summary, therefore, and I do not deny a bias towards our independently developed and delivered RESOLVE Scheme, your Committee has been presented with a number of insupportable conclusions from one who, from start to finish, was determined to undermine the RESOLVE Pilot over which he now claims ownership as well as its success.

Brian Raincock
Managing Director
Resolve Services Limited
February 2006

Evidence submitted by The Newspaper Society

1. The Newspaper Society represents the regional newspaper industry. Its members publish around 1,286 regional and local newspapers in the United Kingdom, including 27 morning titles (19 paid-for and eight free), 75 evening titles, 21 Sunday titles, 526 paid-for weekly newspapers, and 637 free weekly newspapers. The Society’s submission relates to the Committee’s examination of conditional fee arrangements and its terms of reference enquiring into “What has been the effect of the move to ‘no-win no-fee’ contingency fee agreements?”

2. The regional press is read by around 40 million adults each week. Local and regional newspapers enjoy a high degree of trust amongst their readers. The local newspaper reports, investigates, campaigns, informs, entertains and provides a catalyst for action and forum for debate and discussion, comment and opinion in its local community. This can lead to coverage of contentious national, regional and local issues, provoking complaint. Traditionally, the local and regional newspaper editors swiftly resolve complaints of any nature, through correction, apology, follow up story or letter if appropriate. If satisfactory resolution is not obtained and the matter could constitute a breach of the Editors’ Code of Practice, complaint can be made to the Press Complaints Commission where the majority of complaints are quickly conciliated or proceed for adjudication, without the need for legal waiver by the complainant. The regional press has always been concerned that conditional fee arrangements should not undermine the operation of self-regulation, mediation or other systems of alternative dispute resolution.

3. In the event of legal claims, the regional press will also act responsibly and seek swiftly to remedy its mistakes. However, the law does protect freedom of expression and local and regional newspapers, in common with other media, will wish to use the defences provided by Parliament and the commonlaw, where such defences are merited in respect of their lawful publication of fact, comment and opinion, dealing with issues of legitimate public interest.
4. Conditional fee agreements (cfas) have created particular problems in freedom of expression cases. The regional newspaper industry submits that legislative reform of the system for conditional fee agreements is urgently necessary. The system creates a chilling effect upon publication and defence of free speech. Reform is needed in respect of litigation relating to freedom of expression such as defamation, breach of confidence, malicious falsehood, misuse of personal information and data protection.

5. Regional and local newspapers are particularly susceptible to the “chilling effect” of the defamation laws, (where the onus of proof is upon the defendant) and the effect even of modest damages and legal costs (see also Libel and the Media—the Chilling Effect, Barendt and Others, OUP 1997; Reynolds v Times Newspapers [2001] 2 AC 127). The current cfa system increases the costs of merited rigorous defence of actions and provides incentives to settle legal claims and threatened claims on financial grounds rather than on legal merit. It deepens the chilling effect, in a way ultimately inimical to freedom of expression.

6. The problems which defamation litigation under the cfas are currently causing which have given rise to concern that “freedom of expression may be seriously inhibited” were commented upon by Lord Hoffman in Campbell v MGN [2005] UKHL 61 with reference to Turcu v News Group Newspapers [2005] EWHC 799 and King v Telegraph Group Ltd [Practice Note] [2005] WLR 2282. Such problems were summarised in submissions made by the media, including the regional press, to the Department of Constitutional Affairs and recorded in New Regulations for Conditional Fee Agreements, Response to consultation CP(R) 22/04, 10/08/2005. Lord Carswell concluded that he was far from convinced about the wisdom or justice of the cfa system as it is presently constituted and saw “considerable force in the comments made by Lord Hoffman in the concluding paragraphs of his Opinion”.

7. The opinions of Lord Hoffman and Lord Carswell in Campbell v MGN referred to the “chilling effect”, “the ransom factor”, “the blackmailing effect”, “the arms race” of costs created by and inherent in the current system. The problem relates to the effect which the threat of heavy financial liability may have upon the conduct of the newspaper not only in deciding whether to publish information which ought to be published but which carries a risk of legal proceedings against it, but also in the event of a threat or claim post-publication, to the effect of such potential financial liability upon the newspaper’s decision as to whether to defend or settle, irrespective of the merits of its defence.

8. The cfa system produces the risk of liability for very high legal costs, (solicitors’ fees alone calculated at a rate of over £800 per hour under the 100% uplift permitted), further inflated by ATE insurance premiums, which are high, given the comparatively small market. Lord Hoffman noted that cfas also create an “arms race” since cfas permit claimant’s solicitors to conduct a case in ways that “not only runs up substantial costs but requires the defendants to do so as well”.

9. Thus the current cfa system now puts a newspaper defendant under pressure to settle cases “to pay up something to be rid of litigation for purely commercial reasons and without regard to the true merits of any pleaded defence”. Lord Hoffman noted that the “cost capping” and judicial control proposals can be “only a palliative”. It did not deal with the problem of a newspaper faced with the prospect of incurring substantial and irrecoverable costs, win or lose if faced by an impecunious claimant without ATE insurance, or threat of having to pay “claimant’s costs at a level which is by definition up to twice the amount which would be reasonable and proportionate”. In referring to the chilling effect, Lord Hoffman referred to the particular problems for smaller publishers, which might not be able to take the same stand as a larger publisher.

10. Regional and local newspapers face the same cfa problems as national media organisations and share their desire for reform of the system. The differences of scale between say the limited budget of a local weekly newspaper and a national media organisation mean that the “chilling effect” and proportionality concerns begin to operate at a much lower level of costs and damages. Small newspapers are perhaps put even more quickly under greater pressure to settle than larger organisations because the costs factor is operative at a lower financial level. Advisers to regional and local newspapers report that the operation of the cfa system and consequent financial pressure can lead to settlement despite the merits of defences available to them. This will inevitably prevent repetition and could deter other publication of reports that might raise similar issues, leading to the “chilling” of publication on issues of legitimate local interest.

11. Yet advisers to regional publishers suggest the costs of settling relatively minor claims brought under a cfa system, admitted from the outset and relatively minor damages can still be disproportionate and “back-breaking” in respect of any small weekly newspaper’s budget.

12. The differences of scale between media defendants also mean that smaller publishers are also subject to a particular disadvantage that might not apply to larger organisations. Costs might be very significant in respect of a smaller publisher’s budget, but not high enough to warrant the risk of incurring further costs by going to assessment, so that legal safeguard, in practice, may not really be available.

13. There is also particular objection to the effect of ATE insurance and its inflation of costs. This is another problem attributable to the current cfa system. Claimants have to purchase ATE insurance policies at the outset, before any sensible assessment of risk to the claimant and, before respect of cases where the libel might be minor, where the publisher might in any event have admitted liability irrespective of the basis on which the action is brought, where damages might be small and disproportionate to the cost of the ATE premium alone. Any claimant of course might never be liable for the premium as payment might be borne by the losing defendant or indemnification given as part of the cfa by the claimant’s solicitor.
14. Regional and local titles fear that the cfa system allows cases which might otherwise have been swiftly and amicably resolved without legal intervention by the publication of a correction or apology to escalate quickly into legal action and rapidly mounting but disproportionate legal costs. If the title decides to settle a case, damages might be considerably less than £5,000, but costs rapidly escalate to triple that amount, despite the low level of risk to the claimant or amount of damages recovered—indeed the claimant might settle for the publication of an apology, costs and no damages, but the newspaper face very high costs; a newspaper might have admitted liability “in print” before the involvement of a claimant’s solicitor on a cfa basis, but a success fee of 75% initially claimed (later reduced to 40%). Conversely, a newspaper might robustly defend its position and the complaint or threat of legal action is ultimately not pursued, or settled by letter of clarification but no published apology, no damages, no costs, but the title would have had to bear the high level of costs that it had incurred. Thereafter for financial reasons alone, a newspaper may become wary of dealing with stories that might initiate such complaints in future or being so robust in defence of future claims. The chilling effect is deepened yet further where titles already wary, become extremely cautious of dealing with stories about certain types of groups, such as the police, because of successful past litigation brought by individuals, perhaps backed by a union, where it becomes known that cfa agreements may be in place.

15. The problems created by the current conditional fee system which seriously inhibit freedom of expression must be urgently addressed. The Newspaper Society submits that the Department of Constitutional Affairs must now bring forward legislation.

The Newspaper Society

November 2005

Evidence submitted by Times Newspapers Limited

CONDITIONAL FEE AGREEMENTS—THE NEED FOR REFORM

1. In Musa King v. Telegraph Group Limited [2004] EWCA 613 (Civ), the Court of Appeal recognised that “something seems to have gone seriously wrong” in actions driven by Conditional Fee Agreements (CFAs) which involve free speech and the media. Lord Hoffmann recently reiterated this in Naomi Campbell v. MGN Ltd [2005] UKHL 61 when he said “I cannot however part with this case without some comment upon other problems which defamation litigation under CFAs is currently causing and which have given rise to concern that freedom of expression may be seriously inhibited” (emphasis added).

2. While Times Newspapers Limited, publisher of The Times and The Sunday Times (TNL), accepts that there must be “access to justice” and conditional or contingency fee agreements are here to stay, there is nevertheless urgent need for reform in this area. Without reform, the media will continue to be penalised with wholly disproportionate and unreasonable costs in cases where the claimant’s solicitors seek a 100% success fee on base hourly rates of £400 or £500 per hour, and seek to off-load massive insurance premiums or “notional insurance premiums” on defendants. The “blackmailing effect of such litigation”, again referred to by Lord Hoffmann in Campbell, is currently having a serious “chilling effect” on free speech and the role of the media as the “eyes and ears of the public”. The “blackmailing effect” also breaches the Overriding Objective of the Civil Procedure Rules insofar as “the parties are not on an equal footing” because the defendant will be heavily penalised if the case is lost and in most cases the costs will be wholly disproportionate to the damages (see below). The following problems therefore need urgent attention:

(a) The “ransom factor” or “blackmail effect” in CFA libel actions

This was identified in Musa King and is the situation where a defendant knows that however successful he, she or it may be in defending an action the legal costs of defending the action will never be recovered because the claimant is without any insurance and cannot begin to pay the defendant’s legal costs. In short, the defendant will be very seriously out of pocket—win or lose—and will be under very serious commercial pressure from day one to throw in the towel and pay damages to what may be an extremely unmeritorious claimant. As a result of this “blackmailing effect”, the truth can all too easily be sacrificed on the altar of commercial expediency.

(b) 100% success fees on very substantial base hourly rates

A successful claimant’s lawyers may already be charging in the region of £500 per hour to represent a celebrity claimant like Naomi Campbell or Sharon Stone. With a 100% success fee this means a claimant solicitor can charge a losing defendant approximately £1,000 per hour which will put individual defendants or small publishing houses into bankruptcy or liquidation (see Mary Graham v Ossie Stewart for the effect of CFAs on individual defendants). Even large publishing companies and television companies have to think very hard before fighting a CFA driven case where, if they lose, they will end up paying millions of pounds in additional legal costs. Further, claimants’ solicitors often seek a 100% success fee even where there is little or no risk that the action
might be lost, eg, Gazley v. News Group Newspapers Limited [2004] EWHC 2675 (QB) where a 100% success fee was sought even after the defendant publisher had made an offer of amends under section 2 of the Defamation Act 1996.

(c) Rich claimants and their solicitors taking advantage of CFAs

It is far too easy for solicitors to offer to act for a claimant who may be very wealthy and could afford to pay a solicitor’s normal hourly rates on a CFA basis particularly where the claimant has an appealing and almost watertight case against the media. This enables solicitors to cherry-pick cases and increase their costs by up to 100% when in reality there may be very little risk involved in the action (see Gazley v. News Group Newspapers Limited above). While TNL does not object to CFAs in cases where a claimant is genuinely indigent, the present system is open to serious abuse by solicitors taking on cases on a CFA basis for rich clients where there is little or no real risk and solicitors simply want to double their legal costs.

(d) No control over a claimant’s solicitors’ costs

The claimant in any CFA driven case is usually totally disinterested in his own solicitor’s costs as he will never have to pay them. Claimant solicitors are therefore prone to running up huge costs very early on in the proceedings and this can become a real obstacle to an early settlement. In Musa v. King the Court of Appeal clearly felt that massive and wholly unnecessary costs had been run up by Mr. King’s solicitors. Some control and a genuine incentive for a claimant to police his own solicitor’s costs must therefore be put back into the equation.

(e) Cost of deferred ATE insurance and repudiation if a dishonest claimant loses

Even in those cases where a claimant is able to obtain insurance cover for his action, the premiums are always huge and a massive additional burden on a defendant. Insurance premiums often run into hundreds of thousands of pounds as in Miller v. Associated Newspapers Limited [2005] EWHC 773 (QB) where a notional insurance premium of £615,000 was chargeable by the Police Federation (as the funding party), if Associated had lost the action. Moreover, the premium is never paid by the claimant to the insurance company prior to trial. Rather it is deferred until after trial. It is therefore a “legal fiction” and could all too easily be repudiated by the insurance company if the claimant was found by the jury to have lied during the trial. Thus although the claimant never actually pays a premium, the defendant will be liable for it if the action is lost. If the action is won, then a successful defendant could face litigating with the claimant’s insurance company, which might well refuse to pay out under the policy on the grounds that the claimant had lied to his solicitors and had lied to the jury. The financial pressure of 100% success fees PLUS what may be a huge insurance premium or even a “notional insurance premium” where a trade union funds a CFA driven action and under the legislation can charge a notional insurance premium, amounts to huge commercial pressure on a defendant to settle an action rather than lose it and pay millions in additional liability.

3. TNL therefore believes that just as the European Court of Human Rights found, in Tolstoy Miloslavsky v. United Kingdom (1995) 20 EHRR 442, that the £1.5 million damages awarded to Lord Aldington in the original libel action were totally disproportionate and inimical to Article 10 free speech rights (no-one needs to be awarded £1.5 million in order to obtain vindication), so legal costs in CFA driven actions are now totally disproportionate to the damages in the vast bulk of publication proceedings. In Campbell v. MGN the damages were £3,500 while the legal costs ran to over £1,000,000. With 100% success fees in CFA cases plus massive insurance premiums, a defendant fighting, even a strong case, has to be remarkably resilient to fight an action to trial knowing that if the case is lost, eg, a split decision in the House of Lords as in Campbell, it can be heavily penalised and go down for over a million pounds in costs. Associated Newspapers were faced with a threatened bill of £3.3 million, if they had lost the Miller action, which was being funded by the Police Federation and included a notional insurance premium of £615,000. In the circumstances they won.

4. As was accepted by the House of Lords in Campbell, publication proceedings engaging Article 10 rights are few and far between and involve substantial costs. They are quite different from personal injury and Road Traffic Accident cases of which there are a huge number and where insurance plays an integral part. This difference between publication proceedings and other areas of law is due to the following factors: (1) the heavy onus of proof on libel defendants, (2) the relatively small number of such cases going to trial compared with personal injury actions, (3) the fact that there is no true ATE insurance market, (4) the disproportionately high fees already charged by claimants’ solicitors, and (5) the failure of costs judges to use the regulatory regime effectively to control CFA costs in publication proceedings.

5. The position has now been reached in the development of CFAs where it must be acknowledged (as the DCA already seem to have done) that separate provisions need to be made, and can be made, in different areas of the law. Media defendants are particularly vulnerable (the presumptions are all in favour of libel claimants), and both costs and CFA rules need to be changed so that defendants fighting what they believe are proper cases to be fought are not so heavily penalised as to force them into liquidation or bankruptcy.
6. TNL therefore believes that the following options for change should be considered by the Government and the DCA:

A. Some part of any agreed success fee should be paid by the client

   Historically, legal aid was never available in defamation actions so extending CFAs into publication proceedings was a major break with the past, particularly as the onus of proof in any defamation action is almost entirely placed on the defendant. Under the original CFA scheme, as permitted by the (unamended) Courts and Legal Services Act 1990 (extended to defamation cases in 1998), any success fee was paid out of a claimant’s damages, and the profession imposed a voluntary cap on the amount of the uplift. This meant that a) defendants were not being penalised with massive additional liability if the defendants felt that truth was on their side and the action should be fought but was then lost, and b) there was always an incentive on claimants to monitor their own solicitor’s costs as any success fee would cut into the damages and could reduce the damages by up to 25%. TNL believes that it is imperative to reinstate this element of self-regulation by claimants policing their own solicitor’s costs by making part or all of the success fee payable by the claimant up to a maximum of, say, 25% of any damages in the publication proceedings. This could be done by cost capping, fixed fees or only part (say 50%) of any success fee normally being recoverable from a defendant (see below). This would be infinitely more proportionate than a defendant having to bear all the burden of a success fee—the “additional liability”—when it is the claimant who benefits from a “no win, no fee” arrangement with his solicitor.

B. Costs Council to set base hourly rates for solicitors acting under CFAs

   Given the overwhelming public policy in favour of a free press, the recovery of 100% uplifts on very high base hourly rates (£400 to £500) by libel specialists amounts to a wholly disproportionate advantage and effectively penalises a losing defendant. This penalty TNL believes contravenes Article 6 of the European Convention on Human Rights and has a very serious chilling effect on free speech which is protected under Article 10. Because there is a huge difference between a 100% success fee on a base hourly rate of £250 or £300 per hour and a 100% success fee on a base hourly rate of £500, TNL believes a Costs Council (as recommended in the Civil Justice Council’s Report “Improved Access to Justice—Funding Options and Proportionate Costs” August 2005) needs to be set up so that it can recommend base hourly rates for solicitors working in different parts of the country and in different areas of law. In any action where the client agrees to a success fee, the solicitor would have to compute the success fee on the recommended base hourly rate set by the Costs Council and have to justify any increase in that rate before a costs judge. There is TNL believes no “pressing social need” for claimant firms to be allowed to double their costs in publication proceedings, where their base hourly rate is already running into hundreds of pounds per hour.

C. Fixed fees and fixed uplifts

   As Lord Woolf commented in both his Interim and Final Access to Justice Reports (1995–96): “The problem of costs is the most serious problem besetting our litigation system”. Where practicable, a fixed costs regime furthers the aims of predictability and proportionality, encourages responsibility in the management of costs and encourages litigants themselves to exercise greater control of the expenses, which their lawyers incur. Fixed costs are therefore taking a more and more prominent part in litigation (see CPR Parts 45 and 46), particularly pre-action costs. Fixed uplifts of 12.5% or more are also the norm in a range of RTA and Employers Liability cases where the damages recovered are under £500,000 (see CPR Part 45 (II) (III)). TNL believes there is every reason to promote fixed costs in respect of publication proceedings, particularly those in which costs are the only outstanding issue on a prompt settlement or under the section 2 “offer of amends” regime set out in the Defamation Act 1996. Fixed costs could also play an important part in hearings under section 7 (meaning disputes) or section 8 (summary disposal of a claim) Defamation Act 1996. A scheme of fixed costs would achieve the advantages set out above and greatly reduce the ransom factor identified in Musa King. In any such fixed costs regime there should be a rule permitting a claimant to apply to the court for an increase on the ordinary fixed amounts. At the same time, there should be a sanction in the event that an application for an increase on the fixed costs is unsuccessful. The sanction should reduce both the amount of a lawyer’s success fee and the damages recovered by a claimant.

D. Part 36 offer or payment into court and necessary rule change

   Given the dangers identified in Musa King and Campbell, it is also appropriate in publication proceedings for there to be a rule change to Part 36 so that a claimant’s damages (as well as costs) can be reduced where a defendant’s payment into court or offer to settle is not beaten. Such a rule is particularly appropriate in the case of an indigent claimant or a claimant who has not obtained ATE insurance and has little incentive to be practical over the level of damages offered and what is reasonably recoverable.
E. Contingency fees or differential fee agreements

TNL believes that the regulated Ontario Contingency fee system—identified in the CJC Report (see above)—should be considered and encouraged by Masters and Judges in certain types of public interest defamation actions. For instance, it could become regular practice for the court to refuse to allow a Conditional Fee Agreement with any uplift where the defendant had made an offer of amends and the claimant was refusing to accept the damages offered by the defendant and was instead wanting to go to a fully contested section 3(3) hearing on quantum of damages. In such cases, the solicitor would have to make it clear to the claimant that an agreed element of the damages would be forfeited to the solicitor if he was unable to recover any CFA success fee but could only recover his normal reasonable costs from the defendant on the grounds that the court believed that the claimant was indulging in an element of CFA blackmail. This would force the claimant to think long and hard before forcing the issue to a full hearing on damages. Any such contingency fee system would have to come under the auspices of The Law Society and its regulatory system. Further, the statutory protection which currently allows fees to be charged on a differential Thai Trading basis (that is to say which permits ordinary fees (say £300 per hour) to be recoverable in the event of success but reduced fees (say £150 per hour) in the event of failure) enables claimant media firms to act for many middle income clients without a defendant being put under the massive commercial pressure that a CFA can put on a defendant to settle. Again the courts should encourage these types of arrangement as they enable access to justice but without the threat of a massive penalty on a losing defendant which most CFAs produce in publication proceedings. They are also proportional and comply with the Overriding Objective of the CPR.

F. ATE insurance premiums

Under the Pre-Action Protocol in Defamation proceedings, there should be a clear indication in the defendant’s letter of response to the claimant’s letter of claim if a libel complaint is going to be disputed. Further, defendants in defamation actions are now entitled to make an “offer of amends” very early in any proceedings under section 2 of the Defamation Act 1996 Act ie at any time up to the filing of a defence. In the light of these two clear provisions, TNL cannot see any reason why claimant solicitors need take out insurance cover from “day one of a libel complaint”. Indeed, a claimant cannot know if the newspaper is going to come out with its hands up or the action will be resolutely defended. Thus, insurance from day one, when any risk assessment is totally unquantifiable, is effectively the insurance industry imposing its will on the efficient and proper administration of justice and causing wholly unnecessary additional liability when a media defendant may immediately trigger the “offer of amends” system and agree to apologise and pay damages. Insurance cannot therefore be necessary until a letter in response to the letter of complaint under the Pre-Action Protocol is received OR when a defence is received following the issuing of proceedings. Only then can the claimant’s solicitors and underwriters sensibly and effectively weigh the risks which are being undertaken and decide over what period or stage cover should be taken out. Failure at this point by a claimant’s solicitors to obtain satisfactory ATE cover for an appropriate period (premiums should still be low at this stage), should result in sanctions. If an unsuccessful defendant can prove that a cheaper policy would have been available when proceedings are first commenced and that it would have been reasonable for the claimant to have bought a premium at that stage (rather than some later stage), then a rule should direct that that is ordinarily the value of cover which can be recovered. The corollary of this is that if an indigent claimant takes out insurance BEFORE proceedings are actually commenced and the defendant triggers the offer of amends system thereby obviating the need for any insurance cover, any ATE insurance premium should not in those circumstances be recoverable from the defendant but would have to be paid by a claimant out of the damages recovered.

G. Case management through cost capping, fixed fees and fixed uplifts

At the end of the day, TNL believes that for CFAs to be operable and for indigent claimants to be able to bring claims but without defendants being disproportionately penalised in “additional liability”, the courts need to case manage CFA-driven cases extremely carefully. CPD 11.9 may therefore have to be repealed. Indeed, any CFA needs to be looked at by the court at a very early stage in the proceedings to see a) where any success fee falls, b) what incentives there are on the claimant to police his own solicitors costs c) to what extent any uplift reflects the genuine risk that a solicitor may be taking in shouldering some of the risk by conducting it on a “no win, no fee” basis and d) what alternative means of funding the action there may have been. TNL therefore believes that the future working of the CFA system is proper case management by judges and masters which needs to start at the case Allocation Questionnaire stage.

H. The case Allocation Questionnaire

At the case Allocation Questionnaire stage, a claimant should be made to answer the following important questions:

(i) State if the case does or will involve a CFA.
(ii) State, like on any Application Notice, if “the action raises issues under the Human Rights Act 1998”. This question should be simplified down to the following two questions:- First, “Does the action involve libel, slander, malicious falsehood, blasphemous libel OR the misuse of personal information including any Data Protection claim?” Second, “If so, are the words complained of “a matter of public interest”?

(iii) State what the “overall costs of the action are likely to be but do not include any “additional liability”.

(iv) State, if the action is being conducted under a CFA, if the claimant seeks to pass on any agreed success fee to the defendant as “additional liability”, what the percentage uplifts are, if they are staged, and at what stages they occur.

(v) State what the base hourly costs are prior to any uplift for a success fee.

(vi) State what the “overall likely additional liability for the whole case is likely to be including counsel’s and solicitors success fees” (this may need a change to CPD 6.2)

(vii) State if any ATE insurance premium or “notional insurance premium” has been paid or has been agreed with an insurance policy or funding party and if any such insurance policy is staged. While a claimant could not be made to declare how much any ATE premium or “notional premium” might be, the court could order the Claimant to disclose the amount of any ATE insurance premium in confidence to the court at the Allocation Hearing.

Once the above questions have been answered the court would know if the case concerned human rights issues, if it contained a serious “blackmail” element and to what extent a defendant might be put under huge financial pressure to settle rather than fight the action. In all cases involving a CFA there would be an automatic case Allocation Questionnaire hearing.

I. The Allocation hearing

Once the Allocation Questionnaire was filed AND a defence served, the court would automatically order there to be an Allocation Hearing. This would substantially reflect the proposals made by Brooke LJ in Musa King paragraphs 92–94 and 104. For cases involving estimated legal costs of over £250,000 (not inclusive of any additional liability) the matter would be referred to a High Court judge specialising in defamation. For cases involving sums less than that, the case would be referred to a High Court master specialising in defamation actions. Having read the pleadings and Allocation Questionnaires and any supporting affidavits and having due regard to all the circumstances, the judge or master would then exercise the following powers:

(i) check that the action did involve human rights such as free speech and/or the right to a private life and to what extent there might be a “blackmail” or “ransom factor” element in any CFA funded action;

(ii) identify issues which might usefully form the basis for a preliminary issue, eg, meaning or any other factual dispute which lay at the heart of the action and the resolution of which might lead to the early determination of the dispute without substantial legal costs being incurred under any CFA arrangement;

(ii) hear representations on the claimant’s solicitors base hourly rates and the level of success fees agreed with the client and if these were staged or constant in CFA driven cases. The court would, through this process, check that the success fee did bear a sensible and reasonable relationship to any risk the claimant’s solicitor was agreeing to shoulder;

(iii) hear representations from both sides on cost capping in CFA driven cases. The master or judge would then be able to impose a proportionate cap on the costs recoverable from one side or the other making due allowance for the fact that the onus of proof in libel actions lies on the defendant meaning that the defendant should normally be allowed greater latitude in recoverable costs. The cap would include any “additional liability” for success fees but not necessarily for any insurance premiums which would have to remain confidential to the claimant solicitor and his client. The judge or master could though be told in confidence what any insurance premium was and then order that only a certain percentage of that insurance premium could be recovered from a defendant;

(iv) The judge or master could also decide what part of any agreed success fee could be passed on to an unsuccessful defendant as “additional liability”. Alternatively the master or judge could order that the defendant should not have to pay any success fee but rather that the claimant should pay a success fee out of any damages recovered ie a contingency fee system. This would act as an incentive for the client to police his own solicitor’s costs and would only be ordered where a) the court was satisfied that the defendant was legitimately defending the action and b) that imposing any “additional liability” on the defendant would amount to a “penalty” or create a “ransom” or “blackmail” factor.
7. The current system of allowing successful claimants to recover wholly unreasonable and disproportionate costs is placing all the “additional liability” on a losing defendant, is we believe peculiar only to the UK jurisdiction and cannot be found anywhere else in the world. It is we believe neither fair nor proportionate when it is the claimant who benefits from a “no win, no fee” arrangement with his solicitor. As Lord Hoffmann suggests in Campbell, CFAs can seriously inhibit free speech (Article 10 rights) and are likely to contravene fair trial provisions (Article 6 rights of the European Convention on Human Rights). Only if the Government gives careful consideration to the above changes to the current CFA system will the overriding objective of the Civil Procedure Rules and the spirit of the Access to Justice Act be fully realised and the CFA system be compliant with the Government’s obligations under the Human Rights Act.

Times Newspapers Limited  
November 2005

Evidence submitted by Bloomberg News

As you may know, Bloomberg News is a global publisher of financial, business and legal news, with more than 1,800 journalists working from 107 bureaus around the world. Much of that news is UK-based and the more than 270 Bloomberg journalists in our London office provide accurate, fair and timely real-time electronic news to financial professionals around the world. Despite our commitment to accuracy, libel litigation and the attendant costs are a reality with which even the most responsible publishers must be concerned.

In this regard, we hope that our experience as an American publisher with strong British ties might provide a slightly different perspective than supplied elsewhere. As an American company, we are long experienced with the concepts and practice of contingency-fee litigation. It has become a fixture of American law. And so it should be. Our position is that conceptually, allowing contingency-fee cases does indeed provide a greater degree of access to the legal system for those traditionally underrepresented because of socio-economic barriers. In short, we take no position adverse to the goal of allowing all citizens an opportunity to have their damages and deprivations addressed in the courts of law.

Unfortunately, CFAs as currently practiced in the UK present a cure worse than the disease. Because of the “success bonus” provisions, CFAs have mutated into a windfall for the well-heeled libel litigant. The true cost of these actions is not being borne by media entities, or even their insurers. It is the public who will suffer, because the “chilling effect” of CFAs added costs could force publishers to self-censor news in the public interest.

The UK system has long had a “loser pays” scheme. Under this arrangement, a media defendant who has been found to have libeled a person pays not only damages, but the claimant’s attorney’s fees. Thus, the successful litigant has had his day in court, has recovered for his damage, and is not out of pocket for pressing his case. Moreover, his successful lawyer is compensated for the job well done. In short, the system works.

But under the CFA’s “success bonus” scheme, UK lawyers are entitled to tack on an additional fee, sometimes reaching £800 or more an hour, adding hundreds of thousands of pounds to a case. The “success bonus” is a de facto punitive damage award, rather than any form of perceived reward for assuming the risk of taking on a case on a contingency basis. Such a punitive award lacks the moral force of a punishment for willful or intentional wrong adjudicated under principles of due process. American courts have long been reticent in allowing punitive damages in libel cases, because of the high value that our legal system and democracy places on free speech. In one noteworthy case, a US federal court noted that:

Punitive damage awards have within their power not only the ability to punish, but to destroy as well. And although the threat of punitive damages may well deter the false statement, it may deter the truth as well. The mere threat or possibility of a libel action with its vast costs of defense and potential adverse verdict must dampen the enthusiasm for vigorous reporting. If added to that is the specter of punitive damages, awarded with unbridled discretion by juries, then the chilling effect may turn the reporter’s zeal to ice.

Schiavone v Time Incorporated, 646 F Supp. 1511 (DNJ 1986) at 1513. The “vast costs” spoken of in the Schiavone case were present in a matter where the issue at bar involved an allegedly willful and intentional libel. Under the CFA scheme, however, the punitive effect of the success bonus is engaged without regard to the mens rea of the defendant. Punitive damages without commensurate wrongdoing does not comport with due process.

Aside from the fundamental unfairness of imposing punitive damages in what are essentially negligence cases, the “chilling effect” of such damages also punishes the public, for whom a responsible and free press serves as the eyes and ears. It is the press who examines the goings-on in legislative chambers, halls of
government, hospitals and battlefields, and corporate back-rooms, indeed, wherever the public’s interest may be decided. It is only a free and critical press that can tell the public about a war in Iraq, about a bomb in Liverpool Street, about hero teachers, horrific mobsters and heartbreaking accidents.

The House of Lords has already raised in dicta the question of the chilling effect. Lord Hoffman sagaciously noted in Campbell v MGN Limited [2005] UKHL 61 that:

There is no human right to drive a vehicle upon the road free of the cost of litigation arising from road accidents. But there is a human right to freedom of expression with which the imposition of an excessive cost burden may interfere . . . It is the effect which the threat of heavy liability may have upon the conduct of a newspaper in deciding whether to publish information which ought to be published but which carries a risk of legal proceedings against it.

Id at ¶19.

The chilling effect is insidious not only because it throws the censuring blanket of darkness over what is never published, but has also become a weapon of legal extortion. Libel claimants can leverage settlements and retractions of erstwhile justifiable news stories. This is so because media entities, like all corporations, have a fiduciary duty to its shareholders to perform cogent and cautious risk analysis. That analysis is deeply skewed by CFA’s. While a defendant willing to defend a libel case might have the financial wherewithal and intestinal fortitude to do so at a cost of £150,000, the risk of loss at trial for £300,000 presents a different picture, and may force even the bravest media defendant to settle an otherwise defensible case. The CFA’s success bonus provision appears to serves little other purpose.

If contingency fees were allowed without the success bonus, claimants’ counsel bringing meritorious cases would still be paid. True, those counsel would bear the risk of evaluating whether the case would succeed, but given the extraordinarily high billing rate of UK solicitors (approximately twice that of top-level New York or Los Angeles litigators) it behooves the Committee to ask if that is preferable to making the public shoulder the burden.

There are some lessons to be learned from the contingency fee experience in the United States. Allowing contingency fees without the success bonus is a fruitful business for lawyers and has put thousands of cases on the US docket. We have—for better or worse—a court system filled to the brim nationwide with cases brought by the indigent and traditionally underemployed, represented by counsel on contingency fees. These lawyers become experts in their area of law, and work efficiently, collecting on average a third of any damage award. Elimination of the success bonus provision in the UK would not deprive poor citizens of access to the court: it would only require that claimants’ attorneys work efficiently. It is also worth noting that any system that acts as a check-and-balance to weed out frivolous cases designed to bring a ransom settlement would be an improvement.

Bloomberg News again thanks the Committee for the opportunity to raise these issues, and would be glad to provide oral evidence, should the need arise.

Charles J Glasser Jr
Media Counsel
Bloomberg News
November 2005

Evidence submitted by British Broadcasting Corporation (BBC)

I am writing on behalf of the BBC to set out briefly our experience and concerns about conditional fee arrangements (“CFAs”) in cases that engage freedom of expression—principally libel and privacy cases.

I would like to start by emphasising that the BBC recognises the service that conditional fee arrangements provide in enabling access to justice for claimants who otherwise could not afford to take legal action. However the BBC is concerned that the current legislative scheme has had in practice a number of undesirable and unintended consequences for defendants that I outline below, and which it considers warrant a reassessment of the scheme.

Disproportionality of costs

The costs recoverable by CFA funded claimants are frequently disproportionate to the value and complexity of the claim. It is relevant to note in this regard that there is a ceiling on libel damages of £250,000, but that awards at the high end are rarely considered appropriate and the majority of claims are valued towards the lower end of the scale.

Our experience is that the disproportionality manifests itself in a number of ways.
Base hourly rates

The base hourly rate charged by claimant lawyers in the defamation and privacy field is frequently disproportionate to the value and complexity of the claim. CFA claimants frequently use expensive niche firms whose base hourly rates are very high (even though for such specialist firms the claim is often not at all complex) meaning that there is a significant element of disproportionality even before the uplift is factored in.

By way of example in one recent case where there were four parties represented the CFA funded claimant’s solicitors were seeking an hourly base rate (without any uplift) of £400 plus VAT per hour for its partner. By contrast the privately funded parties were paying their partners £165 plus VAT per hour and £145 plus VAT per hour. The BBC was represented in house at a cost of £108 per hour.

The impact of success fees at up to 100% uplift

Justification for an uplift in conditional fee cases engaging freedom of expression can only be established to the extent that it is necessary to provide access to justice. At present the claimant can seek an uplift on costs of up to 100%. In the recent case this meant that attendance at court for the claimants’ solicitors (partner, solicitor and trainee) would be charged at £1,550 plus VAT per hour, the claimant’s leading counsel would be charged at £8,000 plus VAT per day and the claimant’s junior counsel at £3,500 plus VAT per day. Furthermore the current system does not allow the court, when assessing costs to treat the base costs and uplift as a whole for the purposes of assessing proportionality. This has an enormous impact on the costs of defending cases engaging freedom act of expression.

Comparison with publicly funded cases

Public funding of cases works by allowing legal aid firms to recover costs at the standard rates from unsuccessful defendants and to recover lower legal aid rates if their client is unsuccessful. The BBC has consulted an external costs draftsman specialising in media cases. Taking the figures mentioned above he estimates that solicitors for a losing Claimant in a legally aided malicious falsehood action would be entitled to recover hourly rates at approximately 34% of the rates of the claimants’ solicitors before uplift. With an uplift of 100% that figure falls to 17%. Assuming publicly funded solicitors were to be successful in recovering their costs from the defendant—whether through settlement or at trial—they could expect to receive something in the order of 66% of the CFA claimants’ solicitors hourly rates before uplift or 33% after uplift. These recovery rates are in marked contrast to the funding regime currently being imposed on unsuccessful media defendants.

Lack of market forces on the claimants’ costs

Under the current regime there is little incentive in a CFA funded case for the claimant’s solicitors to conduct the litigation in an efficient and cost effective manner, such as there is in a privately funded case where the claimant knows that s/he will be liable for the losing costs. The corollary of this is that claimants’ solicitors can run up substantial and disproportionate or unnecessary costs with the result of exerting additional pressure on the defendant to settle, whatever the merits of the case. Lord Hoffman made this point recently in Campbell v MGN Ltd. The BBC’s experience is that the costs estimated by the Claimants in their allocation questionnaire are frequently exceeded by as much as 100%.

“At the blackmailing effect of such litigation appears to arise from two factors. First, the use of CFAs by impecunious claimants who do not take out ATE insurance. That, of course, is not a feature of the present case. If MGN are right about Ms Campbell’s means, she would have been able to pay their costs if she had lost. The second factor is the conduct of the case by the claimant’s solicitors in a way which not only runs up substantial costs but requires the defendants to do so as well. Faced with a free-spending claimant’s solicitor and being at risk not only as to liability but also as to twice the claimant’s costs, the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant’s own costs were equally high”

ATE insurance

As the Committee will be aware there is an additional feature of CFA cases that has been described as the “ransom” factor. This is the situation the defendant faces where the claimant would be unable to pay the defendant’s costs if he or she were to be unsuccessful at trial and has no after the event (“ATE”) insurance in place. The defendant is then faced with a lose/lose situation financially because winning the action will almost certainly cost more than making a commercial settlement.
However the BBC would also comment that this same situation is apt to arise in a libel action where the claimant has ATE insurance and a justification (truth) defence is being run. In that situation, if the defendant wins the justification defence, the policy is liable to be voided by the insurer on the grounds of the claimant’s non-disclosure of material facts or dishonesty, the inference being drawn that the claimant must have told its insurer untruths or withheld information from it.

A further concern for a defendant is that the limit of the cover under the ATE insurance policy may be relatively low and significantly lower than the amount of the winning defendant’s costs, meaning in practice that, once again, even if successful in the action the defendant will lose financially. In that situation the claimant can of course seek to recover its costs against the claimant personally, but this could be a fruitless exercise. This situation is particularly unfair given that a defendant is liable if it loses to pay the claimant’s insurance premium (which may be as much as two thirds of the amount insured).

The BBC’s experience is therefore that the intended ameliorating effect of ATE insurance may be illusory in practice depending on the terms of the ATE policy, the limit of cover and the nature of the allegations and defences in the action.

**Possible ways forward**

The BBC does not seek here to recommend any one solution to these problems. However, in our view there are a number of possible ways in which some control could be introduced be into the CFA system.

**Cost capping at the outset**

We would submit that there should be the jurisdiction to cap costs in CFA cases from the outset and not only in cases where the Claimant may not be able to pay costs. This would introduce into such cases some element of discipline in the conduct of the litigation. Such discipline in non-CFA cases is provided by the privately paying claimant who has an interest in keeping costs down. We would also suggest the disproportionality in hourly rates charged by CFA claimant lawyers in the defamation and privacy field should be addressed by a court judge at the early stages of any case.

**Success fees**

If, in order to provide access to justice it is established that an uplift is required, there should be a maximum percentage in cases engaging freedom of expression. The exact level up to that maximum could also be determined at the outset by a costs capping Judge.

**Part 36 Uplift**

Finally, indemnity costs orders and additional interest on damages and/or costs may be payable in cases where the claimant succeeds in beating a Part 36 offer of settlement. We would suggest that such uplift is abolished in conditional fee cases where the claimant does not require the additional protection on costs that a privately paying claimant needs in order to ensure that there is not a shortfall between the costs recoverable by him or her from the other side and the costs payable by him or her to his or her solicitors.

We have dealt only very briefly with three possible ways in which control may be brought into the CFA system and would welcome the opportunity to make further oral submissions if this would be helpful.

**Stephen Whittle**
Controller Editorial Policy
British Broadcasting Corporation

November 2005

Evidence submitted by Channel 4 Television Corporation

I am responding on behalf of Channel 4 Television Corporation (“Channel 4”) to the consultation on CFAs in libel actions. In Channel 4’s view there are two important points of principle involved in this issue. The first is that there should be equal access to justice. The second is that, in any democratic society in addition to the proper protection for rights of individuals it is essential that freedom of expression is adequately respected and protected. The media in England and Wales, and in Scotland, Northern Ireland and the Republic of Ireland, is subject to some of the most claimant-friendly libel regimes in the world. The law of libel, in terms of the reversed burden of proof, the damages that can be awarded, the restrictions on republication of allegations and, by no means least, the enormous legal costs involved in defending actions coupled with the risk of paying the costs of the claimant in the event that an action is unsuccessfully defended, already all operate to create a real “chilling effect” on the media. The increasing and unregulated use of CFAs in libel actions with 100% uplifts has a punitive effect on the media and genuinely impacts on freedom of expression where media organisations are wary to publish and then defend subsequent libel actions. CFAs with significant uplifts have not redressed the balance for impecunious claimants but have
tipped the scales in their favour and in favour of their lawyers, thereby creating manifest injustice. In addition, the very wealthy have taken advantage of a system aimed at assisting those with more limited means which has tipped the balance even further against the media defendant.

The risk of libel is taken very seriously by all broadcasters since the effect of libel proceedings, as briefly referred to above has an obvious commercial impact as well as one on freedom of expression, not least on the significant commitment required by members of staff in defending such actions.

Channel 4, like most broadcasters, pays for an Errors and Omissions insurance policy annually to cover the costs of libel actions and other claims such as privacy and breach of confidence. Errors and Omissions cover is expensive to obtain and tends to attract a significant “excess” to be paid by the insured before the legal costs are paid by the insurance company. Such an excess is not uncommonly in the region of six figures.

In addition, Channel 4 is a publisher broadcaster which cannot make its own programmes in-house. Our programmes are produced for us by independent production companies, although, as publishers, we cannot subrogate our responsibilities to comply with the Ofcom Broadcasting Code under our licence. Where a programme is legally contentious, for example all current affairs programming, it will involve detailed advice at an early stage, usually well before filming, from a lawyer employed by the broadcaster who is experienced in advising on legal content issues and on compliance with the regulatory Code. A producer, therefore, will seek an indemnity from Channel 4 in respect of any subsequent legal action. Channel 4 has a policy of providing an indemnity to producers where its own Legal Department (ie Channel 4’s) is advising on a programme with legally contentious content, in turn taking warranties from the producers that they have complied with best journalistic practice. Production companies, producers and reporters tend to be named by the claimant as co-defendants in libel actions along with the broadcaster itself.

Channel 4 is a separate statutory corporation with a public service remit. We have no share holders and all our profit goes back into programme making. Section 265(3) of the Communications Act 2003 provides:

“(3) The public service remit for Channel 4 is the provision of a broad range of high quality and diverse programming which, in particular:

(a) demonstrates innovation, experiment and creativity in the form and content of programmes;
(b) appeals to the tastes and interests of a culturally diverse society;
(c) makes a significant contribution to meeting the need for the licensed public service channels to include programmes of an educational nature and other programmes of educative value; and
(d) exhibits a distinctive character.”

We are currently obliged to broadcast four hours of current affairs programming each week (1.5 in peak times) and this will increase next year.

In the case of investigations, particularly those involving covert filming carried out in accordance with the provisions of the Ofcom Broadcasting Code, it tends to be small production companies, often with only one or two company directors, which have the expertise and inclination to carry out such work which is highly specialised, unpredictable in its outcome and not very lucrative. Under Ofcom’s programme supply review producers retain all these rights in programme fully-funded by a broadcaster which is entitled as of right only to two UK transmissions of it. All other rights must be negotiated and paid for. Because it is time specific and of limited appeal to viewers a domestic investigative programme is unlikely to have any (or only limited) potential for exploitation of secondary rights, such as sales to other broadcasters or another platform.

Therefore, if Channel 4 did not indemnify contractually the small independent production companies who make our investigative programmes for us, libel actions would expose them to an entirely unacceptable level of risk. Even one libel action could effectively bankrupt a small production company, which invariably has no assets, not least because that company would have a very limited ability to carry on generating other revenue by making further programmes, leaving aside payment of their own costs and the risk of losing an action. The operation of CFA agreements in this arena, with 100% success fees, would have a catastrophic affect on a small or moderately sized production company.

Whilst we reiterate that libel should not be the exclusive preserve of the wealthy and that there should be equal access to justice in this area, we are concerned about the current unregulated operation of conditional fee agreements in libel actions and its potential to add even further to the chilling effect of libel litigation.

Jan Tomalin
Controller of Legal & Compliance
Channel 4 Television Corporation

November 2005
Evidence submitted by Newsquest Media Group

Newsquest Media Group is a major regional newspaper publisher, circulating more than 10 million million copies across the UK through some 300 newspapers and magazines, including 17 regional dailies. Among them are some of the longest established and most distinguished titles in the newspaper industry.

So-called “no win, no fee” conditional fee agreements (“CFA”) act in a different way on regional publishers because of the differences of scale. The cost of settling a relatively minor defamation when a CFA is used can rack up to £20,000, even when it is admitted from the start. These are back-breaking figures for the small budgets of weekly titles. Damages might be much less than £5,000, but where an expensive London solicitors’ firm is involved on a CFA, the costs can quickly (from our own experience) add up to £15,000 or more even over the course of just a few rounds of correspondence. The attraction of CFAs for claimants has meant that matters which in the past might have been settled with a published apology can escalate into full-blown legal actions with serious impact on the economics of local titles.

Slowly but surely, CFAs are beginning to poison the relationship local newspapers have with their readers and the local communities they serve. For both parties, the focus on the money distracts from the actual merits of the case. Editors find that the financial logic of the success fee compels settlement even when it would otherwise be reasonable to put up a defence. Then they have to think harder about the financial risk before covering certain controversial stories or particular categories of persons who are known to be litigious. Wariness and suspicion replace openness and trust. The essential idea of the local newspaper as a political and social forum for the community is thus undermined.

The commercial principle of the success fee is understood, but its effects are too onerous at the permitted level of up to 100%. We take particular objection to the practice of charging for the “after-the-event” (“ATE”) insurance policy, which is bought from the outset (even before the first letter before action) apparently regardless of any sensible assessment of the real risk to the claimant. The market for these policies seems small and unsophisticated and so the price is very high, typically £5,000 or £6,000 at this first stage (and rising in steps thereafter), even in respect of the minor libels faced by a weekly newspaper. Moreover, with some practitioners, the claimant could never actually be personally liable for this premium—they are not required by the insurer to pay out until conclusion of the action, and then of course it would either be paid out of their winnings from the newspaper, or else (in a losing case) the claimant solicitor might offer indemnity as part of the CFA deal. Regional publishers find themselves paying out on these excessive and pointless premiums in cases where they immediately admit liability and would have done so whether there was a CFA or not. The effect of allowing ATE insurance from the outset of a claim is simply inflationary and brings no benefit except as a windfall to the insurer.

A particular disadvantage falls on regional publishers as a result of CFAs at this lower level. While the costs are very significant in terms of a weekly newspaper’s budget, they are still not high enough to warrant risking still further costs by going to the court for assessment. Paradoxically, that decision is much easier when the scale of costs is higher (as may be the case with the national media). Therefore, regional publishers have the worst of both worlds: the impact of CFA costs on a small weekly is just as big as for the nationals because of the differences of scale, but the legal safety nets are not really available. The pressure to settle both damages and costs—and to settle quickly—is very great. The result is a corresponding “chilling” effect on local journalism.

Simon Westrop
Head of Legal
Newsquest Media Group

November 2005

Evidence submitted by Ian Hislop, Editor, Private Eye

1. I am writing this letter to you in connection with the above Inquiry, with particular regard to the use and operation of Conditional Fee Agreements (CFAs). In this letter I will recount my experience of being involved in litigation where a CFA has been used by the other party.

2. I have been the Editor of Private Eye magazine since 1986, which was founded in 1961 and is published by Pressdram Ltd. Private Eye has been involved in many libel claims during its existence. Relatively few have had to be resolved at a trial, as agreement about their disposal has been reached by agreement.

3. In March 1992 Private Eye published an article about a chartered accountant practicing in Cornwall called John Condliffe. The essence of the story was that he was dishonestly overcharging many of his small business clients. In July 1993 proceedings for libel were issued on his behalf against myself and Pressdram Ltd as respectively editor and publisher of Private Eye. His lawyers were Peter Carter-Ruck and Partners (“Carter-Ruck”).

4. The proceedings were defended on the grounds of justification ie that what we had published was true.
5. Unusually for a chartered accountant Mr Condliiffe was declared bankrupt in August 1993. However he claimed that he would be able to finance his costs of the claim with financial support from his mother. Unhappy about the risk that we would not be able to recover our legal costs if we won the case we applied for security for our legal costs. However both the Judge and then the Court of Appeal, in October 1995, ruled against us.

6. The action proceeded at a snail’s pace through the court procedures necessary to prepare the case for trial; it was a very expensive process as Mr Condliiffe was required to produce to our lawyers all his files relating to the clients who we said he had cheated, but the form in which his files were received by our lawyers were chaotic. They had to be put in order and then considered by an independent chartered accountant we had engaged to be our expert witness. By the time of the trial we had whittled down the files we wanted available at court to a form that occupied 28 ring-binders. Condliiffe’s lawyers insisted that the court also had available all of the documents from the files that Condliiffe had produced. This meant preparing an additional set of 113 ring-binders for use by the court; in practice this meant preparing copies of this set (in addition to the 28 file set) for each of the Judge, the barristers and the witness. In court our barrister had available all of the documents from the files that Condliiffe had produced. This meant preparing an additional set of 113 ring-binders for use by the court; in practice this meant preparing copies of this set (in addition to the 28 file set) for each of the Judge, the barristers and the witness. In court our barrister suggested to Mr Condliiffe that this was designed to increase costs and try to frighten off Private Eye and to “confuse, bamboozle and obfuscate.” The trial Judge said he was “absolutely horrified” by this decision by Condliiffe’s lawyers. During the trial he also said “I despair of this litigation. It is never-ending. It is the most disproportionate piece of litigation I have ever been involved in.”

7. In the meantime CFA’s became available. In August 2001 Carter-Ruck gave notice that they had entered into a CFA with their client. Some time before they entered into a CFA Carter-Ruck had said that their client would settle for no apology, no damages but payment of £250,000 for his legal costs. In other words all the action seemed to be about was Carter-Ruck getting a substantial amount for their costs and the usual purpose of a libel action, the clearing of one’s reputation, was no longer important. The trial was fixed to commence in October 2001 before a Judge sitting without a jury.

8. The effect of Condliiffe being represented on a CFA was of course explained to us by our own advisers, namely (in summary) that his lawyers would be entitled to charge an enhanced (probably double their normal) rate, for which we would be liable if we lost the case. Of course we knew that the prospect of recovering any of our legal costs from Condliiffe, let alone anything like what our costs would actually be if we fought the case to trial and won the case, was negligible.

9. Even if we and our advisers had not fully appreciated the situation, we would have been left in no doubt about it by Carter-Ruck as result of communications with our lawyers before the trial. Carter-Ruck told us at one point that their costs to date were (now) £600,000, and that they estimated their further costs of the trial would be £1.2 million, which would include their 100% success fee. In other words we faced paying some £1.8 million if we fought the case and lost, on top of which we would have to pay our own lawyer’s bill, which would be about £750,000. Carter-Ruck made clear that if we won Condliiffe simply would go bankrupt (again) ie we would not recover any costs from him.

10. So if we took the case to trial then, at worst, we faced legal costs of some £2.5 million (if we lost) at best £750,000 (if we won). The implications were extremely serious. There was, at the very least, a real risk that if we lost Pressdram Ltd would not have been able to pay Carter-Ruck costs and that it would go into liquidation, leading to the closure of Private Eye. As an individual defendant I would also have been personally liable to pay Carter-Ruck costs from my own resources, regardless of Pressdram’s ability to pay them.

11. There was no doubt in my mind that Carter-Ruck were using the threat of the enormous potential liability we faced to try and force us into settlement purely for commercial reasons, unconnected with the actual merits of the claim. Whatever our perceptions and advice about our prospects of success, the outcome of any litigation at a trial is inherently uncertain, and the commercial reasons for settlement were apparently overwhelming.

12. We decided we were not going to be bullied into settlement by these tactics. So the case came for trial before Mr Justice Gray in October 2001. Condliiffe was represented by a QC and two junior barristers. Their QC was also on a CFA with a success fee. In the sixth week of the trial Condliiffe’s claim collapsed after the Judge indicated that cross-examination of Mr Condliiffe had cast “very considerable doubt on his credibility”, the issue which lay “at the heart of the action.” Immediately following this ruling, settlement negotiations took place in the court corridor, culminating in an agreement made the same day under which the claim was dropped and Condliiffe was to pay £100,000 towards our costs. He failed to do this and was made bankrupt.

Ian Hislop
Editor
Private Eye

November 2005
Evidence submitted by Trinity Mirror Plc

INTRODUCTION

1. This submission is made on behalf of Trinity Mirror Plc, the largest newspaper publisher in the United Kingdom. Its subsidiaries include MGN Limited, the publisher of the Daily Mirror, the Sunday Mirror and the People.

2. It addresses the issue of Conditional Fee Agreements (CFAs) and fee uplifts or success fees in those cases that involve Article 10 of the European Convention of Human Rights (Article 10).

3. In 2002 in the House of Lords case of Callery v Gray¹ Lord Bingham of Cornhill, the most senior Law Lord, said that the Access to Justice Act 1999 had three aims: to contain the rising cost of legal aid, to improve access to the courts for “meritorious claims” and, thirdly, to discourage weak claims. But he also recognised that the new funding regime was “obviously open to abuse”. He said:

“One possible abuse was that lawyers would be willing to act for claimants on a conditional fee basis but would charge excessive fees for their basic costs, knowing that their own client would not have to pay them and that the burden would in all probability fall on the defendant or his liability insurers. With this expectation the claimant’s lawyers would have no incentive to moderate their charges. Another possible abuse was that lawyers would be willing to act for claimants on a conditional fee basis but would contract for a success uplift grossly disproportionate to any fair assessment of the risks of failure in the litigation, again knowing that the burden of paying this uplifted fee would never fall on their client but would be borne by the defendant or his insurers.”²

Lord Bingham also said:-

“... I would not wish to discount either the risk of abuse or the need to check any practices which may undermine the fairness of the new funding regime. This should operate so as to promote access to justice but not so as to confer disproportionate benefits on legal practitioners or after the event insurers or impose unfair burdens on defendants or their insurers.”³

4. Trinity Mirror would argue that the abuses identified by Lord Bingham now exist. If they are allowed to go unchecked they will significantly detract from the three policy objectives of the access to justice reforms.

HISTORY

5. The White Paper “Modernising Justice”, published in December 1998, made it clear that the underlying philosophy of the CFA reforms was that “justice must not be restricted to the very wealthy, who can well afford high legal fees, or the very poor, who may qualify for legal aid”.

6. In the debates about the Access to Justice bill the then Lord Chancellor, Lord Irvine of Laing, said it should be generally right that the successful party in any litigation should be able to recover costs to which he (or she) had been put in prosecuting or defending a claim. However, the success fee is not a cost to which the claimant in any proceedings has been “put”. One of the features of libel and breach of confidence actions in England and Wales is that, as far as we are aware, the claimant has never paid a success fee. It is always sought by the claimant’s lawyers from the defendant and can and should therefore be seen as akin to a tax on the losing party.

7. Section 58(A) of the Courts and Legal Services Act 1990 does not provide that the recovery of the success fee from the defendant should be automatic. Indeed in Scotland, as Lord Hope of Craighead recorded in his judgment in the Campbell case,⁴ the success fee is not recoverable from the losing party.

8. The relevant section of the Access to Justice Act 1999 which substituted new sections (58 and 58(A)) of the Courts and Legal Services Act 1990 came into force on 1 April 2000. This was only a year after the Civil Procedure Rules (CPR)—referred to as the Woolf reforms—were introduced. As has been recognised by the courts “one of the principal objects of the Woolf reforms was the control of costs... to enable the court to limit recoverable costs”.⁵ The extension of CFAs with success fees to libel and breach of confidence cases has had the effect of increasing, rather than reducing, legal costs.

WHAT IS THE SUCCESS FEE FOR?

9. It is very important that the Committee realises exactly what the success fee is for and equally what it is not for.

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¹ Callery v Gray (Nos 1 and 2) [2002] UKHL 28.
⁴ Lord Hope at paragraph 41 in Campbell v MGN Limited [2005] UKHL 61.
⁵ Lord Justice Dyson at 848H in Leigh v Michelin Tyre Plc [2004] 1 WLR 846.
10. The success fee is to compensate a solicitor for the risk that a client might or might not be successful in that litigation. At the time the CFA is entered into the solicitor will assess what the chances are of the client being successful; and should fix the success fee accordingly.

11. We submit that in cases involving Article 10 success fees should not be used to bolster a lawyer’s earnings in one case so as to offset the fact that they may have lost an earlier CFA case.

12. Nor should the success fee be fixed generally, say by reference to the arrangement a particular firm may have with an insurance provider. Our understanding is that one of the main libel claimant firms, Carter Ruck, has recently introduced a system whereby it operates different (stepped) success fees where the success fee claimed increases as the action progresses—and that these steps are fixed by reference to their arrangement with an insurer. Temple-Legal Protection Limited, for staged premiums in relation to the after the event (ATE) insurance which is provided by that insurer to Carter Ruck’s clients. We think this is wrong as the success fee is not being assessed on an individual basis by reference to the risk in a particular case.

13. In May 2004 Lord Justice Brooke said “the availability of CFAs in defamation cases (often including a success fee of up to 100%) certainly created the potential for a chilling effect on investigative journalism and for significant injustice.” And he concluded by saying “it cannot be just to submit defendants in these cases [an impecunious claimant who enjoyed the benefit of a CFA but no ATE insurance], where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win”. In the Campbell case Lord Hoffmann referred, with reference to the case of Turcu v News Group Newspapers Limited, to such litigation having “a blackmailing effect”.

WINS AND LOSSES

14. Most libel and breach of confidence cases are handled by a small number of firms of solicitors: Carter Ruck, Schillings and David Price to name three of the main claimant firms. Although it should therefore be relatively easy to obtain statistics as to how many CFA cases each firm has won and lost these firms are surprisingly reticent about providing such information. This is, we would submit, because the vast majority of CFA funded cases for claimants are won. Losses by CFA funded claimants in this area of the law are very much the exception; we believe that there have been no more than a handful. In reality, therefore, there is little or no risk being taken by these firms given that they can cherry pick the cases they take on and then cherry pick those cases which they offer/agree to handle on a CFA basis.

15. Whilst the above firms are reticent about disclosing precise statistics concerning CFAs Carter Ruck printed on their website as long ago as February/March 2003 that they had ‘successfully acted for about 200 people’ on a CFA basis. In addition a partner of the firm wrote to the Times in February this year to say that his firm had “successfully represented well over a hundred libel claimants on such a ‘no-win, no-fee’ basis”. However, when I asked him he was not forthcoming about the exact number of wins and losses, regarding such information as confidential.

16. We suspect Carter Ruck have lost under 10 and closer to 5 claimant actions funded by CFAs. On the basis of 200 victories that is a loss rate of just 2.5%.

17. Schillings have, similarly, been unwilling to disclose the number of wins or losses. As we will show later in the cases of Sara Cox and Naomi Campbell (both of which were wins for them) they have claimed the maximum success fee and sought, in our view, extortionate costs.

18. In September 2004 David Price was asked how many CFA cases he had won and how many he had lost. He declined to answer but in May 2005 a spokesperson for him told Media Guardian (after the Turcu case) “we have won a large number of conditional fee agreement cases against the News of the World. This was the first CFA case that we have lost against the News of the World and only the second CFA case we have ever lost against a newspaper”.

19. Following the appearance of that quotation I wrote and asked David Price to disclose how many CFA cases for claimants he had won. He said he was not prepared to answer the question.

20. In September 2004 a partner for Russell Jones & Walker said they had never lost a CFA case.

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6 Lord Justice Brooke at paragraph 41 in King v Telegraph Group Ltd [2004] EWCA Civ 613.
7 Lord Justice Brooke at paragraph 101 in King v Telegraph Group Ltd [2004] EWCA Civ 613.
8 Lord Hoffmann at paragraph 31 in Campbell v MGN Limited [2005] UKHL 61.
9 Law Letters; The Times 8 February 2005.
10 http://media.guardian.co.uk/presspublishing/story/0,7495,1480601,00.html
21. The Committee will, we have no doubt, be able to work out why the main claimant firms are not willing to disclose precisely how many CFA cases they have won and lost. The basic truth is that newspapers lose or settle the vast majority of actions brought against them. It follows from this that the risk claimant’s lawyers are taking, in bringing such actions, is very low if not in reality non-existent in the vast majority of cases. Perhaps more importantly, in the context of providing access to justice, we would submit that meritorious cases could (and would) have been brought without any success fee.

**The first abuse**

22. It is our submission that the use of CFAs with success fees has meant that claimant solicitors have charged excessive fees (the first one of Lord Bingham’s possible abuses; see paragraph 3 above).

**Specific examples**

23. Although the court has not yet decided on the appropriate sum of costs which are to be paid in the case of Sara Cox and Jon Carter v MGN Limited the claim for costs by Sara Cox’s lawyers totals £272,961.58. In contrast MGN Limited’s costs were £46,310.28. The claimants’ legal costs were, therefore, almost six times greater than MGN Limited’s and we would suggest there are two main reasons for this. Firstly, the fact that the claimants’ solicitors were acting on a CFA basis and, secondly, because they were seeking recovery of a success fee of 95% (reduced by Master O’Hare to 40%; see paragraph 32 below).

24. Of the figure of £272,961.58 the solicitors’ profit costs are £93,649.50 and the success fee they sought (95%) amounted to £88,967.03. With VAT the solicitors alone sought costs in excess of £200,000.

25. In the Naomi Campbell case the amounts which have been sought by the claimants’ lawyers are even more staggering. Naomi Campbell’s lawyers only entered into a CFA for the application to the House of Lords which involved a 2 day hearing occupying less than 9 hours of the court’s time. By this stage in the case there was no requirement for those solicitors to gather evidence or prepare witness statements; those steps having been taken far earlier in the case.

26. The total amount sought including a success fee of 95% for the solicitors and 100% for counsel is £594,470 in the House of Lords, that figure is over £125,000 greater than MGN Limited’s total legal spend (at that time) on the whole case (our emphasis)—which involved a week long trial and a two and a half day hearing in the Court of Appeal.

27. The claimants’ solicitors, in the House of Lords alone, seek profit costs of £169,733 and a success fee of £161,246.35; £330,979.35 in total. The success fees alone sought by solicitors and counsel amounts to £279,981.35. A table showing a breakdown of the figure of £594,470 is annexed to this submission. In contrast MGN Limited’s solicitors’ costs were £43,084.50 so the claimant’s solicitors are seeking base costs 8 times greater than our solicitors’ charges. And all this in a case where Naomi Campbell only recovered damages of £3,500 and where the trial judge found that “she lied on oath”.

28. Even if the legal costs are severely reduced by the court no sanction will apply to the solicitors personally for seeking what we would submit are simply totally unjustifiable costs as there is no requirement, as we would submit there should be, for lawyers to certify that the legal costs they seek recovery of from the paying party are reasonable and proportionate. If such sanctions were in place it would have two effects, which are both in the public interest. Firstly, such excessive claims for costs would be curbed and secondly valuable court time would not be taken up by so-called satellite litigation on costs.

**The second abuse**

29. It is our submission that as the note to the Committee’s press release suggests 100% success fees are being claimed even when law firms are assuming little or no risk in taking on the case (the second one of Lord Bingham’s possible abuses; see paragraph 3 above).

**Specific examples**

30. One of the worst examples which is in the public domain which involves a 100% success fee being claimed even when the law firm was assuming no risk is the case of Gazley v News Group Newspapers Limited. In that case the Sun newspaper printed the wrong picture of a man in connection with a story about a paedophile. They immediately apologised for that on the Monday after the original story had appeared on the Saturday and, as Mr Justice Eady put it, “by the time Carter Ruck came to be instructed on 2 April 2003 [the Wednesday] the publisher of The Sun had admitted liability published an apology and admitted a willingness to pay damages”11.

31. Members of the Committee could be forgiven for thinking that this was an open and shut case. Though it may have been appropriate for a “no-win no-fee” agreement it did not require or justify any success fee. Nevertheless Carter Ruck entered into a CFA with a 100% success fee with Mr Gazley. What this means is that they had assessed the risk of Mr Gazley winning that case as being no greater than 50/50. Unsurprisingly the costs judge reduced this success fee to 20% but, of course, it was necessary for the defendant, who would have had to pay the costs and an uplift of 100% on those costs proceedings if they had lost, to challenge that 100% success fee in order to get it reduced. In our submission a success fee of 20% is still too high as the chance of Mr Gazley losing this case was, in reality, non-existent.

32. In the privacy case which the Radio One DJ Sara Cox and her husband, Jon Carter, took against MGN Limited, the claimants’ solicitors, Schillings, again entered into a CFA with a success fee of 100%. This was reduced by Master O’Hare to 40% and he said “in doing that . . . I am taking into account primarily what I consider to be the high prospects of success which were appreciated or should reasonably have been appreciated in January [when the CFA was entered into; the proceedings having been commenced the previous October], even though the defendants denied liability. It seems to me that at that stage there was a reasonable cause for thinking that this case was a very strong case because of the advice of leading counsel which had been obtained . . . I am saying that the case is as strong as such a case could be but, nevertheless, I bear in mind it is cutting edge, it is new law”12.

33. That case remains before the courts as both sides are appealing against the decision on the success fee with MGN Limited contending it should be nil on the basis of leading counsel’s opinion to the claimants and Schillings contending that the uplift should be reinstated to be 95%; the sum they sought recovery of from MGN Limited. (Unfortunately, Schillings have not permitted us to show you the advice from their client/s. This has two e...

34. In one case—not involving one of the firms referred to herein—MGN Limited were, effectively, “blackmailed”. (We were made an offer by the claimant during the case and were told by his solicitors that a CFA had not yet been entered into but that it was “their intention to do this if we didn’t accept the offer”.)

35. The Committee must bear in mind that solicitors can go on CFAs with success fees whenever they want. Therefore they can start cases on an ordinary fee paying basis but yet at any point of their choosing subject to the client’s agreement—and why would the client not agree—they can then enter into a CFA with a success fee. In practice, Schillings enter into CFAs when a particular piece of litigation has turned against their client/s. This has two effects. Firstly, it immediately increases the pressure upon the defendant (the “ransom factor”) as, overnight, the claimant’s solicitors have effectively “doubled the odds” and, secondly, because the success fee is based on the risk the solicitor is taking at the time the CFA is entered into it becomes easier for them to claim the highest success fee possible. This, it is quite clear, is the tactical use of CFAs with success fees to increase pressure on defendants and to make more money for the lawyers. It has nothing whatsoever to do with access to justice and indeed in the case of Naomi Campbell which had been obtained . . . I am saying that the case is as strong as such a case could be but, nevertheless, I bear in mind it is cutting edge, it is new law”12.

36. The Committee should also be aware that in view of a recent decision of the Court of Appeal,13 once the court decides on the appropriate success fee then that success fee applies throughout the case. Therefore, it is perfectly conceivable that a solicitors firm could recover a success fee of 95 to 100% on each and every piece of work irrespective of whether that particular piece of work carries any risk to the solicitors whatsoever. In financial terms we face claims of almost £1,000 per hour.

37. The following quotation indicates why the success fee is so iniquitous and should, in our submission, be removed from Article 10 cases:

“The uplift [success fee] is added as a percentage bonus to the cost of work actually done, based not on any conduct or attribute of paying parties, but as a penalty for having lost in litigation against opponents who have entered into a particular type of contract with their own lawyers.”14

**ARTICLE 10 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR)**

38. The real problem comes about because no consideration was given, at the time CFAs with success fees of up to 100% were extended to libel and breach of confidence cases, to whether CFAs with success fees were appropriate for cases which concern the exercise of the right to freedom of expression as guaranteed by Article 10 of the ECHR. (See in this connection the comments of Lord Justice Brooke in the Musa King case15.) Nor was any consideration given to the rights of the paying party.

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12 Master O’Hare at paragraph 2 in *Sara Cox and Another v MGN Limited* and others SCCO 0403832.
13 *KU v Liverpool City Council* [2005] EWCA Civ 475.
15 Lord Justice Brooke at paragraph 90 in *King v Telegraph Group Ltd* [2004] EWCA Civ 613.
39. As the ECHR has made clear freedom of expression, which Article 10 protects, “constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment”.

40. They have also made it clear that on cases in which the Article 10 right to free speech is engaged it is faced:

“not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted . . . . It is not sufficient that the interference belongs to that class of the exceptions listed in article 10 (2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it”.

41. Parliament has also recognised the importance of freedom of expression: Article 10 having been incorporated into law by the Human Rights Act 1988. See also section 12 (4) of that Act which refers to how the court “must have particular regard to the importance of the Convention right to freedom of expression”.

42. An award of costs against a defendant constitutes an interference with the exercise of the right to freedom of expression as guaranteed by Article 10 (1). Such an award will not fall foul of Article 10 provided the costs are reasonable and proportionate; hence the suggestion in paragraph 28 above.

43. However, and in contrast, it is our submission that an exposure to a liability to pay a success fee of up to 100% to the winning party (which in reality their client was never going to pay) above and beyond ‘reasonable and proportionate costs’ falls foul of Article 10.

CFAs for rich people

44. The availability of CFAs with success fees for rich people like Naomi Campbell and Sharon Stone is a far cry from the three underlying aims of the Access to Justice Act 1999 (for which see paragraph 3 above). As Michael Beloff QC the President of Trinity College, Oxford has said (about the Naomi Campbell case) “it is absurd that someone in a profession whose incumbents tend to prefer not to get out of bed for less than £10,000 a day was able to avail herself of a CFA”. There is no public interest in allowing a system to continue which permits, and in reality actively encourages, lawyers for rich people—who could afford to pay for the litigation themselves—to seek to ‘double their money’. In Article 10 terms permitting rich people and their lawyers to have the benefit of CFAs with success fees is neither ‘necessary’ nor ‘proportionate’ and it certainly has nothing to do with permitting ‘access to justice’.

Conclusion

45. There is no evidence to suggest that meritorious claims would not have been brought without the existence of CFAs with success fees. Nor is there any evidence to suggest that preventing successful claimants recovering success fees from losing defendants (the system which operates in Scotland) would prevent those claimants who have good claims being provided with access to justice.

46. In contrast there is evidence that the existence (and reality) of recoverable success fees of up to 100% has led to the abuses identified by Lord Bingham (see paragraph 3 above); examples of which we have given above. Removing those abuses would ensure that the system remained compatible with Article 10 whilst providing access to justice to those claimants with meritorious claims. It would also be in the public interest. Moreover it would not require primary legislation.

Solutions

47. Changes to the court rules should be made to prevent the recovery of success fees from losing defendants in cases which concern the exercise of the right to freedom of expression as guaranteed by Article 10 of the ECHR. Secondly, lawyers should only be permitted to seek recovery of costs which they certify are “reasonable” and “proportionate”.

Marcus Partington
Head of Legal
Trinity Mirror Plc

November 2005

16 Selistio v Finland [2005] EMLR 178.
17 Sunday Times –v- The United Kingdom (1979) 2 EHRR 245.
18 Law 5; The Times 22 November 2005.
Evidence submitted by Independent News and Media

I am writing to you on behalf of Independent News and Media, publisher of The Independent and the Independent on Sunday and other publications (“INM”), to give the Committee our views on the conditional fee agreement (“CFA”) regime and its adverse impact in relation to claims with freedom of expression implications.

INM is a party to the joint submission made on behalf of many of the major media and news organisations. In addition, we have had the advantage of reading the individual submissions sent to the Committee by some other media organisations. The law and the relevant policy issues are set out in detail in these other papers so, for the avoidance of repetition, we will not rehearse them again.

This submission consists of our particular response to the inequities of the present CFA regime and its potential conflict with the ECHR, together with observations on our own experience in this area.

First, we want to make it clear that INM fully accepts that CFAs in civil litigation enable many claimants who do not have the means or the access to other funding to achieve the justice for their claims to which they are entitled. In the field of publication cases, primarily defamation and misuse of private information, since the change in the law in 2000 there have undoubtedly been some claimants who have been enabled to pursue meritorious claims with the assistance of a CFA.

Our key objection is to do with how the system works in cases which engage Article 10 freedom of expression rights, in particular the recoverability of success fees from defendants. As you know, freedom of expression is protected under the European Convention of Human Rights and any interference with this right must be both necessary and proportionate. We believe that this requirement is not met by the current regime.

What we have to say is not special pleading for the media. While it is true that most cases that engage Article 10 have media defendants, this is neither in theory nor in practice exclusively a media preserve. Defendants such as Steel and Morris in the McLibel case and Tolstoy in the Aldington v Tolstoy case have had the fact that their defence of libel claims engaged their Article 10 rights significantly recognised by the European Court of Human Rights. All the mischief we and other media companies identify as inherent in the present CFA regime is suffered by non-media defendants as well.

Our national titles being among the smallest in their sectors, our experience with fighting cases to trial brought by claimants on CFAs is similarly limited. However a number of complaints and claims have been brought against INM by claimants on CFAs with success fees. Indeed, claimants who are not on CFAs with success fees—no matter what their status or means—are now the exception. This situation is not, of course, what Parliament intended. It clearly highlights the extent to which claimant lawyers have identified the hugely augmented rewards available to them when they put clients onto CFAs, even those who do not fall into the category of needy claimant that the legislation was intended to assist to justice.

When we receive a claim for defamation or a related cause of action, like most sensible commercial organisations INM already considers carefully at the outset, and keeps under constant review, the extent to which it might be necessary or desirable to settle the action. With a CFA-assisted action, when the success fee basically doubles the claimant’s costs (already the hugely predominant financial exposure of an unsuccessful defendant), this process is overbalanced to the point where exercising freedom of expression rights by publishing important stories in the public interest is an extremely costly and increasingly unattractive gamble.

With most claimants on a CFA with a success fee recoverable from the defendant (which is not, in practice, recovered from the claimant), our already commonsense approach to the settlement of meritorious claims has had to change. We are now faced with the challenge of claims being brought in the name of a “client” when the crucial interest which needs to be satisfied if a sensible settlement is to be achieved is in fact that of the solicitor. Many “clients” appear to have little knowledge of or involvement in the claim being brought in their name. In every claim brought by a solicitor on a CFA with a success fee in recent years, when the chips are down the single aspect of settlement pursued by the solicitor is not damages or publication of an apology—the “client’s” remedies—but the solicitors’ costs plus uplift. Indeed, we suspect that in these circumstances “clients” are not being fully consulted let alone advised on the downsides of pursuing proceedings or taking them to trial. The Committee may say that there are regulatory solutions to this problem. However the sea-change in the power and interest balance we describe should not be overlooked: defamation/privacy litigation is now run by claimant solicitors in their own interests because the current regime allows them to recover grossly disproportionate success fees from defendants. The negative impact of this interference with Article 10 rights is now endemic.

Control of base costs, as suggested in the media joint submission, is vital, but in our view the recovery of success fees from defendants is the real evil. It cannot be justified in terms of the ECHR as being necessary. The legal services market for defamation is bloated, with too many specialists chasing a small amount of work. Though there has been a rise in the relative number of defamation claims in recent years (6.22% of all QB claims in 2004 compared to 2.29% in 1999), in absolute terms it is still a minute area with only 267 claims issued in 2004. The total number of issued claims was down to 14,830 in 2004 from over 269,000 in 1992, in which year 0.4% of the total were defamation writs, that is there were 339 issued. In terms of the number of defamation claims issued, therefore, the market has in fact held rather steady. This suggests that
the Access to Justice Act has not opened the gates to huge numbers of wronged, poor claimants who have had to issue claims to gain their rightful redress. Linked with the media’s experience, this shows that defendants faced with CFA-based complaints are settling before claims are issued.

There is no evidence that the large number of defamation specialists, let alone mainstream litigators, would not be happy to take on meritorious claims for the handsome base hourly rates that are already recoverable. In the absence of such evidence, we say that the interference with Article 10 rights fails to pass the “necessity” test. Libel specialist lawyers have now had years of experience in assessing which cases are likely to be won and therefore are well placed to assess risk accurately and take on good claims which will succeed. Therefore there is no reason to suggest that a pool of effective providers would not be available to meet the access to justice requirements without success fees being recoverable from defendants.

INM has only encountered one claim against us on a CFA where the risk is assessed at anything other than 50/50, thus “justifying” a success fee of 100%. We can think of no other area of commercial endeavour where professionals would take on a matter in which they risked a six-figure sum of their own money where the odds were only 50/50. It stands to reason that these practitioners know—and certainly their almost unbroken records of wins in media cases would suggest to them—that the odds are in reality very much better than this.

The government has, presumably unwittingly, given defamation claimant lawyers on CFAs a huge sword of Damocles to hold over defendants’ heads. A defendant like INM has the unattractive, lose/lose prospect, when defending a claim, of paying either merely the legal costs of our own advisers of (in rough terms) £400 per hour if we “win” and the claimant cannot pay or any insurance is vitiated by our very success in demolishing the claimants’ credibility in the witness box, or paying £1,400 per hour if we lose and have to pay the defendants’ costs plus uplift as well as our own. We trust that the Committee can see how fighting any claim on a CFA with a success fee even where there is a very good defence is commercially very unattractive.

This disadvantaging of a whole sector in order to force it to fund the government’s delivery of their social policy objectives would be highly distasteful in any circumstances. But since that sector’s battles are essentially upholding Convention rights it is worse than that, it is objectionable to the point of illegality.

The Article 10 issue demands a reappraisal of the imposition of the payment of success fees on losing defendants as a crude mechanism for persuading solicitors and counsel to take on a claim by giving them an undeserved bonanza of success fees. Market forces and the already handsome market rates for legal work would ensure a healthy and competitive market place through which deserving claimants could get access to justice.

The significant interference with Article 10 rights suffered by media and other defendants under the present regime demonstrates the need for the Department for Constitutional Affairs to undertake an exercise to seek evidence that that interference is necessary to provide access to justice. In the absence of such evidence, success fees in cases which engage Article 10 should be ruled non-recoverable from defendants.

We urge the Committee to request that such an exercise is carried out by the DCA as a matter of urgency, and to give their careful consideration to the other proposals outlined by other media submissions as a way to address the current problems.

Louise Hayman
Head of Legal Services
Independent News and Media

December 2005

Evidence submitted by Reynolds Porter Chamberlain

PARTIES TO THIS SUBMISSION

Associated Newspapers Limited
BBC
Express Newspapers plc
Guardian Newspapers Limited
Independent News & Media Limited
ITN Limited
News Group Newspapers Limited
News International plc
Telegraph Group Limited
Times Newspapers Limited
Trinity Mirror Plc
EXECUTIVE SUMMARY
— The operation of CFAs in publication cases (i.e., cases based on complaints about published material) has had unintended consequences, vastly increasing the cost of litigation in this area.
— These consequences are unique to such cases. They operate against the public interest and affect freedom of expression.
— Reform is needed. This would not affect the operation of CFAs in other cases and could be achieved by subordinate legislation and/or changes to rules of court.

BACKGROUND
1. An important policy feature of CFAs in civil litigation has been to impose the cost of such litigation on unsuccessful defendants as a class. In relation to the most common types of litigation, that policy raises no particular difficulty since the additional cost falls mainly to the insurance industry and can be absorbed by passing it on to the public in the form of increased premiums.
2. Publication cases are different. Such cases tend to be low in volume and high in cost compared to the high volume, low cost model of personal injury cases. The cost of such litigation is not capable of being shared fairly among defendants and cannot be passed on to the general public by means of insurance.
3. Most importantly, however, publication cases raise issues of freedom of expression which do not arise in other kinds of litigation. Large awards of costs will inevitably have an impact on free speech. As Lord Hoffmann said in Campbell v MGN: “... there is a human right to freedom of expression with which the imposition of an excessive cost burden may interfere.”
4. The problems
Since, following the Access to Justice Act 1999, it became possible for CFA-assisted claimants to recover success fees as well as ATE (“after the event”) insurance premiums from defendants, there has been no stopping claimant lawyers from (quite lawfully) exploiting the system to its maximum financial potential. Every significant media organisation has its own stories to tell.
5. The scale of claimants’ lawyers’ costs
Libel cases are characterised by their extravagance. Success fees of 100% are claimed in most cases. When added to already very high charging rates of £400-plus an hour, these can result in claimant lawyers seeking costs at rates of £800 an hour and more.

In Naomi Campbell’s case against MGN Limited, her lawyers sought costs of £594,470 for her appeal to the House of Lords. That bill alone not only vastly exceeded MGN’s own costs for the appeal; it exceeded MGN’s own costs for the entire case including a trial before Morland J and an appeal from that decision to the Court of Appeal.

In a case brought last year by a police officer, Associated Newspapers would have faced a bill of £3.3 million for the claimants’ lawyers’ costs (including over £600,000 in respect of an ATE insurance premium) if it had lost at trial.

In a case against the publishers of the Sunday Telegraph, the claimant’s lawyers had incurred costs of £32,000 (equivalent to £64,000 after imposition of a 100% success fee) even by the time the parties’ statements of case had been exchanged.

Legal fees in libel and other cases against the media often bear little relation to the damages available. Naomi Campbell recovered damages of only £3,500. Libel damages are often modest five figure sums. In a recent case against Guardian Newspapers the claimant received damages of £10,000 but his costs payable by the Guardian (even after significant reduction by the costs judge) were around £100,000.

Where an ATE premium has been incurred by the claimant, this will add significantly to the overall cost since the ATE insurance market in libel cases is extremely limited and the cost of such premiums correspondingly high.
Libel litigation is often conducted by claimants’ lawyers, for tactical reasons, in a manner guaranteed to run up costs. Court rules do little to prevent such conduct. In Campbell Lord Hoffmann remarked on the difficulty:
“Faced with a free-spending claimant’s solicitor and being at risk not only as to liability but also as to twice the claimant’s costs, the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant’s own costs were equally high.”
6. THE EFFECT ON FREEDOM OF EXPRESSION

The prospect of having to pay very large legal costs affects media companies in two ways. First, it operates as a powerful incentive to settle cases, even where these cases may be unmeritorious (the “ransom factor”). Second, it operates more generally as a disincentive to publish investigative or other stories which carry greater risk of giving offence and attracting claims (the “chilling effect”).

The ransom factor was recognised by Eady J and later by the Court of Appeal in Musa King v Telegraph Group. It has more recently been acknowledged by Lord Hoffmann in Campbell. There can be no doubt that the spectre of costs looms large when media organisations are deciding whether or not to defend an undeserving libel claim. In cases in which the claimants have little or no ATE insurance, the commercial pressure to settle is likely to be considerable, even for the largest organisations. The effect of such pressure is that claimants will receive false and undeserving vindication and their past and future activities will very probably become immune from future investigation and publication. That is against the public interest.

While the chilling effect of costs is particularly acute for smaller media companies, it should not be thought that it leaves larger organisations unaffected. Such organisations are answerable to shareholders and the prospect of an enormous order for costs against them, especially given the uncertainty of jury trials, may in some cases be enough to discourage publication of a contentious book, programme or newspaper article.

7. THE LACK OF EFFECTIVE CONTROL OF CFAs

There are presently no relevant court or other rules which recognise the impact of CFAs on Article 10 rights and the importance of avoiding unnecessary interference with such rights.

In particular:

— There are no rules controlling or limiting base fees or success fees in Article 10 cases against the media.

— There are no rules requiring, controlling or limiting ATE insurance in such cases. In many libel cases, ATE insurance is not worth the paper it is written on because the occurrence of the very event to which the insurance is meant to respond will of itself trigger numerous exclusions and limitations.

— The protection supposedly afforded by the costs assessment process is too little and too late. The process is cumbersome and expensive, with the odds firmly stacked in the receiving party’s favour. Moreover, where defendants have already incurred irrecoverable costs in consequence of the claimant’s lawyers’ extravagant conduct of a claim, it is no comfort to be told by a costs judge that such costs should not have had to be incurred because the claimant’s lawyers acted unreasonably.

— Cost-capping has so far proved to be a limited solution at best because, among other things; (a) it does not operate retrospectively and (b) it depends upon accurate estimates of future costs being provided by the claimant.

8. REFORM

The changes necessary to secure protection of Article 10 rights in the context of CFA-funded litigation could, we believe, be secured by subordinate legislation and/or amendments to rules of court. Primary legislation would not be required. The parties on whose behalf this submission is made intend to address the possible changes in individual submissions and would also welcome the opportunity to give oral evidence. There is common ground that reform is needed in the following areas:

9. BASE COSTS

In the absence of controls by the client, free-spending solicitors need to be controlled by the courts. This is not simply to limit the costs those solicitors themselves incur (and then expect the other party, but not their own client, to pay); it is to limit the costs they thereby force their opponents to incur.

Such control is probably best exercised by active case management. Rules should ensure that CFA-assisted cases are reviewed by the court at an early stage by judges or masters with appropriate training and experience. A range of steps to control costs should be considered, including:

— more frequent case management conferences;

— active consideration of ADR at regular intervals; and

— cost capping in appropriate cases and not limited to cases in which the claimant is impecunious or has no ATE insurance.
The introduction of fixed costs should be considered in cases where the defendant makes an offer of amends under section 2 of the Defamation Act 1996.

Although libel is not regarded as “City” work, it has become common for solicitors acting on CFAs in libel cases to charge City or premium rates, often much higher than the rates charged by their opponents. Rates in libel cases need to be brought back to reality.

Solicitors should be required to certify that the costs they seek to recover are reasonable and proportionate, with sanctions being imposed on the lawyers where they are not.

In judging reasonableness and proportionality, the courts should take account of the facts of the case, including the seriousness of the libel or misuse of private information and the remedies sought, including the amount of compensation recovered or likely to be recovered.

The provisions of CPR Part 36, which appear to impose unfair and disproportionate costs penalties on defendants while offering little or no disincentive to claimants to refuse reasonable offers of settlement, should be reviewed.

10. SUCCESS FEES

Given that under the ECHR any restriction on Article 10 rights must be no more than is necessary, it has not been established that permitting the recovery of success fees from losing defendants is necessary to achieve the object of providing access to justice. The CFA system was designed without reference to defamation cases; too often, success fees represent a windfall for claimant lawyers; and the adverse consequences for media defendants were unintended and unforeseen. As Lord Hope pointed out in Campbell v MGN, the Scottish system does not permit success fees to be recovered from defendants.

In any event:

— Consideration should be given to limiting recoverable success fees in Article 10 cases to a modest percentage uplift.
— Cost caps should include any recoverable success fee.
— Before permitting a claimant to recover a success fee from an opponent, the claimant should be required to certify that a CFA with a success fee is his only means of financing the case.
— Because of the vagaries of litigation against the media, retrospective assessment of the risk should be permitted and the court should have power to allow different percentages for different stages of the case.
— Success fees should not be recoverable in proceedings for the assessment of costs.

11. ATE INSURANCE

The market for ATE insurance is currently very small and appears to be restricted to a handful of insurers and law firms handling claimant defamation work. Transparency is required to ensure that this aspect of funding CFAs is not open to abuse.

Claimants should be required to give reasonable advance notice of their intention to purchase ATE insurance.

When ATE insurance is taken out, the claimant should be required to disclose the policy to his opponent, making clear the nature of his own liability to the insurers.

12. COSTS COUNCIL

The Civil Justice Council has recommended the establishment of a body to be known as the Costs Council. The parties to this submission agree with this recommendation, which reflects the crucial importance of costs in modern day litigation. They suggest that such a body would be well placed to look into some of the issues highlighted in this paper and formulate appropriate proposals.

Reynolds Porter Chamberlain

November 2005
Evidence submitted by the Media Law Resource Centre (MLRC)

The Media Law Resource Center (“MLRC”) welcomes the opportunity to submit comments to the Constitutional Affairs Committee in connection with its inquiry on “Compensation Culture” and Contingency Fees.

ABOUT MLRC

MLRC is a non-profit information clearinghouse organized in 1980 by leading media entities to monitor and report on developments and trends in the law in libel, privacy and related fields of media law and assess how these impact the right to publish and impart information to the public.

MLRC is headquartered in the United States, but has members worldwide. The membership is comprised of major publishers in all media; media associations representing a wide range of journalists, editors, publishers, broadcasters; and media insurers. MLRC also has a Defense Counsel Section, the members of which include leading media and libel defense law firms across the United States, as well as in Canada, England, Europe, Australia, New Zealand and Asia. More information about MLRC and a list of its members is available at www.medialaw.org.

COMMENTS

1. The current CFA scheme has raised alarm among MLRC’s UK-based members because of the enormous and disproportionate legal fees now being sought by claimant lawyers in libel and related cases. These concerns are set out in detail in the letter to the Committee from Reynolds Porter Chamberlain on behalf of numerous UK media companies.

2. This submission by MLRC is intended to emphasize that the alarm over CFA’s in libel and related cases is not limited to UK publishers. Many American and other foreign media entities regularly publish in the UK and/or make information available on the Internet which is then downloaded and read in the UK.

3. For several years now, American and other foreign publishers have been concerned with claimants “forum shopping” in England to exploit the juridical advantages of English libel law. In contrast to U.S. law, for example, English libel law places the burden of proving truth on the defendant and permits liability without fault. Added to those concerns, is the new and growing risk that media defendants will be assessed punishing legal costs for engaging in free expression.

4. Legal fees of £800 per hour or more as permitted under the CFA scheme are extraordinarily high by any standards, including American standards. (Under the US contingency fee system, by contrast, lawyer’s fees are generally a fixed percentage of the damage award, establishing some proportionality between the value of the legal claim and the work performed.)

5. The current CFA scheme creates an incentive for lawyers to engage in extravagant and unnecessary litigation tactics, as recognized by Lord Hoffman in Campbell v. MGN Ltd [2005] UKHL 61 at 31. Certainly, there is no client-based incentive to adjust legal expenditures to the weight of the actual claim or even the rational needs of the litigation. Lord Hoffman aptly described the “blackmailing” effect of the “freespending claimant’s solicitor” who forces media defendants to run up substantial defense costs and face the risk “not only as to liability but also twice the claimant’s costs.”

6. Legal costs in libel cases conducted under a CFA can dwarf the actual damages that might be recovered by a factor of 10 to 20 times or more. Moreover, under the CFA scheme a successful media defendant will in many instances have no realistic chance of recovering the bulk of its legal costs if sued by an impecunious claimant.

7. As Lord Justice Brooke of the Court of Appeal observed, “The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression . . . and to lead to the danger of self-imposed restraints on publication.” Musa King v Telegraph Group Ltd [2004] EMLR 429 at 99.

8. The chilling effect described by Lord Justice Brooke is not limited to England. Specialist libel lawyers have aggressively sought celebrity clients in the US by trumpeting the legal advantages of bringing libel claims in London. Some firms advertise their services on the Internet, inviting potential claimants—in England and abroad—to submit their complaints for free evaluation and potential representation under a CFA.

9. Ultimately this scheme is bound to chill publishers from doing business in the UK or making their information available to the public worldwide over the Internet. As one American publisher defending a CFA libel action in London stated: “If the price of fighting to prove the truth is too high, suppression of the truth will prevail.” Al-Koronky v. Time Life Entertainment Group, Ltd. [2005] EWHC 1688 (QB) at 55.

10. We understand that Parliament did not contemplate these consequences in libel and related cases—and on Article 10 rights in general—when it enacted the Access to Justice Act 1999. Legislative reform is therefore well-timed and appropriate.
11. Finally, MLRC understands and respects the goal of increasing citizens’ access to justice. We believe, however, that this goal must be better expressed in legislation that does not interfere and chill the fundamental right of freedom of expression.

David Heller  
Staff Attorney  
Media Law Resource Center  
November 2005

Evidence submitted by Karen Stewart

I forward my submission for the enquiry into UK’s Compensation Culture, and Contingency Fees.

The abuses detailed in my proposal fall into a particular category of CFA’s for defamation and I believe could easily happen. I have included a proposal to reduce the worst excesses of CFA’s and which by its very nature can control or could stipulate from the outset any budgetary control on uplift including success fees if necessary. The cap or budget can be applied to cases in order to maintain proportionality in relation to the actual value of a claim. At a basic level a mathematical ratio for instance, could be used as an indicator, whereby fees should not cost more than twice the value of damages or preferably not more than the actual amount awarded in damages. This I feel would have the immediate effect of rationalising proportionality and keeping claims from becoming excessively punitive. The needs of the claimant could be assessed rigorously and should be quantifiable.

I have been in dialogue with Constitutional Affairs regarding many aspects of defamation cases over the last two years, however I have tried to make my proposals applicable to negligence cases wherever possible. I understand both the needs of claimants and defendants in defamation and negligence cases. The reason for my submission is to balance the scales in favour of real justice.

I do not have a formal legal background. I am a mother who seeks a better form of justice, as a protective concept against iniquity, for my two young sons and whatever their futures hold, and to allow them to prosper within it.

SUMMARY

Reference Conditional Fee Arrangements and their inherent injustice. Submission made with particular regard to defamation cases, regarding proportionality, in private actions. Additional comments regarding cost to the state regarding negligence claims brought in public sector CFA claims versus legal aid.

— The inherent injustice
— Abuse of CFA’s in defamation claims including the effect of claimants solicitors disregarding protocol, claimants solicitors disregard of the negotiating element of CFA’s or of solicitors ignoring the spirit of civil procedure rules, and how it can become impossible for individuals to afford redress in the Supreme Court for costs.
— Constraints on free speech
— The moral and financial advantage of Legal aid process over CFA’s for negligence cases, and consequently why I believe Legal aid was never made available for defamation cases in the past. Why? The analysis of this question could lead us all to a fundamental rethink, Is it beneficial to society to enable defamation cases to be brought with such ease, I hope the answers to those questions may lead to a vindication of my opinion. I hope, one day, defamation cases could be dealt with in an entirely different format, when investigative and non-adversarial means of settlement such as mediation could be used initially, and may prove more productive and cost effective. The need for defence or claimants solicitors would be consigned to a secondary role in the mediation process. The adversarial processes of our legal system could come into play only after mediation has failed, but by which time its worse excesses could be curbed.

1. THE INHERENT INJUSTICE IN CERTAIN TYPES OF DEFAMATION CASES

When an individual of modest means is prosecuted for defamation under a CFA by an individual of little or no means, and when that claimant has neither before or after the event insurance [and frankly little prospect of affording after the event insurance] the following happens;

The defendant if he/she wishes to defend themselves find they are facing a high court action with of costs of around £600,000 and with the potential risk, if they lose, of paying over costs in excess of £1,000,000. This is a huge and crippling sum of money for an average family to be able to find. It means the loss of your home and your family beggared.

Nevertheless because the defendant does not believe he/she has defamed the claimant his/her initial decision will be to fight the case to prove their innocence. The reality is soon apparent, should the defendant try to defend his/her innocence to trial and win, [thereby proving their innocence], they are once again in the position of punitive damage because unfortunately since the claimant is of no means and cannot pay the...
The only option is for the defendant to make amends for something the defendant does not believe he/she has done. The adversarial nature of our legal system allows an aggressive claimants lawyer to inflate costs even after amends have been made. Why? Frankly it is in their interest to do so. The one thing they appear to avoid doing for as long as possible is negotiate, why would they? They stand to make so much more money by arguing their own clients claim is worth more than it should be. I have no doubt they advise their own client on an amount they think they can squeeze out of a defendant, which need bear little or no relation to the worth of the implied defamation. This is born out by counsel’s opinion taken by defendants in trying to reasonably settle the amends in order to mitigate the abuse. The costs of settling amends for defamation damages worth between £500 to £13,000 [costs for counsel. defence solicitors and claimants counsel] and claimants solicitors plus disbursements], could be as high as £120,000 even when specialist counsel’s opinion may have been that the claim was realistically worth £500 and at most £3,000! This is clearly not proportional.

There is so much scope for abuse in the system which under the above auspices punishes defendants disproportionately through the levy of spectacularly high legal fees and which ignores proportionality and fairness in costs. In order to stop fees escalating defendants settle claims at levels higher than they should have to.

2. Abuse of protocol and civil procedure rules and why solicitors can continue this behaviour

With legal aid, funding was awarded if the claim was decided to be meritorious. This filtered out some essentially spurious cases. No such overview exists with the present system of CFA’s. It leaves the decision of whether a CFA libel claim has merit or not to the claimant’s solicitor, this would be laughable if it were not so tragic. The claimants solicitor stands to be a major beneficiary [if not the major beneficiary], and frankly the more spurious [I have heard the use of the euphemism ‘complex] the claim, the more they stand to make. I have estimated in the past some libel lawyers can cost out at around £1000 per letter. A poor libel claim is particularly attractive for them to prosecute. They know, however more unfair the circumstances, the greater the lengths a defendant will attempt to go in order to prove their own innocence. They make their money prosecuting their own position no matter how justified that position may be.

Be under no illusion that you have free speech in the UK with law as it stands. The definition of defamation is so loose, that it is possible that an inference not intended or expressly directed at a claimant can be considered defamatory. Mitigation will cut no ice with the claimants solicitors’, they know the system, and can afford to ignore any glaring injustice to the defendant in the pursuit of their own fee earning capability. Statistically they can afford the risk, this point is supported by the fact that few defamation cases are ever brought to trial. Some because defendants may be guilty, mostly because individuals cannot generally afford the costs of defending themselves in a high court action, and some, I have no doubt, folding under the injustices brought about by the abuse of process and/or claimants solicitors simply ignoring the spirit of civil procedure rules. Few will be able to afford to go to the Supreme Court to have the case assessed anyway.

Therefore and somewhat perversely, the more spurious the case, the more money can be made from it, and the greater the uplift and potential for a high success fees. Not all defamation cases are spurious and some are due to great injustice. The smart system has to be able to differentiate between the two, and that decision making process, if CFA’s are to be used, can I believe, only be made by a third impartial party from the outset.

It is also easy for claimants solicitors to bludgeon defendants into paying their outrageous costs, tactics can vary but include, threatening to lengthen days for a hearing in the supreme court, employing a barrister to represent them at the costs hearing, and then saying even if the defendant wins, they will appeal the decision. An average income family cannot hope to fund further costs of an action for costs to be assessed when faced with the financial might of a major London law firm. The risk to cost of trying to reduce an overcharge could incur amounts in excess of £100,000. This nicely deters an average family from seeking justice from the court system.

3. The constraints on free speech

The constraints on free speech with particular note to the “repetition rule” and how it can affect criminal cases. Defamation law has the potential to be used as a weapon by state authorities. Whereby the seeking of simple justice for criminal acts perpetrated on a defendant can be made essentially hazardous, particularly if this situation were to arise out of an incident where the police authority may have been negligent in their initial investigation of a criminal act. The victim can find it difficult to progress a second investigation into the cause of that act if the victim were to be under the constraints of an offer of amends.
4. THE ADVANTAGES OF MEDIATION OR TRIBUNAL

The advantages of Mediation or Tribunal over the process of defamation cases under conditional fee agreements. There are some important distinctions, where I believe others are better placed to inform the committee than I. At the risk of being shot down in flames from my more learned friends I include a simple proposal on how mediation could be structured to resolve some of the problems in libel cases. When a claimant has approached a solicitor and discussed their grievance with their solicitor and the other party has been contacted the claimant must make an immediate application for mediation. The following could then happen:

(a) The mediation should be heard in front of a judge and as such can benefit from his past legal experience.
(b) The issues and context in which they happened can be initially aired by both parties in front of the judge and in front of each other and their respective solicitors.
(c) The parties can if they wish retire to separate rooms for discussion with their advisors.
(d) The mediation process can then ensue.
(e) The claimant and defendant should mediate solely upon the merits of their individual cases with damages being discussed and if appropriate apportioned with regard to actual consequential loss being proven. [Distress to be apportioned by a sliding scale of structured guidelines which the judge in his estimation can vary accordingly].
(f) Solicitor’s Fees, and other disbursements, to be mediated separately after the claimants award and/ or if reconciliation has been achieved.
(g) If the mediation has proved to be unsuccessful the judge is to be given the power to cap trial costs or solicitors fees (whichever is appropriate] with the advice of impartial defamation specialist counsel. All parties are to be informed prior to the case proceeding, of what the limit on costs is to be.

Solicitor’s fees should be much reduced, because the mediation process could be brought in at the start of a case without recourse to further legal process. The judge in this instance can act as a co-mediator, listening to all the arguments. If no resolution to the case can be achieved through the mediation process. The judge is in a good position to budget the costs for the case at this stage. This can based on the worth of the proven consequential losses. The judge can cap the case right at the start to deny aggressive solicitors from inflating costs disproportionately. The judge could also have the assistance of an independent specialist barrister in assessing the true value of a claim if he/she so wished.

The additional comments concern negligence claims made against either state authorities or health authorities and address the point at which costs are made on the public purse. As already mentioned, claims when progressed under the process of legal aid had to satisfy a board as to its merits. The claim on the public purse was initiated only at the point of when a case was selected as worthwhile. The CFA regime has now meant the cost of claims is now paid by the public at some point after a prosecution has started [and rarely brought to trial] and regardless of merit is subject to uplift in the form of success fees, and in “the heating up” of cases through adversarial and aggressive tactics in order to generate more fees. Legal aid solicitors were under a certain moral obligation not to run up costs [although certainly costs were involved], but there was no uplift in the form of success fees, as far as I know. The costs are born by councils and health authorities and are evidently now an increasing burden on essential public services. It is rarely mentioned in the context of personal injury claims that society pays already into a scheme to deal with injury howsoever inflicted, it’s called the national health service. Personal responsibility is a double-edged sword and applies to all of us. The person who fell over a raised kerbstone and say breaks his ankle then sues his local council, should he have looked more carefully where he was going and simply picked his feet up?

The compensation culture is alive and thriving in the UK [see statistical data regarding compensation hot spots] and will remain so until someone has the guts to tackle it.

I thank the members of the select committee for reading my submission and for their valuable time in assessing it. I hope it has been helpful.

Karen Stewart

November 2005

Evidence submitted by the Advertising Standards Authority (ASA)

I am writing to you in your capacity as Chairman of the Constitutional Affairs Select Committee. I was interested to see that the Committee has recently launched an inquiry into the “Compensation Culture” including the role of advertising and regulation.

As you may know, the Advertising Standards Authority (ASA) is responsible for ensuring that all advertising, wherever it appears, is legal, decent, honest and truthful. The ASA’s legal backstop for misleading non-broadcast advertising is the Office of Fair Trading, whilst Ofcom is our co-regulator for TV and radio advertising.
The Department for Constitutional Affairs (DCA) raised their concerns about the role of advertising in the compensation culture with the ASA earlier this year. The ads that appeared to cause the DCA the most concern were those for personal injury compensation services. These ads have formed the focus of a market research project that was commissioned by the DCA (to which the ASA contributed) with the aim of determining whether personal injury compensation advertising has any negative effects in terms of consumer understanding or consumer detriment. We expect to receive the results of this work in early 2006. In the meantime, it would be inappropriate for the ASA to comment formally on this work, which is why I am instead writing to you informally with an overview of our work.

The ASA became involved in this matter when the DCA approached us to discover whether the ASA has experienced unusually high numbers of complaints or difficulties with personal injury ads. The DCA was of the opinion that personal injury compensation ads encouraged members of the public to pursue spurious claims and falsely represented the claims process. The Department was interested to learn about the ASA’s experiences. There was nothing to suggest any particular problems in the data that we had available to us (both through our own files and those of the predecessor broadcast regulators). When personal injury ads first began to appear in 1995 and 1996 (following the abolition of legal aid for personal injury) the ASA did investigate a number of complaints about misleading advertising. However, by the late ’90s, public complaints had fallen to a relatively low level, which is where they have remained.

During these discussions with the DCA, the ASA has tried to discover exactly which aspects of the advertising troubled the Department. We uncovered four main areas of concern:

1. **Volume**
   The DCA was concerned about the sheer number of ads being broadcast and printed. Practically speaking, regulating the number of ads being published would be highly problematic—and in fact quite impossible in non-broadcast advertising. Although such an approach might be more of a practical proposition in broadcast advertising, it has never before been attempted and would have to be a matter for Ofcom rather than the ASA. Any attempts to achieve such a restriction could be deemed to be anti-competitive.

2. **Distanstefulness**
   The DCA’s second concern was that they felt that many of these ads were in poor taste or “tacky”. As you can no doubt appreciate, the ASA can take action against harmful or misleading advertising, but the mere fact that an ad has been produced on a low budget and is perceived to be vulgar is not an issue on which we can intervene. Serious or widespread “offence” would have to be proved, and that is hardly the issue in this genre.

3. **Inappropriate Placement of Ads**
   The DCA had concerns that ads were appearing on public sector property, for example, in hospitals, surgeries, schools and police stations. The ASA recommended that the Government simply withdrew the advertising space from these advertisers. In such cases, the final decision whether or not to carry an ad lies with the site “owner”. We understand that the DCA has now worked with other Government Departments to recommend that public sector property does not accept this type of advertising.

4. **Misleadingness**
   There is already legislation in place to cover misleading advertising and this legislation is soon to be updated by the transposition of the Unfair Commercial Practices Directive into UK law. The ASA is recognised as the “established means” for implementing the Control of Misleading Advertisements Regulations, and we hope that this arrangement will continue under the new regime. The question of whether consumers are misled by this sort of advertising will be explored in the market research, which might provide some harder evidence for assessing whether consumers are being misled.

The DCA’s general uncertainty about the content problems with this type of advertising prompted the research project that I have already mentioned. The findings of the project will be presented to the Code owning bodies (the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice) so that they can judge whether changes to the advertising Codes would be necessary or appropriate.

It is worth noting that, while we await the outcome of the market research with much interest, in the past we have found that where there have generally been poor business practices within a particular industry, that this can sometimes be reflected in that industry’s advertising. It is too often tempting to view such problems as an advertising problem rather than addressing the root cause of the problem. In our experience, tackling the poor business practice itself will often have the desired effect, as well as improving the advertising. The DCA is currently pursuing a wide-ranging work programme aimed at improving the practices of claims management companies and the legal profession in general; it would not be surprising if this work also had the effect of changing advertising, without the need to alter the Codes.
I hope you find the above information useful. I would be happy to provide more information about the ASA and our work in this area or to meet with you to discuss the matter in more depth if you think that would be helpful to your work.

Christopher Graham  
Director General  
Advertising Standards Authority (ASA)  
December 2005

Evidence submitted by Zurich Financial Services

Zurich Financial Services is an insurance based financial services provider with a global network that focuses its activities on its key markets in North America and Europe. We also have extensive operations in Latin America and Asia/Pacific. Founded in 1872, Zurich is headquartered in Zurich, Switzerland. Zurich has offices in more than 50 countries and employs about 57,000 people.

The core of our business is General and Life Insurance. We provide insurance and risk management solutions and services for individuals, Local Authorities, small and mid sized businesses, large corporations and major multi-national companies. We distribute third-party financial services products.

EXECUTIVE SUMMARY

1. We support the Compensation Bill and the Government’s commitment to increasing public awareness of sensible risk management. We look forward to this intensifying widespread discussions with Government and industry partners on solutions for influencing sensible attitudes to risk, advocating the important role of early rehabilitation in the claims process and ensuring fair compensation is paid where rightfully due without delay. We also support the principle that bad claims should not be paid and that compensators should strive to identify and defeat such cases. There should also be a similar onus on claimant representatives not to present such claims.

2. As a large employer and the provider of insurance and risk management services we support the move towards a compensation system that will allow the court to reflect on an appropriate level of social responsibility but we would seek to work further with the government in clarifying the proposed definition of negligence as to what is a “desirable activity”. We accept the difficult balance between access to justice and personal responsibility and support the steps that the Bill takes to try and reinforce this.

3. We welcome the regulation of claims management companies which will ensure transparency and fair advice for the claimant on the validity of their claim and help us channel resources to genuine injured claimants where early help and support is needed most. We are unsure however, why the Bill seems to exclude Trade Unions from such regulation when acting in their capacity as claims farmers.

4. We therefore appreciate the chance to provide feedback to the UK “Compensation Culture” Inquiry. We feel that:

5. A “compensation culture” does not exist in the UK in so far as volumes of new claims have not seen any real increase in recent years. Our concern however, and this can be demonstrated through objective management information, is that the cost of claims has risen dramatically over the last three to four years. This increase in cost has not benefited the genuine claimants but has however, manifested itself in the spiralling costs presented by claimant solicitors. In low value employer’s liability claims we are now typically expected to pay at least 40p in the £ on claimant costs and in some cases, costs match damages pound for pound. This inflation drives levels of premium and adds nothing to the delivery of damages in just cases.

6. The move to “no-win no-fee” contingency fee agreements has led to an increase in claims costs as described above.

7. The perception of a “compensation culture” can and has led to unnecessary risk averseness in public bodies through fear of litigation

8. Firms which refer people, manage or advertise conditional fee arrangements should be subject to regulations

9. From an Insurance and Risk Services viewpoint, changes should be made to the current laws relating to negligence and further enhancement to the proposed definition of negligence to clarify what constitutes a “desirable activity”.

10. Whether a compensation culture exists or not in reality is largely an irrelevance for the purposes of this debate. What does exist is a perception of a compensation culture and that is what all stakeholders must work together to manage. This perception fuels risk adverse behaviour and stunts development at all levels.
FEEDBACK

Does the Compensation Culture Exist?

11. It is our opinion that although many adults are well educated and responsible in sensible risk management, the perception of a “compensation culture” does exist in the UK.

12. Society and the economy require a level of risk taking to function (including daily activities, travel and investments). Individuals need to accept responsibility if their own actions contributed to the injury or loss and not immediately lay blame with another (such as an employer or council). We are particularly concerned as to how this risk adverse behaviour now impacts on the development of children and that their opportunity to participate in risky (but well risk managed) activities is so limited.

13. High profile national media coverage and advertising in public encouraging “have-a-go” claims is evident for example in doctor’s surgeries, places of travel and in the workplace. Certain channels on television sell commercial time to advertising from claims management companies and even public hospitals have posters in waiting areas advertising “no-win no-fee” claims management companies.

14. The increasing national media coverage of exaggerated risk management examples and court cases contribute to feed the public perception, increase “have-a-go” claimants and prevent some social activity from taking place through fear of being sued should an accident occur.

15. Reducing the scale of advertising and working with advertising/newspaper industry partners could help re-educate the public and promote sensible risk management and responsibility to allow social activities such as school trips to continue without unfound fears of litigation.

16. Higher profile education on the importance of early support such as rehabilitation in the claims process to restore/improve the claimant’s quality of life after an accident instead of monetary compensation would be beneficial. Redress should not automatically be conceived as monetary compensation.

17. The “compensation culture” also goes beyond the obvious areas that the Better Regulation Task Force looked at, such as personal injury. Other aspects are affected, for example, in Financial Services the Financial Services and Markets Act set up systems of complaints that were as user friendly as possible and this shifted the burden of proof towards the company that was being complained against. That has meant that some organisations have exploited this situation encouraging consumers to make spurious complaints when they know that the system will force financial service companies to pay out.

What has been the effect of the move to “no-win no-fee” contingency fee arrangements?

18. Since 2000, the move to Conditional Fee Arrangements has added complexity and unpredictability to the compensation system and an increase in claims cost for compensation where people “have-a-go” when there is no cost to themselves if the claim is unsuccessful. There are heavy obligations on defendants (especially in the public sector) to investigate claims if only to dismiss them. There is no cost to the claimant but a significant cost to the investigating Insurer. We would like to see more emphasis on rights and responsibilities in terms of individuals being at financial risk if they choose to present a bad claim.

19. The introduction of the Civil Justice Council matrix for predictable claimant costs (or “fixed fees”) in pre-litigated motor cases up to £10,000 in agreed damages has brought more predictability to the process and real benefits settling many motor cases under £10,000 pre-issue of proceedings. We consider that significant benefit could result in predictable costs being extended both in motor claims but also in the areas of employers and public liability. This predictability with regard costs would certainly influence the claims process and result in a more claimant centric and efficient mechanism to deliver damages.

20. We are supportive of the Department for Constitutional Affairs consultation and commitment to a significant simplification of the Conditional Fee Arrangement process.

21. Increasing pressures on the compensation system such as the rise in “have-a-go” claims could ultimately be at the expense of the capacity of the insurance market and could affect the ability of individuals and organisations to insure themselves as premiums inevitably rise. Whilst many of these claims are subsequently repudiated, the cost to compensators to investigate these cases is still significant. Is the notion of a “compensation culture” leading to unnecessary risk averse ness in public bodies?

22. It is evident that the notion of a “compensation culture” is leading to unnecessary risk averse ness in public bodies and the diversion of public resources to this issue.

23. The Commons Education and Skills Select Committee “Education outside the classroom” report in February 2005 commented on the decline in school trips as a result of litigation fears should something go wrong. Zurich responded to this inquiry by saying that the fear of litigation was largely a myth as we had not seen a significant increase in claims and we do not single out school trips from other public liability insurance in schools so there had been no adjustment to premiums.

24. Media descriptions of extreme risk management cases such as removing hanging flower baskets for fear of litigation or the case wearing safety goggles while playing conkers are well reported.
25. Clarification in the Compensation Bill and legislation on the law of negligence, especially clarification of what is a “desirable activity” would contribute to removing unnecessary risk avoidance and promote sensible risk management.

Should firms that refer people, manage or advertise conditional fee agreements be subject to regulations?

26. With the emergence of a growing industry of claims farmers offering their services to pursue compensation for personal injuries, mis-sold endowments, unfair employment treatment and against public bodies, we agree that these such firms should be regulated.

27. We welcomed the Lord Falconer’s plans in November 2004 to pursue statutory regulation of claims management companies if they were unable to develop a self-regulatory approach and support the regulation content in the Compensation Bill introduced to the House of Lords on 3rd November 2005.

28. The regulation of claims management companies will ensure transparency and fair advice for the claimant on the validity of their claim and which will help us to channel resources from assessing claims that do not proceed to genuine injured claimants where early help and support is needed most.

29. The regulation of claims management companies should reduce the volume of bogus or inflated claims and foster a more responsible approach to risk management

30. Regulation would also assist Conditional Fee Arrangements to proceed in a transparent and trustworthy environment

31. We support the view that fair compensation should be paid where rightfully due without delay. The increased volume of less valid “have-a-go” claims delay the system and cases where legitimate claimants require assistance.

32. A Regulator and agreed Codes of Practice could ensure genuine claimants have crucial support at an early stage in the claims process (such as access to rehabilitation) which could provide the help they need to return to health and work. Delays to this assistance can lead to long term health, benefit and compensation implications.

33. The appointment of the Regulator should be a long-term solution to protect claimants, bring enhanced and improved governance and be part of the solution in defeating fraud.

Should any changes be made to the current laws relating to negligence?

34. It is in our opinion that the laws of negligence should be further clarified going forward.

35. Part 1 of the Compensation Bill should be clarified and made robust before enactment. The definition of negligence should contain a definition of a ‘desirable activity’ to prevent future reliance on satellite litigation. We would seek to assist in formulating this with the Government and other industry partners

We hope this feedback from both an employer and service provider perspectives assists the consultation and look forward to being informed in due course of any developments or further consultation. Zurich is the largest liability insurer in the UK and the dominant insurer in the Local Authority markets. We therefore seek to work closely with and support those who drive change that will bring about a more streamlined and cost efficient claims process that supports early rehabilitation and pro-active risk management.

Steven Thomas
UK General Insurance Technical Claims Manager
Zurich Financial Services
November 2005

Evidence submitted by AXA Insurance

EXECUTIVE SUMMARY

1. AXA Insurance believes that elements of a compensation culture (or perhaps more appropriately a “have a go” culture) do exist but that argument over whether such a culture actually exists diverts attention from major flaws inherent in the current personal injury process.

1.1 Change is needed to produce a process fit for the 21st century. This process should be easy to access and understand and deliver prompt consistent and fair compensation to those who suffer injury through the fault of others.

1.2 Legal involvement in this new process should be restricted to cases where those representing tortfeasors (usually insurers) have failed to act in accordance with the new process or where there are genuine disputes.

1.3 This improved process should help to deter fraud. Fraudulent claimants should be subject to appropriate punishment.
2. Contingency fee arrangements have significantly increased the amount paid out by insurers in legal costs (and therefore the public in premiums) and have led to the development of a number of questionable practices.

2.1 Recent costs litigation has centred almost exclusively on problems created by the new funding regime.

3. We believe that public bodies have become increasingly wary of engaging in activities that have an element of risk about them. A balance needs to be struck between what society requires the public bodies to do in the exercise of their duties and the attendant risks.

4. Formal independent regulation of claims management companies is essential: history has shown that they cannot be trusted to regulate themselves.

5. The law of negligence has historically been deliberately undefined to allow courts to interpret the law against the background of current social and political realities. We understand why it is felt there is a need to set out a definition but are concerned that this may have the effect of restricting the courts’ power of interpretation and will almost certainly give rise to litigation over the meaning of Parliament’s words.

1. AXA Insurance’s detailed response

AXA Insurance is pleased to have the opportunity to respond to the request from the House of Commons’ Constitutional Affairs Committee for submissions on the terms of reference for their inquiry into the so-called “compensation culture”.

1.1 We are one of the five largest general insurance companies in the United Kingdom with annual written premiums in excess of £2 billion. We are part of the global AXA Group, one of the world’s largest insurers.

1.2 Our portfolio of business in the UK comes predominantly from small to medium sized businesses placed with us through insurance brokers. Many of these businesses insure against injury to staff and the general public with us: many of them do not have any Union representation of their small number of staff. This potentially gives us a unique insight into the so-called compensation culture at this level.

1.3 We also have several hundred thousand motor policies on our books that generate accidents for personal injury, principally whiplash or other soft tissue injury claims.

1.4 Five specific terms of reference are mentioned. We’ll deal with them in the order in which they appear.

2. Does the compensation culture exist?

2.1 There is no agreed definition of “compensation culture” so it is easy to make arguments over whether “it” exists or not. Most newspapers carry stories regularly about incidents that they say are examples of the compensation culture.

2.2 Whether such a culture exists or not is not the real issue. Arguments over its existence often appear to be simply a smoke screen designed to deflect thoughts and actions away from addressing other and greater problems that exist within the current process for dealing with personal injury claims.

2.3 We have seen a small reduction in the number of personal injury claims but the average cost of these claims has increased significantly, primarily as a result of increased legal and associated costs.

2.4 Statistics suggest that only a limited number of people who are actually injured make a claim. This will in many cases be a result of the current law where fault has to be demonstrated against the person who caused the injury, but there is little doubt that others are put off from making a claim because of worry or even fear of the process.

2.5 On the other hand, we have a number of examples of staged accidents and other types of fraudulent claim. Based on our own internal data, the number of this sort of incident is slowly increasing.

2.5.1 There is clearly a significant group of people willing to “have a go” to see if they can extract money from insurers for injuries that either do not exist or were self inflicted.

2.5.2 This sort of behaviour must be stamped down on and fraudulent claimants quickly identified and penalised.

2.6 The main beneficiaries of the so-called compensation culture are lawyers, claims claims management companies and other so-called service providers. Levels of damages have increased but nowhere near to the same extent as costs associated with injury claims. All those who are paid money in connection with injury claims have a vested interest in perpetuating the “myth” of the compensation culture as it takes focus away from the very high level of fees and income that they are currently permitted to make out of injury claims handling.

2.7 All concerned with the personal injury claims process are guilty to varying degrees of ignoring the needs of the person who has been injured.
2.8 Insurers have contributed to the problems within the current process through taking too much time over all aspects of claims handling, including making decisions on liability, arranging rehabilitation where this is appropriate and paying over damages. We too have been losing sight of the injured person in the ongoing battle over fees.

2.9 To improve the situation, we need to create a new process that is easy to understand and get at and that guarantees resolution within a specific time whilst preserving an injured person’s access to justice.

2.9.1 This process should be based around the original concept of the DWP EL pilot where notification of losses was to be made by the employer to their insurer. That insurer would immediately investigate and let the injured party know their decision on liability within a short fixed time scale. If liability was accepted, then the amount of compensation would be resolved through the most appropriate means (rehabilitation, medical report etc) and a calculation of loss of earnings and any other special damages made. The insurer would provide a “pack” to the claimant setting out their views on liability and quantum. Only where legal advice was needed (and therefore only where there was “added value”) would a lawyer become involved. The whole process should take less than nine months as opposed to the two or three years that is presently the norm. The injured party would have their compensation paid quicker and the cost to society as a whole would reduce. The only losers would be the lawyers: they would still have a major role to play in those cases where disputes still arose.

2.9.2 This approach has been adopted with some minor variations in the NHS Redress Bill for those injured by the negligence of NHS staff.

2.9.3 Restricting this approach to NHS cases produces different processes for what is essentially the same problem. We would like the opportunity of developing a similar scheme in the private sector.

2.9.4 We are keen to work with those within the NHS who will be tasked with introducing this new approach to redress to help shape it and make sure it truly benefits the injured party with a view to bringing in the same approach for all those who have suffered injury through another’s negligence.

3. What has been the effect of the move to “No Win No Fee” contingency fee agreements?

3.1 The introduction of contingency fee agreements (“CFAs”) created the environment for the spawning of the claims farming companies referred to earlier with all the problems associated with an unregulated uncontrolled group.

3.1.1 The practice has grown up of claims management companies “selling” potential claimants to firms of lawyers who are prepared to pay a sum to “buy” the right to handle these claims. This has resulted in lawyers with little experience in personal injury claims dealing with them because they are prepared to pay the acquisition cost. This leads to additional difficulties in dealing with valid claims and potentially a poor deal for claimants.

3.1.2 Networks have been created where money passes from one member of the network to another solely in order to increase revenue. This can be seen with investigation, the supply of medical reports and rehabilitation in injury claims and the provision of car hire in non-injury claims.

3.2 There has been a big increase in the average legal costs paid by Insurers and therefore the public as policyholders, on each claim. This is particularly noticeable in the lower value claims where legal costs are usually more than damages until the level of damages reaches about £4,000.

3.3 We regularly see costs claimed at a level many times more than the damages.

3.4 The concept of proportionality has all but disappeared, with costs on some of the higher value claims being sought at 50% or 60% of damages agreed, even where liability has been promptly admitted and there are no other complicating factors.

3.5 As the injured person under the new funding regime has no financial interest at all in his solicitors costs, defendant insurers have been forced to police costs, raising issues (some of which we recognise have been of questionable merit) that have led to the “trench warfare” of satellite costs litigation. Even if insurers are successful in the point being argued, the only real winners are the lawyers who receive extra costs for this satellite litigation.

3.5.1 These constant arguments on fees take claims handlers’ attention away from their real job of making sure that a genuine claim for compensation is dealt with promptly and efficiently.

3.6 Actual compensation damages are generally paid very rapidly: costs issues can drag on for many months or even years.

3.7 Some arrangements for CFAs effectively tie lawyers into specific arrangements which reduce customer choice and do not necessarily represent good (or any) value.

3.7.1 Most CFAs are supported by a success fee. These success fees are supposed to ensure that, overall, a lawyer’s unrecovered costs of running genuine but ultimately unsuccessful claims are covered by the costs recovered on genuine successful claims. These success fees are based on a risk assessment by the lawyer concerned of the chances of winning any given claim. Our experience of risk assessments on success fees is that they are always too high resulting in hugely increased legal costs for no valid reason.
4. Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

4.1 AXA is not a public body and so is not in the best position to deal with this question.

4.2 However, we have seen reports in the press of cancellation of school trips, the removal of hanging baskets from electric lamp standards, the unwillingness to stage events which historically might have been staged and other examples of a similar nature that lead to the inevitable conclusion that the public bodies concerned are seriously worried about the prospects of being sued in the event of any incident occurring during any one of the events.

4.3 The recent tragic death of a young schoolboy in the caves of North Yorkshire while on a school trip will inevitably bring this debate to the fore again.

4.4 Some risk averseness is essential, but there has to be a balance. Public bodies need a clearer dividing line so that they know that if they carry out their duties properly and competently after balancing the risks involved, they will not face court proceedings for injuries that might occur. This is subject to the proviso that this dividing line does not prejudice any individual’s right of access to justice.

4.4.1 It must not be forgotten that individuals have a responsibility for their own safety and also have obligations towards other individuals.

5. Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

5.1 We believe that formal regulation of claims farming companies is absolutely essential. Some of the less reputable of those who entered this market had absolutely no interest in the well being of those they were purporting to help: they merely saw an opportunity for making a “quick buck” out of those who had suffered personal injury. The fallout from the activities of this less reputable group has been widespread and brought the process for funding and handling personal injury claims into greater discredit.

5.1.1 Self-regulation of these companies has failed precisely because of the nature of a number of those who chose to enter into this new market.

5.2 The growth of advertising in this area is one of the key reasons for the belief (real or otherwise) that a compensation culture exists: some of the adverts leave nothing to the imagination.

5.2.1 Many of the adverts are targeted at individuals at a particularly vulnerable time. This is especially true of the advertising that can be found in Accident and Emergency Departments of hospitals.

5.3 Sales of ATE insurance policies and other “services” to back up CFAs are often carried out by those with no understanding of what they are selling, with inadequate or no training on what the agreement means or, perhaps more importantly, on what the obligations of the purchaser might be and who are paid on a commission basis per sale. Their “explanations” about the product they are selling are often not understood by the person to whom the product is being sold. The public needs protection from this sort of selling.

5.4 It is inherently distasteful for a lawyer to “buy” a client from any source, particularly where that source may have “acquired” the client in a manner that leaves that client with an inadequate understanding of his rights and obligations and also that may give him an unreasonable belief that he will receive money.

5.4.1 Anecdotally, we have been told that some claimant lawyers reject up to six out of every 10 cases that some claims management companies try to sell to them as they are concerned about the merits of the claims and the way the clients were signed up. Although these solicitors reject these claims, they may well be bought by less scrupulous lawyers anxious to maintain their fee income.

5.5 There is an increasing market in buying and selling injured claimants and services to them and their lawyers fuelled by referral fees and retainers. This market covers the supply of medical reports, investigation fees, credit rehabilitation and credit farming of legal bills. Transparency of fees and the arrangements surrounding them is critical.

6. Should any changes be made to the current laws relating to negligence?

6.1 The current law is based effectively on many years of evolution, through interpretation of the common law or statute by the courts. In general, those most affected by the law of negligence understand the boundaries that presently exist and can adapt easily to any changes that may be brought about by judicial interpretation of the law.

6.2 The courts are used to defining negligence. They do make allowances for changes in the prevailing social and political climate when making decisions on whether there has been negligence at any given time. They have to do this to accommodate changes (particularly advances in science and manufacturing) that were unforeseen when many of the older cases were decided.

6.3 This approach is most noticeable in the Court of Appeal where political and social reality is more clearly recognised, perhaps through “steers” are provided to the lords of appeal.
6.4 We understand why the Government wants to create a statutory definition of negligence and we sympathise with public bodies who feel a need for greater clarification. However, we are concerned that any new definition will lead only to protracted legal argument (and therefore increased payments to lawyers) on the exact meaning of the definition created. This could lead to a period of uncertainty until the judges have interpreted the new definition and produced guidance on what it means.

6.5 The notes accompanying the draft Compensation Bill suggest that section 1 of the bill merely restates part of the law of negligence as it currently stands. This may be the intention, but both claimant and defendant lawyers we have spoken to believe that the draft Bill does not achieve this intention, thereby opening up the prospect of litigation over its precise meaning.

AXA Insurance
November 2005

Evidence submitted by the Actuarial Profession

EXECUTIVE SUMMARY

1. Personal injury claims costs have inflated by approximately 10% per year for well over a decade. This is confirmed by the data collated for the IUA/ABI study (see below) and analysed by an independent firm of consulting actuaries. The factual evidence of the IUA/ABI study is corroborated by a survey of practitioners in the CCC paper (see below). The consensus view of GI actuarial practitioners in the CCC paper is that personal injury claims inflation has been 10%+ for the last decade and is set to continue at similar levels for the foreseeable future. During this time legal costs as a percentage of claim payments have remained remarkably stable, so by corollary legal costs have inflated by 10% per year over the same period. The consensus view of actuarial practitioners as part of the survey in the CCC paper is that the main drivers of claims escalation have been a series of legal changes affecting claims costs and the increasing litigiousness of society.

Does the compensation culture exist?

2. The fact that the cost of personal injury claims, and associated legal costs, have escalated by double-digit inflation for more than a decade is beyond doubt and we don’t believe any informed, unbiased, commentator would conclude otherwise. Whether this constitutes evidence of “compensation culture” is a moot point. What it does show is a steadily increasing cost of compensation claims. The CCC paper, whilst (clearly) not representing the views of every actuary, concluded that “We believe that a Compensation Culture is developing in the UK”. It also noted that “ . . . a more litigious society would be a bad thing because the costs to society, both financial and in terms of restricting activities, outweigh the benefits of providing better compensation . . .”

What has been the effect of moving to “no-win, no fee” contingency fee arrangements?

3. We believe the consensus amongst actuarial practitioners is that “no win, no fee” agreements have lead to an increase in the frequency of compensation claims, particularly in the £5–15,000 size band. The 1999 IUA/ABI Study noted that “We can see that claim frequency levels have increased significantly more within the claim size band £5,000 to £15,000. This tends to support the assertion that the “litigious effect” or “compensation culture” appears to be centred on the smaller claims and for minor injuries that might otherwise be ignored by the claimant.” (The frequency of £5–15,000 claims increased by approximately 150% over the period 1991–99 according to the actuarial analysis in the IUA/ABI study). The introduction of “no win, no fee” arrangements was cited in the survey of actuarial practitioners in the CCC paper as one of the main reasons behind the double-digit inflation of injury costs in the last decade.

Should firms which refer people, manage or advertise conditional fee arrangements be subject to regulation?

4. One of the other conclusions of the CCC paper was that “ . . . the mechanism for Conditional Fee Arrangements, Before and After-the-Event insurance is being determined in an adversarial fashion by a series of test cases. This creates delays and uncertainty for compensators and accident victims and serves the interests of no one”. We believe it is widely accepted that, in the past, some “claims management” companies have engaged in dubious practices to launch “claims” when there was no reasonable basis to expect compensation. These observations suggest that the greater regulation of claims management companies, and clearer guidelines about the operation of “no-win, no-fee” arrangements, would be in the public’s best interest.
BACKGROUND ON THE ABI/IUA STUDY AND THE CCC WORKING PARTY PAPER

5. Actuaries have been involved in a number of pieces of work that quantify costs and trends in compensation payments. In October 2002 an actuarial working party published a paper "The Cost of Compensation Culture" ("the CCC paper"), which was published as the backdrop to a debate on compensation culture at the profession’s annual General Insurance conference ("the GIRO conference"). For a number of years, the Association of British Insurers and International Underwriting Association have commissioned a multi-disciplinary bodily injury awards study ("the IUA/ABI study"); this study included an actuarial working party looking at trends in personal injury claims.

6. The third IUA/ABI study, published in March 2003, analysed over a million motor personal injury claims, collated from all major UK insurers. It is the biggest exercise of its kind ever undertaken, it covered more than 90% of the UK insurance market and looked at all claims going back to 1989. The statistical analysis was performed by a firm of actuarial consultants, in conjunction with medical and legal experts who looked at other aspects of compensation. The second study concluded that bodily injury claims had been rising at an average of 11.7% per year from 1989–99; the third study concluded that the cost of bodily injury claims has risen by nearly 10% per year over the period 1991–2001. Broadly the escalating cost of claims is made up of 7% per year for increasing severity (average cost) and 3% per year for increasing frequency. The main reason behind the increase in frequency has been increasing numbers of claims in the £5–15,000 size band. The study is widely recognised by actuarial practitioners and other insurance professionals as the definitive source of information on trends in industry-wide motor personal injury claims.

7. The CCC working party reviewed all types of compensation in the UK. It reviewed a variety of information sources to make an overall estimate of the cost of compensation claims in the UK, as well as reviewing recent social/legal developments that affect the compensation environment. The working party conducted a survey of general insurance actuarial practitioners to establish their views of past and future trends in compensation amounts. It also conducted a (limited) survey of members of the public to get a sense of public views of the compensation environment. The headline conclusion was that compensation claims (at the time) totalled £10 billion per year and that this cost has escalated at more than 10% per year in the recent past and is set to continue to rise at a comparable level for the foreseeable future.

8. The CCC survey of practitioners looked at both Motor and Commercial Liability (broadly accidents at work, or in the street) injury claims. The views of inflation for both categories were very similar. Ninety per cent of practitioners believed the inflation rate of bodily injury claims had been 10% or more over the last five years and 65% believed that inflation would continue at 10% or more going forwards; the average view of future inflation was 11%. Practitioners were asked what the main causes had been of the high levels of escalation in injury costs over the last decade. The introduction of no-win, no-fee arrangements and an increasingly litigious society were two of the top four reasons practitioners quoted. An increasingly litigious society and other judicial changes were the top two reasons given for the estimated 10%+ future inflation.

9. The separate CCC public survey was a smaller exercise and was by no means representative of the public at large, but overwhelmingly (more than 90%) the respondents thought there had been a shift in the public’s attitude to claiming compensation in the last decade and more than 80% of respondents thought that this was not a good thing.

DETAILS OF THE ACTUARIAL PROFESSION AND MORE DETAILED REFERENCE TO THE IUA/ABI STUDY AND CCC PAPER

10. Actuaries provide commercial, financial and prudential management of a business's assets and liabilities, especially where long-term management and planning is critical to the success of any business venture. They also provide advice on social and public interest issues. Members of the profession have a statutory role in the supervision of pension funds and life insurance companies. They also have a statutory role to provide actuarial opinions for managing agents at Lloyd’s.

11. In particular in the field of general insurance, actuaries routinely advise insurance companies (or other companies with claims-related exposures), either employed directly or as a consultant or auditor, on appropriate levels of reserves. This involves a detailed assessment of historical claims costs and trends in the frequency and average cost of claims. Actuaries are also involved in projecting claims costs, and hence profitability trends, forwards and translating this into insurance premiums for personal and commercial policyholders.

12. The profession is governed jointly by the Faculty of Actuaries in Edinburgh and the Institute of Actuaries in London. A rigorous examination system is supported by a programme of continuous professional development and a professional code of conduct supports high standards reflecting the significant role of the profession in society.
13. The two papers referred to above are:


“The IUA/ABI Third UK Bodily Injury Awards Study” (“the IUA/ABI Study”) was published in March 2003. The various working groups included representatives from a range of medical, legal, insurance and actuarial bodies. The report was introduced and commended by Lord Phillips, then Master of the Rolls (“These reports have made a valuable contribution to our understanding of the consequences of bodily injury. They have, in particular, stimulated debate about how the insurance industry and the legal community should respond when people have the misfortune to be involved in accidents”). ISBN reference 1-872207-29-4.

The Actuarial Profession

November 2005

Evidence submitted by Aon Ltd

1. INTRODUCTION

1.1 Aon Corporation welcomes the opportunity to make this submission to the Constitutional Affairs Select Committee’s enquiry into the UK’s “compensation culture”. We believe that the Company is well placed to add to the evidence base that the Committee is gathering as part of this enquiry given our surveys of business and public sector opinion on the compensation culture that have been conducted over the past eighteen months.

2. ABOUT AON LIMITED

2.1 Aon is a leading provider of risk management services, insurance and reinsurance brokerage, human capital and management consulting, and specialty insurance underwriting. There are over 6,000 employees working in Aon UK’s 70 offices around the country. Worldwide we employ 47,000 people working in 500 offices spread across 120 countries.

3. OVERVIEW OF POSITION ON THE COMPENSATION CULTURE

3.1 Aon believes that there is a compensation culture in the UK that is having a detrimental impact on the performance, profitability and employment levels of businesses and public sector organisation. We do not believe that this is sustainable over the long term and are therefore generally supportive of efforts being taken to solve the problem. However, we are concerned that the new Compensation Bill does not go far enough and in many ways fails to address the key drivers of the compensation culture identified by both business and local authorities.

3.2 In the course of our work on this issue, we have sought to represent the views of both business and local authorities on the compensation culture and to put forward their recommendations for change.

4. 2004 SURVEY OF OPINION

4.1 Aon carried out a survey of the opinion of UK business in the summer of 2004 in order to determine the existence of a compensation culture and its impact on performance, profitability and employment levels. This survey of over 500 businesses found that they had become increasingly hampered by the costs of dealing with claims for compensation that was in turn diverting management resources and financial investment away from core business and revenue generating activities.

4.2 At the time of the survey, there were arguments as to whether a compensation culture genuinely existed in the UK. The Better Regulation Task Force (BRTF) report published in May 2004—shortly before our survey was undertaken—argued that the evidence did not suggest an out of control, US style compensation culture.

4.3 This argument was at odds with our survey, which revealed that 62% of companies had seen an overall increase in the cost of claims to their business over the previous five years. In addition, the survey found that:

— 60% felt that the fear of the compensation culture was hampering their business by distracting management time;
— 49% said it diverted financial resources; and
— 46% said it created too much red tape.
4.4 At the time of the survey, the top three reasons for the growth of the compensation culture were:
— the growth of “no win no fee” legal services;
— media advertising of these services;
— the reluctance of insurers to defend claims.

4.5 Some respondents also commented that the claims culture would hasten the growing trend for offshoring business activities away from the UK as companies seek to minimize their risks and the chances of being sued.

5. 2005 Survey of Opinion

5.1 In the autumn of this year, Aon decided to revisit the results of the survey carried out in 2004 to see whether the perception of the compensation culture had changed in light of the Better Regulation Taskforce and the Government’s decision to introduce new legislation to implement its key recommendations. We decided to extend the 2004 survey of opinions to public sector organisations as well as businesses. The research was chiefly conducted just before the introduction of the Compensation Bill in the House of Lords on 2 November 2005.

5.2 According to our latest survey, many of the findings of the 2004 survey remain unchanged. Organisations surveyed continue to be hampered by the costs of dealing with the UK’s compensation culture but interestingly few believed that the many of the causes of the problem would be addressed by the new Bill.

5.3 Once again, the main drivers of the compensation culture were perceived to be:
— the growth of “no win no fee” legal services (84%);
— media advertising on the part of “claims farmers” (70%); and
— reluctance among insurers to defend claims due to the lower costs of settling out of court (42%).

5.4 Aon’s latest research also revealed that 86% of the organisations surveyed have been detrimentally affected by the compensation culture this year, either directly or through rising insurance costs. In contrast to figures from the Compensation Recovery Unit, many businesses have experienced no reduction in compensation claims received since 2004, and only 10% have seen a decrease in the overall cost of claims. More than one in three organisations (36%) believe that they are still receiving fraudulent claims.

5.5 Over two thirds of UK businesses and local authorities strongly agree that if the compensation culture is allowed to continue, it will place an unsustainable burden on industry, commerce and public services. Over three quarters of organisations claim that it diverts resources and financial investment away from core business and revenue generating activities.

5.6 Despite the obvious seriousness of the issue, ahead of the publication of the Compensation Bill, it should be noted that more than nine out of 10 organisations surveyed by Aon doubted that the new Bill would successfully alleviate the problem and 93% said that they did not think the Government is doing enough in this area.

6. Conclusion

6.1 Aon does acknowledge the fact that the Compensation Bill positively demonstrates the Government’s recognition of the problem and its desire to implement change. Given the level of concern about the problem—as shown in the two surveys we have undertaken and impact it appears to be having on the profitability and productivity of business and public services, this is a welcome start.

6.2 But our survey does call into question the extent to which the proposed legislation can get to the heart of the problem. Businesses and local authorities clearly identify the main drivers of the compensation culture as being the growth of “no win no fee” legal services, media advertising on the part of “claims farmers” and reluctance among insurers to defend claims due to the lower costs of settling out of court. However, we believe that the Bill does little to address these root causes as it currently stands. In order to tackle this more effectively, we would encourage the consideration of more fundamental reform of the no-win no-fee legal systems and more detail on the tighter controls envisaged for advertising on the part of claims farmers. We would also welcome a more prescriptive approach to the role and remit of the proposed claims management services regulatory body.

6.3 Ultimately, in order to protect profitability, jobs and the quality of public services, Government and regulators must listen to the concerns of business and local authorities. In particular, businesses and local authorities would like to see greater Government consultation with industry and the public sector, with a view to introducing tighter limits on compensation awards and more ambitious reform. Mutual recognition of the problem and the desire for requisite measures in Parliament is clear from our survey, but we now need to give the new Bill real teeth to tackle the problem.

Aon Limited

23 November 2005
Evidence submitted by the National Accident Helpline (NAH)

1. Introduction to National Accident Helpline

1.1 National Accident Helpline (NAH) is pleased to respond to the House of Commons Constitutional Affairs Select Committee’s inquiry into the Compensation Culture.

1.2 NAH was founded in 1993 to help people claim compensation for the injuries they have suffered in accidents. In the years since, NAH has helped many thousands of people to gain compensation by putting them in touch with solicitors across the UK who specialise in personal injury claims.

1.3 NAH provides initial free advice from law graduates to people who have suffered a personal injury, facilitating their contact with a quality solicitor who can then advise them on the merits of their claim. All the solicitors we recommend are specialists in personal injury cases. They span the whole UK: England, Wales, Scotland, Northern Ireland, the Isle of Man and the Channel Islands and are listed in appendix 1 at the end of this submission.

1.4 NAH is not a claims management company. Our service is to offer phone advice (from a call centre in Kettering staffed by law graduates) to callers who have had an accident. We filter out those whose claims have no obvious merit and refer the remainder to a suitable solicitor. As such, NAH would be subject to the authority of the new regulator for claims services proposed in Clause 2 of the Compensation Bill, under the provisions contained in Clause 2 (3) (a) (iii). A more detailed analysis of NAH’s business and the wider personal injury market, as well as some example case studies of people who have been helped by NAH, are provided in appendices 1, 2 & 3 at the end of this submission (not printed).

1.5 NAH advertises its services mainly on national television, often to people who may be recuperating from their injury at home. Many of those who contact us have suffered painful and serious injuries and have no alternative representation—they are neither legally insured nor members of unions. Until they saw one of our advertisements, they did not realise that they were able to access free reputable legal advice. Our experience has taught us that without a service such as that provided by NAH, many genuine accident victims who have a right to claim compensation would not find a way to access help in our legal system.

2. The Compensation Bill and regulation of the claims sector

2.1 Part 2 of the Compensation Bill sets out provisions for the regulation of “claims management services”. NAH supports effective regulation as a means of improving the accountability, performance and reputation of the sector. However, this regulation must be fit for purpose and address the clear “regulatory gap”, rather than simply add a layer of bureaucracy to what is already a complex area.

2.2 NAH welcomes the provisions of Part 2, Clause 3 of the Compensation Bill, in particular those which state that the Secretary of State will only designate a regulator for the sector if he is satisfied that the regulator is “competent to perform the functions of the Regulator” and “will make arrangements to avoid any conflict of interest between the person’s functions as Regulator and any other functions”.

2.3 Some organisations in the sector have established the Claims Standards Council (CSC), and have stated that they wish the CSC to become the statutory sector regulator, appointed by the Secretary of State through the powers granted by the Compensation Bill. The Department for Constitutional Affairs’ press release accompanying the publication of the Compensation Bill in fact referred to the CSC as providing “voluntary self-regulation” of the sector at present and called on any complaints about the sector to be directed to the CSC ahead of the introduction of statutory regulation.

2.4 We understand that the CSC may appear to offer the Government a potentially efficient way to bring in regulation and provide consumer protection without the need to create a public sector body which would be timely and expensive—and counter to the principles set out in the Hampton Review. However, we are concerned that the CSC as currently organised does not truly represent the range of reputable businesses in the sector and is over-represented by one or two business interests that may lead to it being seen as commercially partial.

2.5 The CSC has been effective in promoting its own role as a trade organisation. However, this could not have been done without commercial sponsorship, which has led to one or two specific interests dominating the organisation and using what should be an official brand to promote what are essentially commercial products.

2.6 Largely as a result of this, many major reputable industry players, including NAH, Injury Lawyers 4U and the Accident Line, have, to date, avoided involvement with the CSC.

2.7 We do not want to have an ill-thought through “quick fix” solution to regulation in this sector that does not abide by the high standards necessary for a regulatory body to succeed. As a consequence, we believe that the CSC is not currently fit for purpose to serve as a sector regulator and therefore does not, in its present form, meet the requirements set out in Part 2, Clause 3 of the Compensation Bill.
3. **Key Principles for an Effective Claims’ Sector Regulator**

3.1 It is essential that the claims sector regulator appointed following the passage of the Compensation Bill is:

- Capable of offering effective consumer protection.
- Impartial.
- Not beholden to any one segment of sector commercial interest.
- Transparent, both in governance and operations.
- Properly representative of the different stakeholders with a legitimate interest in the sector.

3.2 For the CSC to become “fit for purpose” to take on the role of sector regulator, it must be reformed and have certain safeguards built into its structure and operations. It is vitally important to get the framework right at the beginning for the new body to be effective, and to have the potential to respond to the demands that are likely to be placed upon it.

3.3 For the CSC to be able to meet the qualities set out in Part 2, Clause 3 of the Compensation Bill, there must be a clear distinction made between its role as a trade organisation and its regulatory function.

3.4 We suggest that, if it is to become the regulator, the CSC should be governed by a new regulatory board. This regulatory board should consist of:

- Five elected representatives each from a different and unrelated member company.
- The remainder, a working majority, should be appointed by the new Legal Services Board from relevant industry sector stakeholders—for example the Consumer Association, the CAB, APIL and the FSA.

A reciprocal representation arrangement with the Law Society regulation body would also be useful.

3.5 The CSC currently uses its brand as endorsement for specific products (such as Claimsense, see appendix 4) to the exclusion of other equally high quality products available from other players in the sector. We believe that the CSC must immediately cease from engagement in commercial activities and/or its members must cease from using the CSC brand as a brand for commercial activities (or those that could be perceived as such) if the CSC is to become the sector regulator meeting the criteria set out in the Compensation Bill, specifically in Part 2, Clause 3 (2) (c).

3.6 As a result of this previous and existing use of the CSC brand as a marketing tool, we recommend that, if a reformed, “fit for purpose” CSC is recognised as sector regulator following the passage of the Compensation Bill, it should be made to re-brand with a new neutral name that is untainted by previous use as a marketing label.

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4. **Wider Recommendations for Outlawing Bad Practice in the Claims Sector**

4.1 At NAH we have been actively promoting reform of the current rules governing the personal injury claims sector.

4.2 Clause 3 (2) (c) (ii) and (iii) state that the new sector regulator should promote good practice in the sector and protect those people who use claims management services from unscrupulous practice. We support this aim, and to achieve it we believe that the new sector regulator must quickly act in the following areas set out in paragraphs 4.3, 4.4 and 4.5 below.

4.3 Regulate selling practices—

There are many selling practices within the personal injury sector that we believe are unacceptable and put pressure on the consumer when they are in vulnerable settings. These are:

- Cold calling: Canvassing for claims and selling claims-related insurance products at the doorstep.
- Street canvassing: Canvassing on the street, including in market places and shopping centres and people posing as quasi-market researchers.
- Hospital canvassing: Approaching people in any hospital environment or GP surgeries.

Recent research conducted for the NAH by an independent researcher, Dr Terry O’Brien, in August 2004 concluded that much of the bad publicity and the lack of public confidence in the claims industry arises from experience or reporting of these “high pressure” sales techniques. We are also aware that Citizens Advice Bureaux across the country have received numerous complaints about these techniques. Legal advice is, by its very nature, often complex and not without some financial risk. There should be no place for quick, high-pressure sales on such important issues. The new regulator must therefore:

- Ban doorstep, street and hospital canvassing of personal injury claims services or products.
— Learn from the example of sales techniques that have already been prohibited in the financial services sector. For example, the FSA rules do not allow cold-calling (or “unsolicited real time promotions” as they define it) of mortgage products as they believe that this technique can expose consumers to high pressure sales tactics which mean that they may end up with an inappropriate or over-expensive product (or service). Such regulation could be used as a model for prohibiting these examples of bad practice in the personal injury claims sector.

4.4 Ban advertising and sponsorship by organisations involved in personal injury claims on NHS sites.

We do not consider it appropriate for personal injury claims to be promoted or advertised on NHS property, for example when a person is receiving primary medical treatment. As well as being distasteful and creating potential public upset on the issue, they are also communicating with people at what is often a stressful or vulnerable time.

We therefore call on the new regulator to work with the Department of Health and the NHS to ban personal injury claims advertising in hospitals and the wider range of NHS establishments. This includes hospital premises, primary care premises (ie GP surgeries, clinics) and associated NHS printed materials (ie NHS/hospital magazines, appointment cards etc).

4.5 Introduce specific rules to govern advertising in the PI sector—

We believe that there should be no place for irresponsible or high pressure advertising. Working with the ASA, we believe the new regulator should develop specific rules to ensure a high standard of advertising across the sector. Specifically, we would suggest that all advertisements:

— should not feature examples of accidents in schools or on school journeys;
— should not feature examples of accidents in hospitals;
— should not feature children;
— must state whether advice would be provided by a solicitor or a claims management company—ie they must make clear the proposed entry point for access to justice and who will be giving the legal advice about the merits of a claim;
— should not highlight a damage award if it is exceptional and not typical for a case type.

4.6 TV advertising for claims management is already highly regulated and does in many ways set the model for strong and effective advertising/marketing regulation. All our TV advertising adheres to the BACC code (a copy is contained in appendix 5) which has strict guidelines which prevent any sensational images. For example, TV ads must not “offend against public feeling”, “contain material which is likely to cause distress to significant numbers” or “encourage or condone behaviour prejudicial to health and safety”. We have never received complaints from either the ASA or CAB about any of our advertising and we believe it would be good policy for the regulation of other advertising in the sector to be strengthened so that the same rigorous standards that apply to TV advertising are applied equally to other forms, such as print media, posters, flyers etc.

4.7 In our experience TV advertising does not “generate” false claims—if it did we would only waste time and cost in our call centre filtering out false claimants as our member solicitor firms have no interest in talking to anyone other than genuine claimants. That there is no value for us in false claims is also demonstrated by the fact that we do not advertise to the mass evening TV audience as it is in our interests to minimise the number of non-accident victims who see our ads. This has been confirmed by the views of Allianz Cornhill, part of the Allianz Group, the largest Legal Expenses Insurer in Europe. As underwriters, they have a direct interest in only genuine claimants proceeding as this means the claim rate is controllable and they can charge premiums that are based on good underwriting experience.

4.8 Allianz Cornhill support the NAH model as it allows NAH “to identify genuine claimants who have the correct motivations to proceed with a claim”.

5. CONCLUSION

5.1 We welcome the provisions contained in the Compensation Bill and the Government’s intention to strengthen regulation in the claims sector.

5.2 We believe that the new sector regulator must be fit for purpose, and hold the respect of policymakers, the industry and, most crucially, the public.

5.3 The CSC in its current form is not suitable to serve as sector regulator, and as such we do not believe that it is genuinely capable of holding such respect.

5.4 We hope that the Committee will support a call for the new sector regulator to be properly effective, transparent and unbiased. We hope that the Committee will call for reform of CSC governance structures before it is allowed to take on any formal regulatory role.
5.5 We believe that the new sector regulator should prioritise cracking down on those unacceptable forms of marketing listed in section 4 of this submission. We believe that such action by the regulator would do much to improve the reputation of the claims sector and ensure that the public are not targeted by unscrupulous claims businesses.

National Accident Helpline

November 2005

Evidence submitted by WITNESS

1. WITNESS AGAINST ABUSE BY HEALTH AND CARE WORKERS

WITNESS (formerly POPAN) has 15 years experience of working with people who have been abused by health or social care workers. It runs a Helpline and a Support and Advocacy Service for people who have been abused and for professionals, relatives and others who are concerned that abuse may be happening. WITNESS’ brief is to work across all health and care sectors, including hospitals, community, mental health settings, social care, primary care, in complementary therapies and in counselling. WITNESS also provides training in professional boundaries and abuse for professionals and the public.

2. INTRODUCTION

This briefing focuses on the NHS Redress Bill. The Bill takes forward some parts of the “NHS Redress Scheme” outlined by the Chief Medical Officer in 2003. WITNESS supports quicker and easier access to justice for the survivors of abuse by health professionals and believes that the Bill has the potential to achieve this for claims below the planned cap of £20,000. However WITNESS is concerned that the Bill as it is currently drafted does not do enough to ensure an equitable system of accountability, there is an absence of independence in the management of the proposed schemes and these factors will not help inspire confidence in people having need of it.

It is important to understand that the Bill is not only concerned with clinical errors such as misdiagnosis or mistakes in surgery but will also encompass abuse, whether intentional or accidental. Whilst there is relatively little information on the extent of abuse by health workers, there is an emerging acceptance that the problem is sufficiently widespread to require improved systems of accountability and control. The Pieming Inquiry into Drs Kerr and Haslam posited the possibility that as many as 13,000 doctors have had sexual contact with one or more of their current patients. Recent research for the CHRE found that there was very little guidance issued by the nine healthcare regulators in the UK on professional boundaries. The Department of Health estimates that the potential cost of “unsafe to practice” psychologists alone is as much as £9.6 million.

3. OVERVIEW

WITNESS supports the Bill in principle and believes that providing a new mechanism for redress in the NHS is an important step forward. In general terms there is a shared objective of ensuring that when things go wrong there is recognition and acceptance of responsibility on the part of health agencies providing care and treatment.

It is therefore vital that NHS authorities be allowed to address concerns in a direct way and that the new scheme does not mitigate against openness and honesty by encouraging over-reliance on procedure. In other words NHS Trusts must be free to recognise mistakes made and to respond appropriately of their own accord and without waiting for an application to the new scheme to be made. It is therefore possible that there appears to be an expectation that scheme members will in time initiate access to the scheme of their own volition, thereby removing the onus from the potential applicant.

However, for people who have suffered abuse there remains a danger that schemes will become overly bureaucratic, fixing on processes and procedures which may not allow for the individual to reclaim some of the personal autonomy lost in their experience of abuse. Indeed, one of the major benefits of civil litigation is that it is client driven and many clients find that this is beneficial and therapeutic in itself.

Regulations should make clear that NHS services can expedite the process in clear cut cases.

1 “Making Amends”.
2 The Kerr/Haslam Inquiry TSO 2005.
4. INDEPENDENCE

The bill proposes that the NHS itself be responsible for investigation, adjudication and decision on compensation and this is, in our view, inappropriate and would work against natural justice. In abuse cases it would mean asking the same body which may have allowed the abuse to happen to investigate it, to assess responses and to make a judgement about compensation. In many cases abuse has happened over a long period and the NHS Trust may have a distinct conflict of interest which will mitigate against open and honest inquiry. It is of crucial importance that new arrangements have the faith of the people they are there to help. The principle of external involvement in serious complaints is already established with the Healthcare Commission’s role in the second stage of the NHS Complaints procedure. The NHSLA have stated that an independent party will be brought in for disputed cases (though this does not appear on the face of the Bill or in the Explanatory Notes). However the idea of an independent person to report on disputed cases begs further questions: what experience would they have; what training; how could we be sure that they understood the dynamics of abuse cases. The person would be effectively given the role of a judge.

An external body, such as the Healthcare Commission, should be given the duty to organise and manage the scheme.

5. DETAILED COMMENTS

5.1 Setting/Applicability

The bill states that the schemes are to apply “[. . .] in connection with the provision [. . .] of services in a hospital” (Clause 1(2)). It is not clear why primary care services or other contracted health services are not included. The Explanatory Notes state only that “[. . .] consideration would be given to whether [. . .] the scheme should be extended beyond hospital services [. . .]” The commitment is only to a consideration of whether it should be reviewed.

Given that there are around 250 million primary care appointments each year this is a major gap. In addition the current proposals will act disproportionately against mental health service users in that many services are now provided in the community. As the draft Mental Health Bill proposes new compulsory community treatment it will be important to determine which services are “hospital” and therefore subject to the scheme and which are “community” and therefore not subject to it.

If the proposed arrangements had been in place historically survivors of sexual abuse by Dr Ayling, Dr Green and Dr Healy (all GPs) would not have been eligible for redress under the scheme and would have had to seek compensation through the courts.

The scheme should be widened to include all NHS provision, including primary care, domiciliary care, mental health services and contracted community services.

5.2 REDRESS

It is positive that clauses 3(2,3) allow for a range of options for redress (financial, apology and explanation, remedial treatment). In particular, where abuse is the issue, remedial treatment appropriate to the patients needs and circumstances, should be built-in. This may include NHS or contracted treatment, for example for counselling or other support services.

The cost of remedial treatment should not routinely be part of any financial settlement but should be provided through the NHS in the normal way, except where the client is not happy to accept this.

5.3 LEGAL ADVICE

The Bill makes provision for free legal advice (Clause 8). The Explanatory notes state simply that this advice (to the individual seeking redress) is for an independent assessment of the amount of the initial offer made under the scheme. Sub-clause (b) allows for the provision of services “designed to help in reaching an agreement” and the Explanatory Notes say that this might include mediation. The Bill leaves open the question of what else might constitute “services designed to help in reaching an agreement”:

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4 Eg Kerr, Haslam, Ayling, Britten, Allison, Green, Healy.
6 Chief Executive’s Report to the NHS, Nigel Crisp 2002.
5.5 Assistance

Clause 9 places a duty on the Secretary of State to arrange for the provision of assistance to individuals seeking redress and that payments may be made for this service. The assistance may be “by way of representation or otherwise” and must be independent any person who is involved in dealing with the case. However there is no guidance on what kind of assistance could be provided and no clarity on how it will be provided.

There should be a duty to ensure the provision of independent specialist support and advocacy services for individuals seeking redress. The advocacy role should be described by statutory order and advocates trained to carry out the role. The new schemes should be required to ensure that support services specialising in working with abuse survivors and survivors of medical accidents are contracted to work with individuals seeking redress.

5.6 Standard of proof

The “Bolam” test is planned as the way to settle claims: it is designed to test whether there has been a breach of the duty of care by assessing whether the same actions would have been taken by the “the reasonable man” or the “reasonably competent practitioner”. The use of this test is problematic as it implicitly involves transplanting a complicated legal test, much argued over in court, from the legal system into NHS services.

WITNESS believes that this test should be replaced with one designed to determine whether or not the alleged action took place and that it was the result of avoidable error or action. We are supportive of the notion of an “avoidability test” where adverse events would be compensated for except where they were unavoidable.7

5.7 Disclosure of information

This clause(12) requires that information, including patient records, be provided to the scheme, except where to do so would breach the Data Protection Act. This is to be welcomed but is not in itself an adequate replacement for the “Duty Of Candour,” proposed by the CMO and not present in the Bill, which would have ensured that information, including individual recollections of events and opinions, clinical and otherwise, not recorded on paper, would have been brought to light.

The Duty Of Candour should be re-introduced.

Jonathan Coe
Chief Executive
WITNESS
November 2005

Evidence submitted by Action Against Medical Accidents (AvMA)

Introduction

Action against Medical Accidents (AvMA) is an independent charity which has worked for fairer and more effective ways of resolving disputes following medical incidents for over 22 years. AvMA is widely recognised as being the leading “consumer” voice on medical accidents and clinical negligence in the UK, drawing on its direct experience of supporting people affected by clinical negligence and the experience of the “panel” of specialist clinical negligence lawyers which it has responsibility for accrediting and monitoring. Our evidence will be confined to the committee's consideration of issues as they relate to clinical negligence and the NHS Redress Scheme.

Does the compensation culture exist?

In relation to clinical negligence, the answer to this must be an unequivocal “no”. The Department of Health for England estimates that there are over 850,000 medical accidents a year in English hospitals. Research evidence suggests that a third of these involve clinical negligence. Yet, the NHS Litigation Authority received only 5,609 new claims in 2004–05 (a drop of 10% on the 2003–04 figure, which itself represented a 20% drop on the year before). A recent article in the Annual Report of the National Patient Safety Agency1 quoted a range of stakeholders, including the chief executive of the NHS Litigation Authority, as confirming that there is no compensation culture when it comes to the NHS.

7 See AvMA NHS Redress Bill Briefing.
AvMA’s experience of dealing with approximately 5,000 enquiries a year from people affected by medical accidents is that people are extremely reluctant to take legal action or seek compensation unless (a) this is the only route open to them to be vindicated in their belief that the treatment was negligent and/or (b) they desperately need the compensation in order to meet needs created by the negligence.

AvMA believes that if anything, there is an “anti-compensation culture” when it comes to the NHS. People who come to us often refer to the stigma attached to suing the NHS, doctors or nurses. In view of the low take up of claims, we believe that this area should be prioritised for improving access to justice rather than making it harder (which is what various reforms to the Legal Aid scheme have done).

WHAT HAS BEEN THE EFFECT OF “NO-WIN NO-FEE” AGREEMENTS?

AvMA welcomes the availability of Conditional Fee Agreements (CFA’s) for clinical negligence claims, where the claimant is not eligible for legal aid. The availability of CFA’s have undoubtedly improved access to justice to the wider population. However, CFA’s have not yet come near to meeting their full potential. The vast majority of claims are still conducted by people who qualify for legal aid. The reasons for this include the prohibitive cost of after the event insurance policies to cover the claimant against the costs of the defendant if they lose. This has also led to a worrying trend in claimants choosing to litigate on a CFA without having insurance, which is clearly not in the individual citizen’s or the State’s best interests.

Another problem with CFA’s as an alternative to public funding (legal aid) is that because of the insurance fees and success fees involved, it has been estimated that they cost over five times as much as legal aid.

IS THE NOTION OF A “COMPENSATION CULTURE” LEADING TO UNNECESSARY RISK AWARENESS IN PUBLIC BODIES?

We are not aware of “defensive medicine” being a significant issue in the NHS. However, we believe that ill-informed suggestions that there is a compensation culture in respect of health care has a negative impact on the morale of health professionals as well as stimulating an “anti-compensation culture” amongst the public.

We believe that it should also be acknowledged that there are positive “spin-offs” from the NHS having to meet the cost of compensation. We would suggest that if it were not for the cost of settling clinical negligence claims the NHS would not be giving patient safety the priority it does now. Avoiding compensation claims adds further incentive to improving patient safety.

SHOULD FIRMS WHICH REFER PEOPLE, MANAGE OR ADVERTISE CONDITIONAL FEE AGREEMENTS BE SUBJECT TO REGULATIONS?

Yes, we believe tighter regulation of this area is desirable. We firmly believe that clinical negligence claims should be handled by specialist clinical negligence solicitors. Presently, the commonly agreed indicator of such a specialist is being a member of the AvMA or Law Society specialist panels. “Claims farming” and inappropriate marketing or advertising has given personal injury claims a bad name. To some extent this has rubbed off on clinical negligence and contributed to what we describe as the “anti-compensation culture”.

We believe that there is a danger of the current proposals in the NHS Redress Bill having the unintended consequence of stimulating claims management activity in connection with helping people achieve redress under the scheme, or as an alternative to it, using CFA’s.

SHOULD ANY CHANGES BE MADE TO THE LAWS RELATING TO NEGLIGENCE?

The legal definition of negligence, as it applies to clinical negligence, already places a huge burden of proof on the claimant. The number of claims in clinical negligence, and in particular, successful claims, is therefore much lower than might be expected given the frequency of medical accidents. We believe there is a strong argument for creating a lesser burden of proof. The Chief Medical Officer aspired to a fairer test in his report Making Amends. So far, the scheme proposed in the NHS Redress Bill relies on the same legal definition of negligence as is used by the courts. We have suggested an “avoidability test” or “reversing the burden of proof” as an alternative methodology for this type of scheme.

THE NHS REDRESS BILL

AvMA is concerned that as currently provided for in the NHS Redress Bill, the proposed NHS Redress Scheme could have the unintended effect of creating more of a litigious/compensation culture. The scheme would not be effective in reaching fair conclusions if, as currently designed, it lacks any independence or provision of specialist medico-legal advice to empower the patient in the process leading to a decision as to
whether an offer of redress is made. It would not enjoy public confidence and would lead either to people litigating as an alternative to using the scheme, or at the end of the scheme, thereby costing the NHS more than would otherwise be the case. AvMA’s more detailed briefing on the NHS Redress Bill is attached as an annex.

Peter Walsh
Chief Executive
Action against Medical Accidents
November 2005

Annex

INTRODUCTION

The NHS Redress Bill had its first reading in the House of Lords on 12 October 2005. It takes forward elements of an “NHS Redress Scheme” first mooted in “Making Amends” by the chief medical officer in 2003. It has huge implications for access to justice for people affected by medical errors and for the NHS. Action against Medical Accidents (AvMA) is a registered charity which has been promoting patient safety and justice for people who have been affected by medical errors for over 20 years. AvMA’s casework department deals with approximately 5,000 enquiries a year, and the charity has been at the fore of promoting good practice and reform in handling clinical complaints and clinical negligence investigations. This analysis of the NHS Redress Bill draws on extensive experience of dealing with clinical disputes, the experience of people affected by medical errors, and the considerable wealth of clinical, legal and policy expertise within the organisation. Whilst AvMA welcomes the intention to create an NHS Redress Scheme, which if done well could provide speedier, less painful and less costly access to full explanations, remedial treatment, compensation and actions to reduce the risk of errors being repeated, we have serious concerns about the proposals set out in the Bill.

OVERVIEW/CONCERNS

AvMA’s main concern is that the Bill provides for a scheme which is totally lacking in independence and therefore lacks the ability to deliver fair outcomes for injured patients/families, or enjoy public confidence. NHS trusts responsible for clinical negligence would investigate themselves. The NHS would be asked to be judge and jury over itself.

— There are not sufficient safeguards built into the Bill with respect to specialist advice for patients/families. It will be difficult/impossible for adequate legal advice to be provided just at the end, in respect of offers made. Without specialist medico-legal advice during the course of an investigation, people will not be empowered to play a meaningful role in the determination of their own case.

— The Bill does not do enough to ensure that there will be a “joined up” approach to making sure that patient safety lessons are learnt as well as determining eligibility for Redress.

— The proposals set out in the Bill are far less radical than the vision shown by the chief medical officer in “Making Amends”. He had sought a fairer test than the “Bolam” test which is used by the courts. AvMA have suggested an alternative in the form of an “avoidability test” (which is described below). However the NHS Redress Bill would see a scheme which uses the “Bolam” test but without the independence, rigour or representation afforded by the court system. There is also no indication that the recommendation for a legal “Duty of Candour” will be taken forward.

— The Bill allows for artificial limits to be put on the compensation which can be awarded for elements such as loss of earnings. This would be a move away from the principle of restorative justice. Compensation/redress should be about trying to put people back as nearly as possible where they would have been if it were not for the negligence. Offering less than a court would do would put patients/families under pressure to accept less than they deserve. In practice, short changing people in this way might also make it impossible for them to fund litigation at the end of the process (as they would be seeking to litigate only for the difference between what they are offered and what they would expect to get through the courts). This is particularly the case if the claimant requires legal aid. As both the NHS and the Legal Services Commission are agents of the State, we are exploring whether this would be in breach of the Human Rights Act.

— AvMA believes that unless these weaknesses are addressed, the scheme would be unlikely to be fair to patients/families and would lack credibility and public confidence. If that is the case then many people will choose to litigate instead, using “no-win no-fee” agreements. The initiative could create a lucrative market for claims farmers to operate in. This would have the result of costing the State much more, as success fees attached to successful no-win no-fee cases make them much more expensive. There may also be resources wasted in running investigations through the scheme and claimants ultimately still having to turn to the courts to attempt to access genuine justice.

Below we set out some of our key concerns in more detail and how they can be addressed.
**Why is independence needed? How can it be built in?**

In the vast majority of clinical negligence cases that are determined in favour of the claimant, the NHS body concerned has defended the claim after having conducted its own internal or NHS complaints procedure investigations. Only when independent medical expert opinion has been obtained, and the claim been subjected to robust legal investigation, is a claim usually settled. Without independence in determining eligibility for redress, many deserving cases will lose out. There would also have to be enormous investment in specialist staff for the NHS to be able to conduct the investigations which would be necessary itself. It might be more economical as well as realistic to provide for more independence as suggested below.

The Bill could be amended to allow for an independent investigation and decision about the merits of the case. Instead of vesting these functions with the NHS Litigation Authority, they could be made functions of an independent body such as the Healthcare Commission.

Alternatively, the Bill could be amended to build on the experience of the “Resolve” pilot scheme in England and the “Speedy Resolution” pilot in Wales. In these schemes, independent medical experts determine the eligibility for compensation based on the evidence put before them by lawyers/the trust.

The Bill could also be amended to provide a suitable appeal procedure. There is no appeal mechanism built into the proposals set out in the Bill. We believe that the Healthcare Commission and Ombudsman should have a role in considering the appropriateness of findings in respect of the NHS Redress Scheme investigation, just as they do with respect to the NHS complaints procedure.

**Why is specialist independent advice important? How can it be built in?**

It is intended that in order for people to qualify for redress, negligence will need to be identified using the same test as is currently used by the courts (commonly known as the “Bolam” test). However, the Bolam test was developed by and for a court system where legal arguments are developed and tested by lawyers. It is widely accepted that clinical negligence cases are by necessity complex and require the input of accredited specialist solicitors. It would be inappropriate and lead to injustice for injured patients and their families if their cases were to be decided using the Bolam test without any specialist advice/representation for them.

The vast majority of clinical negligence claims which ultimately are successful are initially robustly defended by the NHS. It is only when the often complex and subtle clinical and legal arguments are tested through specialist representation of the claimant that most claims are settled.

The Bill could be amended to guarantee participants in the NHS Redress Scheme access to specialist medico-legal advice or representation. For example, the scheme could build upon the experience of the “Resolve” scheme in England and the “Speedy Resolution” pilot in Wales. In these schemes, speedy resolution of claims is achieved and legal costs kept to a minimum, with specialist lawyers representing claimants on a fixed fee, “no-win no-fee” basis.

Alternatively, funding could be provided for a scheme to provide independent medico-legal advice to NHS patients/families considering using or involved in the NHS Redress Scheme. It is already well established and enshrined in legislation that people making complaints to the NHS have access to independent advocacy (the Independent Complaints Advocacy Service—“ICAS”). Advice required for the NHS Redress Scheme will be considerably more specialist than ICAS, which is only designed for generic help with the NHS Complaints Procedure. Specialist independent agencies with appropriate medico-legal expertise (such as, but not necessarily or exclusively, AvMA) could be funded to provide such a service, working in close liaison with ICAS.

**Does the proposed scheme do enough to ensure patient safety lessons are learnt?**

All the Bill introduces is a provision for a “specified person” to have responsibility for, amongst other things, advising about lessons to be learnt from cases in the scheme. We believe a far more robust approach is taken. Putting the investigation in the hands of the Healthcare commission as suggested above would ensure that it could make recommendations for improving safety and monitor that they are carried out. The scheme could draw on the “Speedy Resolution Scheme” in Wales, where independent medical experts report on patient safety/risk management issues and the trust concerned is required to respond as to what it will do.

**Are the proposals inconsistent with the Human Rights Act, Article 6; right to a fair trial?**

According to clause 3(4) the NHS Redress Scheme may not offer compensation (“damages”) in line with what the Courts would award. Short-changing patients in this way and putting them in a “take it or leave it” position is contrary to the principle of restorative justice. In effect, patients/families may then find it impossible to fund litigation through the courts for the difference between what the scheme offers and what they might receive through the court, particularly if the claimant is eligible for legal aid (which by definition means the most poor, potentially vulnerable and socially excluded members of society). The Legal Services Commission apply a tight cost-benefit ratio in assessing whether legal aid is awarded. There is also a danger
that the Legal Services Commission may turn down applications because the Redress Scheme has turned
down a redress package. This would be unfair as the Redress Scheme as set out lacks any independence. As
both the NHS and the Legal Services Commission are agents of the State, we are exploring whether this
would be in breach of the Human Rights Act.

WHERE THE PROPOSALS AS THEY STAND ENCOURAGE CLAIMS FARMERS AND OTHER NON SPECIALIST SOLICITORS
to tout “no-win no-fee” agreements (Conditional Fee Agreements)?

If the scheme lacks credibility and public confidence and if suitable specialist advice representation within
the scheme is not guaranteed, there might be an explosion of claims farming activity and cases being taken
through the courts on a “no-win no-fee” basis. Because of the success fees and insurance premiums involved
with these “Conditional Fee Agreements”, this could end up costing the State much more than cases brought
under legal aid let alone the Redress Scheme would. Also, it is widely accepted that non specialist solicitors
lack the knowledge and expertise to pursue clinical negligence claims efficiently and effectively.

IS THE “BOLAM” TEST A SUITABLE TEST OF ELIGIBILITY FOR A NON-COURT SCHEME? WHAT ABOUT AN
“AVOIDABILITY TEST” AS AN ALTERNATIVE?

We are disappointed that the chief medical officer’s wish expressed in “Making Amends” to develop a
fairer test than the “Bolam” test to be used to establish eligibility for redress through the scheme, is not being
pursued. AvMA has suggested an alternative in the form of an “avoidability test” which could be
characterised as “An adverse event is compensatable except where it is the result of an unavoidable
complication regardless of treatment or non-treatment.” The onus would be on the NHS to demonstrate
that it was an unavoidable complication, or offer redress. Focussing the investigation in this way would also
mean that the route causes of adverse events would be identified at the same time, leading to improvements
in safety. Such an approach would be able to deal with systemic problems rather than focus on individual
blame, which the Bolam test inevitably tends to do. This would be more conducive to the kind of “safety
culture” which it is widely agreed is needed in order to improve safety and the reporting of incidents.

WHY IS THE SCHEME LIMITED TO HOSPITAL TREATMENT?

The Bill restricts the remit of the NHS Redress Scheme to hospital services. The vast majority of NHS
care is provided in primary care and this is also where a lot of negligent treatment occurs. We believe that
all care provided on behalf of the NHS should be included in the remit of the scheme.

WHY HAS THE RECOMMENDATION TO CREATE A LEGAL “DUTY OF CANDOUR” NOT BEEN ACCEPTED?

We are concerned that the recommendation to create a legal, “Duty of Candour” for health professionals
and managers contained in “Making Amends” does not appear to be being taken forward. This would have
placed a legal obligation on being open and honest in reporting incidents to patients/families. Without this
it remains the case that information about negligent harm can legally be withheld from patients/families.
The guidance for health professionals (e.g. “Good Medical Practice” by the GMC) remains only guidance
and only applies to health professionals. Without a more formal, binding commitment to openness and
honesty it is difficult to see how the necessary culture change to make an NHS–run scheme viable and for
it to carry public confidence can be achieved.

Supplementary evidence submitted by Action Against Medical Accidents

I write further to the previous evidence we submitted to the Committee. I understand that the Committee
is interested in how bodies, such as Citizens Advice Bureaux and Law Centres, might provide advice and,
in particular, “independent legal advice” as part of the NHS Redress Scheme. Firstly, it is important to
distinguish between the two forms of advice which seem to be provided for in the Bill.

Clause 8 deals with “Legal Advice”. It has been clarified that what is intended here is paying for legal
advice for a patient if the Scheme authority has decided that they are eligible for compensation and have
made an offer. We would argue that legal advice should be available to help determine whether or not a
patient should be offered compensation. Otherwise the patient will not be empowered in the process and will
be completely at the mercy of the NHS’s own judgement. There is also a problem in expecting legal advice
to be provided solely on the suitability of an offer. Legal advisers would be reluctant to offer such advice
without conducting a more thorough examination of the merits of a case. To advise solely on the basis of
the NHS internal investigation would be to put the adviser in danger of being professionally negligent. In
either of these scenarios, as the Redress Scheme is dealing with the legal test of negligence applying to clinical
negligence cases, it should be imperative that the adviser was a member of either the Action against Medical
Accidents or Law Society’s clinical negligence panels. Only members of these panels are recognised by the
Legal Services Commission as being sufficiently specialist in clinical negligence, and it is generally accepted that clinical negligence is a highly specialist area of law. Citizens Advice Bureaux or Law Centres do not have specialists in clinical negligence.

It has been suggested that the concerns about lack of independence and specialist representation in the NHS Redress Scheme could be addressed by adopting the approach used in the “Resolve” pilot in England or “Speedy Resolution Scheme” in Wales. We would support this, as the assessment of eligibility would be made by an independent medical expert and the patient’s case represented by a specialist clinical negligence solicitor. This process would act as a safety net. There would be no need for it to be used if the NHS had itself already recognised negligence and made a suitable offer.

Clause 9 deals with “assistance for individuals seeking redress” under the Scheme. The Department’s policy statement makes it clear that this assistance would not be legal advice. They see a role for Independent Complaints Advocacy Services (ICAS) or Patient Advice & Liaison Services (PALS). PALS are not suitable as they are employees of the trust ICAS Is not suitable as it is a service designed solely to help people navigate the NHS complaints procedure. The NHS Redress Scheme will be using the legalistic “Bolam” test to determine eligibility. The adviser will therefore need to be much more specialist In dealing with medico-legal issues than ICAS could be. The ICAS service Is also In a very unstable position even to deal with NHS complaints. Citizens Advice Bureaux will no longer be involved in providing ICAS from 1 April 2006. Contracts are held by three charities who are struggling to get to grips with providing the service and replacing Citizens Advice Bureaux In six of the 9 regions of England. The arrangements are temporary In any case, the NHS Reform and Heat Professions Act makes it clear that ICAS will be provided by POT Patients forums.

Peter Walsh
Chief Executive
Action against Medical Accidents
February 2006

Evidence submitted by The British Association of Leisure Parks, Piers & Attractions Limited (BALPPA)

BALPPA is delighted to have the opportunity to provide input to the Constitutional Affairs Committee’s inquiry into the UK’s ‘Compensation Culture’. This issue has caused great concern amongst our members and the wider leisure and tourism industry for many years. BALPPA has been confirmed by the Tourism Alliance to lead on this issue on behalf of the industry.

BALPPA is the leading trade association representing the interests of owners, managers, suppliers and developers in the UK’s commercial zoos, leisure parks, piers and static attractions sector. It speaks for some 300 members and includes leading UK attractions such as Blackpool Pleasure Beach, Alton Towers, British Airways London Eye, Butlins, Colchester Zoo, Madam Tussauds, Thorpe Park and Woburn Safari Park among our members.

We welcome the publication of the Compensation Bill and agree there is a need to legislate in this area. We hope that the Bill will put an end to the unethical promotional practices of claims brokers, which continues to fuel significant increases in our member’s public liability insurance premiums.

At the same time, we are disappointed that the Bill does not address the important issue of personal responsibility, where it would recognise that individuals have a responsibility to behave in a safe and sensible manner. This would mean that individuals should follow advice that has been given in the interest of their own health and safety.

I have attached a briefing that outlines BALPPA’s position in more detail, illustrates the solutions found in other countries when tackling this issue, as well as suggested solutions to the problems currently experienced in the UK.

I hope that you find the information useful and I reiterate that BALPPA would be very willing to present our case to the committee through oral evidence. If you wish to discuss anything further, please do not hesitate to contact me.

BALPPA has a number of concerns:

(1) The law should encourage the public to behave in a responsible and safe manner when enjoying leisure pursuits. Behaviour analogous to that required of employees under the Health and Safety at Work Act 1974 would be an appropriate measure. This would place participants under a legal duty to comply with the safety instructions they receive both visually and verbally when enjoying leisure pursuits. Whilst the current law provides a system of contributory negligence, the Courts seldom make a finding (especially where the claimant is a child and irrespective of the fact that the child was under the control of the parent at the material time). Even where a finding is made, it is almost unheard of for the amount to exceed 50% and more often the figure is around 20% and fails to reflect an individual’s responsibility.

(2) One of the factors influencing the dramatic increases in BALPPA member’s employee and public liability insurance premiums is the number of claims being made on a “no win-no fee” basis. While some of the claims are genuine and treated accordingly, many of them are frivolous and clearly an
Ev 178

attempt to work a system perceived as easy to utilise with minimal risk of discovery. Un-ethical promotional practices of claims farmers/brokers need to be curtailed. Practices such as soliciting potential claimants by questioning passers by, knocking on doors of possible leisure facility employees, offering cash incentives to doctors in exchange for leads to accident victims and advertising in hospital and doctors waiting rooms and A&E departments, are some examples.

Whilst the no win-no fee arrangements were introduced as a result of the Government reforms to improve access to justice, the unrealised financial impact of these reforms has been met by companies and their insurers. It is the excessive legal costs that have been permitted that have caused the damage, where such costs can be uplifted by up to 100% and more when after-the-event insurance policy premiums are charged. Fixed costs have been introduced to cover RTA claims, but BALPPA members face claims under the Occupiers Liability Act 1957/1971, and fixed costs should be extended to these claims.

(3) We are aware that other countries have faced the same problems now affecting England and Wales, namely the U.S.A. Australia and the Republic of Ireland.

In the USA the Colorado Ski Industry was saved from closure through the introduction of measures to outline an individual’s personal responsibility for their own health and safety where relevant information and guidance is provided.

In Australia, many states have re-written their laws on negligence and occupiers liability so as to create a more equitable balance.

In the Republic of Ireland, the Government has created a department dealing exclusively with claims for accident compensation, where the claim is filed, liability is determined and a level of compensation is fixed. Costs are therefore fixed, with an Appeal to the Courts in limited circumstances.

Scotland has operated on a fixed costs scale for many years.

We also wish to comment on the argument relating to the existence of a so-called Compensation Culture. It may be correct that claims being issued with the Court Service have not increased, but it is also correct that our members and their insurers are having to take an economic approach to claims received because of the potentially high costs involved. This translates into a situation where claims are settle, particularly by insurers, even where the injury circumstances may be clearly against such action but our Members have no right to insist a defence claim is made, and these claims are therefore excluded from official statistics. The Courts have not adequately controlled the spiralling costs, and consequently satellite litigation has risen.

During its campaign, BALPPA has received support from many other tourism related bodies including

— Association of Leading Visitor Attractions
— Historic Houses Association
— Guild of British Travel Agents
— Tourism Alliance
— Visitor Attractions Forum
— The Showman’s Guild of Great Britain

C Dawson
Chief Executive
BALPPA

November 2005

Evidence submitted by the Field Studies Council

INTRODUCTION

1. The Field Studies Council welcome the Government’s Compensation Bill as a positive step in addressing what we perceive to be a growing culture of risk averse ness. We believe that, among other outcomes, the Bill is an opportunity to revitalise students’ learning experiences by reversing the decline in fieldwork caused, in part, by the fear among teachers and LEAs of risk and litigation. We are pleased to be given the opportunity to contribute our views to the Constitutional Affairs Select Committee on this important development.

2. The Field Studies Council (FSC)—a pioneering educational charity—is the UK’s leading independent provider of field courses, and in recent years the FSC has witnessed a continuing fall in numbers of schools sending pupils on A-Level biology courses in particular.

3. Similar trends at all key stages and extending to universities appear to be leading to a shortfall in people with the practical skills needed to support biodiversity-related careers and activities. It also undermines the potential to raise the level of informed environmental awareness at a time when there is an increasing demand for students to be aware of their impact on the world around them.
KEY ISSUE

4. Good quality residential fieldwork helps to improve education standards. Despite this, fieldwork provision in science and biology is declining in British schools. Over 96% of GCSE science pupils will not experience a residential field trip, and nearly half of A level biology students will do no fieldwork, or will only have a half-day experience near to their schools.2

5. Fieldwork should be a vital element of an imaginative and contemporary science education. It helps students to develop their understanding of science as an evidence-based discipline and to acquire the hands-on experimental skills that are an essential part of science work. Furthermore, and often most importantly, out-of-classroom activity provides an exciting and memorable experience for young people which can enthuse and inspire them, and will help to link science to their everyday lives.3

6. The Health and Safety Executive has stated that “The overwhelming majority of educational visits are carried out safely and responsibly by teachers who take the time and effort to get things right. The benefits of such trips to pupils can be immense”.4

7. The decline in biology field work must be reversed. An essential element in this process is to reassure those involved in teaching by addressing what is often a disproportionate fear of litigation among those in the sector.

DOES THE COMPENSATION CULTURE EXIST?

8. It is our understanding that a limited compensation culture has emerged in recent years. However, the public perception of a compensation culture has been greatly inflated through media coverage.

9. Today, there is a slightly increased risk of claims against organisations such as the FSC which are involved in providing activities.

IS THE NOTION OF A COMPENSATION CULTURE LEADING TO UNNECESSARY RISK AVERSIVENESS IN PUBLIC BODIES?

10. The experience of the FSC suggests that there is an unnecessary and disproportionate level of risk averseness, particularly among public bodies in the education sector, with which we have most contact. For some LEAs in particular the approach is to avoid all activities perceived as “risky”, to the detriment of children’s experiences of out-of-classroom activity and real-world experience.

11. We are concerned that some public bodies may be making arbitrary decisions, based on the notion of a compensation culture, with serious consequences for students’ learning experience.

SHOULD ANY CHANGES BE MADE TO THE CURRENT LAWS RELATING TO NEGLIGENCE?

12. We welcome the proposed change to current law contained within the Compensation Bill. We believe that this change will have a positive impact in addressing public misperceptions that can lead to a disproportionate risk-averse behaviour.

13. Without the proposed legislative change, the sector will continue to face the difficulties which arise through a fear of litigation. Insurance premiums have greatly increased for activity providers in recent years. It is our experience that 50–100% increases in premiums are commonplace across the sector—a rise which does not reflect the modest increase in claims and is based on misconceptions of risk and a compensation culture.

14. Field studies are a vital element of a contemporary science education. We welcome the proposal that a court, when considering the standard of care in negligence cases, may take into account whether additional precautions would prevent such an important activity taking place.

Dr Stephen Tilling
Field Studies Council
November 2005

Evidence submitted by Anthony H Silverman, Fellow, Institute of Actuaries

1. The level of UK compensation claims looks low in an international context, not just compared to the US where “tort costs” are three to four times as high but also, according to work done by consulting actuaries, in a European context as well. UK citizens still appear relatively unwilling to consult a lawyer even when they have potentially valid claims. On the basis that this will change, the prevalence of claims management companies may turn out to be a temporary phenomenon. In general terms the overall scale of compensation claims in a cohesive society depends on a combination of the role of the state in welfare

4 Health and Safety Executive http://www.hse.gov.uk/schooltrips/
provision and the importance attached to the civil justice system. Research may be appropriate to look at ways to encourage good cases to be pursued so that the perversely high success rate of 95% for bodily injury claims in the UK might be reduced somewhat. It is, of course, important that the value of justice is brought in to any accounting of the benefits and costs of litigation.

INTRODUCTION

2. The existence or otherwise in the UK of a so-called “compensation culture” is of interest to the insurance sector as, when a compensation claim is made, the allegedly at-fault party’s insurer is usually responsible for paying any successful claim and will usually handle the policyholder’s legal defence. The legal framework for compensation claims therefore has a pivotal influence on insurers’ profitability. In general terms insurers’ nearer term commercial interest clearly is that the value of claims should be minimised, and consequently insurers have taken a prominent role in the public debate on “compensation culture”.

3. It may be argued that over the longer term the interests of the insurance sector are somewhat different as the scale of the industry is dependant on the overall scale of claims.

4. Having, as an analyst with investment banks, followed the insurance sector, in the US and Europe in particular, I believe I have some relevant observations for the Committee inquiry into the UK’s so-called “Compensation Culture”.

5. The percentage of any territory’s GDP that is reallocated by means of compensation type claims can, in principle, be defined as a product of two factors. The first is the extent to which compensation is provided by the government out of taxation rather than being provided by an at-fault party identified through the civil justice process. The second factor is the importance that is then attached by society to making at fault parties accountable for their actions/omissions through the payment of compensation. The following considers how these factors can vary in different territories, looks at some work that has been done within the actuarial profession on where the UK stands, and considers what this work means for the level of compensation claims in the UK viewed in a wider context.

A LOOK AROUND

6. At one end of the spectrum there is the US where, at least in theory, little is provided by the government and an elevated importance is therefore attached to the civil justice system. Indeed what in the UK is usually referred to as “the legal system” is usually spoken of in the US, in a telling contrast, as “the justice system”. If the government, in general terms, does less and the legal system does more then citizenship acquires a subtly different balance. There is a degree of participation in the civil justice system in the US including, for example, the direct election of State court judges and, perhaps most importantly, the use of juries in civil cases, that is largely absent in the UK. The elevated profile of the civil justice system may be seen as an essential component of the remarkably robust consensus around the nature of their society. In a society with such enormous variations in wealth it may well be essential for good order to have a legal system which means, in simple terms, that if anyone can truly blame someone else for their misfortune, the legal system would be expected to provide an avenue for redress. At the same time people in the US have historically been less likely to vote in elections than is the case in the UK.

7. There are always, of course, tensions in the US around the subject of “tort reform” but, at the end of the day, there is a balance of forces which clearly is a different one to that in many other territories.

8. There is a sense in which aspects of what in Europe might be seen as welfare and social policy are “privatised” to the legal system in the US.

9. The forgoing dwells a little on the US because I believe it illustrates issues which, ultimately, are where the choices have to be made when we are considering where to pitch an appropriate level of compensation claims in our own society.

10. The older European model is very different. Fundamentally, more is expected of the government and less is expected of the legal system. Civil wrongs are more likely to be righted by obtaining the intervention of an arm of government, or even by some form of civil disobedience. The legal system is seen more as an instrument of the rich, though even they might historically have found its costs prohibitive. Some common civil wrongs may be dealt with by compensation schemes paid for out of taxation. Inevitably such a more centralised system will be slower to develop and react as circumstances change, if it reacts at all. Equally it seems inevitable that citizens also are less likely to feel their fate is in their own hands, but then the system does work on the basis that people will place trust in the government anyway.

THE UK

11. Can we quantify in any way where we are in the UK? A discussion paper, which was not peer reviewed, was prepared by a working party of the Institute of Actuaries in 2002, under the somewhat loaded title of “Cost of Compensation Culture” (referred to as the “discussion paper” below), which attempted to do just that. The discussion paper received a great deal of publicity but has been contentious within the actuarial profession ever since it was published. It engaged with a pivotal issue for the insurance sector and,
to that extent, was very much to be welcomed, but it contained, I believe, some serious flaws, particularly in the use made of some of the data that was gathered. Unfortunately it has formed the basis of much comment on where we stand in the UK.

12. However the work done for the document can be utilised for a somewhat more rigorous attempt to see where we are.

13. Some of the changes required to make better use of the data were set out in an article in The Actuary magazine of September 2003 (see http://www.the-actuary.org.uk/pdfs/03_09_04.pdf) written by myself.

14. Adjusting the discussion document use of data (in order to preserve proper comparability with the quoted US number for the percentage of GDP subject to reallocation through the tort system) produces some instructive results. I estimate the relevant percentage of GDP at the time of the paper is around three times as high in the US as in the UK (0.7% in the UK compared to 2.03% in the US on 2001). A significant part of both figures derives from motor liability claims and excluding these the US percentage of GDP becomes over four times as high as in the UK. Even these figures are derived after excluding all punitive damages from the US figures.

15. Compensation claims in the UK may have expanded to a degree in the period after conditional fees were introduced in 1995 but clearly, if we are moving at all in the US direction, then we are likely to have a very long way still to go!

16. The front page projection in the discussion paper that UK compensation claims are “set to continue rising at over 10% per year” has turned out to be far too high. According to a Datamonitor report, also quoted in the above Actuary magazine article, claims actually fell in 2001. Total UK motor claims have grown at just 2.9% per annum between 2000 and 2003 according to ABI data (adding the “change in provisions” reported in the following year to each year’s claims number). Incidentally, the expectation in the discussion document that US tort costs, having been over 2% of GDP were set to be “coming down” also proved wrong. Subsequent versions of the study used in the paper in respect of US tort costs (by Tillinghast, a firm of consulting actuaries) have shown a small increases in tort costs as a percentage of US GDP (to 2.23% in 2003 compared to 2.03% in 2001 and the 1.83% in 2000. So the gap between the US and the UK seems, if anything, actually to be widening.

17. As regards comparisons with continental Europe, the following is a quote from the IoA discussion document

18. The table below shows the tort costs as a percentage of GDP (in 1998) for selected countries as measured by Tillinghast:

<table>
<thead>
<tr>
<th>Country</th>
<th>Tort Cost (% of GDP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>1.9</td>
</tr>
<tr>
<td>UK</td>
<td>0.6</td>
</tr>
<tr>
<td>France</td>
<td>0.8</td>
</tr>
<tr>
<td>Japan</td>
<td>0.8</td>
</tr>
<tr>
<td>Canada</td>
<td>0.8</td>
</tr>
<tr>
<td>Australia</td>
<td>1.1</td>
</tr>
<tr>
<td>Germany</td>
<td>1.3</td>
</tr>
<tr>
<td>Italy</td>
<td>1.7</td>
</tr>
</tbody>
</table>

19. It is likely that all systems are subject to a level of invalid claims and to some level of fraudulent claims. Again it is hard to see that the UK is out of line. A letter to The Actuary magazine from actuary Guy Thomas, commenting on the discussion document stated:

“the paper incidentally notes that over 95% of bodily injury claims in the United Kingdom are in fact successful. This astonishingly high figure suggests that too few claims are pursued, not too many”.

This perversely high percentage is at least partly the result of the “After the Event” expenses insurance system in the UK where the insurers, naturally, are looking for the solicitors involved to have as high a success rate as possible. Unlike in the US, the risk taker regarding legal expenses (a role that the claimant’s lawyers are able to take on in the US in the absence of liability for defendants’ expenses) has no share in the proceeds of a successful case. So the actual seriousness of a claim, which is a combination of the claim amount and the likelihood of success in court, may not be properly reflected in the decision as to whether a potentially valid case is pursued. Research may be appropriate to look at ways of improving the perverse incentives which may currently be in place.

20. The “Better routes to redress” report described the so-called compensation culture in the UK as an “urban myth”. The report was the subject of an article published in The Actuary magazine, also by Guy Thomas, which again showed the Institute’s discussion paper stance to be contentious (see http://www.the-actuary.org.uk/pdfs/05_10_02.pdf)

... which means that, as regards compensation culture
21. There are, no doubt, many ways to interpret statistics but, in light of the above, any genuine attempt to locate the level of UK compensation claims in an international context cannot conclude it is out of line except to say that, on the face of it, it is very much at the low end of the range.

22. The Committee may wish to research slightly more up to date numbers but the nature of the story is clear.

23. What clearly would be peculiarly unacceptable would be for the government to withdraw to some degree from some of its historic roles as a guarantor of welfare, which it very probably has done in the UK over recent years/decades and, at the same time, for the legal system to be unable to step up to the challenge of filling the vacuum.

24. In a sense the singular thing about the UK has been the growth of non-lawyer claims management companies. It seems that an unusually significant element of UK claimants with valid claims have been, perhaps for cultural reasons, unwilling to consult a lawyer. Perhaps there is still, in the aggregate, a somewhat Dickensian view of the legal system as expensive and not an instrument of redress for average folk. This is what needs to change. If there really was an excessive inclination amongst ordinary people to pursue legal claims then potential claimants would, of course, be consulting lawyers whereas in fact they have been doing nothing at all until the idea was sold to them by a claims management company!

25. Ultimately the claims management companies may be a transient phenomenon which has flourished in the period between, on the one hand, a move towards a greater “access to justice” on the part of the legal system and, on the other hand, the subsequent catching-up of awareness and inclination on the part of people with valid claims of their ability as UK citizens to obtain redress through the justice system.

26. The discussion paper’s often-quoted conclusion managed to hardly allude to justice as a benefit of litigation at all, or at least it did so only in the most oblique terms. It stated “...a more litigious society would be a bad thing because the costs to society, both financial and in terms of restricting activities, outweigh the benefits of providing better compensation to accident victims”. There are no costs “to society” viewed as a whole, that is to a society defined as including the claimants and the civil justice process. But most importantly, as regards benefits, the major benefit of litigation, indeed the only reason civilised countries undertake the whole exercise of running a civil justice system, is to expand justice and fairness.

27. The important point is that this latter value surely needs to be accounted for explicitly in any judgement worthy of the name regarding what to do going forwards. Can we say we have sufficient emphasis on a “justice culture” in the UK?

28. It may be that we would benefit in the UK from substantially reinforcing the vigour with which we promote a justice culture and nurturing the role of the civil justice system.

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November 2005

Evidence submitted by the Kevin Williams, Reader in Law, Sheffield Hallam University

SCOPE OF SUBMISSION AND SUMMARY

1. This memorandum is in two parts. Part 1 reviews the recent evidence concerning the so called “compensation culture” and its claimed adverse effects. Part 2 considers clause 1 of the Compensation Bill, which seems unhelpful and, maybe, unnecessary.

PART 1. THE “COMPENSATION CULTURE”

2. Assertions that Britain is (or is in danger of becoming) a “blame and sue” society are so frequently repeated in the media and elsewhere that they have all but become received wisdom. The growth of a “compensation culture” implies an increased and unreasonable willingness to seek legal redress when things go wrong, whilst the idea of a “litigation crisis” suggests that this shift in social attitudes has been translated into undesirable (perhaps unbearable) levels of formal disputing. Yet, as a government commissioned report pointed out in 2003, there is usually “very little analysis of what this term [compensation culture] means, let alone proof that such a ‘culture’ exists”.¹

3. The definition of the “problem” may depend on who is asked. Seemingly, there may be a number of different problems. These include too many claims, fear of litigation provoking risk-averse behaviour, compensation payouts that are too costly, excessive fees charged by lawyers and “claims farmers”; sometimes a mixture of all of these. What kinds of claims should count is also disputed. Candidates include claims before employment tribunals, largely on the basis of their number, and family law disputes because they consume the biggest slice of the civil legal aid budget. Usually, however, attention focuses on claims for damages for personal injury.

¹ Office of Fair Trading, An analysis of current problems in the UK liability insurance market, (June 2003) at para 10.4.
4. In December 2002, a report by the Institute of Actuaries, The Cost of Compensation Culture, concluded that there is a growing compensation culture, estimating the cost at about £10 billion a year or 1% of GDP. However, as the report candidly admits, the figures "are by no means precise and in places rely on somewhat heroic assumptions". Claims by the City of London and insurers have criticised it for including the costs of a very wide variety of claims, including criminal injuries’ payments and the substantial sums paid to farmers following outbreaks of foot and mouth disease and BSE. Nevertheless, the Actuaries’ headline-grabbing figure is frequently cited in the media as gospel without any qualification.

5. In May 2004, the Better Regulation Task Force, published Better Routes to Redress, which was largely accepted by the government subsequently. It concentrated on personal injury litigation because this "attracts most attention from the media … and was raised most frequently in our stakeholder meetings". Drawing on an international review of the cost of personal injury claims, the report listed the UK’s expenditure at 0.6% of GDP as lower than that of 10 other industrialised nations, including Canada (0.8%), Australia (1.1%), Germany (1.3%) and the USA (1.9%): only Denmark spent less.

6. The report denied there was any sound basis for the belief that Britain was in the grip of a compensation crisis, basing itself partly on the opinion of "almost everyone" who gave evidence and partly on the declining number of injury claims reported in recent years.

7. Settlement costs, on the other hand, have increased. This is mainly due to the fact that compensation calculations are nowadays more favourable to claimants than formerly. In Wells v Wells, the House of Lords decided that damages for future pecuniary losses (consisting principally of loss of earnings and care costs) should be based on the likely rate of return available if an award was invested in index-linked government securities rather than the stock market. The effect of this change to the “discount rate” has been to increase significantly the lump sums awarded in order to offset the expected lower levels of investment return. The following year, the Court of Appeal held that the conventional sums awarded in respect of non-pecuniary losses (such as pain and suffering and loss of amenity) were too low. In consequence, this element of awards to the most seriously injured has increased by approximately a third with proportionately smaller increases for the less seriously hurt.

8. These judicially inspired increases have affected the cost of liability insurance, though not in a directly linear manner. The legal system has operated for more than a hundred years on the largely unspoken assumption that the principal categories of defendants are able to insure themselves. In 2003, sensitive to misgivings expressed by some business lobbies about the affordability of liability (especially employers’ liability) insurance, the government instituted separate inquiries by the Office of Fair Trading and the Department for Work and Pensions. These reports confirm that the cost of employers’ liability cover, in particular, had risen steeply over a relatively short period. However, the rises appear to have more to do with insurers belatedly attempting to rectify accumulated losses caused by poor underwriting or investment decisions and historically unrealistic pricing policies, rather than to the increased cost of injury claims. Fortunately, most forms of liability insurance continue to be available at prices that are not prohibitive, though there have been reports of difficulties faced by some in the voluntary and community sector.

9. There are two other matters connected with the number of claims. First, the great majority of injured persons never resort to the law. Arguably, it is the absence of a compensation culture that characterises our liability system; and that not much has changed overall since the time of the Pearson Royal Commission almost thirty years ago. The picture is, however, mixed. The claim frequency rate by road accident victims has increased in recent times,8 while it is still the fact that comparatively few of those hurt at work are compensated.9 Given that perhaps only one in a hundred negligently damaged patients sue, claims against the NHS attract disproportionate (media) attention.10 In some areas too many wrongful harms go uncompensated.

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3 In contrast, market analysts, Datamonitor, predict that between 2001 and 2007 injury (excluding workplace disease) claims will increase, albeit very slowly by around 0.4% a year, see UK Personal Injury Litigation, 2002.

4 In Wells v Wells [1999] 1 AC 345 it was estimated that the effect of moving from the then prevailing discount rate of 4.5% to 3% increased the award by about £108,000.


7 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Cmd 7054, 1978), vol. 2, para 74, estimating that only 6.5% of accident victims actually recover damages.

8 International Underwriting Association of London. Third UK Bodily Injury Awards Study (March 2003) showing the average rate of increase as 3% per annum between 1992 and 2000.

9 Trades Union Congress, “A Little Compensation”, Hazards (May 2005) suggests that fewer than one in ten of the 80,000 who suffer workplace illness or injury each year recover compensation from their employer or from the industrial injuries scheme.

10 P Pleasence et al., “The experience of clinical negligence within the general population” (2003) 9 Clinical Risk 211. The number (though not the cost) of clinical negligence claims appears to be declining, see NHS Litigation Authority, Factsheet 3: information on claims, 2005. The NHS Redress Bill, when enacted, is expected to generate more (low value) claims. The Bill was inaccurately and unhelpfully characterised by the Health Minister, Jane Kennedy, as “an important step in preventing a US-style litigation culture”, see DoH Press Release 2005/0349.
10. A second question is whether well-founded claims should count as part of the “problem” at all. One reason why “compensation crisis” stories find such ready audiences may be related to the way they tap in to anxieties about declining social and moral values, such as self-reliance and personal responsibility. Tales of greedy lawyers egging on grasping claimants chasing compensation for trivial harms that in an earlier era would have been stoically shouldered without complaint feed such fears. Accordingly, attempts to test for the existence of a “compensation culture” should look beyond the absolute numbers of claims to whether there has been an increase in those that are substantially without merit or are bought off simply for their nuisance value. Unfortunately, there is no direct or reliable evidence concerning this. In the post-civil legal aid era, the economic imperative underpinning “no win-no fee” deals (together with the “loser-pays’ costs’ rule) may have to do duty as the gatekeeper against frivolous claims. We know that lawyers are unlikely to act for clients with poor chances of success.11

11. Whatever the statistical facts, the Task Force saw the “real” problem as lying elsewhere. A combination of exaggerated media stories and the avaricious advertising of some claims management companies had, allegedly, generated an “urban myth” about a “have a go” culture which, in turn, had inclined some undefined minority of the public to press speculative or spurious claims. Like the Actuaries before them, the Task Force made no attempt to quantify the size of this supposed problem, asserting merely that there is a “perception” that the public is more likely to seek legal redress than “ever before”. Conveniently, perhaps, this chimes nicely with the findings of several surveys concerning changing attitudes to blame and responsibility. Inconveniently, the results of most of these surveys are unreliable.12

Somewhat despairingly the Task Force concluded that “quoting statistics will not win the argument whilst the papers run ‘compensation culture’ stories”. By definition, claims reported in the media are unlikely to be representative—exceptionally they are simply fabricated. Nonetheless, they may be highly influential in shaping public debate, including the direction of law reform, as the United States’ experience shows.13

12. Commonly expressed opinion says that mere fear of (excessive) litigation results in undue caution with dire social consequences. Reputedly, organisations become less innovative, scarce resources that would be better applied elsewhere are unproductively diverted, unnecessarily costly safety precautions are taken, sometimes beneficial activities are fearfully abandoned altogether. Examples range from the potentially serious, such as defensive medical practices14 to the cancellation of downhill cheese-rolling competitions.

Here again, however, there is a good deal of mythologizing but little hard evidence documenting the extent of the phenomenon.

13. In some quarters, the number of injury claims has been made to appear as a yardstick to measure the moral (and economic) condition of the country. Are we less tolerant and more litigious? On balance it looks as if the British continue to be a nation of “lumpers” rather than litigators. There is good evidence that some sorts of accident claims have risen (from a relatively low base) and that the overall costs of personal injury settlements have gone up. But there is no reliable evidence about the number of bogus or exaggerated claims and whether they constitute a grave (or increasing) problem. What has plausibly been suggested is that “some insurance industry commentators rely heavily on anecdotal evidence of a worsening environment in order to justify price increases, quoting individual cases of highly doubtful or speculative claims that cannot be truly representative of claims in general”.15 When Lord Levene, the Chairman of Lloyd’s of London, complains that a “deluge” of claims is “plundering the economy”,16 we sense this may not be a totally disinterested assessment.

PART 2. THE COMPENSATION BILL

14. In March 2005, the Prime Minister said that too many public servants (particularly teachers and healthcare workers) were worried they might “be subject to unfair legal action” and promised that ways would be found to “protect” them from what he called this “real problem”. Within eight months, the Department for Constitutional Affairs has produced a bill which appears to be a response to this Prime Ministerial concern. The fact that Better Routes to Redress had denied that Britain actually was beset by a “litigation crisis” seems to have been overlooked.

11 S Yarrow, Just Rewards: The Outcome of Conditional Fee Cases (London: Policy Studies Institute, 2001). The Citizens’ Advice Bureaux report, No Win, No Fee, No Chance (December 2004), para 9, observes that such deals ‘create perverse incentives for the legal profession and provide the conditions for cherry-picking high value cases with high chances of success’.

12 Methodologically unsound survey methods are not uncommon. The Cost of Compensation Culture, claimed that public attitudes have changed for the worse, though since those surveyed were “actuaries and their friends” the sample was hardly representative. A survey for insurers, Norwich Union, by means of a leading question, elicited the response that “96% of people in Britain believe we are more likely to seek damages today than a decade ago”, see “The truth behind the claim game”, The Observer, 23 May 2004.

13 W Haltom and M. McCann, Distorting the Law. Politics, Media, and the Litigation Crisis (Chicago: University of Chicago Press, 2004) provide a vivid account of the selective and sensationalised nature of much of the media reporting of America’s “litigation crisis”, the role of other elite groups in constructing a populist moral panic and their implications for the direction of legislative reform.

14 The existence of defensive medicine is widely asserted, though there seems little reliable evidence documenting its precise nature, extent or effects. As to the UK, see M Ennis and C Vincent, “The Effects of Medical Accidents and Litigation on Doctors and Patients” (1994) 16 Law and Policy 97, at 99-106. For the position in North America, see D Dewees et al, Exploring the Domain of Accident Law. Taking the Facts Seriously (New York, Oxford University Press, 1996) at 104-112.

15 “Blame culture is the road to suicide”, Daily Telegraph, 3 February 2004.
15. Part 2 of the Compensation Bill introduces powers to control “claims farmers”. The government having earlier accepted a Task Force recommendation that regulation was desirable, something of the sort was widely anticipated. No more will be said about this here. Instead, Part 1 is considered.

16. Part 1 of the Bill consists of a single clause. As presently drafted it provides:

Clause 1. Deterrent effect of potential liability.

A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

17. Being addressed to the courts this looks uncontroversial—technical lawyers’ law. Moreover, the “Explanatory Notes” accompanying the Bill tersely say the clause does no more than “reflect the existing law”. How this will give effect to Mr. Blair’s wish to see potential (especially public sector) defendants better protected from (unfair) litigation and judgments is obscure. Will they be reassured when told the clause is merely declaratory of how things already are?

18. Clause 1 is expressly confined to questions of breach—with how the standard of care is to be applied—and not with the prior duty issue. The Bill will, therefore, not affect the power of courts to recognise new responsibilities in negligence, which may not be quite so welcome to those defendants facing recently minted causes of action, such as complaints of educational neglect or child protection failures.

19. Clause 1 is side-noted “Deterrent effect of potential liability”, an effect which courts sometimes assume exists, but which is more commonly questioned by academic commentators. For example, doctors frequently assert that litigation leads to “defensive medicine”, though we saw earlier that reliable evidence concerning its precise nature, extent or effects is scarce. What we do know is that the medical profession has a strong tendency to exaggerate its exposure to the risk of being sued: a critical misperception that teachers now also seem to share. If attitudes such as these are thought to be a (perhaps the) problem—because they promote socially and economically damaging risk-averse behaviour—clause 1 seems poorly suited to changing them.

Given the paucity of demonstrable connections between (the threat of) liability and real world behaviour, instructing judges to have regard to whether a “desirable activity” may be “prevented” or “discouraged”, and to what extent, seems potentially fraught. Moreover, uncertainty over what activities may qualify to be regarded as “desirable” may provide more, rather than less, scope for litigation. So far, the government has merely said that courts will be able to “consider the wider social context of the activity”.

20. By offering a statutory steer to the courts, clause 1 purports to be improving the lot of defendants while simultaneously allowing judges to continue to act as they have always done. It looks like an unnecessary solution to a non-existent problem. More to the point, it seems unlikely that it will reduce fear of unfair litigation, risk-averse behaviour, or the number of allegedly frivolous claims. Nor, one suspects, will it actively encourage more out-of-school opportunities, community volunteering or other socially valuable activities. Loose talk of a “compensation culture” no doubt helps to sell the very sorts of newspapers that purport to despise it most; however, it ought not to dictate the legislative agenda.

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November 2005

Evidence submitted by Michael Jones, Professor of Common Law, University of Liverpool

INTRODUCTION

1. The Constitutional Affairs Committee is seeking to investigate the effect of lawyers’ Conditional Fee Arrangements, and the question of whether legislation can address the apparent “risk averse” culture in public bodies, stemming from fear of litigation. There are two Bills presently before Parliament which are potentially relevant to this inquiry, the Compensation Bill and the NHS Redress Bill.

2. Most of my comments will be addressed to the NHS Redress Bill, where I believe I have some specialist knowledge. First, however, I would like to comment on the Compensation Bill.

17 See Education Outside the Classroom, Second Report, (HC Paper 120, February 2005) describing teachers’ fears of being sued (or prosecuted) following an accident as “entirely out of proportion to the real risks”.
THE COMPENSATION BILL

3. The Compensation Bill is in two Parts. Part 2 provides for the regulation of “claims farmers.” I have no specialist knowledge of claims management companies, although I am aware of allegations that in some cases they leave clients with little or no compensation, having charged significant fees for their services. In an age when virtually all professional services are subject to some form of statutory regulation in the interests of protecting the public from poor service or abuse of position, I can think of no good reason why those providing claims management services should not also be regulated.

The deterrent effect of potential liability

4. Clause 1 of the Compensation Bill provides that a court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might:

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
(b) discourage persons from undertaking functions in connection with a desirable activity.

5. This does no more than state the position that currently applies at common law. When assessing whether a defendant is in breach of duty for the purposes of the tort of negligence a court undertakes a risk-benefit calculation. This involves the weighing of a number of factors: (1) the magnitude of the risk; (2) the defendant’s purpose in undertaking the activity that creates the risk; and (3) the practicability of the defendant taking precautions against the risk. The magnitude of the risk is the product of two factors: (i) the likelihood of the risk materialising (how probable was it that it would occur?), and (ii) how serious any damage would be if the risk did actually materialise. So a small risk of minor harm could reasonably be ignored, but if the damage is potentially catastrophic one would expect a reasonable defendant to take precautions against even a small risk. The “defendant’s purpose” looks to the nature of the defendant’s activity. Attempts to save life and limb (for example the emergency services racing to the scene of an accident) will justify the taking of greater risk. Conversely, at the other extreme, where the defendant’s activity has no social utility, the taking of even small risks may not be justified. The practicability of taking precautions looks at the burden or cost of taking precautions to the defendant when assessing what risks it is reasonable to ignore, and what risks should be guarded against. The risk-benefit calculation is not a precise mathematical process, but does involve weighing these competing factors.

6. There are numerous cases setting out these principles, and they would be well-known to an undergraduate Law student. A recent example was the decision of the House of Lords in Tomlinson v Congleton Borough Council1 where it was held that a local authority was not liable for the claimant’s injuries when he dived into shallow water at the edge of a lake and struck his head on the bottom, despite the presence of warning notices. It was stressed that in considering what precautions it was reasonable for an occupier to take under the Occupiers’ Liability Acts 1957 and 1984, the court should have regard to the ordinary risks of life which individuals could be expected to encounter as result of their own activities, and also to the effect that imposing liability would have in effectively preventing the general public from using such recreational facilities. In other words, the court did precisely what clause 1 of the Bill suggests should happen.

7. There can be little objection to a statutory provision replicating the common law position, except perhaps that it represents a waste of Parliament’s time. Such a provision may possibly have the effect of clarifying the law for the general population to whom it is addressed, and may therefore have some beneficial effect. This may particularly be the case here because there appears to be a distinct misconception about the risks of litigation and the appropriate response to that risk from potential defendants. The standard of care required by the tort of negligence is that a defendant should exercise reasonable care in the circumstances. It is not a requirement that a defendant should avoid all risk of causing injury; merely that a defendant should not expose others to an unreasonable risk of harm.

8. The terms of reference for this inquiry refer to the possibility of “unnecessary risk averseness” in public bodies stemming from a fear of litigation. Examples of that might include teachers refusing to take children on school trips, and, at its most absurd, the banning of the playing of “conkers” on school premises. Whilst it is true that some instances of accidental injuries on school trips have resulted in litigation and, in some cases, findings of liability for negligence against adults supervising children, it is important to bear in mind that negligence sets a standard of reasonable care, not of perfection. It is difficult to see what other standard a court should set when asked to adjudicate on the conduct of someone undertaking a role, whether in the context of private or public relationships, which involves responsibility for the safety of others. Is it really being suggested that a court should hold that teachers do not have a legal responsibility to exercise reasonable care for the pupils in their charge, whether in or out of school, because of the risk that this would “discourage persons from undertaking functions in connection with a desirable activity” or “prevent a

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1 [2003] UKHL 47.
desirable activity from being undertaken at all”?

It seems doubtful that, for example, school trips in which the adults in charge have no responsibility to exercise reasonable care for the safety of children could be described as “desirable activity”.

9. The argument that those undertaking public functions should be free from liability for negligence because imposing liability has an unduly deterrent effect on the performance of their public duties (resulting in “defensive practice”) or produces significant reduction in the resources available to a public body to perform its functions (as a result of awards of compensation) is an argument, ultimately, for a complete immunity of all public bodies from claims in negligence. I do not believe that this would be regarded as either desirable by Parliament or acceptable to the general public.

10. What is needed is a greater level of understanding (or education) about the balanced approach that the courts take to assessing whether someone’s conduct can be classified as unreasonable, and therefore negligent. The stories that sell newspapers, and that tend therefore to inform public opinion, are not necessarily typical of the cases that pass through the courts or make their way into the law reports.

THE NHS REDRESS BILL

11. The NHS Redress Bill is the government’s response to the proposals for reform outlined in the Department of Health’s consultation report, Making Amends (2003), where the Chief Medical officer made a number of recommendations for the handling of clinical negligence claims, the most important of which were:

1. a scheme of “redress” for patients harmed as a result of “seriously substandard” NHS hospital care in relatively low value claims (with a ceiling of about £30,000); and
2. a compensation package for brain damaged babies who suffer severe neurological impairment related to or resulting from birth, irrespective of the proof of fault.

12. Redress would consist of a “package of care” from the NHS to deal with the effects of the injury, plus possible financial compensation, limited to the notional cost of the episode of care or other amount as appropriate, at the discretion of the local NHS Trust; and up to £30,000 where authorised by the national body managing the new scheme.

13. The NHS Redress Bill makes no reference to a “compensation package for brain damaged babies”, which has been dropped from the CMO’s recommendations. Thus, the proposed NHS Redress scheme is limited to relatively low value claims. The Bill does not mention specific figures, but it is understood that compensation under the scheme will be capped at £20,000. The Bill provides only a framework for the Redress scheme, conferring discretion on the Secretary of State to establish a scheme in Regulations. It will apply to hospital services (in England) in relation to personal injury or loss arising out of or in connection with breach of a duty of care owed to any person in connection with the diagnosis of illness, or the care or treatment of any patient. It does not apply to liability that is or has been the subject of civil proceedings.

14. The Scheme must provide for:

(i) the making of offers of compensation;
(ii) giving explanations of what went wrong;
(iii) acceptance of a settlement under scheme must include a waiver of the right to sue; and
(iv) suspension of the tort limitation period until the process of dealing with NHS Redress is complete.

15. The Scheme may provide for:

(i) compensation to take the form of a contract to provide care or treatment or financial compensation or both;
(ii) provisions specifying for what forms of damage compensation may be offered;
(iii) the assessment of compensation;
(iv) an upper limit on financial compensation.

16. There are also a number of procedural matters that need to be addressed in Regulations, such as who can commence proceedings; how proceedings can be commenced; and time limits for claiming. The criteria for making a claim under NHS Redress will be the common law test for “clinical negligence”. The Scheme can also make provision for giving patients legal advice without charge (in order for them to assess the value of any offer of compensation), and for services designed to help in reaching a settlement (eg mediation). NHS Redress will be overseen by a Scheme authority (which will be the NHS Litigation Authority).

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2 See for example the comments of the Court of Appeal on this point in Capital and Counties plc v Hampshire County Council [1997] 2 All ER 865 at 890-1.

3 In its place the Department of Health has issued a “Statement of Intent” to improve the quality of care which the NHS delivers to children and young people with disabilities.

4 The wording of the Bill appears to be restricted to claims in respect of the tort of negligence, though the Explanatory Notes suggest that the scheme is meant to cover “liability in tort” arising out of the provision of medical care. The difference is important, because a claim in the tort of battery where there has been no valid consent to the treatment (eg in the case of “wrong site surgery”) does not involve “breach of a duty of care”.

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17. The benefits of the NHS Redress scheme are said to be that it will: (1) provide a real alternative to litigation; (2) reduce delays and legal costs; (3) provide for the giving of explanations to patients about what went wrong with their treatment; (4) place an emphasis on immediate, appropriate remedial healthcare; (5) help in preventing harm to patients (by enabling the NHS to learn from its mistakes and reduce risks); (6) represents a move away from a “blame culture”.

18. The Scheme will undoubtedly provide an alternative to litigation, for some patients—ie those whose claims are below the £20,000 cap. Indeed, for these patients it may be the only remedy, since litigation may not be a realistic alternative for many small claims (see para 32 below). It will do nothing for those patients whose injuries are such that the cost of compensation exceeds the £20,000 cap.

19. The Scheme should also reduce delay, though whether it will reduce the overall cost of claims (by reducing legal costs) depends upon how many claims are brought that would not previously have been brought through the tort system.

20. The remaining claims for the benefits of NHS Redress are more speculative. Although it is said that explanations for what went wrong will be encouraged, there is nothing in the present arrangements to stop health care professionals providing an explanation (and/or an apology) when something has gone wrong with a patient’s treatment. An explanation or apology does not constitute an admission liability. Entitlement to NHS Redress still depends upon a conclusion that there has been “clinical negligence”. If health professionals are currently reluctant to provide explanations because they are worried about their personal reputation or disciplinary action (which in practice almost never results from simple negligence), they should, in theory, be equally worried under NHS Redress. The same point applies in relation to learning from mistakes and reducing risks. The same pressures will be present. There is nothing in the tort system that stops NHS Trusts or individual health professionals from seeking to learn from mistakes that will not also be a feature of NHS Redress. The suggestion that NHS Redress will assist in a move away from a “blame culture” (whereby individuals have to be blamed in order to establish negligence) seems to overlook the problem of higher value claims. Presumably, if there is a tendency to a “blame culture” as a result of litigation, this will still be present for incidents giving rise to claims worth more than £20,000. And how is the health professional to know, except in a very obvious case, that the resulting damage is likely to exceed £20,000. It seems unlikely that attempts to shift the attitudes of NHS staff to the problem of medical accidents will succeed by focusing only on relatively small value claims.

21. The fourth benefit of NHS Redress is said to be more emphasis on immediate, appropriate remedial healthcare for injured patients. This is a remarkable claim, since it is difficult to see what stops that from happening now. The NHS treats individuals who have developed disease or suffered an injury without reference to how they acquired their injuries. The victim of a road traffic accident wheeled into Casualty receives treatment on the basis of a need for treatment. Why would that not happen to the victim of a medical accident? Either the implication to be taken from this purported benefit is that the victims of medical accident do not currently receive immediate, appropriate remedial healthcare (and if so, then one should ask the question: why not?); or injured patients will be in precisely the same position in terms access to appropriate remedial healthcare as they are now.

Does a “compensation culture” exist in medical negligence litigation?

22. The term “compensation culture” is value-laden, and it is value-laden in a pejorative sense. It implies that within society, or within certain sections of society, there are people who seek to bring claims for compensation which are entirely unjustified and this is having adverse consequences for others, whether it be those who pay insurance premiums to cover the risk of liability (or taxpayers who fund public services), or individuals who are potential defendants who adjust their behaviour in response to the perceived threat of litigation.

23. There are two points to make at the outset, before addressing what I consider to be the real issue in this debate. First, there are undoubtedly some individuals who make claims that are unjustified, in the sense that they fail to obtain compensation. However, the fact that some claimants are unsuccessful tells one nothing about whether we have a compensation culture. Any system of adjudication is bound to have cases that fall on both sides of any given liability rule. Some cases will succeed, some will fail, but that is a product of the uncertainty of the adjudication process. If we knew at the outset which claims should be compensated and which should be rejected, we would not need a system of adjudication.

24. Secondly, the legal system is not exclusively concerned with the payment of compensation, even in cases of personal injury. Legal rules are meant to have a deterrent effect. This is most obvious in the criminal law, but it also applies, though to a lesser extent, in the civil law. In other words, there is an expectation that individuals will respond to the threat of liability by adjusting their behaviour to the optimum standard set by the legal rules. This is a rather weak effect in the context of the civil law, because liability insurance tends to insulate the potential defendant from the most serious financial consequences of a finding of liability. Moreover, in the area of liability for negligence, some types of carelessness are difficult to deter (consider the sheer “inadvertent carelessness” of many motorists). Nonetheless, it remains arguable that if the civil law had no effect on the behaviour of potential defendants it would be failing in one of its functions.
25. The more fundamental question that needs to be asked, however, when considering whether a “compensation culture” exists is not “are too many claims for compensation made?” but: “how many claims should there be?” I will address this issue in the context of clinical negligence claims.

How many claims for clinical negligence should there be?

26. It is not known how many accidental injuries are attributable to medical treatment each year, but the figure is probably high. Extrapolating from studies carried out in the USA and Australia the Department of Health estimates that there are about 850,000 “adverse events” in NHS hospitals causing £2 billion direct cost to NHS in additional hospital days alone.5 Nor is it known how many of these adverse events are preventable, but some studies put this at around 50%, which would give a figure of 425,000.6

27. We do not know how many of these preventable adverse events are attributable to negligence by the medical staff (bearing in mind that simply because an event is preventable, does not necessarily make it negligent). The best “estimate”, based on the most significant American study, is that possibly 1% of hospital patients suffer injury as a result of negligence.7 Applied to hospitals in England and Wales this would produce a figure of 8,500 patients per annum who suffer injury as a consequence of negligence by medical staff. How many claims are there per annum?

28. The figures from earlier years are not particularly reliable, because the NHS was not very good at collecting the data, but they are the best available. Figures from 2002–03 onwards from the NHS Litigation Authority are likely to be the most accurate. It is notable that for 2002–03 three very different figures are available from public sources (the Department of Health, the NHS Litigation Authority, and the National Audit Office):

<table>
<thead>
<tr>
<th>Year</th>
<th>Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>7,000</td>
</tr>
<tr>
<td>Mid-1990s</td>
<td>5,000</td>
</tr>
<tr>
<td>1999–2000</td>
<td>10,000</td>
</tr>
<tr>
<td>2002–03</td>
<td>6,797</td>
</tr>
<tr>
<td>2003–04</td>
<td>6,251</td>
</tr>
<tr>
<td>2004–05</td>
<td>5,609</td>
</tr>
</tbody>
</table>

29. There are two significant features from the available figures on claims for clinical negligence. First, over the years 2002–03 to 2004–05, according to the figures from the NHS Litigation Authority, claims are going down, not rising. Secondly, the number of claims as proportion of the likely number of medical accidents attributable to negligence is small (probably under 10%). This does not suggest that, in the context of claims for clinical negligence, at least, there is a “compensation culture”. On the contrary it suggests that there are probably large numbers of patients who suffer injury as result of medical negligence who never make a claim at all. In other words, the problem is not too many claims, but too few.

30. Moreover, these figures take no account of the number of claims for clinical negligence in which the claimant loses. Estimates of “success” rates vary between around 25% and 45%. The Review of Legal Aid expenditure, Eligibility for Civil Legal Aid,16 estimated the success rates for Legally Aided litigation medical negligence claims at 42% (compared to 84% for road traffic accident claims and 79% for work accident claims). Empirical studies have put the success rate at around 25%17 or 30%.18 The Legal Services Commission reported an overall success rate for clinical negligence claims supported by legal aid for 1999–2000 at 24%;19 and the NHS Litigation Authority has stated that in approximately 45% of claims...
for clinical negligence made against the NHS as at 31 March 2005 the claimant recovered some compensation. Although the estimates vary, we can say with some confidence that in less than half of the relatively small number of claims brought does the claimant actually recover any compensation.

**Will NHS Redress address the problem of large numbers of patients who presently are unable to obtain compensation for medical negligence?**

31. Clinical negligence is the only area of personal injuries litigation for which claimants can still seek legal aid. All other areas are funded on the basis of conditional fees. The comparatively low success rates for clinical negligence, and the greater legal costs involved in proving professional negligence (as opposed to, say, negligence in a road traffic accident) have resulted in very few providers of after-the-event insurance being willing to offer cover for claimants against the risk of having to pay the defendants’ costs if the claim fails. Moreover, premiums can be thousands, rather than hundreds, of pounds. I have no data on the number of clinical negligence cases that have been run on a conditional fee basis, combined with after-the-event insurance failing. Furthermore, Lord Woolf found that 92% of medical negligence cases were legally aided. There is no evidence that the victims of medical negligence are disproportionately poor. The inference is that many victims of medical negligence do not bring proceedings because of the difficulties of proof and the disproportionate costs of litigating.

32. NHS Redress will go some way to providing a means of obtaining compensation for these patients, at least where the value of the claim does not exceed £20,000. Indeed, the probability is that even where potential claimants satisfied the means-testing requirements for legal aid they would still not obtain legal aid to pursue a “small” claim, so that NHS Redress could open up an avenue to compensation for many low value claims currently denied any remedy.

**Is there any evidence of risk averseness in the NHS?**

33. The Committee’s terms of reference for this inquiry ask: “Is the notion of a ‘compensation culture’ leading to unnecessary risk averseness in public bodies?” In my view there is no evidence of a “compensation culture” in clinical negligence litigation. Despite this, there has been, for many years, the suggestion that doctors practise “defensive medicine” because of the threat of litigation. This is a hugely contentious claim, for which there is little or no empirical, as opposed to anecdotal, evidence. The CMO’s report, *Making Amends*, refers to the concept of defensive medicine, without citing a single piece of empirical evidence to support its existence in the NHS. Conceptually, defensive medicine does not make sense, because the test for medical negligence is based on the standards applied by a “responsible body of medical opinion.” A doctor cannot protect himself or herself from a negligence claim by doing something which would not be supported by responsible professional opinion. There is no agreement as to what defensive medicine means (one doctor’s “defensive practice” may be another doctor’s “safe practice”), nor how one can identify it. Some doctors use the term “defensive” simply to mean treating patients conservatively or even “more carefully.” Personally, I would prefer my doctor to approach my case defensively, if that means being cautious about the assessment of risks and the various treatments available.

34. Moreover, it is not clear from all the assertions about defensive practice, what the suggested alternative to liability in negligence should be. Is it really being suggested that, unlike any other professional group, doctors should not be accountable in the tort of negligence? There are undoubtedly pressures on healthcare professionals to act carefully when exercising their professional functions, which may cause them some concern. But these pressures are not unique to the medical profession, and indeed, may have value in promoting patient safety. The assertions about defensive practice are, ultimately, an admission that potential defendants respond to the threat of liability, but the claim is that that threat “over-deters”. Can anyone be confident that removing the threat of potential liability would not result in under-deterrence, with a resulting rise in risky professional judgments ultimately causing more damage to patients? In other words, the risk of tort liability does have a deterrent effect, and removing that risk may simply lead to more careless behaviour.

35. My conclusion is that, in the context of NHS medical treatment at least, “risk averseness” is probably a desirable feature of the tort system, particularly given the evidence from the Department of Health as to the staggering number of adverse events that occur in NHS hospitals each year.

**Professor Michael Jones**  
University of Liverpool  
November 2005

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20 *NHSLA Fact Sheet No 3, (July 2005).*  
23 *Making Amends,* June 2003, p 27, para 17; p 76, para 5; p 108, para 61; p 110, para 6; p 118, para 8, where there is a reference to “the rising tide of defensive medicine.”
Evidence submitted by Richard Mullender, Lecturer, Newcastle Law School, Newcastle upon Tyne

1. JUDICIAL AND ACADEMIC COMMENT ON BLAME CULTURE

Judicial comment

It would be wrong to assume that the issue of blame culture has only recently become a matter of concern to judges. Certainly, recent judgments reveal such concern: eg, Tomlinson v Congleton Borough Council.1 But judges have been expressing similar concerns since, at the last, the 1980s. Two examples illustrate the point.

1980s: In CBS Songs Ltd v Amstrad Consumer Electronics plc, Lord Templeman stated that claimants (and those representing them) were increasingly ready to assume that foreseeability had become “a reflection of hindsight and that for every mischance in an accident prone world someone solvent must be liable in damages”.2

1990s: in John Munroe (Acrylics) v London Fire and Civil Defence Authorities, Rougier J stated that “[t]here seems to be a growing belief that every misfortune must . . . be laid at someone else’s door”.3 He also observed that “after every mishap, every tragedy, the cupped palms are outstretched for the solace of monetary compensation”.4 He plainly thought that the situation he was describing had grown worse during his working life. For he said that “claims that would have been unheard of 30 years ago are now being entertained”.5

More recently, senior judges have suggested that some claimants may be engaging in exaggeration (concerning, inter alia, their injuries): eg, Judge LJ in Bradford-Smart v West Sussex County Council.6

Academic comment

In The Damages Lottery, Professor Patrick Atiyah argues that the judiciary have “stretched” negligence law in a variety of ways. This has made it easier for claimants to recover compensation. The stretching described by Atiyah has resulted in a relaxation of duty of care and causation requirements. Likewise, the requirement of a showing of harm has been relaxed, with the result that, inter alia, post-traumatic stress disorder can ground a claim. Atiyah argues that judicial “sympathy” for claimants explains, in large part, the developments he describes.7 In an earlier essay (on US tort law), Atiyah associated this sympathetic outlook with adoption of a “social insurance principle”, according to which (and, here, Atiyah exaggerates) “the plaintiff should always win”.8 Moreover, he identified British judges as having begun to adopt the same outlook.9

Like Atiyah, Tony Weir argues that legal developments have played a significant part in the emergence of a blame culture. He identifies the two-stage duty of care test set out by Lord Wilberforce in Anns v Merton LBC as “pure plaintiff’s law”.10 He also sees this and other such developments as having fostered a “wondrously unstoical and whinging society”.11 Moreover, this process of development (pro-claimant law encouraging “unstoical” attitudes) has, on Weir’s analysis, been unfolding for a long time. He argues that, from 1846 onwards, “development [both at common law and statutory] has been almost universally in favour of claimants”.12 As a result, expansion and progress have, on Weir’s account, been conflated. For a society is “thought to be progressive to the extent that it increasingly meets its citizens’ complaints”13.

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3 [1996] 4 All ER 318, 322.
4 Ibid.
5 Ibid.
9 Ibid, 279 (discussing compensation for mental harm).
10 Weir, “Governmental Liability” [1989] Public Law, 40, 51. (The approach to duty of care questions adopted in Anns v Merton LBC [1978] AC 467 was disapproved by the House of Lords in Murphy v Brentwood DC [1991] 1 AC 398. In Anns, Lord Wilberforce stated that “in order to establish that a duty of care arises . . . it is not necessary to bring the facts of that situation within those of previous situations in which a duty . . . has been held to exist”. As a result, the law was identified as strongly receptive to novel claims. See Weir, op cit, 50.)
11 Ibid, 55. (Weir shares with such non-legal commentators as John Humphrys and Jeremy Paxman the view that the British have become less stoical”. See Weir, supra, n 10, 55.)
13 Ibid, 4.
2. “Weak” or “bad” claims

The danger of circularity

Those who comment on blame culture tend to talk in critical terms about “weak”, “bad”, “unmeritorious”, or “unethical” claims. This sort of language is used by the Better Regulation Task Force (BRTF). When offering justifications for its reform proposals, the BRTF refers to the inconvenience caused by “ill-conceived” and “unethical” litigation. Critical comment of this sort can only have force if the reasons for regarding a claim as weak or unethical are spelled out. If this is not done, there is a danger that the problem of circularity (begging the question) will arise: ie, the claim will be considered weak because it lacks merit. Here, nothing useful is being said about the nature of the claims coming under criticism. As a result, we do not have a normative argument against weak claims. Legal basics provide at least the beginning of a basis on which to make good this deficiency. Weak claims are advanced where (among other things):

(i) the relevant harm was not reasonably foreseeable (and/or can only be seen as reasonably foreseeable with the benefit of hindsight);

(ii) a causal connection cannot be established between the defendant’s conduct and the claimant’s losses; or

(iii) the relevant interference does not constitute a significant harm.

How should we regard claims that exhibit weaknesses of this sort? Here, generalisation is dangerous. Some of these claims may be advanced by those who are ready to “have a go”: ie, to seek to advance a claim that they know to be, at best, shaky. At least some of those who “have a go” might be said to be ready to instrumentalise the defendant: ie, treat the defendant as a means to the end of a money sum in circumstances where they do not regard him or her as the author of their misfortune. Where this happens the relevant claim is not only weak from a legal standpoint but also “ethically” (to use the BRTF’s term) or morally objectionable.

The readiness to “have a go” is a matter that merits rigorous empirical research. This is because the typical claimant has, until recently, been assumed to be (sometimes highly) risk-averse. If it is the case that a large number of claimants are ready to have a go, then this marks a significant development. Empirical research on this subject should examine the ways in which incentives, attitudes, and behaviour may have been altered by conditional fee arrangements and the Woolf reforms.

Some weak claims have positive value

Here, two points need to be made:

(i) While some claims are weak, they raise issues of public concern, where judicial scrutiny of the defendant’s conduct is valuable. One such case is Brooks v Commissioner of Police for the Metropolis. Here, a young man who was with Stephen Lawrence on the night he was killed (and who, like Lawrence, was attacked) brought a claim against the police. He argued that, as a result of, among other things, their failure to give him adequate support and attach appropriate weight to his account of the incident in which Lawrence was killed, he suffered post-traumatic stress disorder. Moreover, Brooks made his claim after the Lawrence Inquiry had sharply criticised the way in which the police had treated him. The House of Lords held that, to accept this claim would be to go “too far”. But their Lordships recognised that Brooks’s invitation to examine the outer limits of liability was a socially useful exercise.

(ii) We live in a society where knowledge relevant to effective risk-management accretes sometimes quite rapidly. And this can result in an alteration in our understanding of the range of circumstances in which harm is reasonably foreseeable. Likewise, we may conclude that our understanding of harm has altered and that, as a matter of justice, protection should be provided against a broader range of interferences. Judge-made common law can (and does) track shifts in the bounds of reasonably foreseeable harm. Likewise, it can (and does) reflect alterations in our understanding of properly compensable harm. But this flexibility (as earlier noted) opens the way to abuse of the law by at least some litigants.

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14 Arculus, et al, n 1, above, 12, and 19.
15 Harris and Campbell, Remedies in Contract and Tort (2002), 432.
16 Ibid, 436.
17 [2005] 1 WLR 1495.
19 Brooks v Commissioner of Police for the Metropolis, n 17, above, 1509, per Lord Steyn.
20 Ibid, 1509.
21 See, for example, Watson v British Boxing Board of Control [2001] QB 1134.
22 In the twentieth century, negligence law began to offer compensation to those who had suffered psychiatric injury but no accompanying physical harm.
3. NEGLIGENCE LAW AS A DISCOVERY-PROCEDURE

Our society is pervaded by risks. And these risks may give rise to harms many of which cannot be anticipated in advance. Negligence law provides at least part of the answer to this problem. For it operates as a discovery-procedure. “Discovery-procedure” is a term of art in Friedrich Hayek’s writings. Hayek applies it to markets which, on his account, afford means by which to co-ordinate and distribute knowledge in socially beneficial ways.\(^2\) But Hayek’s term is applicable (in an extended sense) to the process that unfolds in trials concerning novel negligence claims.\(^2\) For co-ordination is a feature of the trial process. A judge (who is in a position to make an authoritative determination) is presented with hitherto unavailable information that may reveal the existence of a new threat to society’s members. Likewise, the process issues in the distribution of knowledge. For a judge may establish a new liability rule, speaking to a new source of danger. Or (where a claim fails) he or she takes the opportunity to indicate where the outer limits of liability are thought to lie in the relevant risk environment.

On this view, at least some genuinely weak claims have comparatively low value. This is because they do not (because, for example, the requirement of harm cannot be met) indicate the presence of a significant threat. But given the difficulties noted in 2, above (shifts in the bounds of reasonable foreseeability, etc), we should perhaps conclude that a readiness to tolerate some weak claims is (all things considered) justified. This is because some of them can be expected to prompt new understandings of reasonable foreseeability, harm, and matters of public concern (such as those considered in the Brooks case).

4. ADJUDICATION AND THE PURSUIT OF EQUILIBRIUM

In negligence law, judges seek to accommodate a range of competing interests: most obviously, the security of accident victims and the freedom of action of defendants.\(^2\) To this end, they have fashioned doctrines (eg. duty of care, breach of duty, and remoteness of harm tests) that employ the idea of “reasonable foreseeability” as a means by which to mediate the two sets of interests. But the positions they stake out are necessarily controversial. Security and freedom of action stand in a zero-sum relationship: more of one entails a reduction in the other. Here we have a problem of uncombinability.

Problems of incommensurability also arise in this area of the law. We encounter these problems where two values or two sets of practical arrangements cannot be ranked relative to one another on a common scale.\(^2\) How, for example, should we rank two bodies of negligence law that accommodate security and freedom of action differently (one giving more emphasis to security, and the other giving greater emphasis to freedom of action)? The difficulties involved in seeking to answer this question have led some commentators to conclude that the problem of incommensurability rears its head in negligence law.\(^2\)

The problem of incommensurability may explain why judges seem constantly to be seeking an “equilibration of social interests” in negligence law.\(^2\) Assuming that this is the case, the work done by judges is, in large part, reactive.\(^2\) Existing rules are altered to address perceived imbalances. We see this in English negligence law. From the 1930s until the early 1980s, the scope of negligence liability was expanded.\(^3\) A wider range of duties was imposed and, thus, security appeared to be the value that figured most prominently in the minds of judges. But from the mid-1980s, judges began a (much commented upon) “retreat” from this expansive approach. Hence, freedom of action appeared to figure more prominently in judicial thinking.

Each of these developments indicates that judges were seeking to establish a defensible accommodation of interests. But given the problem of incommensurability, there is no single set of arrangements that judges can identify as “the best”. However, they can and do respond to the problems that arise from, say, expansion: eg, a high level of defensiveness on the part of potential defendants, increased insurance premiums; a diversion of funds from front-line public services into compensation awards and risk-management strategies.

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23 See Hayek, *The Road to Serfdom* (1986), 161 and 15–17. (In the case of the market as a discovery-procedure, knowledge is encoded in prices that are themselves determined through voluntary exchanges. See Gray, *Hayek on Liberty* (1984).)
24 The use of “discovery-procedure” proposed in the text is extended for this reason. Hayek focuses on a comparatively informal discovery-procedure (the market, where (save for a body of constitutive rules) outcomes (prices) are determined by an aggregate of free choices. But, in negligence law, a judge makes an authoritative ruling on the significance of evidence and arguments that (in order to be accepted) must satisfy a range of legal requirements. The need for this latter discovery-procedure is easily explained. The transaction costs (most obviously, search costs) involved in identifying the myriad circumstances in which reasonably foreseeable harm could be inflicted are prohibitively high. But, by allowing addressees of the law to mount negligence actions, a body of knowledge concerning risks and means by which to counter them can be accumulated.
29 Ibid.
5. **Mediating principles**

Clause 1, Part 1 of the Compensation Bill is clearly intended to focus on the issue of breach of duty. But it raises an issue that is also addressed when duty of care questions are examined. This is the question whether socially “desirable” activities may provide grounds for rejecting a claim. In the duty of care context, questions of this sort are tackled by judges when considering the third stage of the duty of care test in Caparo Industries plc v Dickman (which is concerned with the question whether imposing liability would be “just, fair, and reasonable”).

Fundamentally, what is at stake here is the question as to how negligence law should accommodate two types of argument that compete with one another:

(i) arguments advanced by claimants that have to do with (or, at least, should have to do with) corrective justice (running on the theme “I have been wronged and this wrong should, as a matter of justice, be righted”); and

(ii) arguments that concern a broader range of interests (eg. those of persons who are denied access to needed medical services, or those of children who are unable to go on enriching school trips). Arguments of this sort are commonly described as “policy-based”. But at least some of them have to do with the public interest and a smaller subset implicate the ideal of distributive justice.

When addressing this issue, two points need to be made.

(i) Assuming that some claims can be properly described as “bad”, we do not have a collision between an argument from corrective justice and a countervailing argument concerning policy (or the public interest or distributive justice). This is because a genuinely bad claim cannot be categorised as an appeal to corrective justice (since the defendant has not wrongfully inflicted harm). The existing striking out procedure provides a means by which to deal with many such claims.

(ii) In cases where we do have a clash between an argument from corrective justice and a countervailing argument that concerns policy (or the public interest or distributive justice), thought needs to be given to this question: could a mediating principle be used to ensure that both types of argument are adequately considered. At present judges invoke the ideas of “justice, fairness, and reasonableness” when trying to mediate competing concerns. But perhaps a principle like proportionality could do useful work here. If used in this area of the law, judges would address this question: “Is it necessary to reject an otherwise good claim in order to ensure that a publicly beneficial activity can be effectively pursued?”

6. **Rights and responsibilities**

The argument for seeking to limit the circumstances in which weak or bad claims can be advanced might draw strength from the principle that rights and responsibilities should stand in a complementary relationship. At present, the addressees of negligence law are expected not merely to discharge existing duties. They are also expected to act on the law’s reasonably ascertainable implications. Moreover, to the extent that they do act in this way, they forestall harm, secure others’ interests, and participate in the generation of social capital. Given that negligence law’s addressees are expected to act in this way, they bear significant responsibilities. As a matter of distributive justice, these responsibilities should be offset (or balanced) by a right not to be exposed to (or only rarely to be exposed to) weak claims.

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Evidence submitted by Mark Lunney, Associate Professor, School of Law,
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1. **Introduction**

1.1 I am an Associate Professor at the School of Law, University of New England, Australia. Before taking up this post I was a lecturer, senior lecturer and reader at the School of Law, King’s College London. My primary research interest is the law of torts, and, among other publications, I am the co-author (with Ken Oliphant) of one of the leading tort coursebooks in the United Kingdom.

1.2 Since returning to Australia I have became familiar with the major statutory changes made to the law of tort in Australian jurisdictions. I believe my comparative experience—between the unreformed UK law of tort, and the modified law of tort in Australia—may be of value in assisting the Committee in its deliberations.

31 [1990] 2 AC 605, 617-618, per Lord Bridge.
2. THE “CHILLING EFFECT” OF THE LAW OF NEGLIGENCE

2.1 It is important at the outset to recognise that the primary concerns about a “compensation culture” relate to actions in the tort of negligence. My submissions will be addressed to this issue.

2.2 Absent a major empirical study (and even such a study would not be conclusive) it is difficult to assess claims that behavioural change can be attributed to the law of negligence. However, there is certainly some evidence that public bodies modify their behaviour because of a fear of litigation. A very good example is a case that reached the House of Lords in 2003, Tomlinson v Congleton Borough Council [2004] 1 AC 46. Here the claimant sued when he hit his head on the bottom of a man-made lake (or something protruding from the bottom of the lake) after diving into the water and suffered catastrophic injuries. Although the claimant ultimately lost in the House of Lords, it is instructive to see what steps the Council thought it had to take to avoid being sued. Because warning signs had not prevented unauthorised access to the lake, and it was impractical to employ sufficient rangers to prevent such action, the Council had decided that the only way to avoid the risk of injury from people diving into the lake was to prevent access to it by planting a reed-bed on the foreshore of the lake. As I have argued previously (“Occupiers and Obvious Risks” (2003) 11 Tort Law Review 140), this is a classic case of the “chilling effect” of the law of negligence—the Council felt it was forced to deny access to the lake to the detriment of the vast majority of the users of the facility over concerns that it might be found liable.

2.3 Although the claimant ultimately lost in the House of Lords, the decision does not exclude the possibility of such claims in the future. This is because the legal basis of the Council’s victory was that it had not breached its duty of care (ie it had not been careless). This is a question of fact to be decided on each case. However, the House of Lords did stress that the voluntary nature of the claimant’s actions, and what the Council could assume the claimant knew as regards the risks associated with that conduct, were important factors in deciding the “breach of duty” issue. In other words, it was not careless to allow the defendant to voluntarily run a risk of injury (by diving into the lake) of which he was or ought to have been aware.

2.4 It was this line of reasoning—put in terms of reintroducing “personal responsibility” into the law of negligence—that supported the reforms to the law of negligence in Australia. I will return to that legislation shortly, but in terms of the result in the Tomlinson decision, similar notions of personal responsibility clearly underpin the decision of the House of Lords.

2.5 Whether decisions such as Tomlinson are sufficient to reduce risk averseness of public bodies (to the extent such a trend is evidenced by this case) to an acceptable level will depend on the level of protection from the law of negligence that it is thought such bodies deserve. It is worth flagging here the diverse views that are held by tort scholars as to the appropriate role of the law of negligence. If the aim is to embody notions of “corrective justice”—that is, to remedy a “wrong” committed by one party against another—the approach of Tomlinson can hardly be faulted. The Council failed to take steps to ensure that the claimant did not voluntarily act in such a way as to harm himself. Only on a broad view of the social responsibility of the Council would such a failure be seen as culpable (see also Clough v First Choice Holidays and Flights Ltd [2005] All ER (D) 205—no liability where intoxicated claimant fell into shallow pool; claimant had to accept the risks associated with his conduct). However, if the goals of the law of negligence are seen as compensation and loss distribution, finding the Council liable in circumstances such as Tomlinson may be seen as desirable. Accidents are an inevitable by-product of allowing people access to man-made lakes, and as the community benefits from such facilities, the community should pay for accidents. This is achieved if Councils are held liable because Councils can spread the loss amongst its ratepayers. Taken to its logical conclusion, such an approach justifies payment of compensation on a no-fault basis, but, failing this, at least more accident victims are compensated if public bodies are held liable in negligence in a wide variety of circumstances.

2.6 My point here is that to ask whether there is a “compensation culture” or whether public bodies are unnecessarily “risk” averse is to ask questions that cannot be answered solely by recourse to empirical arguments. Acceptable levels of litigation are conditioned by the view one holds of the role of negligence in the relationship between public bodies and the individual (see, for example, the competing reviews expressed in Kneebone, Tort Liability of Public Authorities (1998) and my review of this book in (2000) 22 Adelaide Law Review pp 109–115). Although judges are not free to decide cases according to an individual sense of justice, there is undoubtedly scope in cases at the margins for such views to be influential. This is not a criticism; rather, it reflects the view that at some level judicial decision-making involves choices. In a parliamentary environment, the “political” questions should be made explicit and any decision justified, at least partly, by recourse to views about the appropriate relationship between fault, compensation and loss-distribution.

3. STATUTORY REFORM OF THE LAW OF NEGLIGENCE

3.1 Clause 1 of the Compensation Bill is a limited attempt to legislatively reduce the “chilling effect” of the law of negligence. In my view, the clause will have little effect. First, it is directed to the question of breach of duty (the reference to standard of care) rather than to the “duty of care”. It might not be possible in every case (because of the decisions of the European Court of Human Rights) to deny a duty of care for the reasons set out the clause, but it should be possible to do so in appropriate cases. However, the legislation is not
directed to this point. Secondly, the “public benefit” of the defendant’s activity is already taken into account in the breach of duty enquiry. For example, liability in relation to ambulances in WWII (Daborn v Bath Tramways [1946] 2 All ER 335) and fire engines (Watt v Hertfordshire County Council [1954] 1 WLR 835) has been denied because of the public benefit of the defendant’s activity. Clause 1 is likely to bring this factor into greater prominence but it remains a relatively minor change. It might also be noted that the extent to which the individual must suffer in the public interest is a matter which has attracted the interest of human rights lawyers (see Marcic v Thames Water Authority [2002] QB 929 (CA), [2004] 2 AC 42, Dennis v Ministry of Defence [2003] EWCH 793). It is at least arguable that denial of a breach of duty on the grounds of the public interest of the defendant’s activity, so as to avoid the payment of any compensation to a person injured by that activity, may infringe Articles 2 and 8 of the Convention.

3.2 Far more radical statutory change has been undertaken in all Australian jurisdictions in response to concerns similar to those that have motivated this inquiry. The reforms affect questions of both liability and quantum of damages. Liability is affected by legislative reform requiring claimants to take greater responsibility for their actions (hence the idea that the reforms are based on ideas of “personal responsibility”). Broadly, these reforms provide defences to actions in negligence where the claimant has run an obvious risk, and then seeks to hold a defendant liable for either failing to eradicate the risk or failing to warn of it. In most jurisdictions there is no liability for failing to warn of an obvious risk. Persons are presumed to be aware of obvious risks, and there is no liability where inherent risks materialize to cause injury. In New South Wales, where the most radical changes have been made, defences also apply in respect of dangerous recreational activities, and providers of recreational services are allowed to exclude liability for negligence (subject to certain restrictions). Apart from these generic defences, public bodies are also given specific, additional defences. Thus, in New South Wales, limited resources are taken into account in determining questions of duty of care and breach of duty, and there are limits on the liability of a public body acting as a regulator.

3.3 The detailed provisions of the Australian legislation reforming the law of negligence represent a different model for legislative reform than that proposed by the Compensation Bill. Whether it is preferable depends upon the amount of flexibility it is thought desirable to give judges. For the reasons set out above, it is possible that the enactment of Clause 1 would make little change to the common law. However, the changes made by legislation in Australia have had a dramatic effect in reducing the amount of litigation. It is true that the High Court of Australia had already begun to limit liability in negligence through a series of what were seen as pro-defendant decisions, but the legislative reforms have limited the scope for the judiciary to take decisions seen as either pro-or-anti claimants or defendants.

3.4 It is my submission that, if there is seen to be a “compensation culture” and that this is undesirable, legislative reform of the law of negligence should go further than that contained in Clause 1 of the Compensation Bill. Whatever the success of the remainder of the clauses of the Compensation Bill, and the NHS Redress Bill, the law of negligence will remain open-ended and will not provide the certainty that greater legislative intervention would provide. In particular, the liability of those who supply recreational services, or allow their land to be used for such purposes, could be limited in the manner of the Australian legislation. I should add that I am not an advocate for the wholesale importation of this legislation into the England and Wales legal system (see “Personal Responsibility and the ‘New’ Volenti” (2005) 13 Tort Law Review 76). However, the Australian experience suggests that greater legislative reform than that proposed might be more successful in reducing the number of actions for negligence.

3.5 Apart from notions of personal responsibility, the other method adopted by Australian legislatures to avoid a “compensation culture” has been to legislatively intervene in the rules relating to the assessment of damages in personal injury claims. The most significant has been to eliminate claims for non-pecuniary loss where the injury resulted in less than 15% of total body impairment, the latter state being one of catastrophic injury. Even beyond 15%, damages are scaled down to a proportion of total body impairment for the purposes of calculating the award of damages for this head (so, for example, injury assessed at 25% of total body impairment is scaled down to 6.5% for assessing damages). The legislation also sets a maximum amount that may be awarded for non-pecuniary loss, and the percentage recoverable is a percentage of that maximum amount. The maximum amount is currently $416,000.

3.6 Limits have also been set on awards of damages for pecuniary loss. Damages for loss of earnings are capped, and damages for the cost of care gratuitously provided to a claimant are also limited (to where the care is for a period of at least six months and for at least six hours/week). As in the United Kingdom, the discount rate for future loss is set by statute (currently 5%).

3.7 Whilst these changes have also been successful in limiting the number of successful claims, the changes have been controversial. Whilst eliminating the claim for non-pecuniary loss in respect of minor injuries has reduced the number of claims, the creation of a cap for such damages raises concerns about insufficient compensation. Indeed, one of the main findings of the Law Commission of England and Wales Report, Damages for Personal Injury: Non-Pecuniary Loss, No 257 (1999) was that awards of damages for non-pecuniary loss were too low in cases of serious injury. I note also that awards under the Guidelines for the Assessment of General Damages in Personal Injury Cases (6th ed. 2002) suggest that awards considerably higher than $416,000 (about £175,000) can be made in England and Wales. Some of the advocates of reform in Australia have also recognised that the reforms may have gone too far (see for example, the speech of the Chief Justice Spigelman to the Commonwealth Law Conference in London in September 2005).
3.8 In my submission, there is no justification for the statutory caps introduced by legislation in Australia. In particular, the caps on damages for non-pecuniary loss operate to increase the chances that the seriously injured will be under-compensated. Such a reform should not be introduced in England and Wales.

3.9 Once a claimant has established a cause of action against a defendant, the principle of full compensation should be applied. The aim of any legislative reform of the law of negligence (if thought necessary) should be to reduce the circumstances where defendants are found liable. It should not penalise claimants who have established a good claim by reducing the damages awarded to them.

4. THE WIDER QUESTION

4.1 Although it is outside the terms of reference of the inquiry, it is necessary to point out that the question of compensation for accident victims arises in circumstances outside the law of negligence. As has frequently been pointed out, persons injured through actionable negligence are the elite in terms of accident compensation (see Cane, Atiyah's Accidents, Compensation and the Law (6th ed, 1999). Any legislative reform of the law of negligence will not address the wider issue of the difference in treatment between victims of negligence and other accident victims. To that extent, any such reform will be piecemeal.

5. CONCLUSION

5.1 Questions of the existence of a “compensation culture” or “risk averseness” of defendants are not questions that can be answered solely by reference to statistics. The levels of litigation thought acceptable are value judgements based on wider views as to the appropriate scope of the law of negligence. Different views can be discerned from the existing caselaw, but there is some evidence that notions of personal responsibility are influencing judicial decisions, with the result that defendants will not be found liable where the claimant voluntarily runs a risk of which she knew or ought to have known.

5.2 The legislative reform proposed in Clause 1 of the Compensation Bill is minor and is unlikely of itself to produce a major change in the course of negligence litigation. If real change is desired, consideration should be given to adopting some of the legislative reform adopted in the Australian jurisdictions. In particular, legislation limiting claims against occupiers of land and organizers of recreational activities in respect of injuries to participants voluntarily engaged in risky activities should be introduced. This would legislatively entrench the approach of the House of Lords in the Tomlinson decision. Such legislation might be more nuanced than that in Australia, so that the manner in which the claimant ran the risk (reckless indifference, mere inadvertence) could be taken into account in deciding whether the defences would apply. However, it is submitted that legislative reform should not extend to changing the rules relating to the assessment of damages. Once a claimant has established her case, she should be entitled to a full award of damages assessed under existing rules to ensure, as far as is possible under this system, full compensation.

5.3 The question of compensation through the law of negligence is only one aspect of the wider question of accident compensation. It is to be hoped that this wider question will be addressed in due course.

Mark Lunney
Associate Professor of the School of Law
University of New England
Australia
November 2005

Evidence submitted by Berrymans Lace Mawer Solicitors, Solicitors

INTRODUCTION

1. Berrymans Lace Mawer is a firm of solicitors which works primarily for defendants and insurers. The firm has seven offices in England and Wales and our clients include as well as the major UK insurers, government departments, local government, the voluntary and private sectors. Our clients range from the largest PLCs to the smallest employer and undertake business in all areas of the UK economy including the primary, secondary and tertiary sectors. We also advise, amongst many others, clients who are part of the education, retail, leisure, transport, construction and private healthcare sectors. The practice is part of the compensation process and its turnover, primarily from advising defendants and their insurers, is of the order of £40,000,000 per annum.

2. This practice is an active participant in the civil justice process and partners in the practice sit as Deputy District Judges, are members of industry groups and have contributed to numerous Civil Justice Council and Law Society initiatives as members of those organisations and/or their sub-committees and advisory groups.
EXECUTIVE SUMMARY

3. We and our clients believe that there is a compensation culture.
4. There has been a substantial increase in the cost of each claim.
5. This increase is due to an acceleration in the legal costs and disbursements of the claimant’s solicitors.
6. The increase in these costs exceeds general inflation by a substantial margin.
7. The increase in costs is a consequence of the introduction of the CFA regime and particularly the fact that the “success fee” became a recoverable cost from the defendant.
8. The increase in costs has had an impact on behaviour.
9. There should be regulation of claims management services.
10. There is no need to change the current laws relating to negligence.
11. Part 1 of the Compensation Bill 2005 could contribute to the “compensation culture” by creating uncertainty and resulting in additional litigation.

DOES THE COMPENSATION CULTURE EXIST?

12. We have canvassed the views of our non-insurer defendant clients, primarily but not exclusively the larger plcs whom we represent. We assume that our insurer clients will provide their own response through the Association of British Insurers.
13. The overwhelming feedback from our clients is that there is a compensation culture. Our client’s report that there are significant regional variations in claims frequencies—by way of example the South East is not regarded as generating higher levels of claims.
14. Since the introduction of the present CFA regime our clients report an increase in the volumes of claims that they have faced although robust defence has often enabled our clients to reduce their claims levels from their peaks.
15. It is acknowledged that the volumes of claims may be stable but we would expect there to be a decline in claims volumes over a period of time as the economy continues its gradual change to a service based economy. We have also seen amongst our clients a much greater attention to risk management and believe that claims volumes should, as a consequence be declining.
16. All of our clients report that the cost per claim has increased markedly. This is not a “perception” but is an increase in their operational costs that significantly exceeds general inflation. Their analysis confirms that the reason for this increase in costs is not due to an increase in the damages payable but to an increase in the legal costs of the third party.
17. We are aware that the anecdotes about the compensation culture are legion and assume that the Committee is well aware of those stories. We however o

WHAT HAS BEEN THE EFFECT OF THE MOVE TO “NO WIN, NO FEE” CONTINGENCY FEE AGREEMENTS?

18. We are able to report a significant change in the behaviour of a number of our clients. There has been a very substantial increase in the cost of each claim which arises from the obligation to pay the “success fee” in addition to the “base” costs of claimant’s solicitor.
19. This increase in the legal cost of each claim has had an impact on claims behaviour in two ways.
20. Firstly, our clients fearing the substantial costs associated with defending litigation will prefer to settle matters early to mitigate the risk of those substantial costs. This may include settlement of claims with little merit and in thereby encouraging the unmeritorious claims leads to an increase in the overall volume of claims. Thus, whilst the behaviour on an individual basis is viewed as rational and logical, the collective outcome is to encourage the “have a go” or “compensation culture”.
21. The second factor which is evident is that the costs penalty associated with compromise now means that our clients are more ready to fight matters to a conclusion where they would once have preferred to explore the possibilities of compromise. Thus cases will more likely proceed to trial before the Court than settle during the later stages of litigation.
22. We are able to confirm that clients in various sectors including the leisure (particularly vulnerable to public liability claims) and construction sectors report this phenomenon. We believe that the Committee will be particularly interested to note that this outcome has also been confirmed to us by clients in the “not for
profit” social housing sector ie housing authorities. It is the unanimous view of clients in that section that the “no win, no fee” opportunity offered by solicitors to their clients has greatly increased the claims for disrepair.

23. The effect of the move to “no-win no-fee” has meant that the receiver of the service has no obligation to pay for that service. This disconnection has resulted in the absence of a control mechanism in relation to the base costs incurred by the solicitor for the claimant in bringing his claim. The substantial cushion of the success fee means that the solicitor for the claimant is less concerned about whether his base costs will ultimately be assessed as reasonable.

24. We are of the view that the issue of fee shifting (that is whether costs in whole or in part should be payable by the unsuccessful party or borne in whole or in part by the party receiving the service) should be reconsidered as part of a control mechanism in relation to legal fees. We believe that the absence of any control mechanism has contributed to the costs of dealing with claims and consequently the compensation culture.

Is the notion of a compensation culture leading to unnecessary risk averse ness in public bodies?

25. We act for a Local Authority that has taken a particularly robust view on the claims that it faced. Over a period of 15 months, 108 litigated claims have been defeated. If we make a conservative assumption of £2,000 for average damages, £3,000 for defence costs and £10,000 to include the success fee uplift, the 108 claims defeated represent a saving to that local council of £1.62 million of rate payers’ money.

26. Our Housing Association clients report that the consequence of the claims brought against them has been that the planned improvement programmes for their properties have been affected as they have been forced to undertake costly repairs out of synchronisation with those improvement programmes. The additional cost of this ad hoc programme has affected the provision of services. The increase in the third party costs has obliged these clients on occasions to meet legal fees from a budget that was earmarked for repairs/improvement.

27. We consider it relevant to mention that whilst some clients have success in dealing with their public liability claims (see above in relation to Local Authorities), it does appear that those claims may merely transfer to another industry group or sector. Certain of our clients with a significant exposure to public liability claims from “slippers and trippers” have recently reported an increasing trend of these types of claims.

Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

28. It is both our view as participants in the litigation process and the view of our clients that there is a fundamental and unconditional need for those providing claims management services to be subject to Regulation.

29. Our Housing Association clients often deal with vulnerable tenants on income support. It is their perception that the claims against them are all too often generated by claims management companies which direct them towards risky and high cost legal expenses insurance schemes which are handled by solicitors who are not local to those clients.

30. This practice and indeed every participant whom we come across in the litigation process, both claimant and defendant, is strongly of the view that claims management services should be regulated. We wholly endorse the aims of Part Two of the Compensation Bill 2005.

Should any changes be made to the current laws relating to negligence?

31. We consider that there is no necessity to change the law relating to negligence. We consider that the law is appropriately set out in the judgment of Lord Hoffman at paragraph 34 of his judgment in Tomlinson v Congleton Borough Council:

“the question of what amounts to ‘such care as in all the circumstances of the case is reasonable’ depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative of measures. These factors have to be balanced against each other.”

32. In relation to related considerations which are more important than the financial costs of taking preventative measures identified in the case of Tomlinson for the occupier of land, Lord Hoffman goes onto say:

“the first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the council should be entitled to allow people of full capacity to decide for themselves whether to take the risk.”
Lord Hoffinan continues:

“a duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees, or some lack of capacity, such as the inability of children to recognise danger or the despair of prisoners which may lead them to inflict injury on themselves.”

33. This is the existing state of the standard of care in this country. We confirm that it is our experience that the lower Courts since Tomlinson have applied the law of that case. There is no need for statutory reinforcement of the duty.

34. We have considerable concerns about Section 1 of the Compensation Bill 2005 does not add to the law and arguably, given the conditionality (“A Court considering a claim in negligence may . . . have regard . . . ”) it is arguable that the position is weakened. What criteria should be used by the Court in deciding whether to apply section 1 of the Compensation Bill? Will it be a ground for appeal if a Court does not, and why has the legislator not considered it appropriate to require the judge to consider these issues when in the words of Lord Hoffinan this should be considered in all such cases?

35. In addition it is not clear whether “a claim in negligence” is intended to cover all cases in which the Courts are required to consider the issue of “duty of care”. Such cases would include statutory duties of care (such as those provided for by the Occupiers’ Liability Acts) and contractual duties of care. Is section 1 only intended to apply where the pleaded claim is the tort of negligence?

36. In deciding what steps might have been taken, or what precautions taken to guard against risk are required, to meet the standard of care, it is necessary to take into account whether the taking of such steps might prevent a desirable activity from being undertaken at all or in a particular manner. What constitutes a desirable activity?

37. Generating a profit for a business would undoubtedly be considered desirable from the standpoint of a shareholder and maybe so from the standpoint of the reasonable man. Would the reasonable man be willing to forego safety measures for the purposes of generating profit and thereby pursuing the desirable activity outlined in section A of part 1? Consider next the similar situation where a not for profit organisation provides work to the disabled and socially deprived and utilises unrewarded (at least financially) employees. Surely that could never be construed as anything other than a desirable activity. Is it suggested that the application of safety measures as outlined in employee related regulations and statutes should be balanced against the desirability of the activity? Is it suggested that different standards of care should apply?

38. It is difficult to read section 1 of the Compensation Bill without coming to the conclusion that a desirable activity is likely to be looked at in a manner which is less sensitive to health and safety needs, than a non desirable activity. If enacted the possibility is that there will then be new litigation to consider issues in what until now have been settled areas of law. The effect of the bill may be to contribute to rather than detract from the “compensation culture” with more extensive pleadings and evidence to be submitted in relation to the issues surrounding “desirability”.

39. From whose perspective is the desirability of an activity to be measured? The beneficiaries, society at large, or in cases of employers and employees either of them, or both, or neither?

40. In summary, a bill this widely drafted for the purposes of clarifying law which is already clear has obvious risks. The use of the word “may”, and the use of the words “desirable”, and “discourage”, are loose drafting and are likely to make for many appeals.

Berrymans Lace Mawer Solicitors

November 2005

Evidence submitted by Andrew Twambley, Director, injury4u.co.uk

1 Does the compensation culture exist?

The myth of the compensation culture, fuelled by the PR machines of the insurance industry, is real. It is that myth that is just as powerful as the non reality of its existence. Government figures have proved that it does not exist, but that is not what the insurance industry and the popular press wish the public to believe. The legend of King Arthur and The Knights of the Roundtable was a myth... but is still a powerful and popular story 1,000 years later.

2 What has been the effect of the move to “no win no fee” contingency fee arrangements?

This has provided access to justice to a greater number of injured claimants. It has transferred risk away from the parties and dropped it into the laps of the lawyers and insurers. It has saved the government millions in Legal Aid payments and has ensured lawyers don’t get paid just for “turning up”. It has however lead to the “costs war” and masses of satellite litigation which has clogged up the system. This has now
abated to a large extent and the courts can now pay more attention to real issues. “No Win No Fee” has allowed the corruption of the system by non regulated accident management companies. It is hoped that future legislation will control the abuse and exploitation practiced by the majority of these companies.

Contingency arrangements are a minor consideration, which work in situations where there is no costs recovery.

3 **Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?**

The answer must unfortunately be “yes”. The newspapers are full of anecdotal stories of claimants taking action against public bodies. Premiums rise so public bodies do all they can to stem the tide. Out of context risk management decisions are fed to the media and the problem tends to spiral. It is good to see that the judges have little sympathy for ridiculous claims.

4 **Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?**

Yes . . . heavily. Most of such organisations prey upon the greedy and vulnerable. All unethical practices should be outlawed and regulated out of existence.

5 **Should any changes be made to the current laws relating to negligence?**

Case law is updating itself on a daily basis and I do not think it necessary to change the law by statute. The first part of The Compensation Bill is a vague attempt to tinker with the law. I would be surprised if it survives the House of Lords unscathed.

Andrew Twambley
Director
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November 2005

**Evidence submitted by Kerry Underwood, Underwoods Solicitors**

1. Kerry Underwood is a solicitor and senior partner at Underwoods Solicitors in Hertfordshire, and author of one of the leading textbooks on conditional and contingency fees—No Win No Fee No Worries—and the editor of the costs products section of Butterworths Personal Injury Litigation Service.

2. He is the author of the standard textbook on fixed costs—Fixed Costs—and a regular columnist for the Solicitors Journal. Recent articles have covered topics such as conditional fees, the commoditization of legal work, over-specialization and so-called “supermarket law”.

3. He lectures extensively to solicitors and is a consultant to many law firms and has attended many Civil Justice Council meetings concerning conditional fees, fixed costs and funding. Kerry is a Fellow of the Chartered Institute of Arbitrators, a Fellow of the Institute of Advanced Legal Studies and sat as a part-time Chairman of Employment Tribunals for eight years.

4. He was the lawyer most prominent and vociferous in exposing Claims Direct and The Accident Group’s activities, and appeared on BBC’s Watchdog in relation to Claims Direct.

5. He is Chief Executive of Law Abroad Limited, a company seeking to offshore legal work to South Africa.

**Executive summary**

6. There is no evidence of the existence of compensation culture but there is a perception of one and that is causing harm.

7. Anyone who refers a claim to a solicitor should be barred from involvement in after-the-event insurance.

8. Clients should have freedom of choice of solicitors, subject to costs limits. Solicitors should retain freedom of choice of after-the-event insurer, experts and counsel.

9. Before-the-event legal expenses insurers should be prevented from restricting client’s freedom of choice.

10. The small claims limit in personal injury cases should be raised to £3,000.

11. The fast track limit should be raised to £50,000.

12. Fixed costs should be introduced for all aspects of all fast-track cases.

13. Fixed success fees should be introduced for everything.

14. Success fees should be recoverable from the client, not the other side.
Referral fees should be barred.

Consideration should be given to a contingency legal aid fund.

Consideration should be given to a recoverable contingency fee scheme as being the standard way of costs being recoverable.

There should be massive investment in information technology for the courts.

Advertising should be restricted in hospitals etc.

The indemnity principle should be abolished.

Does the compensation culture exist?

Personal injury claims have not risen significantly, and employment tribunal claims have fallen sharply over the last two years.

There is no evidence to suggest that there is a compensation culture. However there is a perception of a compensation culture and arguably that does as much harm if it leads to risk averseness by public bodies and businesses.

The perception of a compensation culture has undoubtedly been fuelled by widespread and tasteless “in your face” advertising along the lines of “where there’s blame there’s a claim”.

Extensive advertising, especially on television, has largely been by claims management companies. Claims management companies have made substantial sums of money by receiving referral fees from solicitors, initially illegally but now legally, and by making the solicitors sell their own after-the-event insurance to those clients. Some claims management companies insist on their panel solicitors using specific medical agencies from whom the claims management companies receive commission. Claims Direct even insisted on solicitors using certain barristers chambers as Claims Direct then received commission from those barristers or their clerks.

What has been the effect of the move to “no-win no-fee” contingency agreements?

These issues have inevitably become mixed up with “no win no fee” agreements but in fact they are distinct and can be dealt with without sacrificing the key benefit of ‘no win no fee’ arrangements, namely access to justice for people of limited means at no cost to the state.

While it is true that no win no fee arrangements are more attractive to clients, as they risk nothing in the event of defeat, they are less attractive to lawyers, who do not get paid on the event of defeat. Virtually all lawyers, given the choice, would prefer to be paid, win or lose.

Contrary to popular opinion my view is that no win no fee arrangements, combined with the abolition of legal aid for personal injury matters, has not led to any significant increase in claims. This is all the more remarkable given the large amount of advertising in recent years.

The difficulty of getting after-the-event insurance for unsafe cases and lawyers’ unwillingness to take such cases on, because they risk not being paid, has led to a reduction in cutting-edge actions but possibly an increase in “safe” cases such as those arising from road traffic accidents. Ironically these are the very claims likely to be funded by the insurers themselves through pre-existing legal expenses insurance.

Notably actions against tobacco companies have got nowhere in this country.

The notion of a compensation culture may indeed be leading to unnecessary risk averseness in public bodies but no recent court decisions give any reasons for such risk averseness. Society is generally more risk-averse and this is shown in a more widespread unwillingness to take risk in business or politics for example. Risk-averseness in public bodies may reflect something wider in society than a fear of being sued.

Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?

Yes, but so should legal expenses insurers, so-called “before-the-event” insurers, and indeed anyone who starts to make money out of referring people to solicitors. The problems are exacerbated by, but not caused by, conditional fee agreements.

It should be a criminal offence for any person acting in any capacity as a claims manager, to have any interest in any after-the-event insurance product.

It should be a criminal offence for a solicitor to accept instructions on the basis that a referrer, that is someone other than the client, dictates the choice of insurer, expert or counsel. This prohibition in fact only reflects the Law Society’s Practice Rules but they simply have not been enforced at all, and thus there is a need for a criminal sanction.
34. Legal expenses insurers should not be able to dictate to the insured, that is the lay client, which firms of solicitors should be used. The reality is that legal expenses insurers do not pay panel solicitors in the event of defeat. Such insurers have repeatedly breached the indemnity principle and their solicitors have repeatedly been in serious breach of the rules of court by signing costs certificates to the contrary.

35. DAS is the worst offender in restricting freedom of choice.

Should any changes be made to the current laws relating to negligence?

36. No, the common law is adaptable and has been modified by the courts to meet changing social conditions. Legislation tends to make the law more rigid.

37. Recently the courts have restricted the chances of success in certain areas, such as stress-related claims and repetitive strain injury claims.

Recommendations not included above

38. The small claims limit, that is the point at which costs are payable by the losing party, should be raised from £1,000 to £3,000 in personal injury cases. It is already £5,000 in all other cases except those involving actions against the police or housing disrepair. It is not apparent to me why a complex dispute over say a car engine, or a ruined family holiday where the value of the claim is £4,000 should not attract costs but a very simple road traffic accident where the injuries are valued at say £1,200 does attract costs. No costs are generally recoverable in employment tribunals and the system is perceived to work reasonably well and has not attracted the attention of claims managers. The need for after-the-event insurance is removed from such cases as there is no potential liability for the other side’s costs.

39. The fast track limit, whereby claims are dealt with quickly and relatively cheaply, should be raised from £15,000 to £50,000.

40. Fixed costs referable to the type of case and the damages recovered or agreed, should be introduced in all civil claims valued at £50,000 or less, and for all stages, that is pre-issue work, post-issue work and at trial. At present fixed costs apply for trial costs in cases worth £15,000 or less and for pre-issue work in road traffic accident cases settled for £10,000 or less. Certainty of costs exposure should dramatically reduce the need for and cost of after-the-event insurance.

41. Conditional fee success fees should be introduced for all types of case.

42. Conditional fee success fees should be recovered from the client, not the losing party, as was the case prior to 1 April 2000. Thus the client would have the choice of avoiding payment in the event of defeat—by paying an enhancement—the success fee—to his own lawyer in the event of success. This system worked exceptionally well prior to the 1 April 2000.

43. The ban on lawyers paying referral fees should be reintroduced by statute with criminal sanctions on lawyers who pay for work. The lawyers’ professional bodies have been unable or unwilling to police and enforce these rules.

44. Subject to costs limits there should be a statutory right of freedom of choice for lawyers, however funded, whether by legal aid, legal expenses insurance or by other means. This is a basic human right.

45. Consideration should be given to the introduction of a contingency legal aid fund whereby winning litigants pay a percentage of damages to fund cases that may be lost.

46. Consideration should be given to a recoverable contingency fee scheme being the basis for all costs orders. Thus a losing party would still pay costs but would know, when the claim was settled or lost, exactly what these costs would be. Thus one might say that in a road traffic case the appropriate figure is 20% if a person receives £50,000. The lawyer gets £10,000 (20%) but payable by the losing party. Discounts could be given for very early settlement.

47. There should be a massive investment in information technology for the courts with a view to all proceedings being filed electronically by 2010. The ability of all lawyers, parties, courts and judges to search for similar cases should achieve consistency and predictability of outcomes and damages leading to very much earlier settlements and dramatically reduced costs.

48. There should be a complete ban on all advertising, not just for legal services, in NHS hospitals, doctors’ surgeries, police stations and local authority premises.

49. The indemnity principle should be abolished.

Kerry Underwood
Senior Partner
Underwoods Solicitors

November 2005
Evidence submitted by Andrew Parker, Head of Strategic Liaison, Beachcroft Wansbroughs

1. This response is sent on behalf of Beachcroft Wansbroughs, a full service UK commercial law firm employing more than 1,300 people with a turnover of around £89 million, approximately half of which is generated from litigation services, principally for insurance and health sector clients. Operating from offices across the UK in London, Leeds, Birmingham, Bristol, Manchester and Winchester as well as Brussels, our clients include business sectors as diverse as financial services, retail, construction, telecommunications, education, health and local government.

2. As Head of Strategic Litigation, the writer Andrew Parker has been involved in the main test cases on the “no win, no fee” regime since 2001, including the test cases on the Claims Direct and The Accident Group (TAG) schemes. Both these claims management companies styled themselves as market leaders, championing the cause of injured claimants; both have since ceased trading, leaving many claimants out of pocket.

Executive summary

— There is a “compensation culture”, not least in the people’s perceptions about bringing claims;
— Claims Farmers and others advertising “no win, no fee” are largely responsible for a “have a go” culture;
— The true workings and effect of “no win, no fee” are poorly understood;
— “No win, no fee” has driven up legal costs and removed genuine claimants from the centre of the process;
— Rehabilitation needs greater focus, without creating an opportunity for extra layering of costs;
— The recovery of success fees and ATE premiums from paying Defendants has no logic;
— The ability of defendants to fight spurious claims must not enable solicitors and claims farmers to increase their profits;
— Claims farmers and other intermediaries must be tightly regulated, especially in their advertising activities and their financial security;
— Some clarification of the law of negligence would send a welcome message to the public and to the courts.

In response to the Committee’s specific questions we would answer as follows:-

Does the compensation culture exist?

3. 10 Years ago the “horror stories” of frivolous law suits came exclusively from the USA. The striking change over the last five years is that those stories have been joined by similar stories from the UK.

4. Those who derive an income from bringing injury claims will argue that the falling number of claims is proof that there is no Compensation Culture. However our position is that the cost of claims remains on the increase, despite the civil procedure reforms introduced in 1999. Objectively that may be sufficient evidence that there is a Compensation Culture even if claims numbers are falling.

5. It is quite possible that the underlying trend remains upwards. The annual figures over the past five years or more have been distorted first by the vast numbers of claims by miners under the scheme set up by the Government and secondly by the activities of Claims Direct and TAG, who arguably generated more claims than could legitimately be brought. Analysis of the annual figures without further development of these points should be treated with caution.

6. More importantly, the perception from stories in the media is that we do have an unacceptable culture of claims being brought on the basis that there is “something for nothing”. That culture is creating a climate in which intermediary companies thrive, by feeding on the “have a go” mentality and encouraging people to sign up to agreements that are not in their best interests. The survey undertaken by Norwich Union in 2004 (see their December 2004 report “A Modern Compensation System: Moving from Concept to Reality”) showed that the vast majority of people believe that compensation claims are more prevalent now than 10 years ago.

7. The current activities of so called Claims Farmers in the endowment mis-selling field is a classic example. The purpose of compensation in this field, which is available via a free service set up by the Financial Ombudsman’s Service, is to provide compensation for endowment policyholders who believe that they may suffer a shortfall in their mortgage repayment. Without exception, the Claims Farmers advertising a competing service (usually for 25/30% of the recovery) encourage people to make a claim on the basis that this is a windfall—none of the companies advertise the link to mortgage shortfall, as otherwise this would discourage Claimants from parting with a substantial proportion of the winnings.
What has been the effect of the move to “no win, no fee” contingency fee agreements?

8. We would be happy to explain the workings of this regime in more detail, as our experience from talking to clients, journalists and even judges over the last 5 years is that the full implications of the regime remain poorly understood.

9. Briefly since 1995, a solicitor has been able to enter into a conditional fee agreement (CFA), which provides that he is not paid unless he wins, but that if he wins he is entitled to an uplift (called a success fee) of up to 100% of his basic charges. Between 1995 and 2000 the success fee was deducted from the client’s damages and was subject to a voluntary Law Society cap of 25% of damages.

10. Clients were still exposed to the risk of paying opponents’ costs, so a market developed for “After the Event” (ATE) legal expenses insurance, so called because it was taken out after the accident had happened. Initially the cost of this insurance was just £85, priced on the basis that if all claimants paid the premium and most claimants were successful, this would be adequate. In practice solicitors only advised claimants to take out insurance when they were at real risk of paying costs and so the pricing proved to be too low.

11. In 2000 the Government implemented the Access to Justice Act 1999 and made the success fee and ATE premium recoverable from the losing party as part of the legal costs. This effectively removed any direct interest for the claimant in the level of success fee and the ATE premium, as in their minds they were no longer paying. Schemes developed whereby the cost of the premium itself was incorporated in the insurance and payment was deferred until the end of the case. The claimant therefore never paid the premium unless and until the case was won, when it was reclaimed from the defendant.

12. As a firm we have been involved in a number of high profile cases on the impact of the “no win, no fee” regime, particularly the test cases on legal costs in the Claims Direct and the TAG Schemes. The following points have been obvious throughout our conduct of these cases:

(a) Intermediaries drive up the overall cost of claims and have a business model which takes money from everyone in the process, including the Claimant;
(b) Once success fees and insurance premiums were recoverable from paying Defendants under the Access to Justice Act 1999, any link between those success fees and premiums and the real risk taken by the Solicitors or after the event Insurers disappeared.
(c) Where a real risk was involved, both Solicitors and after the event Insurers were averse to taking it.
(d) As the OFT report in 2005 makes clear, such products compete on service rather than price, but often to the detriment of the Claimant.
(e) In many cases the only real winner was the claims farmer—we have a number of examples including the claimant who received just £33 of his £1,500 damages from a Claims Direct case and the TAG client who succeeded in a £1,000 damages claim but was left owing money due to a £2,000 loan agreement.
(f) The recovery of success fees and ATE premiums from paying Defendants has no logic (see below).

13. The TAG Scheme showed that all involved, including the Solicitors nominally responsible for vetting claims, were more driven by making their margins from increased volumes of business than by providing a proper objective service to the client. As the BBC documentary “The man who made accidents happen” showed, the ultimate behaviour driven was for a number of people involved in the process to manufacture claims.

14. All this activity around CFAs, ATE insurance and legal costs generally has detracted from the primary aim of the compensation system: to return genuine injured claimants to full capacity or to provide damages in lieu of this. The claimant should be at the centre of the process, yet now trails a distant 3rd or even 4th behind other vested financial interests in the system.

15. One way of putting that right is to focus on rehabilitation: in this context we mean treatment or other assistance designed to return a claimant to work or independent living as soon as possible. The insurance industry should be working more actively with other stakeholders including the NHS to achieve this. However there is the danger that the same vested financial interests will see rehabilitation as just another opportunity to layer on cost for themselves and this needs to be avoided.

16. The Government has urged Defendants, particularly public authorities, to take a firm stance and refuse to pay the more spurious of claims. The difficulty is that this approach leads to increased exposure to legal costs from the “no win, no fee” regime. The Solicitor can effectively double his costs and may also be able to recover an insurance premium of the same amount again, if he wins the claim.

17. No Defendant can guarantee winning a claim which goes to trial. Even if the Defendant wins some of these cases, the effect of winning is to produce a more valid argument for solicitors and after the even insurers in other cases to charge higher success fees and insurance premiums.

18. We should explain that whilst our interest in these cases has been on behalf of liability insurers and has been concerned with the insurance premiums charged to Claimants by after the event Insurers, the majority of such premiums has gone to intermediaries involved in the claims process (Claims Management Companies etc.) rather than to the after the event underwriters themselves. In the Claims Direct cases for example, initially just £140 out of a total of £1,250 charged went to the underwriters.
19. One particular problem has been the frequency and ease by which claims management companies have become insolvent, leaving claimants and suppliers to shoulder the financial burden. There is no direct protection for claimants in such circumstances, compared with the protection available if a solicitor or insurer goes out of business. Where an industry is providing services on such a widespread basis, there should be some sort of “bond” or equivalent financial protection, as for example in the travel services industry with ABTA.

20. For further information on the effect of “no win no fee” agreements on members of the public, we would refer you to the report by Citizens’ Advice in December 2004, aptly titled “No win, No fee, No chance”.

Is the notion of a “compensation culture” leading to unnecessary risk averseness in public bodies?

21. Whilst we believe that there is evidence of risk averse behaviour caused by the Compensation Culture, the stories in the media have to be treated with a certain amount of caution. There are undoubtedly valid examples of decisions lead by a genuine fear of claims: for instance the local authority who chops down chestnut trees for fear of children injuring themselves searching for conquers, or the Borough Council who removed handing baskets from shop fronts in the town centre in case they fell on passers by.

22. There are however other examples which are no more than “urban myths”, for instance the suggestion that trapeze artists might have to wear hard hats.

23. Yet other examples represent local authorities using “compensation culture” as an excuse to mask other reasons for decisions to close facilities. The recent coverage of the decision by Havant Council to “ban Christmas” is a classic example, as numerous articles have cited “health and safety” reasons for Christmas lights not being installed.

24. What is clear is that fear of a “Compensation Culture” has distorted the balance in risk management decisions, particularly in the public sector. Media coverage of such stories has certainly not helped, but the mass advertising by claims companies and by solicitor groups has fuelled the perception that compensation is an easy way of paying for your holiday or new furniture. It is no accident that these adverts are targeted (eg through daytime television) at the most vulnerable sectors of society.

Should firms which refer people, manage or advertise Conditional Fee Agreements be subject to regulation?

25. Although this potentially raises three separate questions, as those referring, managing or advertising work in different ways, our unequivocal answer is that everyone who works in this market should be properly regulated.

26. We are quite clear that the problems caused by the Claims Direct and TAG Schemes stem largely from the mass advertising of services portrayed as “free” in a context in which the companies sought to charge money and to recover that mainly from paying Defendants.

27. The response from the legal profession has been to ramp up its own advertising. In part that is probably a good thing, as it has made the public more aware of services on offer. However advertising which purports to be “free” (but in fact represents an opportunity to recover a cost) and advertising which suggests a windfall rather than proper compensation should be subject to much tighter controls.

28. Solicitors and liability insurers involved in the claims process are already regulated by the Law Society and the Financial Services Authority. The problems have come largely from unregulated service providers. There needs to be a level regulatory playing field and the proposals in the Bill, which as we understand it are designed to plug the gaps, are welcome.

29. There is no doubt that the Law Society’s decision to permit the payment of referral fees in March 2004 has driven up costs. Whilst these arrangements may have existed prior to March 2004, they were unlawful and if found out, the solicitor and other players involved would probably lose money. Since March 2004 such arrangements have become widespread.

30. Solicitors who are obliged to part with a fee of several hundred pounds for each valid referral will look to make that money elsewhere in the process, hence their aversion to fixed fees in low value cases. There is no valid basis on which the legal costs for running a claim worth say £2,000 should be more than twice that amount or even higher.

Should any changes be made to the current laws relating to negligence?

31. This is a difficult area. The Government is trying to implement a change which does not in fact alter the common law. A change which simply generates uncertainty is not likely to achieve the necessary objective. However something does need to be done to combat the “have a go” culture.

32. On this basis we cautiously welcome the concept behind Clause 1 of the Compensation Bill and its attempt to restrict the application of the law of negligence where the defendant is conducting a “desirable activity”. This must however be on the basis that the provisions do in fact operate as a restriction and are clearer in impact than the current draft.
33. For the Compensation Bill to be effective, there must be a change in culture and that must come from people taking more responsibility for their own actions and being less willing to blame others. For this reason, we recommend an amendment to the Compensation Bill which makes it clear that Courts can find Claimants wholly to blame for actions which might technically also be the fault of another person.

34. A provision which made it clear that it was permissible to apologise or offer help to someone injured, without this being seen as an admission of liability, would also in our view go some way to changing the underlying culture. There is a school of thought that if everyone apologised, this would devalue the apology (ask any rail commuter); however if Part 1 of the Bill is essentially about sending messages to the public, we believe this should be included. This links with our theme of putting genuine claimants back at the centre of the process and concentrating on rehabilitation to return them to work or independent living as soon as practicable.

Andrew Parker
Beachcroft Wansbroughs
November 2005

Evidence submitted by Tony Jaffa, Partner, Foot Anstey Solicitors

INTRODUCTION

1. The Committee is seeking submissions from interested parties into the UK’s Compensation Culture, including an examination of “the way lawyers’ fees are arranged, in particular Conditional Fee Arrangements and uplifts....which have been a particular issue in libel cases”.

2. There are approximately 85 regional daily and Sunday newspapers in England and Wales, and hundreds of paid-for and free weekly papers. Foot Anstey’s Media Team, headed by partner Tony Jaffa, represents a very large proportion of those newspapers, and has done so for the last 15 years or so.

3. This submission relates purely to the specific issue of the effect of Conditional Fee Agreements (CFAs) and success fees on freedom of expression.

4. The intent of this submission is not so much to advise the Committee of the law, but rather, to give an indication of how CFAs operate, and their practical consequences.

CURRENT ARRANGEMENTS

5. As members of the Committee will know, CFAs, otherwise known as “no win, no fee” agreements, are complex arrangements between a lawyer and his/her client. Essentially, they have the following elements:

5.1 If the CFA funded party to the litigation loses the case, his/her lawyer is not paid.

5.2 If the CFA funded party to the litigation wins the case, his/her lawyer is paid entirely by the losing party.

5.3 As a reward for taking on the risk of losing the case, the lawyer is entitled to apply a “success fee”, i.e. a percentage uplift applied to the lawyer’s hourly rate. Theoretically, the uplift varies according to the risk and complexity of the case; in practice, the uplift in libel cases is invariably in the region of 95%—100%, subject to certain refinements, as described in paragraph 6 below.

5.4 A CFA funded party never objects to the success fee, because it makes no difference to him/her what level of success fee is applied. The reason is that s/he never has any liability to pay costs calculated in this manner: if the case is successful, the costs are paid by the Defendant; and if the claim fails, s/he has no liability to pay his/her own costs.

5.5 If the CFA-funded party buys a legal expenses insurance policy, the substantial premium is recoverable from the loser as part of the CFA.

5.6 If the CFA-funded party does not buy a legal expenses insurance policy, any costs order which the defendant obtains against him/her is unenforceable if the CFA funded party is impecunious.

6. As a result of criticism directed at them by the Court of Appeal in the Spring of 2005 in the case of King v. Telegraph Group, the firm of solicitors which may well be described as the country’s leading exponents of CFAs in libel actions changed the way in which they apply the success fee. Their current arrangements are that the success fee is now “stepped”, as follows: 25% from the inception of the CFA to the issue of proceedings; 50% from proceedings to 45 days before the trial, and 100% thereafter.

7. Our experience is that the operation of the CFA system fails to discourage weak claims against the press, and allows claimants and their lawyers to hold publishers to ransom by threatening litigation, meaning that publishers risk incurring huge, irrecoverable, costs.

8. Further, it is our view that CFAs in libel cases presently operate more to the advantage of claimants’ lawyers than to the claimants themselves. The most prominent firms of solicitors in London charge their time at rates of up to £400 an hour, which double to £800 per hour after the application of the success fee
(unless the firm involved is operating the system described in paragraph 6 above). Whether the success fee is a straightforward uplift or a stepped uplift, such massive legal fees impose intolerable pressure on the regional press, and effectively compel publishers to settle cases, irrespective of the merits of the claim.

9. The serious “chilling effect” created by such financial pressures on the regional press, despite the right to freedom of expression guaranteed by the Human Rights Act 1998, is obvious. This chilling effect was recognised by the House of Lords in Campbell v MGN (No 2), who deliberated this issue and whose judgement was delivered on 20th October 2005. It will be recalled that in this case, the claimant claimed damages for infringement of her privacy, and was awarded damages of £3,500, for which costs in excess of £1 million were claimed. Although the House decided that any change to the CFA regime was a matter for Parliament, all the Law Lords save one agreed with Lord Hoffman, who expressed concern about “the problems defamation litigation under CFAs is currently causing and which have given rise to concern that freedom of expression may be seriously inhibited”.

CONTESTED CLAIMS

10. Allegations of libel are rarely clear cut. It is usually the case that when a person complains that s/he has been libelled, there are arguments as to:

10.1 Reference—do the words complained of refer to the complainant? Has s/he been identified?

10.2 Meaning—what do the words complained of mean? Do they bear a defamatory meaning? Are they capable of bearing a defamatory meaning?

10.3 Defences—if the words are capable of bearing a defamatory meaning, does the publisher have a defence? Are the allegations true? Is the article protected by Absolute or Qualified privilege? Do the words amount to fair comment on a matter of public interest and importance?

11. In theory, if the publisher takes the view that the words in question did not refer to the complainant; or are not capable of bearing a defamatory meaning; or if defamatory, are true, are protected by privilege, or amount to fair comment, then he may defend the claim and have the issue determined before a judge and jury.

12. Even if this Utopia existed prior to the introduction of CFAs, for the regional press to contemplate defending a claim brought by a CFA funded person under current arrangements, now demands a financial commitment which many regional publishers are simply not capable of giving. Small companies simply do not have the resources to risk being ordered to pay hundreds of thousands of pounds to a claimant, whether the claim is meritorious or not.

13. In consequence, it is increasingly common for the regional newspapers to settle claims which they could properly and legitimately defend, but do not do so for fear of losing the case and having massive costs orders made against them. Our experience increasingly is that the factors which drive a publisher to settle a claim are not the merits of the claim or the merits of a defence, but the huge financial risks that accompany litigation.

14. If the editor of a small weekly newspaper, far from London, is faced with a complaint from one of the well known specialist firms of solicitors in London, whom he knows charge their time at £350 or £400 per hour and whom he also knows charge success fees of 100%, what is he going to do? When faced with a threat to the very existence of his title, he has no option but to take a pragmatic and commercial approach, and settle the case as quickly and as cheaply as possible. An examination of the merits of the claim, and the legitimacy of defending it, are luxuries which are overwhelmed by financial considerations. In such circumstances, our society’s commitment to freedom of expression is mere lip service.

15. This is not just idle speculation or scaremongering. For example, I am currently advising the editor of a small weekly newspaper, circulation 11,000 copies per week, which published a letter in mid-2005 from a reader on its Reader’s Letters page. The letter was strongly critical of the performance of the local District Council, its elected Chairman, and its Chief Executive. The Chairman and the Chief Executive (a solicitor) took exception to the letter, and threatened to sue the paper for libel, not on the basis that it was the author of the item, but that it was the publisher. No similar threat was sent to the author of the letter, presumably because he is impecunious.

16. The editor was advised that in these circumstances, he should rely on the defence of Fair Comment, and that in principle, he could expect this defence to succeed at trial. However, as soon as it became known that the Claimants would be represented by solicitors advising them under CFAs accompanied by a success fee, the editor took the view that as an adverse costs order would shut down the title, he could not take the risk of becoming embroiled in litigation. In consequence, the case was settled with an apology being published and substantial damages and costs being paid.

17. In the context of freedom of expression, the more serious effect of this incident is that for the foreseeable future, it is very unlikely that this particular newspaper will scrutinise, much less criticise, the performance of the Council or its members or officers, even if such scrutiny or criticism is warranted.
18. Although anecdotal, this is a typical example of the chilling effect of CFAs on freedom of expression, how the fear of an adverse costs order has successfully silenced this local newspaper, and CFAs prevented it from serving people living in that particular area. This is not an isolated incident; it is a widespread attitude that prevails throughout the industry. Of course, it has always been the case that in litigation, the loser has to pay the costs of the winner. What is so new is the doubling of those costs, and their consequences.

LEGAL COMPLAINTS

19. It may be argued that if a newspaper makes an error, or intentionally publishes an article which is defamatory, it is only right that it should bear the financial consequences, even if those consequences include the payment of massive legal fees.

20. In all the years I have been advising regional newspapers, I have never encountered a single editor who takes a cavalier approach to accuracy or the truth. In my experience, the stereotype of the hack who does not let the facts get in the way of a good story, simply does not exist. If a libel has been published by a regional newspaper, my experience is that it did so either by mistake, or as a result of a genuine belief in the truth, public interest, etc., of the article, which later transpires to be incorrect. In that scenario, the editor always wants to correct the error immediately, and rectify the harm caused, not primarily because of the fear of litigation, but because it is the right thing to do.

21. In such circumstances, no-one denies that the claimant should receive a public apology, compensation for the harm done, and if legal advice has been sought, payment of his/her reasonable legal costs. However, in such cases where liability is admitted from the outset, it is difficult to see how any success fee can be justified, let alone the huge uplifts previously described. In such circumstances, the application of a success fee, whether stepped or under a flat rate, can only be explained as an opportunity for the lawyers to make a huge amount of money at the expense of the local paper.

22. An example of the abuse of the system occurred in early 2005, before the judgement in King v Telegraph Group was delivered. In this instance, I advised a regional newspaper editor in respect of a libel his newspaper had inadvertently published. The newspaper apologised immediately for the error, and agreed to pay damages which were agreed with the claimant’s solicitors after minimal negotiation. It also agreed to pay the claimant’s reasonable legal costs, which, his solicitors advised subsequently, amounted to approximately £20,000. The newspapers own costs amounted to only £2,000. Even allowing for the extra time that a complainant’s solicitor has to spend in considering a possible claim, and making an allowance for the additional overheads incurred by London based solicitors, this claim for costs was clearly excessive, and arose principally because of the application of a 100% success fee and the insurance premium (which the claimant had not paid and would never pay). So outraged was the publisher at this blatant abuse of the CFA system that it intended to contest the claim as a “test” case, although in the event, the matter was settled after the claimant agreed to accept less than 50% of the amount originally claimed for costs.

23. Although anecdotal, this is a typical example of the abuse of CFAs, and how they are used as money making exercises by certain solicitors. Examples of this type of behaviour are common throughout the country. CFAs do not encourage, or increase, access to justice; they simply bring the whole system into disrepute and serve only to increase the turnover and profitability of those lawyers who operate in this way.

THE WAY AHEAD

24. In our view, the current system is unsustainable if Parliament wishes the regional press to continue to perform its historic role in local life. The financial risk that now accompanies the publication of contentious opinions or material is now so great that many editors are forced to engage in self censorship.

25. In our view, this is incompatible with this country’s democratic traditions, let alone the right to freedom of expression enshrined in Article 10 of the European Convention for Human Rights.

26. Conversely, given Parliament’s stated aim of improving access to justice and the absence of legal aid in defamation cases, we accept that it is unlikely that CFAs and success fees will be abolished.

27. Therefore, we believe that the current system should be fundamentally reformed, particularly in view of the fact that the House of Lords in Campbell took the view that the only remedy for rectifying the current problems is legislation.

28. The most comprehensive proposals for reform of which we are aware, are contained in a document dated 27 September 2004, submitted to the Department of Constitutional Affairs by solicitors Reynolds Porter Chamberlain on behalf of a number of news gathering organisations. The paper, entitled “Submission by media organisations in response to DCA’s consultation paper ‘Making Simple CFAs a Reality’” contains a number of proposals for reform, which we recommend to the Committee as being the most equitable way of reforming the current system of funding libel litigation.
SUMMARY

29. Therefore, our views of the way CFAs operate in the context of libel actions may be summarised as follows:

29.1 CFAs and success fees do not improve access to justice, but rather, they distort the legal playing field in libel cases to the detriment of freedom of expression;

29.2 CFAs and success fees have resulted in freedom of expression being restricted throughout the regional press, and continue to do so;

29.3 CFAs and success fees, when used as a means of funding meritorious complaints, are being abused and operate more to the advantage of claimants’ lawyers than to the claimants themselves, thus creating a climate which encourages a restriction of freedom of expression;

29.4 CFAs and success fees fail to discourage weak claims against the press, and allow claimants to hold publishers to ransom;

29.5 the current system should be reformed in accordance with the proposals contained in “Submission by media organisations in response to DCA’s consultation paper ‘Making Simple CFAs a Reality’”, dated 27th September 2004.

Tony Jaffa
Partner
Foot Anstey Solicitors

November 2005

Evidence submitted by Richard Shillito, Farrer & Co Solicitors

We are a central London practice of 61 partners. Our Media Team specialises in all aspects of media law including defamation and privacy and we have experience of conditional fee agreements, having been involved in some of the leading recent cases affecting the Press including Turcu v NGN and Musa King v Telegraph Group.

1. To state our conclusions first:

1.1 CFAs may be appropriate for personal injury cases, but they are not working satisfactorily in media cases (ie libel, privacy and the like) and are open to abuse;

1.2 the defects in the current regime are unlikely to be resolved, either by mediation between interested parties or by legislation;

1.3 because of the potential adverse consequences for freedom of expression, they should be abandoned in media cases.

2. PROS AND CONS

2.1 A balance sheet would in our view show a preponderance of factors against, although there are undoubtedly factors in favour of, CFAs.

2.2 We accept that since Legal Aid is unavailable, CFAs make up for some of the disadvantage between impecunious claimants and wealthy defendant publishers. In addition to the right of freedom of expression (article 10), the rights to privacy and to a fair trial are recognised under the ECHR (articles 6 & 8), and these rights may be harder to exercise where funding is absent or in short supply. We accept that there have been some deserving cases, notably Lillie & Reed v Newcastle City Council and ors.

2.3 With the exception of the last-named case, most of the publicity about CFAs has attached to cases which either involve celebrities taking advantage of CFAs or national newspapers having to deal with CFA backed claimants. It is tempting to assume that if problems persist they affect the wealthy and are therefore of low priority in terms of law reform.

3. OUR EXPERIENCES

3.1 Our practice as defamation experts includes advising a large number of publishers, who publish both national and regional newspapers and specialist magazines. They include public companies and smaller, family-owned companies. By way of example, a regional newspaper publisher, Johnston Press plc, for whom we act, has recently sought our advice on two libel claims where the Claimant was represented by solicitors acting under a CFA:

(i) An evening newspaper in the North East was the subject of a claim of libel by a police officer backed by the Police Federation, whose solicitors said that he would incur liability for an after the event (ATE) insurance premium if proceedings were issued. We were warned that this could amount to as much as £50,000, payable in the event that the newspaper lost the action, or even if the claim was settled before trial, in addition to costs which could be uplifted by up to 100%. Our estimate of likely damages, if the matter settled before proceedings were commenced, was in the range of
£5,000—10,000. The claim’s downside risk (which we put in six figures) caused consideration of possible settlement at Board level, before the company decided on principle to resist the claim, which, happily, was later effectively abandoned. The Editor concerned has commented that the experience has led to extreme caution when dealing with any stories about police officers.

(ii) An evening newspaper in the North West made an error in a report and, when a claim was made, immediately apologised and, in response to the letter before action, made a formal Offer of Amends under the Defamation Act 1996. Damages were quickly agreed at £12,000, by negotiation. The Claimant’s solicitor’s costs amounted to approximately £25,000, or double the damages, and were not justified by the work involved, having regard to the newspapers’ conciliatory attitude.

3.2 In a third case, involving a smaller publisher of company reports and analyses, our clients, who were initially confident that they had a good defence of fair comment, decided to settle a claim for libel only after the claimants changed to a firm of solicitors who threatened a CFA backed claim for libel.

3.3 In addition to advising “defendant” publishers, we also—but to a lesser extent—advise claimants and potential claimants. We consider ourselves professionally obliged, notwithstanding our reservations about CFAs, to advise clients of their availability and, when asked to act on that basis, to give the proposal serious consideration.

4. Proposals for Reform

4.1 Possible reform of the CFA regime has been considered by the DCA and in a recent Report, New Regulation for Conditional Fee Agreements, Response to Consultation 10.8.05, at Annex C, is a submission from media organisations (settled by Andrew Caldecott QC & Aidan Eardley), which contains a number of proposals. These proposals are of interest because they indicate the general media view of CFAs. (We explain below why we think they are impractical.) They are intended to cover all “publication” cases, including libel, confidence and data protection and include:

(i) a maximum 12.5% uplift where cases settle early, before Defence
(ii) cost capping at the allocation questionnaire stage in all cases (not just where there is no after the event (ATE) insurance as in Musa King)
(iii) that success fees must always be proportionate to financial compensation (disapplying CPD 11.9 of the Civil Practice Rules)
(iv) suggestions as to factors to be taken into account in assessing uplifts, which should be staged
(v) courts to consider whether a claimant is wealthy enough or has methods of financing a claim other than by a CFA
(vi) that Defendants should have notice of intended ATE insurance, in view of the very high cost in some cases
(vii) that the court should take certain factors into account in deciding if an ATE premium is reasonable
(viii) uplifts in costs proceedings to be decided on own merits and not by reference to the substantive proceedings.

4.2 We do not disagree with these proposals. Rather, we consider that they are, for the most part, impractical in terms of what is likely to be agreed or enacted. More particularly, in our view:

4.2.1 Cost capping is a blunt instrument in a field of law where the subject matter is so varied and consequently the time to be expended and the costs incurred so variable. There is a risk that this will lead to serial approaches to the courts to cap costs or to vary costs caps in individual cases.

4.2.2 The decision of Gray J in Henry v BBC [2005 WL 3016932] illustrates how imperfect the cost-capping regime, commended by Hoffman LJ, really is. In that case and for good reason an application to cap was made when trial was only days away. By that time it was apparent that the Claimant’s ATE insurance cover was wholly inadequate. Doubts were also raised as to whether a successful defence of justification might allow insurers to avoid liability on grounds that the insured had provided false or misleading information.

4.2.3 The Naomi Campbell case shows that sometimes the principle or vindication may be more important than the amount of compensation (only £3,500). Any rule that costs should be proportionate would have to take account of such cases. (Costs exceeded £1m in that case.)

4.2.4 Campbell is also a good example of a case where it would be impractical to implement the Scottish system advocated by Lord Hope, whereby the uplift is paid by the winning client, not by the losing defendant. In many defamation cases now, the costs (on any basis) greatly exceed the damages, so the system would very often leave the winning claimant out of pocket.

4.2.5 Staging of uplifts is good idea in principle, but would require a reappraisal of the court’s current approach, which is that a solicitor is entitled to take a view at the outset of the chances of success and that it is not for the courts to second guess him. In turn, this could involve difficult “inquests” by costs judges after the event.
4.2.6 The House of Lords has ruled in Campbell that means-testing of claimants is impractical and (although it is apparently achieved in legally aided cases) it is certainly cumbersome. Nevertheless, it must be contrary to the intention of the CFA regime that millionaires can use CFAs.

4.2.7 The ATE market is restricted to a very small number of insurers. They undoubtedly have difficulty in assessing risk and premiums, which accounts for the widely varying figures encountered. We have mentioned the premium of £50,000 quoted in respect of a regional newspaper. In the Miller case, the defendants were told shortly before trial that the Claimant had incurred costs of £3.3m including a premium of £615,000. In brief, we do not consider that it is open to the courts or the legislature to remedy market failings in this context.

4.2.8 It would risk an injustice if, the claimant having incurred an ATE premium, the courts ruled that it was too high.

5. FREEDOM OF SPEECH

The Miller, Musa King, and Turcu cases are well-known and will be cited in more detail in other submissions to this Committee. We consider that there is a serious potential risk to free speech, which could arise where, for example, a small publisher or indeed an individual was faced with a CFA-backed claimant and decided that he could not afford to defend the claim in view of the possible financial consequences.

6. GENERALLY

The issue of CFAs should not be seen in isolation. In general terms, pressure for reform has led, since the 1980s to a more acceptable, but still not perfect, regime for assessing libel damages. Costs remain a problem and are disproportionate to damages in too many libel and privacy claims. This problem requires consideration in the context of the law and practice generally, with a view to making the courts more accessible to all, and not just the well-heeled. Specifically we favour a costs assessment system based on reasonable rates, for time reasonably spent. If there is to be an uplift on costs and the Defendant has to pay it, then we consider that the costs judge should be able to take the whole bill into account (ie base costs plus uplift) when considering whether it is proportionate.

Richard Shillito
Partner
Farrer & Co
November 2005

Evidence submitted by Davenport Lyons Solicitors

INTRODUCTION

1. This submission is made on behalf of Davenport Lyons and addresses the issue of the use of Conditional Fee Agreements (CFA’s) in cases which engage Article 10 of the European Convention on Human Rights—principally libel and breach of confidence/privacy cases.

2. Davenport Lyons is a firm of solicitors practising in Central London. It has a well-established reputation for acting for media organisations in claims for libel and breach of confidence. Amongst its clients are MGN Limited (publishers of the Daily Mirror, Sunday Mirror and Sunday People), Express Newspapers, Private Eye, Penguin Books, Harper Collins and Macmillan Books. Davenport Lyons has acted in many of the high profile libel and breach of confidence cases that have helped shape these areas of law and recently acted for MGN Limited in the breach of confidence action brought by Naomi Campbell, in which the House of Lords, in its Judicial capacity, ruled in her favour on the validity of her CFA in October 2005.

3. This submission represents the combined input of the four partners of the firm who specialise in this area, and who together have over 70 years experience in this area.

4. In compiling this submission we have had to have regard to the duty of confidentiality to our clients.

BACKGROUND

5. CFAs were introduced to provide “access to justice” for those who were not “...very wealthy, who can well afford high legal fees, or the very poor, who may qualify for legal aid” (White Paper on “Modernizing Justice” December 1998).

6. The legislation which introduced the CFA regime (principally the Access to Justice Act 1999 and subsequent subordinate legislation) reversed the Common Law Rule that it is unlawful for lawyers to charge fees which depend on the outcome of a case.
7. A CFA allows fees to be payable only in specified circumstances and for those fees to be increased above the amount which would be payable if they were not only payable in specified circumstances (the “success fee”). The success fee can be included in the costs recoverable from the losing party. The success fee cannot exceed 100%.

8. The success fee is to compensate a solicitor or barrister for the risk of taking on “no win, no fee” cases and the “risk” that a proportion of those will be lost. As Lord Hoffman explained in Campbell v-MGN Limited, it was a deliberate policy of the legislature to impose the total cost of all CFA funded litigation, successful or unsuccessful, upon unsuccessful Defendants. The effect of the 1999 Act (as amended) and the legislation made under it is that losing Defendants are required to pay not only the reasonable and proportionate costs of their adversary in the litigation in which they are involved but also to make a financial contribution to the funding of other (unsuccessful) litigation as a supposed means of providing access to justice to those (unsuccessful) litigants. Here it is important to note that not all publishers are large corporate entities which can swallow these costs. The system may work in personal injury actions where insurance companies are in practice paying but not in media cases. Lord Hoffman pointed out a number of problems which CFA funded defamation/privacy claims were causing to the media but felt the Courts were powerless to resolve these problems and that only a legislative solution could do so.

9. The success fee is an uplift on the basic costs that the solicitor/Counsel have charged. It is our experience that in nearly all libel and breach of confidence cases where a CFA is used the uplift claimed is 100%. This is because the risk is assessed at the time the CFA is entered into (often before proceedings are commenced) and the success fee is fixed then. This percentage success fee then applies throughout the litigation (no matter what defence is raised, if any at all), even including the assessment of the successful Claimant’s costs after Judgment.

THE CENTRAL ISSUE

10. In summary the central issue is whether CFA’s (as currently operated) have a “chilling effect” on freedom of expression. Our view is that it does have such an effect. We have already seen that in Campbell Lord Hoffman felt that a legislative solution may be needed, a point upon which Baroness Hale concurred. Lord Carswell also agreed adding “That such fees, [success fees] constitute a “chill factor” cannot be doubted . . .”

11. This “chilling effect” is caused by the level of costs which a losing party is obliged to pay—theoretically to finance other cases brought by (unsuccessful) claimants which solicitors and Counsel would not be prepared to undertake if they were unable to recover such high success fees in successful cases. Our submission is that the current CFA regime in libel and privacy cases does not strike the appropriate balance between improvement of access to justice for meritorious claims and the financial burden upon losing Defendants with the consequent interference with their right to freedom of expression. In this context it must be remembered that not all publishers/media organisations are financially strong enough to take a stand when faced with huge potential costs should they lose an action.

THE CAUSE OF THE PROBLEM

12. As noted above CFA’s with a success fee operate by increasing the basic costs claimed by a percentage uplift (the success fee). The first issue is the level of basic costs. It is our experience that Claimant solicitor/Counsel operating under a CFA claim basic costs far in excess of this firm acting for a Defendant. In Campbell the Claimant’s solicitor’s basic costs were over four times our costs in acting for MGN Limited, it was a deliberate policy of the legislature to impose the total cost of all CFA funded litigation, successful or unsuccessful, upon unsuccessful Defendants with the consequent interference with their right to freedom of expression. In this context it must be remembered that not all publishers/media organisations are financially strong enough to take a stand when faced with huge potential costs should they lose an action.

13. The success fee is determined when the CFA is entered into and is often done when the claimant does not have all the information available to assess the risk, such as what defence will be run. The level of that success fee does not change even if the risk anticipated does not materialise. Thus the risk assessment may advise a 100% uplift be claimed on the basis that a jury trial is anticipated. If this risk does not materialise and an offer of amends is made (for example) the rate of 100% does not change. As noted above our experience is that the vast majority of Claimant’s solicitors operating under a CFA seek a 100% uplift.

14. In non-CFA funded litigation, costs assessed on the standard basis must be reasonable and proportionate and in applying the test of proportionality, the Court is to have regard to the overriding objective that cases be dealt with justly. This includes, so far as practicable, ensuring that the parties are on an equal footing, saving expense and dealing with cases in ways which are proportionate. However, as mentioned above, the costs which a losing party is required to pay in a CFA funded case are necessarily unreasonable and disproportionate because a large proportion of those costs are effectively a levy on losing parties to fund other non-related litigation in which they are not involved. The disproportionality of the overall costs which a losing party is required to pay is expressly preserved by paragraph 11.9 of the Practice
Direction to Part 44 of the Civil Procedure Rules. This provides that a percentage increase will not be reduced simply on the ground that when added to base costs, which are reasonable and (where relevant) proportionate, the total appears disproportionate. Thus a losing party is necessarily required to pay costs which are far in excess of what would be reasonable and proportionate in the circumstances of the individual case.

15. Although on detailed assessment, the Costs Judge has jurisdiction to reduce both the base costs and percentage increase, in practice there have been few cases where the percentage success fee has been reduced substantially. It is only in the most obvious cases where this has been done. Further, paragraph 11.9 of the Practice Direction referred to above prohibits the Costs Judge from interfering with the overall level of costs if the base costs and the percentage uplift are separately considered to be reasonable.

16. In our submission, it is not appropriate in media related cases to assess the appropriate percentage increase on the basis of a notional bucket of cases with varying degrees of risk. There are comparatively very few cases in this area of law and the number of losing cases is extremely small. It is therefore a misconception that on average solicitors are likely to lose a percentage of cases. Although perhaps mathematically theoretically correct, it is therefore not appropriate to suggest that a solicitor requires a success fee of 100% in winning cases in order to compensate him for the losing cases.

17. It follows therefore and in any event solicitors will not refuse to undertake cases if there was a greater restriction on the percentage increase recoverable as a success fee. In libel and privacy cases, the base costs of solicitors and counsel are already substantial, far more than would be recoverable in, for example, a road traffic case. Base hourly rates of £400 per hour are not uncommon which are almost doubled when applying a success fee.

The blackmailing effect

18. Lord Hoffman made mention of the “blackmailing effect” of CFA’s in Campbell. By this he meant that a Claimant operating under a CFA who has no financial means and no after the event insurance can put considerable pressure on media organisations to settle for fear of running up huge costs that they can never recover. We have seen this type of threat used on a number of occasions and a system that allows this must be flawed.

Executive summary and conclusion

19. The current CFA regime has a “chilling effect” on free speech.

20. There should be no success fee in Article 10 cases or success fees should be capped at, for example, 25%.

21. Paragraph 11.9 of the Practice Direction to CPR Part 44 should be revoked so as to allow the Costs Judge to look at the overall level of costs.

22. Where the “risk” changes the reward for taking it should change. For example the success fee claimed in relation to cases where an offer of amends is made under s.2 of the Defamation Act 1996 should be reduced, as it should after judgment or settlement where the only ongoing issue is the assessment of the Claimant’s costs.

23. Costs Judges should be directed to assess the risk and appropriate success fee in each particular case without assuming the solicitor needs to be compensated for some notional losing case for each one which is successful.

Davenport Lyons
Solicitors

November 2005

Evidence submitted by Thompsons Solicitors

Summary

— Thompsons provides a wide range of free services to trade union members.
— Extensive use of CCFAs.
— CCFAs have enabled the union movement to offer entirely free personal injury cover to their members and their members’ families.
— Compensation culture does not exist.
— Insurers exploiting the notion of compensation culture to push for regressive change in the handling of personal injury claims.
— Personal injury case intake substantially down.
— Legislating to deal with the perception of compensation culture is entirely illogical.
— The law on negligence does not need clarifying. It has been laid down for years and is understood.
— Firms, but not trade unions, that refer people and advertise CFAs should be subject to regulation.
— A snapshot of the financial health of Britain’s largest general insurers shows their profits going up, not down.
— The ELCI crisis was brought on the insurers by themselves.
— No empirical evidence to justify the insurers’ claim that 40% of costs are lawyers fees.
— Delay is substantially down to insurers, not claimants.
— No demand being made of insurers to reward employers who have good health and safety practices.
— De-lawyering the litigation process results in unfairness and under-settlement.
— A system where the defendants determine who the claimant may have as their expert undermines the fairness of the system.
— Insurers are losing the challenges they bring to what they claim to be disproportionate costs.
— The use of a computer system for damages assessment is both absurd and potentially dangerous.
— BTE insurance is bolted on to policies without the insured’s permission and places the lawyers running cases under immense pressure to settle as quickly as possible, at a low sum.
— Increasing the small claims limit only suits the insurers.
— Restricting access to justice by removing the right to representation runs the risk of political and industrial alienation.

INTRODUCTION

Thompsons is the UK’s largest PI law firm, with 23 offices across all 3 UK jurisdictions. We have around 70,000 cases at any one time, the majority of our cases are for trade union members (and their families).

Throughout its 85 year existence Thompsons has refused as a matter of principle to act for defendants. We believe we are uniquely placed to comment, from the claimant and trade union member perspective, on the issues being considered by the Committee.

Thompsons and its union clients operate free legal assistance schemes. Trade union members and their families can take advantage of a range of legal services from personal injury cover, through free legal advice on non employment issues, to employment law advice and representation and even wills and conveyancing. Almost all the services (save conveyancing which is at a highly competitive rate) are offered free.

In personal injury cases the unions use specialist law firms such as Thompsons. Since the introduction of Collective Conditional Fee Agreements (CCFA’s) it has been possible to guarantee no deductions at all are made from the compensation, whether or not the claim is successful.

We back the unions’ comments, which refer members and advertise their legal services, that they should not be subject to regulation.

Although this evidence is to the Committee’s inquiry on compensation culture, Thompsons believes that the inquiry on small claims is equally fundamental to the debate around compensation culture. This is all part of a general acceptance of “crisis” in the personal injury (work and non work) insurance market and is part of an insurance driven agenda to limit their expenditure by limiting claimants’ access to independent advice.

Thompsons believes that the right of individuals to receive damages if they have been injured due to negligence and their right to representation is under threat.

REAL INJURIES, REAL PEOPLE

Over the last 10 years negligent employers have paid out over £3 billion in compensation to staff who have sustained physical and psychological injuries at work. This figure may appear dramatic, but it reflects the seriousness of the issue of workplace health and safety. Much of this compensation has to be fought for through the legal system.

Here are some examples of the sort of people that Thompsons represents on instruction from the unions.

Mrs F, a nurse, fractured her toe when injured at work. Her claim settled for £1,050. The claimant has been very nervous of the litigation process and would not have made the claim without the backing of her trade union and the legal assistance it provided.

Mr M, employed as a patient shuttle driver by an NHS Trust, was assaulted at work by a volunteer ambulance driver. He suffered a broken rib and a bump on the back of his head. The case was complex due to the issue of liability and the difficulty in obtaining documents about the assailant. The claimant had some difficulty understanding the legal process, and without legal representation from his union he would not have pursued the case beyond the initial denial of liability by his employer.
Miss B was travelling on a London bus when the driver closed the doors on her foot, ripping the nail off. She was off work for a week and a half. Initially she corresponded with the bus company herself and they made an offer to her of £1,000. On consulting Thompsons she discovered she could also claim for her loss of earnings and also that she had a contractual obligation to repay sick pay to her employers in the event of a successful third party claim. She has been advised that the claim is worth in the region of £2,000.

Compensation culture

Compensation culture does not exist in Britain. The Better Regulation Task Force said so, and the government’s own statistics show that the number of personal injury claims are down. Employers liability claims dropped 20% last year.

There may be a host of reasons for this drop in cases. The drop may be a reflection of better health and safety or of the move from more traditional industries to less dangerous occupations. It may reflect less union density. There may be an impact from the proliferation of claims companies. People may actually be being turned off making a claim by the whole notion of a compensation culture as it involves making a fuss and is as such inherently “un-British”.

Unfortunately, the decline in claims does not mean that there are fewer accidents. Health and Safety Executive statistics suggest some reduction in accidents but not of this magnitude. We have been working with the unions to raise awareness of trade union legal services and people’s rights to claim. Our view and the unions’ view is that people should not have to suffer in silence and that poor health and safety practices should be exposed and corrected.

We carried out a nationwide survey of 500 people. This suggested that there is widespread ignorance of the right to claim and that people believe more should be done to increase awareness of that right.
- 85% of employees questioned believed that more should be done to inform workers of their rights to claim if employer negligence has caused them to be injured.
- This figure rises to 91% in the manufacturing and construction industries and, regionally, to 93% in Greater London, and 94% in Northern Ireland and Wales.
- The majority of respondents listed three key players—trade unions, government and employers—as needing to take the lead in raising awareness of people’s rights to claim.

The Committee has heard from the Lord Chief Justice that in his view there is no compensation culture. The same has been said on numerous occasions by the Lord Chancellor.

The perception of a compensation culture

As it is clear that there is no compensation culture in Britain, the Compensation Bill describes compensation culture as “a perception” and suggests that it is necessary to legislate for this perception.

This is an entirely illogical position.

If people started to keep guns to protect themselves against a perceived threat of burglars the government would publicise statistics and call on individuals not to rise to hysteria.

In its reaction to Anne McIntosh’s Private Members Bill on the right of householders and shopkeepers to use greater force against burglars, the government showed its distaste of responding to perception rather than fact. And yet responding to a perception is exactly what the government is doing with compensation culture.

When people have started, without justification, to panic buy petrol and there are queues at filling stations the government has sought to inject a sense of realism and calm. It has not pandered to the panic and inflamed it. And yet with its reaction to the perception of a compensation culture, peddled by the insurers and the media, it is behaving as the worst panic buyer.

Thompsons can offer the Committee many examples of how the media uses compensation culture to describe almost any compensation claim. One recent one was a particularly serious distortion of the facts. Gavin Bassie, a fire-fighter, suffered a catastrophic knee injury in a fall during a PT exercise on a dusty floor that ended his 13-year career. The press and the Merseyside Fire Authority, have sought to present the case as compensation culture, when it is in fact anything but. The Fire Authority was in breach of the Health and Safety at Work regulations.

Mr Bassie originally offered to settle his claim without recourse to lawyers, for £40,000. By refusing to admit liability and by defending Mr Bassie’s claim all the way to the Court of Appeal, the Fire Authority has been landed with a £200,000 bill for damages and costs.

The Court did not believe the Fire Brigade’s witnesses, and criticised them heavily for the way in which they investigated the accident.

However, the court did not suggest that anything onerous needed to be done to prevent further similar accidents. The floor simply had to be cleaned before PT exercises.
Yet the chief fire officer has sought to hide his Brigade’s failings by a gross over-reaction including a running ban and staging a media campaign which seeks to present Mr Bassie’s claim as more evidence of compensation culture.

He has also attacked the right of fire fighters to claim compensation when they have been injured as a result of their employer’s negligence and claims that the case will lead to cuts and a recruitment freeze.

This is just one example of how the notion of a compensation culture leads to unnecessary risk averseness in public bodies. Rather than a genuine fear of claims, compensation culture is being used as an excuse to attack claimants and shape policy. The government should condemn such reactions rather than fuel them by attempting to legislate against a perception.

The Bassie case is also evidence of why the law on negligence does not need to be changed or clarified. The law has been set down for years. It is perfectly understood by those who need to understand it. Employers and insurers will however always deny negligence when they defend a case. That is nothing to do with the law being unclear. Attempting to change or clarify it will simply result in more money for lawyers to argue what it means.

THE INSURANCE INDUSTRY

The debates around compensation culture and raising the small claims limit are insurance industry driven. Legislating against a “perceived” compensation culture, or cutting lawyers out of the claims process suits only the defendants.

The insurance industry is a major employer, a major income generator and as such a major part of the UK economy. Insurance impacts in one form or another, on virtually every household in the country. It is understandable therefore that when the insurance industry speaks through the Association of British Employers (ABI) or individually, people in government listen.

A SNAPSHOT OF THE FINANCIAL HEALTH OF BRITAIN’S LARGEST GENERAL INSURERS

Aviva

Aviva is the world’s sixth largest insurance group and the biggest in the UK. Its main UK brands are Norwich Union, Norwich Union Direct and the RAC.

Aviva Group’s operating profit before tax for 2004 was £2.3 billion, up from £1.9 billion in 2003 and £1.7 billion in 2002.

RBS Insurance

Royal Bank of Scotland Insurance is the second largest general insurance provider in the UK. Its subsidiaries include Direct Line, Churchill Insurance, Green Flag and NIG.

Operating profit for the RBS Group as a whole was up 15% from £7.1 billion in 2003 to £8.1 billion in 2004. In 2002 its profits had risen 12% to £6.4 billion.

AXA

AXA became a major UK insurer in 1999 when it acquired Guardian Royal Exchange through its subsidiary Sun Life and Provincial Holdings.

In 2004 its UK insurance value by gross written premium was £1.9 billion. Its UK general insurance business posted a revenue increase of 4.3% to £3.1 billion, that itself up from £2.9 billion in 2003.

Allianz AG

Allianz is one of Europe’s largest financial services companies. In March 2005 it released a breakdown of its performance in the UK for the first time, showing that pre-tax profit for its UK division rose 56% from £145 million to £227 million in 2004. Operating profit rose to £218 million, against £159 million in 2003.

This snapshot shows just how profitable the insurance industry is. If its profits are being hit by rising costs in PI claims, then that is not reflected in the evidence we have found.

Insurance industry profits make it a very powerful lobby group. The risk is that what it says becomes fact.
Fact 1—Employers Liability Insurance (ELCI) “crisis”

The perceived “crisis” in Employers Liability Insurance (ELCI) led to the abortive Department of Work and Pensions (DWP) pilot. Premiums were soaring and “something” had to be done.

The fact was that—as the appended article by the former Editor of the Insurance Times makes clear—there had been an irresponsible race to the bottom on ELCI premium prices. We were, in the UK, massively out of step with the rest of Europe on premium rates. But instead of a thorough investigation as to why ELCI was going up to such an extent, there was a push for significant changes to be made to the way in which claims were dealt with.

Unrealistic premiums, combined with factors that suggested insurer incompetence rather than anything else, led to the problem that the DWP sought to tackle.

The insurers had been exposed on asbestos claims. If they had properly read the clear signs from the early 1900’s they would have realised that this was a disaster waiting to happen. Insurers had also had their fingers burned in the late 1980’s stock market crash and were seeking to recoup some of their losses from natural disasters.

The “crisis” in ELCI had little to do with the ELCI market or the PI claims process and everything to do with insurer incompetence and having to pay out on policies they naively assumed would not lead to claims.

Fact 2—The current personal injury claim system is too slow and too costly

The ABI has complained that costs in personal injury cases are soaring. They say that the current protocols that set down clear rules and timelines for both parties to follow are not sufficient for the efficient (ie speedy) disposal of cases. The ABI claims that 40% of costs are lawyers fees.

Yet the UK court system actively prevents solicitors from running up unreasonable costs and encourages challenges to any that are unreasonable. The ABI has offered no empirical evidence to justify its 40% figure despite Thompsons and others having repeatedly disputed it and asking them to produce the facts behind the figures. It is notable that this figure bears no relation to Thompsons figures on case costs notwithstanding that we are the largest trade union personal injury firm in the UK.

We dispute the reliability of the ABI’s figures. Even if they were correct then questions would need to be asked about what is responsible for them. In Thompsons’ experience it is the changes that insurance companies have made to their methods of claims handling over the past 5 years. In order to cut costs, they have “dummed-down” by doing away with the old style claims inspectors who would discuss claims and settle legitimate ones quickly, leaving instead an insufficient number of experienced claims handlers.

Insurers could simply follow protocols and respond to claims more quickly rather than, in our experience, often only responding to a claimant’s solicitor after court proceedings have been issued. In that way claims could be progressed to a speedy conclusion, with minimal costs.

Both issues have been transmogrified into fact. This is what has happened with the compensation culture and the alleged “facts” that back that up. No one is turning the tables back on insurers and questioning their motivation.

And no one is demanding any return from the insurers for any of the change that they seek to impose. There is no request for a guarantee from the insurers that change in their favour, which must lead to savings, will be made public and passed on in the form of reduced premiums (which would in turn encourage good practice by employers). If we believe in the principle of the Polluter pays then those who do not should surely be rewarded.

CONDITIONAL FEE AGREEMENTS (CFAs)

The committee is examining the way lawyers’ fees are arranged, in particular Conditional Fee Arrangements. It is significant that the impact of these are being considered at the same time as the furore around deductions from damages by compensation claims handlers generally, and by some firms handling coal miners’ claims under the health coal scheme.

Since their introduction Collective Conditional Fee Arrangements (CCFAs)—CFAs for membership organisations—have allowed trade unions to provide high quality legal services free to their members. To enable trade unions to take on the immense power and seemingly bottomless coffers of the insurance industry, unions had to make deductions from members’ compensation. This ensured that the unions had the funds to pay for the level of expert representation that members should reasonably be able to expect. CCFAs have allowed the trade unions to move away from deductions and offer a wholly free service.

The furore that has surrounded the deductions made by some areas of the NUM in the coal health scheme shows how sensitive the issue of members not getting 100% of their compensation really is.

There are sound and valid reasons why areas of the NUM have made deductions. The practice started in 1993 in Durham, for example, when the last pit closed. With no pits and no membership income the union had to secure funds to allow them to continue operating.
In mining communities, the union operates as a social welfare organisation, often as the first port of call for former miners, their families and dependents rather than the local authority or Citizens' Advice Bureau.

In the Durham coalfield the Durham Miners Association has 9,000 members and represents 3,000 next of kin. There are 15,000 retired or redundant miners.

The voluntary deductions taken from 1993 were used to back the successful legal test cases, which led to the introduction of the Miners' Compensation Schemes, and opened the door to more than 750,000 claims by injured miners, their families or dependants of deceased miners.

The money deducted now is being fed back into the mining communities in a variety of ways including delivery of social welfare services, provision of school uniforms, transport to and representation at Social Security and Medical Appeals Tribunals and delivery of the Concessionary Fuel Allowance scheme.

People who attack the deductions made on behalf of the NUM forget that the practice of making deductions from compensation payments was widespread in the trade union movement before the introduction of Collective Conditional Fee Agreements, enabling the Davids of the trade union movement to take on the Goliaths of the corporate and insurance world.

Any attempt by the insurance industry to limit when the cost of using lawyers may be recovered, by devices such as fixing costs and increasing the small claims limit, runs the risk that unions will be forced to reconsider how they fund their legal schemes. Deductions may creep back.

It is possible that this is what the insurers want to achieve. By squeezing the ability of claimants to get funding for or even questioning the legitimacy of their having independent advice they may force all those not on one of their panels to make a deduction from damages. The claimant will be forced to make a choice between a service that whilst free is in the thrall and pay of the insurance industry or having a deduction made from their compensation.

**CREEPING POST HOC RATIONALISATION**

Under the guise of tackling a compensation culture, or even addressing the perception of it, the insurance industry is making suggestions that are gaining ground and credibility.

**Limited lawyer involvement**

De-lawyering the litigation process is suggested by the insurance industry as the answer to any problems there may be with the current system. This is superficially attractive. Regrettably our experience of dealing with insurance company Intervention Units (departments within insurance companies whose task is to capture as many cases as possible from accidents and deal with them direct and without lawyer involvement), or of picking up the pieces for a claimant whose claim has been dealt with by a claims company is that it results in unfairness and under settlement.

People have their cases wrongly rejected completely (how does the claimant know they in fact have a case if no one is fighting their corner?) or under settled either in damages or because the medical evidence obtained is at the wrong level or from doctors on the payroll of the insurance industry.

Despite these risks, in the abortive DWP pilot and through recent proposals from the CJC, restricting claimant access to lawyers has been a significant and serious suggestion.

**Limiting use of experts**

There is a suggestion that expert use should be limited either in the choice of doctor or the level of their qualification. This must start from the assumption that the level of expert at present is inappropriate. Yet despite the insurers under the pre action protocols having the opportunity to object to the choice of doctor in each and every case they rarely do so.

And experts, like costs, have to be proportionate to be recoverable disbursements. To allow a system where the defendants directly or indirectly determine who the claimant may have as their expert can only undermine the fairness of the system and harm the claimant.

**Proportionality**

It is true that in some cases there is a lack of proportionality of costs to damages. But no one seems to be looking beyond the superficial as to why that occurs.

The insurers repeatedly and publicly complain about a lack of proportionality and yet they have a significant weapon available to challenge any claim they consider to be unreasonable through the costs assessment process. In Thompsons’ experience when they do so (in over 50% of the cases) they end up either losing the assessments or conceding on a case by case basis that, in fact, the costs are both reasonable and...
proportionate and reflect their behaviour not the claimant’s representatives. The conclusion we draw from this is that it is precisely because their arguments continually fail when put under the judicial microscope that the insurers have opted to scream about proportionality from the political and media rooftops.

**Damages assessment**

The typical claimant in a personal injury case is ignorant of what their claim is worth. If there is a perception of compensation culture, it is not held by potential claimants, who tend not to even be aware of what they can claim for.

There is a proposal that there might be the use of a computer system for damages assessment. This is frankly absurd. A computer can no more replace a Judge in assessing damages than it could replace a Judge sentencing offenders. Judicial assessment of damages has developed over years of experience and practice. It requires a degree of common sense and judgement that we all reasonably expect of the Judiciary. It requires consideration of competing and often apparently conflicting and partially reported authorities of differing levels of courts. It is not a mathematical exercise which can be done by pushing buttons.

If a computer system is the answer why have insurers not done this long ago in a way which wins over claimant confidence? They could have cut their own staff and made settlements quicker and more easily as all would have confidence in the system.

There is a parallel in the notion of a computer calculating damages to the tariffs which have been attempted and led to unfairness in the CICA scheme. Even that tariff scheme has not sought to introduce computerised assessment.

And at Thompsons, as claimant lawyers, we continuously remind ourselves that damages themselves remain—according to the Law Commission—massively out of step with what they should be in real terms.

**Encouragement of Before The Event (BTE) insurance**

In its August 2005 paper Improved Access to Justice: Funding Options and Proportionate Costs, the CJC suggested actively encouraging BTE insurance.

Most people will have three or four domestic insurance policies: for their car, their household contents, their property and perhaps an annual travel policy. On each they may have a bolt on BTE policy—attached without their agreement—for which they will have paid an undisclosed sum.

BTE is considerably more expensive to the community than union funding by After The Event (ATE) insurance, self insurance or commercial insurance. And yet it is being heavily promoted and bolted on by the insurers at every opportunity.

A union with 1 million members taking advantage of the CCFA regime and having an average self insurance premium of £340 supporting 10,000 successful cases in a given year would have a total premium income—to pay for the cases that are lost—of £3.4m.

By contrast if the average cost of a BTE premium is, say, £20 per policy per year, one million people will pay in the region of £60 million per year for before the event insurance that the majority will never need (trade union members certainly don’t need it) or use (it is poorly promoted when bolted on and has restrictions) and who most will not even know they have (who reads the detail of their insurance policies?). Even taking into account success fees, £60 million is a considerably greater cost to society than ATE cover and self insurance.

If BTE is encouraged to dominate the market, as the CJC suggests, ATE insurance will either wither or become disproportionately expensive. ATE insurance will only survive if it has a mixed basket of cases to support. It will not survive if it is forced to back only the more difficult cases that BTE lawyers reject.

Our experience is that BTE is, in fact, nothing more than a claims company arrangement for insurers, a way of capturing cases and profiting from them.

The cases are sold to panel law firms for a referral fee. The law firms are then often required to run the cases on an unlawful basis, ie no charge to the insurer if they win or lose. That means the claimant is misled into thinking they are insured when, in fact, the insurer’s price of panel membership is that the lawyer pays what the insurer should.

This arrangement is of great concern because of the position it places the injury victim in. This system bypasses the extensive consumer protection arrangements for CFAs set up precisely because of the concern to preserve complete integrity and impartiality of lawyers giving advice.

A lost case could mean a huge bill for a law firm without any insurance protection as could rejecting an offer and failing at court. The claimant is not told that his lawyers are carrying this burden when they advise him about the case.
Lawyers running a case on BTE will be under immense pressure to settle claims as quickly as possible and at a lower sum than they might otherwise have fought for in the light of the fact that they will:

- Have purchased the case from the insurance company and therefore have a sum paid out they will want to recover.
- Frequently be pursuing the same insurance company on behalf of the claimant.
- Not be paid at all if they lose the case.

**Small claims**

We finish on the issue of raising the small claims limit as this is very much part of the debate about compensation culture. It is one of the aims the insurance industry would, using the smokescreen of the compensation culture, like to see pushed through.

It is something that the committee has already considered and we are conscious is not part of its brief for its current enquiry. Nevertheless the limit in small claims is of fundamental importance to claimants and the trade unions that represent them, and there are points that we wish to raise.

It is a myth that the limit has not gone up. Until 1999, the small claims limit of £1,000 were for general damages only. By including special damages, the limit was effectively increased by 25%.

£1,000 is not a “small” sum. It is a lot of money to someone on the minimum wage, for whom it represents over five weeks wages. Only 1/3 of people successful in a claim through the small claims court ever actually receive the awarded compensation.

Raising the limit will reduce the number of claims. Many individuals such as the three we featured at the start of this submission will not feel confident in making a claim without legal representation.

How will a claimant know that their case will attract £2,500 or more and so they should approach a lawyer? It can be a considerable time after an accident before it becomes clear that a claim is worth that much. There is no such problem with £1,000 as this is clear early on in a claim.

And if a claimant doesn’t know what the law is relation to issues such as reasonable practicability and foreseeability, they won’t know what evidence to gather to back their claim. Insurers regularly deny and misquote the law in order to escape liability. That is why a claimant needs a lawyer.

Thompsons carried out a survey of a thousand trade union members who had been represented by trade union legal services in a claim completed over the last year, in order to find out what value claimants put on being able to call upon advice from their union’s lawyers.

Of those surveyed, over 70% of the cases were employment accidents, with the next most important case type being road traffic accidents, both at work and elsewhere.

- Sixty four per cent of respondents in the survey received awards of between £2000 and £5000.
- Sixty three per cent of respondents would either not have proceeded with their case, or would not have felt confident about going before a judge without legal representation.
- Only a third of respondents believed their case would have been fairly dealt with if they hadn’t had a trade union lawyer.
- Ninety per cent of respondents said they would trust specialist solicitors appointed by a trade union, while less than 10% said they would trust claims companies or high street solicitors.
- Nearly 85% of respondents rated the service that they received from trade union solicitors to be either good or very good.

**Conclusion**

The right to representation, to access to justice, is fundamental to ensuring that everyone has an equal chance. We believe, as the government does, that people unable to protect themselves should be empowered. Removing the right to representation in “small” claims, or any claim, creates an unequal fight.

At Thompsons we believe there is such a thing as society. If we cut individuals loose and leave them on their own against a powerful adversary, they will be politically alienated, angry and short changed.

If as a society we are trying to encourage better employment relations, what message do we send to individuals who have to take on their employer without representation? If they feel short changed or belittled what will they feel about the work that they do and the employer that they have?

Thompsons Solicitors

*December 2005*
Evidence submitted by Amicus

Our interest

Trade Unions are the largest “stakeholder” for claimants in the UK. This covers those looking to pursue personal injury and employment cases in particular. This support has existed for decades, without fears of a “compensation culture” or people losing out in the hands of unscrupulous representatives.

Amicus has a membership of 1,179,850. The unions affiliated to the TUC have 6.5 million members. For personal injury claims the extent of trade union cover includes family members of a member of the union (and this applies to most unions, including “the big four” Unison, Amicus, Transport and General Workers and GMB). More than 10 million people have the opportunity to have union backing for a personal injury claim. What is more, that is not on the basis of “no-win no-fee” (see question 2 of the terms of reference), but no fee: win or lose. Those without union support can lose up to 25% of their damages, or sometimes more.

We agree with the statements that “Trade Union Legal Services are the foundation stone to a progressive and just society” and that we have “an important role to play” as we “bring forward just claims attracting compensation for those who deserve it and promoting good health and safety”. These are the words of the Lord Chancellor earlier in 2005.

We have seen and endorse the evidence submitted by the TUC, and have significant evidence to add. In addition, as one point on their evidence, please note that where the TUC point out that “Britain also pays out much less out on civil compensation, as a proportion of its GDP, than any other major European country apart from Denmark”, we would say that the extent of social security payments in Denmark means that suing for compensation is not as necessary to make up losses. We effectively pay out less than all other major European countries.

We recognise and support the right of those not in trade unions, or not related to a trade union member, to have access to justice. In fact our position in this field has facilitated that access and developed the law, where justified, in favour of all claimants.

We would be delighted to give oral evidence, or to assist further by expanding upon any aspects of this evidence, to substantiate the assertions we make with additional evidence, which we would, given time, have made earlier than this.

1. Does the “compensation culture” exist?

“Compensation culture” is a myth in Britain. We accept the Better Regulation Task Force 2004 report “Better Routes to Redress” to the effect that “compensation culture does not exist, for the reasons given in that report and adopt the TUC submission in this regard. It is in the interests of the insurance industry and the defendants, such as employers, to encourage fear of the “compensation culture” and to encourage those parts of the media who seek to raise the issue in a hysterical fashion. It is not in our interests to promote this hysteria.

It is interesting to see who else bought into the myth of “compensation culture”. On 15 March 2004 David Blunkett was reported hitting out what he called “compensation culture gone mad”. Speaking in the vague direction of a group of journalists, Mr Blunkett decried the current trend towards “demanding payment for every imagined injury”. The Shadow Home Secretary, David Davis, joined in a few months after calling for a new liability law, ending the excesses of the compensation culture.

Seven years ago, the Law Commission (report 257) concluded that damages for personal injury had not kept pace with inflation and proposed methods to redress this. Nothing has happened since. Damages remain too low to compensate and serve justice. This has an obvious impact on the issue of proportionality comparing the level of damages with costs of a case.

We understand the fear of a growth of risk averse behaviour used to justify part 1 of the Compensation Bill. We do not share that fear to the extent that it justifies Clause 1 of the Bill. First, as a growing phenomenon, this problem, in so far as it exists, is largely the result of “claims farmers” advertising and promoting claims, in the last five years, sometimes when claims are not justified. Trade unions do not seek or wish to make unjustifiable claims and this has remained our position for decades.

In relation to fears such that, for example, teachers may be reluctant to take children on school trips, we must bear in mind that such potential claims are a very small proportion of the total number pursued. In promoting access to justice for all we must resist the potential to throw the baby out with the bathwater.

In relation to further evidence on Clause 1 of the Bill and risk aversion, please refer to our response below to question 3 and 5 of the terms of reference.
2. What has been the effect of the move to “no-win no-fee” contingency fee agreements?

First let us clear up another misconception. Contingency fee agreements (under this country’s definition in law and as referred to by the Law Society) are not available to those who wish to pursue a personal injury case. A contingency fee means that the fee is taken from the sum of damages. Contingency fees are available to those wishing to have a lawyer assist them take an employment tribunal case (where costs are not generally payable by the losing party and the Law Society recognises such proceedings as “non-contentious”).

The arrangement on offer for those taking a personal injury case is a “conditional fee”, which is to say the lawyer or service provider does not charge the claimant for the work done, unless the case succeeds, whereupon the losing party is generally obliged to pay the other parties costs. A combination of success fees and insurance against losing helps with the prospect of losing.

However, there are often some costs to the claimant, albeit never in cases backed by the great majority of unions. (This explains, in part, the importance of the “small claims” limit about which this Committee recently made incorrect conclusions without the benefit of evidence from the largest stakeholder, namely the unions. Of over 4,000 Amicus cases concluded in the year to 30 November 2005, nearly 40% were for an inclusive sum of damages of £2,500 or less. We simply could not afford to support those cases in the event that the limit was to be raised. There would be no-one else to step into the breach and many would be deprived of access to justice. We would be more than willing to make separate comment in connection with that issue.)

In 2000, the possibility of state funded legal aid for injury claims was effectively abolished. The cost to the state had been greatly reduced by the existence of trade union support. The conditional fee arrangements, outlined above, were intended to replace legal aid. Unions have collective conditional fee arrangements, facilitating their ability to offer “no fee; win or lose” opportunities to their members and their families. There remains a cost to the union from losing too many cases and this acts as a disincentive to unmeritorious claims.

Without a clear political will and financial ability to revert to legal aid cover, interference with the conditional fee process carries a real risk of serious detriment to access to justice and an adverse effect on health and safety.

The insurance industry continues to complain of the arrangements from 2000. They complained about legal aid before that, as anyone with a legal aid certificate had a disincentive to withdraw a case, even one without reasonable prospects. Their continuing complaint, however, relates to relatively high levels of “transactional costs”.

Amicus has no problem with working towards a system that reduces transactional costs. However, it must be recognised that the level of transactional costs is in the hands of the insurers. They can keep such costs to a minimum. They can do this whenever they do not dispute fault unnecessarily and when they pay appropriate levels of damages promptly in deserving cases. They can promote good health and safety practice.

Contrary to the aims of the Woolf protocols for injury cases, insurers behaviour runs up transactional costs. This can appear deliberate. They can perceive that this may deter claimants knowing that at least some claimant’s costs are likely to be disallowed.

There is direct evidence of representatives of defendants saying that they believe cases under the small claims limit will not be pursued because fees are not recoverable.

It is understood that conditional fees are a significant problem in libel cases, however. In other words, the problem identified by insurers for legally aided claimants in the last century, is now a problem for those defending libel cases, as even if they win, they do not recover substantial costs. A solution may be to require the unsuccessful applicant to carry insurance to pay the defendants costs.

One question you may wish to consider is in relation to the effect of referral fees. In spite of a vote by a substantial number of members of the Law Society, these remain permissible. They act as an incentive for those who “capture” claims to gather as many as possible; the meritorious and unmeritorious alike. The Claims Standards Council will also tell you of examples of the unscrupulous, or indeed crooked, who pay people to make up claims. Amicus does not require its lawyers to pay a referral fee and we would be happy to see them banned.

As they stand, the conditional fee arrangements assist access to justice and help towards equality of arms. They also promote health and safety practices better than would be the case, if cases were hampered following change.
3. **IS THE NOTION OF A “COMPENSATION CULTURE” LEADING TO UNNECESSARY RISK AVERSENESS IN PUBLIC BODIES?**

As we have said: We understand the fear of a growth of risk aversion used to justify part 1 of the Compensation Bill. However, we do not share that fear to the extent that it justifies Clause 1 of the Bill. There are a number of stories of public bodies (and others) being fearful of being sued, so that their behaviour is changed to such an extent that is not justified by the facts. This cannot be used as a reason to stop or hinder legitimate claims.

We accept that this “fear” is being used to save money. A local authority can close down a leisure facility, claiming there is a risk of injury and being sued, when in fact a reasonable risk assessment and suitable provision will avoid any claim being successfully pursued. Insurance companies are also risk averse. They refuse cover or charge high premiums, when again this is not justified. The pressure brought by the insurance industry over recent years is, by their own admission, due at least in part to their failure to set appropriate premium levels over many years. The issue of asbestos disease is a particular case in point, but the problem is not confined to such diseases.

At this point we refer to the case of Tomlinson v Congleton Borough Council and the Annex note, which is also relevant to question 5 of the terms of reference. If the political will does not bend to the calls for removal of clause 1, then other solutions are proposed at the end of the Annex.

4. **SHOULD FIRMS WHICH REFER PEOPLE, MANAGE OR ADVERTISE CONDITIONAL FEE AGREEMENTS BE SUBJECT TO REGULATIONS?**

The short answer is “yes”, if by “firms” those who operate genuinely on a not for profit basis are excluded. This question appears to arise from the issue developed by clause 2 of the Compensation Bill.

We disagree with the conclusions of the All Party Parliamentary Group for Insurance and Financial Services (funded on behalf of the insurance industry) in their report of November 2005 looking into the Compensation Bill and regulation of claims companies. APPGIFS were “deeply sceptical about the prospect that Trade Unions and Citizens Advice Bureaux might be exempted” from regulation. Those bodies do not exist to make profit, but to support their members (and members families in the case of trade union backed claims for injury) or the individual members of the public who may be injured through no fault of their own, in the case of the CABx.

APPGIFS also concluded that “exempting insurance companies” from regulation over dealing with the public directly in relation to “might be appropriate as they are already regulated by the FSA”. We disagree with this conclusion. The FSA does not regulate them in relation to the payment of claims. The insurers have an obvious conflict of interest. The insurance companies say they will pay people from their profit margins exactly the amount they are entitled to, but that is not backed by the research (from the Association of Personal Injury Lawyers). Those foolish enough to deal with the insurers direct often do not receive what they are entitled.

Whilst APPGIFS heard a lot from the insurance lobby, they neither invited nor heard from the unions. (Those like APIL do not have the same perspective or arguments as the unions).

The draft definition of claims management activities in the Compensation Bill would appear to include the activities trade unions undertake such as “referral of a claim or claimant’s details to a person with a right to conduct litigation”. This is the view of the DCA. “Regulated areas” initially include Personal Injury, Criminal Injuries Compensation and Employment.

The desirable outcome is the situation whereby unions are

— not covered by the definition of “claims management activities”, or, if not;
— not required to register, or, if not;
— exempt from registration.

Our arguments include:

— Further, the provision of legal services by unions, involves additional regulation over solicitors who are permitted to work for union members. This is so in relation to the selection of specialist lawyers, the standards and protocols, which are set for them, and the review and complaints procedures. These are in addition to the regulation by the Law Society.
— It is in our vested interest to maintain or increase member satisfaction to retain and recruit members by ensuring that the service is second to none.
— It is in our interests to refer cases to our lawyers as soon as possible in a long established and effective way.
— However, in employment cases, our officials advise and assist and will seek to resolve issues within the industrial relations framework in the first instance (consistent with the October 2004 changes to the law over discipline and grievance). A legal claim is not necessarily the first option and we believe it is appropriate to keep it that way.
— Unions do not charge their members costs or deduct from damages in personal injury or employment cases and we have no plan to change*.

— It is important that Unions, who have a deservedly good reputation for provision of legal services, are not undermined in the eyes of the public or their members, by being lumped in with deplorable claims organisations, which have sprung up relatively recently, and which need regulation, as they have proved incapable of self regulation.

*We are aware that other unions representing a relatively small number of members make administration charges in successful personal injury cases. This is not the norm. We are also aware of an area where there has been a significant problem caused by a trade union in relation to the conduct of claims. This involves the Union of Democratic Mineworkers and an organisation called Venside. That union was formed at the time of the 1984/85 miners’ strike in opposition to the NUM and it is not affiliated to the TUC. We are also aware that some charge is considered appropriate by some unions in successful Equal Pay cases, but this is nowhere near the level of contingency fee required by non-union lawyers.

We cannot emphasise enough the importance of ensuring that our role in relation to employment rights is not undermined. It is an issue as fundamental as covered by Article 11 of the European Convention on Human Rights, we say.

We have concerns about claims farmers actions and the manner and extent of insurers attempts to handle claims, when they have financial conflicts not to act in the interests of claimants.

We also have concerns about the only regulator in the frame. The “Claims Standards Council” has failed to regulate the claims farmers to date and we are not at all convinced that we have a voice on that body, when other stakeholders do.

5. SHOULD ANY CHANGES BE MADE TO THE CURRENT LAWS RELATING TO NEGLIGENCE?

The short answer is “no” and the insurance industry and the DCA agree. We would wish to see more strict liability, not least in relation to injuries at work, but that is probably a separate matter for consideration.

This question appears to arise from the issue developed by clause 1 of the Compensation Bill. Again there are misconceptions. Clause 1 is said to be necessary to deal with the problem of the myth of “compensation culture” and the risk averse response (or the reliance on risk aversion to save money).

The DCA say they do not intend to change the law of negligence by clause 1 of the Bill. However, let there be no doubt as a matter of philosophy and logic as well as jurisprudence, a statement of the common law in statutory form changes the law. In this instance, the effect is potentially and probably substantial. In short, the concept of “desirable activity” in clause 1 is different from an activity of “social value” as referred to in the leading case of Tomlinson v Congleton Borough Council. Please consider Appendix 1. Whilst the definition of a “desirable activity” is not at all clearly stated, “social value” is set out in context in the Tomlin case. For example, is it a “desirable activity” to work for a charity? (Amicus represents many who work in this sector. Indeed let us ask the question “Is being a member of the clergy a ‘desirable activity’ since we represent them too.”) We do not believe it is right that the law of negligence may fail to compensate a worker depending on the activity of the employer.

CONCLUSIONS

We would be pleased to assist you to reach the correct decisions based on a proper assessment of the available evidence. We believe that the conclusions reached would be that:

— The “compensation culture” does not exist.

— In so far as there is a perception of a compensation culture, steps taken to deal with it should not have any adverse effect on the great majority of legitimate claims.

— The system of supporting claims must be viewed in light of the fact that large numbers of claims have trade union support and with that support claims have been pursued without significant problems.

— A review of the system should also take account of the effect of different types of claims, including employment cases.

— Commercial organisations which refer people, manage or advertise for claims should be subject to regulation.

— There should be no change to the current laws relating to negligence.

Amicus
Legal Services Department
January 2006
NOTES ON COMPENSATION BILL CLAUSE 1 AND THE TOMLINSON CASE

“A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precaution against a risk or otherwise), have regard to whether a requirement to take these steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.”

We know the background to the introduction of this clause. We also know from Lord Falconer that it is said to be intended to reflect the existing law and he has referred to the case of Tomlinson v Congelton BC Hol 31 July 2003.

Having considered it, this is clearly a largely very well reasoned Judgment, particularly by Lord HoVman and, subject to the argument about whether society should compensate someone like John Tomlinson, who as an 18 year old broke his neck “diving” in shallow water onto the sandy bed of a large lake in a popular park, the conclusion on the existing law is faultless.

However, a number of points emerge which are important. The Judgment is based on the need to take account of the “social value” of activities (as one of four factors) and not, as the Bill has it, whether the activity is a “desirable activity”.

The intention may be that these concepts should be one and the same, but in the context of the Judgment “social value” is relatively clearly defined, but we must ask the question “What is a desirable activity?” For example, perhaps most importantly for us is the question “Is work a ‘desirable activity’?”

The facts and background of the case appear relevant. The decision is based on the Occupiers Liability Acts. John Tomlinson was said to be a trespasser. “. . . there is no dispute that the act in respect of which Mr Tomlinson says that he was owed a duty, namely, diving into the water, was to his knowledge prohibited by the terms on which he had been admitted to the Park” (para 15). “. . . the risk . . . arose out of what he chose to do and not out of the state of the premises.” (para 27) and “it follows that . . . there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises” (para 29 and see Occupiers Liability Act 1984 s1 considered in the Judgment at paragraph 8). Thus there was no duty.

The Judgment goes on to consider alternatives, in a way that may be considered “obiter”. Paragraph 34 is preceded with the heading “The balance of risk, gravity of injury, cost and social value” (the four factors, which need to be considered and balanced). Hoffman distinguishes cases like “The Wagonmound No.2” (1967) (unlawful activity with no value—dumping oil in Sydney Harbour) and Bolton v Stone (1951) (a lawful and socially useful activity—playing cricket).

In the context of “social value”, paragraph 45 is important. “If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair”. See also paragraph 81, where Lord Hobhouse this time says “. . . it is not . . . the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled.” (Arguably, it is this which the Bill seeks to refine from the existing law*). Hobhouse goes on to refer to climbing trees, coastlines and other beauty spots, and waterside picnic spots. He also refers to “social utility” as considered by the Illinois case of Bucheleres v Chicago Park District as having the same effect.

It is this narrow definition of social value/desirable activity, which we must ensure is clearly stated in the Bill.

This is a long way from having any effect on work. We have always assumed that issues of reasonableness and the balance of factors in the context of work (even for charities, or in the context of social activities) takes account of risk of injury and gravity of injury balanced with cost. We do not think “Tomlinson” was intended to change that and it does not.

Indeed, Hoffman clearly points out at paragraph 46 “A duty to protect against obvious risks . . . exists only in cases where there is no genuine informed choice, as in the case of employees” and it goes on “or some lack of capacity, such as the inability of children to recognise danger*”

The other mention of work in the Judgment concerns the occupiers’ liability in the context of a specialist, such as a steeple jack, invited on to premises to work at height.

In any event, obviously the only way to keep the law the same is not to have Clause 1 and challenges at court can be anticipated, related to the extent of any lack of clarity and certainty.

CONCLUSION

We should seek to ensure that the Bill is amended so that “desirable activity” is clearly limited to “social value” of the sort expressly stated by their Lordships in “Tomlinson”.
Alternatively or in addition we would also suggest further consideration of an amendment to add “nothing in this Act shall be taken as detracting from the duty to protect against obvious and other risks in the case of employees and other workers, or in the case of those affected by some lack of capacity”.

Another way to achieve the objective perhaps would be a carefully worded clarification of the doctrine of “volenti non fit injuria”.

*This is intended to draw attention to the issue of children, given that the clause is specifically said to be intended to prevent teachers and the authorities being too risk averse in relation school outings and the like. However, any attempt to bend the law of negligence to allow those with limited capacity to suffer injury when they cannot recover damages, must be fraught with irony as well as difficulty for the Government and we must ensure that the baby is not thrown out with the bathwater.

Amicus
Legal Services Department

January 2006

Evidence submitted by InterResolve

InterResolve Holdings Ltd is a private and independent body set up, owned and operated by a group of mediators, sector experts, lawyers and other professionals to create and then deliver workable solutions for industry problems in a number of sectors.

In 2004, InterResolve acquired InterMediation Group, one of the main ADR providers active for many years and involved in several Court mediation schemes, the Claims Mediation Centre at Lloyd’s of London and many other projects. InterResolve has subsequently developed a number of initiatives in the insurance, reinsurance and other markets—including its Bodily Injury Claims Scheme (otherwise known as IR:BICS).

Both InterResolve and InterMediation are members of the Civil Mediation Council.

INTERRESOLVE BODILY INJURY CLAIMS SCHEME (IR:BICS)

EARLY NEUTRAL INVOLVEMENT

IR:BICS operates as a private contractual and collaborative arrangement between major insurers, employers and responsible claimant law firms who want to see people with genuine injury claims treated fairly. The arrangements allow InterResolve, as a neutral body, to be involved and to look after people as soon as they are injured, even prior to the formulation or making of a claim, helping them initially to recover and return to work before they turn to the usual present channels for dealing with claims. The objective is to help to avoid the significant additional cost that some of the present channels add to the system (often with little value), to say nothing of years of delays and frustrations that those arrangements can involve for claimants.

EARLY REHABILITATION

It is at this early stage that rehabilitation is most effective on numerous fronts and from our own experience we know that people treated well at this stage are less likely to be antagonised and unreasonable when discussing claims settlement. InterResolve’s in-house medical unit provides independent and objective assessment for rehabilitation and return to work programmes.

SIMPLE CLAIMS SETTLED EARLY AND AT LOW COST

Being involved at an early stage means that, where fair compensation is required in smaller and more straightforward claims, InterResolve can provide the option for claimants to have an Independent Legal Opinion (ILO)—there are strict rules governing how ILOs are provided—at very low cost to insurers and at no cost to themselves. Having arranged for claimants to receive an ILO, InterResolve can then facilitate settlement of most smaller claims so that:

— claimants get earlier settlements and
— insurers end up with a bill from around £700, including claimants’ legal costs, compared with around £2-4,000 they may currently have to pay—representing savings of 80% or more.

MORE COMPLEX CLAIMS

For more complex unresolved claims, a national network of claimant law firms will conduct these on terms that are contractually agreed through InterResolve with insurers and captives, geared to avoiding legal proceedings and unnecessary costs and delays.
Additionally, where members of this network are retained directly by claimants they will offer to conduct those claims under the IR:BICS contract.

Under the IR:BICS contract, where claims are settled lawyers’ fees are agreed and fixed for the first time in all Employers Liability, Public Liability and Road Traffic Accident claims and insurers undertake not to seek costs against claimants so that there is no need for a further (ATE—After the event) insurance against this eventuality.

InterResolve is available throughout as a neutral to troubleshoot problems, mediate settlements and provide other advanced ADR options—a job it is well qualified to do.

Special provisions apply for children and more vulnerable patients and for more complex cases where litigation might be needed.

THE RESULT

The result is that simple claims are dealt with simply and in a proportionate manner and more complex claims are dealt with in a less adversarial, more collaborative and cost-effective way. *This means that everyone wins:*

- claimants get looked after at an early stage with treatment for recovery and earlier claims settlement at no cost to the NHS;
- insurers and employers benefit from massively reduced claims costs; and
- responsible claimant law firms involved in the network are able to look after clients’ interests better, win new business without having to pay for it and operate a better business model that gives them much improved cashflow and better profitability;
- the burden on the Court Service is reduced;
- public policy and market concerns are addressed.

WHERE WE ARE NOW

We are already running a number of cases referred to us by members of the network and negotiations with most of the major liability insurers are underway in detail at board, underwriting and technical claims level with a view to running initial pilots in a large number of cases. Discussions are also taking place with a number of major employers. The negotiation of the detailed contractual terms has been concluded with the Solicitors’ Steering Committee on behalf of LawAlliance and some 100 law firms around the country have indicated their interest, many of them listed on InterResolve’s BICS website (www.irbics.com).

Agreement has also been reached for these schemes to be independently monitored and verified by a team at Nottingham Trent University Law School headed by Professor John Peysner.

PUBLIC INTEREST

These plans have been of considerable of interest to the government (DCA, DWP, CJC and others with whom we have retained direct channels of communication). There is general determination to find a better way for claimants with genuine compensation needs to have their claims resolved. InterResolve has offered to share collective data and results of these schemes.

Aware of the interest and work of the Committee and others in the area of claims costs and its impact on the insurance industry, InterResolve is keen to include the Committee in this chain of communication and ensure that the thrust of its activities continues to be consistent with any emerging policy, strategy and objectives.

FURTHER DISCUSSIONS

We hope this short briefing is helpful and would be happy to discuss these matters in further detail. In particular a doctor and researcher at InterResolve are currently preparing a report examining the potential and actual impact of rehabilitation no public policy and the market. InterResolve is willing to share its findings with the Committee when completed.

Looking further into the future the outcome of the independent monitoring by Prof. Peysner is expected to produce some valuable information. It is anticipated that this information would be made available for discussion between InterResolve and the Committee in due course.

InterResolve

*November 2005*
Evidence submitted by Headmasters’ & Headmistresses’ Conference (HMC)

I have taken soundings among my colleagues in HMC and can confirm that schools have been monitoring informally any trends in greater risk aversion in school activities as a result of increased legal action nationally. In the independent sector, we are, on the whole, fortunate that our staff are both expected and are willing to be actively involved in extra-curricular activities and school trips, so that the problems associated more in the state sector have not necessarily affected independent schools in the same way.

Nevertheless, all our schools will have reviewed their guidelines for school trips, in particular enhancing the quality of the all-important risk assessments. One other trend that has been noticeable is the increasing numbers of commercial companies offering to run outdoor education activities. These may be attractive to some schools as the companies will take the risks associated with the activities away from the school (at least in theory). However they charge considerable sums of money for their services which has put additional pressure on some schools with limited budgets, yet wanting to offer school trips to enrich the pupils’ learning experiences.

Dr Priscilla Chadwick
Vice Chairman HMC

January 2006