BETTER REGULATION TASK FORCE

STUDY INTO REGULATORY ASPECTS OF LITIGATION AND COMPENSATION

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

OCTOBER 2003

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 4,900 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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Better Regulation Task Force

1. APIL recognises that people from all parts of society may suffer personal injury. Their accidents may have devastating effects on all aspects of their lives. Nothing can fully compensate people for their injuries. But where the accident is someone else's fault, society should ensure and the law provide that those who cause injury are held accountable and take responsibility for their actions. Compensation should aim to rehabilitate the injured victim and assist him to try to restore his quality of life. The law requires those who cause the injury to compensate the victim so as to put him or her back in the same position as if the injury had not occurred, so far as money can do so.

2. APIL believes that the Government has a key role to play in:

   - Ensuring accident victims receive fair, just and prompt compensation
   - Promoting safety and preventing accidents and disease

3. As such APIL fully supports the intention of the Better Regulation Task Force in examining regulation in litigation and how it can work more effectively. We are concerned, however, that the investigation into this issue will be driven by the 'headlines' mentioned by David Arculus or the perception of a 'compensation culture' as intimated by Teresa Graham (both in the initial press release). In addition any alteration to the regulatory aspects of litigation should not be structured around the mistaken belief that *"the only people that really gain [out of litigation are] insurance companies and lawyers".* Any change in litigation regulation must be first and foremost for the benefit of the negligently injured party. APIL believes that in the absence of a no-fault compensation system, civil tort litigation is the most effective and efficient system to both compensate and protect people, and any

wholesale change in this system would be like 'throwing the baby out with the bath-water'.

Introduction

4. APIL asserts in response to David Arculus' question - *"is litigation the most effective and efficient regulatory tool for making amends?"* – that numerous studies have considered the tort litigation system, and possible alternatives (such as 'no-fault' compensation and tariff systems) and have concluded that the present system, while not perfect, is the best option for redress available to people negligently injured. These studies have included the Pearson Report 1978[1], the recent Department of Work and Pensions (DWP) study into employers' liability compulsory insurance[2] and the Chief Medical Officer's (CMO) review of compensation for clinical negligence.[3].

5. APIL believes that someone has to pay for the consequences of injuries to accident victims – to compensate them for pain, suffering and loss of amenity, the inability to work and to earn a living and expense of providing care. But who should pay for this compensation? There are three possibilities: the individual, the state or the wrongdoer.

6. If the individual is expected to insure himself against all risks in advance, but can expect no additional support from the state and is forbidden from seeking compensation from the wrongdoer, only the better off could afford personal insurance (although they might not think it fair to have to pay for insuring against the consequences of someone else's fault). The poor will not be able to afford it, and probably would not take out personal insurance. This is not a realistic option for society today because the burden would therefore pass to the state.

[1] Royal Commission on Civil Liability and Compensation for Personal Injury (1978) (Cmnd.7054-I, II & III)
[2] Department of Work and Pensions – Review of Employers' Liability Compulsory Insurance (First Stage Report) (June 2003)
[3] Department of Health –Making Amends, a report by the Chief Medical Officer (June 2003)

7. The state means the taxpayer., This Government, however, is clearly seeking to reduce the burden on the taxpayer and there is no sign that it wants to take over the full responsibility and cost for compensating for injury caused by negligence. Indeed the evidence points the other way – more of the financial cost of accidents is being put on to the wrongdoer.[4] As Health Minister David Lammy said in September 2002 when announcing the extension of the system of recovery of NHS costs *"Wrongdoers should meet the costs of their actions in full. Extending the recovery of NHS costs to all personal injury claims will remove the burden from general taxpayers of subsidising part of the costs to a wrongdoer."* It also seems very unlikely that any future Conservative government would want to increase taxes to pay for a full compensation state-run scheme. The state accepting the expense is not a realistic political option.

8. This only leaves the wrongdoers, and in most cases, their insurers. The current system works on the basis that society expects injuries caused by negligence or breach of duty to be paid for by the wrongdoer. Normally the wrongdoer will have taken out insurance against this risk. Indeed it is the continuing cost to the insurance industry that has lead it to become so exercised over the so-called 'compensation culture'. Indeed Teresa Graham intimates that it is 'compensation culture' that is the cause of the difficulties within litigation regulation. APIL submits that there is no evidence of a 'compensation culture' and does not believe that the number of claims likely to be pursued in the future would make the litigation system unsustainable. A thorough analysis of UK personal injury litigation by Datamonitor – independent market analysts – concluded that *"the much-feared compensation culture will not really develop much further"*[5]*.*

[4] see for example the Social Security (Recovery of Benefits) Act 1997
[5] Datamonitor report – 'UK Personal Injury Litigation 2002'

9. Between April 2001 and March 2002, 688,691 claims were made to insurers, 24.8 per cent of which were employers' liability claims. This represented a decrease of 7.4 per cent on the 743,593 claims registered the previous year. Datamonitor found that this decrease was largely due to a steep decline in disease claims, dropping from 123,814 in 2000-2001 to 74,408 claims in 2001-2002 – a fall of 39.9 per cent. This picture certainly does not seem to accord with consistent claims of a 'compensation culture'.

10. Further, in addressing the claim made by Teresa Graham concerning the prevalence of litigation in the United States, Datamonitor concluded that *"[t]he UK is unlikely to reach the same levels of compensation numbers and awards as the US"* [6]. This, it explained, was due to the following factors:

    - The UK does not have a similar provision of lawyers or culture of legal representation;
    - There is no need to pay for healthcare since the NHS is a free service, meaning that claimants are not worried about funding their return to health;
    - The prospects of multi-million pound damages are some way off in the UK, with average payouts being substantially less than those in the US.

11. It estimated that claims numbers would grow by an annual average of just 0.4 per cent to reach a total of 627,081 claims in 2007 (excluding disease claims). This would represent a total increase of only 2.1 per cent between 2001 and 2007. Datamonitor concluded that the *"compensation culture has reached its peak and thus there is not much left to be squeezed out of the market"* [7]. As far as APIL is aware, Datamonitor is the only independent analyst to have considered the future of the personal injury market and we submit that its conclusions

[6] Datamonitor report – 'UK Personal Injury Litigation 2002', p.148
[7] Ibid

on the non-existence of 'compensation culture' are extremely persuasive.

12. Indeed, the findings of the Datamonitor report are confirmed via various other sources. Surprisingly, a report by several UK actuaries associations - which is often quoted as highlighting the presence of a 'compensation culture' - in fact suggests that compensation in this country is well below that of other countries. The headline stories in the press following publication of the aforementioned actuaries' paper read *"the cost of compensation is £10 billion per annum and 1% of GDP [for the UK]"*. In isolation this is meaningless, as we are given nothing to compare it with. Exception might be taken to some of the actuaries' figures, particularly the inclusion of the exceptional cost of the BSE crisis. Furthermore, despite the free use of 'madcap claims' examples in the actuaries' paper, 70% of the cost identified by the actuaries relates to injuries caused in road traffic accidents. And expressly included in the £7 billion cost of motor claims is £1.5 billion which is the cost of the insurance industry administering motor insurance, which, incidentally, exceeds the £1.4 billion identified as claimant and defence lawyers' costs.

13. But is the UK's record good or bad in comparison with other industrialised countries? Buried away in the actuaries' report is a summary of a comparison published in February 2002 by independent consulting actuaries Tillinghast-Towers Perrin. This shows that the UK has the lowest 'tort cost expressed as a percentage of 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%). The actuaries do fail to mention in their paper that in 1994 Tillinghast had found the UK percentage was 0.8% so that the comparable UK figure has in fact fallen. The actuaries seek to explain all this away by recalculating the UK figures to produce a result of 1% of GDP. Even leaving aside the question of whether it is right to adjust

one set of figures for one country in isolation, this still leaves the UK at half the rate of the US, and well behind Italy and Germany.

14. Moreover, APIL would argue that the questions posed by David Arculus and Theresa Graham are the wrong questions. Rather, if it is not intended to remove or restrict established legal rights to compensation, what should be asked is whether there is in fact any system other than civil tort litigation that can deliver those rights, if it is assumed that self-insurance and state compensation are unrealistic. APIL submits that no alternative exists or has been devised and unless or until an alternative exists, civil tort litigation is in fact the only (albeit imperfect) system capable of delivering the compensation to which negligently injured people are legally entitled. It is accepted, however, that it is both right and proper to strive to improve the way litigation achieves that object.

<u>What are the options for better regulation now and in the future?</u>

The review will examine:

- Whether the risk of litigation promotes good practice and compliance with the law

15. APIL strongly believes that the continuing use of litigation one of the strongest and most effective mechanism for the promotion of good health and safety practice among organisations and in anyone with a duty of care towards others. This view is supported by a variety of different institutions and commentators. For example, the DWP has recently asserted that employer liability insurance premiums should be based on the health and safety records of companies. It is by visiting the consequences of negligence on those who have caused it that health and safety standards will be driven to improve; an improvement in health and safety intrinsically means less negligent injuries and deaths. Indeed the DWP stated *"We think there is a strong case for*

making the improvement of health and safety practices an explicit objective of the compensation system." The report then stated that *"a key challenge is to improve the link between health and safety practices and EL premiums"*[8].

16. This suggestion by the DWP has subsequently been taken up by the insurance industry. In a press release from the Association of British Insurers (ABI) on the 8th September 2003, John Parker (ABI's head of general insurance) said *"Business will understand the health and safety practices insurers are looking for, while insurers will be able to reflect good health and safety in the terms they can offer. Hopefully, we will see rising standards of health and safety across the small business sector."*

17. Finally, recent reviews by the CMO and the Ministry of Defence (MoD) again emphasise the potent linkage between the business consequences of litigation (i.e. financial penalties) and the improvement of health and safety. In the report into clinical negligence within the NHS ('Making Amends') the CMO stated that learning effectively from mistakes will make healthcare safer. Thus *"the relevance to medical litigation is obvious – if more of the healthcare risks that currently cause harm to patients are identified, anticipated and reduced, then the number of avoidable injuries to patients should be reduced. So too should their severity. This must be the primary aim"*[9]. Also the MoD, in its study of compensation claims, stated that "*The Department recognises that risk, incident and claims-handling form a cycle and the success in reducing the number and cost of claims depends partly on thorough risk assessment and incident prevention and investigation.*[10]"

[8] Department of Work and Pensions – Review of Employers' Liability Compulsory Insurance (First Stage Report) (June 2003)
[9] Department of Health –Making Amends, a report by the Chief Medical Officer (June 2003), p.8
[10] Ministry of Defence – Compensation Claims / HC957 – 18 July 2003, p.2

- What is the impact of the fear of litigation on the public and private sectors?

18. APIL considers that the concept of a 'fear' of litigation is highly subjective, and thus not easily quantified. As has been illustrated above if there is a 'fear' of litigation, or more precisely the repercussions that it entails both financially and otherwise, it ought to lead to the promotion of good practice and compliance with the law. It is hoped that the impact of litigation on the public and private sectors similarly promotes adherence to safe practices. In evaluating the concept of a 'fear' of litigation, however, it is worth considering where this appears to be applicable. The often cited example, which Teresa Graham echoes, is that of the school trip being cancelled due to worries over litigation. A summary of some of the most widely reported accidents on school trips during the last ten years shows that about one-third of accidents involved drowning and another third comprised coach crashes and skiing accidents. In the majority of these cases, where negligence was found there, was little doubt of the culpability of the people responsible. In 1993 in Charmouth in Dorset, four teenagers died while on a sea canoeing trip. In this case it was found that the activity centre had sent the children out to sea with two inexperienced instructors (with no instructor qualifications) into a situation beyond their competence, with no flares and no life jackets. The teachers on the trip had been given false information about the activity centre. In this situation would it be appropriate to deny the families of the children recourse against the activity centre?

19. Incidents, such as the above, have subsequently led to the introduction of the Activity Centres (Young Persons Safety) Act and the setting up of the Adventurous Activities Licensing Authority (AALA) in October 1997. Continuing from these initiatives, in December 2001, the Government published good practice guides setting out the principles for running safe school trips. In addition, local authorities and teachers' unions issued their own guidance and in August 2002 the Department

for Education and Skills supplied more specific guidance. All that is being asked is that organisations adopt best practice with regards to safety. If this is adopted then individuals will not sustain injury as a result of the fault of whoever is responsible for the school trip.

20. Indeed in a recent case involving the drowning of a boy of ten, and where the teacher pleaded guilty to manslaughter, the National Association of Head Teachers commented that the conviction *"demonstrates the vulnerable position teachers are in if they act without due regard for the safety of their pupils in their care … Nobody is going to accuse them of negligence, or worse, if they follow the guidance..*[11]*"* In addition the Secondary Heads Association said that the death could have been avoided if the teacher had followed Government guidelines.

21. In addition Teresa Graham also refers to the fear of litigation leading to *"volunteering [being] hampered".* APIL has recently been involved in a consultation with the Home Office's Insurance Cover Working Group into Insurance Cover for the Voluntary and Community Sector (VCS). The research that accompanied this consultation investigated the insurance problems faced by VCS organisations[12]. The problems faced included huge increases to premiums, withdrawal of cover (often at short notice), an increasing number of exclusions and an inconsistent approach by the insurance industry. The inability to obtain the proper insurance cover was seen to have led to the cancellation of various activities. While there is mention of the so-called 'compensation culture', it is not this fear of litigation that is the genesis of the problems. The primary problems faced appear to be based around a lack of understanding between the insurance sector and the VCS. Recommendations to improve insurance cover centre on the promotion of risk management by both the insurance industry and the VCS, as well as a willingness for insurance companies to actively support VCS

[11] Metro (London) – Wednesday September 24 2003, page 1 and 7
[12] Home Office / Active Community Unit – Research into Insurance Cover for the VCS in England – Final Report (19 June 2003) (No. T001/ACU-CSD/03)

organisations by offering cover. APIL naturally supports these suggestions as they reflect the importance of health and safety to determining the insurance cover of an organisation.

22. APIL feels that if there is any 'fear' of the litigation system it is due to a poor understanding of what tort law actually does. The concept of 'compensation culture', so beloved of the media and insurance industries, has meant that there is a perception that you can be sued for 'anything'. In fact litigation only rightly occurs where there has been negligence on the part of one of the parties. Litigation does not arise when a pure accident, devoid of negligence on the behalf of anyone, occurs. It is this lack of understanding of what the civil tort system actually does that can be seen to lead to the further promotion of the 'compensation culture' myth.

- The efficiency of the claims process?

23. APIL feels it is both difficult and subjective to effectively assess the efficiency of the claims process within litigation. Firstly, what is meant by efficiency? And secondly, who defines this efficiency? The claimant, the lawyer or maybe the Government? If efficiency equates to the public's access to the litigation process and cost of litigation, it is difficult to definitely determine what the current state of the system is. Since the Woolf report in 1996 and the introduction of the civil justice reforms in April 1999 there has been a huge amount of change within the field of civil litigation. The field has changed further with the scaling back of legal aid and introduction of conditional fee agreements (CFA). As such civil litigation is currently in a state of flux.

24. There are, however, some reports which have attempted to assess the effect of these reforms on the civil litigation system. For example, the Civil Justice Reform Evaluation – Further Findings[13] – in August 2002

[13] Lord Chancellor's Department – Civil Justice Reform Evaluation – Further Findings (August 2002)

built on evidence obtained in the paper 'Emerging Findings'[14]. The findings concluded that *"Overall there has been a drop in the number of claims issued, in particular in the types of claim most affected by the new Civil Procedure Rules introduced in April 1999"*[15]. In addition Datamonitor concluded that "*Although initially greeted with some reservation, the [Woolf] reforms have helped boost efficiency to the benefit of all concerned. Quicker and improved claims investigations have allowed insurers to make faster decisions on liability and the number of pre-litigation settlements has consequently increased. Ultimately improved efficiency will result in cost reductions long-term*[16]*".* Datamonitor continued *"Early evaluation of the Woolf reforms has indicated a 30 per cent decrease in insurance based claims where proceedings are issued, with fewer cases resolved in court. Moreover, pre-hearing settlements for fast-track cases have risen by 50 to 70 per cent, thus reducing legal costs*[17]*".* With reference to legal costs, the cost of legal representation is often quoted as making the litigation system unnecessarily expensive. The law is often sophisticated and complex. This applies as much to the law relevant to pursuing a claim for compensation for personal injury as any other area of law. In these circumstances, lay people are entitled to have legal representation in order to pursue their remedy. The legal costs that result from such representation are the subject of immense scrutiny. Unlike any other area of activity, lawyers' costs are subject to detailed assessment by the court. Lawyers are required to demonstrate that the fees they are charging are reasonable, necessary and proportionate. If they are unable to do so, then the level of costs they are seeking will be reduced.

25. The implications for the insurance industry in terms of legal costs for CFA cases were recently addressed by David Lammy (Parliamentary

[14] Lord Chancellor's Department – Civil Justice Reform Evaluation – Emerging Findings (March 2001)
[15] Lord Chancellor's Department – Civil Justice Reform Evaluation – Further Findings (August 2002) – Executive Summary
[16] Datamonitor report – 'UK Personal Injury Litigation 2002', page 75
[17] Ibid, page 75

Under-Secretary of State for the Department of Constitutional Affairs). He stated that the CFA reforms have *"provided defendants and their insurers with a fairer system by which to recover costs in successfully defended cases, whereas under Legal Aid, defendants were rarely entitled to recover costs from their legally aided opponent. The reforms provided increased deterrents to the bringing or defending of weak claims and stronger incentives for parties to settle cases early and cheaply because of the increased potential liability in costs[18]".*

26. In addition David Lammy mentioned research from Fenn, Gray and Rickman (January 2003) which indicates *"that there seemed to be little difference between CFA and non-CFA claims with respect to agreed base costs and disbursements, and that success fee and After-the-Event (ATE) insurance premiums remain a relatively small part of overall costs recovered from insurers.* David Lammy continued *"The OFT commented in its recent fact finding study of the liability insurance market that it seemed unlikely the cost of individual claims has risen substantially as a result of the reforms and it was unclear whether they have had a significant impact on the frequency of claims. The OFT also said that while it had frequently been suggested the number of claims has risen because the reforms have made the claiming process easier and associated publicity has drawn more attention to the availability of compensation, the evidence for this was in fact largely anecdotal."*

- Whether the system is accessible for everyone – or does it encourage abuse?

27. APIL has always strongly supported the principle of the individual's right to access to justice. We believe that everybody should have access to the legal system when they have been an unfortunate victim of a negligent act. Previously, the legal aid system allowed members of the public to fund their cases via government funds when they were not

[18] House of Commons written answers – Monday September 8 2003 / Column 32W

financially able to pursue a claim privately. As already mentioned, since the scaling down of legal aid, CFAs are now used to fund numerous aspects of civil litigation. Whilst APIL sought the retention of legal aid, it has also sought to make CFAs, with recoverability, work to deliver access to justice.

28. Claimant solicitors are, however, finding it difficult to achieve this. Both the Access to Justice Act 1999 and the secondary legislation made under it, contain drafting uncertainties. In view of this, no-one could have blamed the insurance industry for seeking reasonable clarification through the courts. Instead, however, the insurance industry has launched a campaign to undermine CFAs by challenging the system at every turn. This abuse of the litigation process led to Baroness Scotland making the following statement at APIL's conference in 2003: *"Some challenges to the new regime were inevitable. New legislation is invariably scrutinised and its parameters tested. However, what occurred went well beyond this and has been unreasonable and destructive."*

29. Judges have also expressed concern that insurers are still challenging the validity of CFAs, despite a strong Court of Appeal judgment in Hollins v Russell in May. Lord Justice Brooke stated that he thought the Court of Appeal had *"made it clear that this nonsense had to stop"* and that if it continued, the court *"may have to get people up here and warn them off"*. In addition, recent comments made by FOIL and insurer representatives at the Civil Justice Council's costs forum in Oxford were discouraging and it seems that the costs war is far from over.

30. APIL also has anecdotal evidence from its members that defendants do not appear to be adhering to the time restrictions that are specified in the pre-action protocols. This would seem to be a further abuse of the litigation system as a whole. It also challenges the original

intentions of the pre-action protocols in attempting to make the litigation process more efficient and effective.

Conclusion

31. APIL feels that better regulation of the civil litigation field is a positive goal. We feel, however, that the effectiveness and efficiency of the system can be increased with reference to the various components of the current tort litigation system, rather than any significant wholesale change to the system itself.

32. Thus APIL's recommendations are :

- Government legislation and/or guidance to require the industry wide adoption of insurance premiums being based on the effective risk assessment and previous history of health and safety provisions within a company.
- The strengthening of sanctions in respect of health and safety breaches. This would include fines related to business turnover for health and safety offences, the need for a specified company director to be responsible for the implementation of health and safety regulations and the increase in the criminal penalties related to health and safety breaches.
- The adoption of APIL recommendations with regard to CFAs and CCFAs. (Please see attached Annex A)
- The enforcement of sanctions, both financial and procedural, for breach of pre-protocol regulations.
- An increase in the level of understanding of the tort system, particularly in local government, via education and targeted courses. Included in this should be a re-education concerning the fallacy of a 'compensation culture' within the UK.

33. Finally, APIL would like to put forward a representative for the ongoing study that is due to start in the autumn. We feel we would be able to effectively and significantly add to the discussion regarding regulatory aspects of litigation and compensation.

ANNEX A

APIL's response to the Department of Constitutional Affairs consultation – 'Simplifying Conditional Fee Agreements'

September 2003

DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

SIMPLIFYING CONDITIONAL FEE AGREEMENTS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

SEPTEMBER 2003

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 4,800 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

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SIMPLIFYING CONDITIONAL FEE AGREEMENTS

Introduction

1. Funding is an extremely important issue, as it determines the extent to which the injured and bereaved can pursue personal injury claims. Conditional fee agreements (CFAs) are, of course, now the main funding mechanism for personal injury cases. Whilst APIL sought the retention of legal aid, it has sought to make CFAs, with recoverability, work to deliver access to justice.

2. Claimant solicitors are, however, finding it difficult to achieve this. Both the Access to Justice Act 1999 and the secondary legislation made under it contain drafting uncertainties. In view of this, no-one could have blamed the insurance industry for seeking reasonable clarification through the courts. Instead, however, the insurance industry has launched a campaign to undermine CFAs by challenging the system at every turn. This led to Baroness Scotland making the following statement at APIL's conference in 2003:

   "Some challenges to the new regime were inevitable. New legislation is invariably scrutinised and its parameters tested. However, what occurred went well beyond this and has been unreasonable and destructive."

3. Judges have also expressed concern that insurers are still challenging the validity of CFAs, despite a strong Court of Appeal judgment in Hollins v Russell in May. Lord Justice Brooke stated that he thought the Court of Appeal had "made it clear that this nonsense had to stop" and that if it continued, the court "may have to get people up here and warn them off". In addition, recent comments made by FOIL and insurer representatives at the Civil Justice Council's costs forum in Oxford were discouraging and it seems that the costs war is far from

over. The Government must take this into account in considering the future of CFAs.

4. For as long as these problems continue, claimant solicitors will find it increasingly difficult to conduct personal injury claims, complex or otherwise, on a conditional fee basis. The risk is that those without Before-the-Event (BTE) insurance and without access to public funding will find it extremely difficult to pursue reasonable personal injury claims. The objectives of the Access to Justice Act 1999 will have been undermined.

5. We must make the CFA system work and APIL welcomes this consultation paper which allows for timely reflection on the operation of the current system. Any system of CFAs must, in APIL's view:

   - Be clear;
   - Be certain;
   - Be simple and easy to use;
   - Be adequately and appropriately regulated;
   - Have appropriate consumer protection; and
   - Provide for the recovery of additional liabilities.

   Our detailed suggestions on how this could be achieved are outlined below.

6. In summary, APIL calls for the abrogation of the indemnity principle for personal injury claims which would allow the development of a simple CFA, which would be easy for solicitors to use and for clients to understand and difficult for insurers to unreasonably challenge. Following the abrogation of the indemnity principle, the Court will still be able to order that reasonable and proportionate costs be paid by the loser. Under the Legal Aid scheme, the Courts regularly determined reasonable hourly rates for the assessment of costs to be paid by the

loser, notwithstanding the absence of any agreement with the client and the express delinking of rates to be paid by the loser from the rates paid by the Legal Aid Board.

7. APIL also calls for many of the client care protections to be removed from secondary legislation, where they have provided a tool for unreasonable defendant challenges, and to be placed in professional rules of conduct where their proper purpose of client protection can be attained.

8. The CFA 'lite', or the CFA 'simple', as it is sometimes known, was intended to remedy many of the problems caused by the continued existence of the indemnity principle. This form of CFA seems, however, to be plagued with problems of its own. For example, under a CFA 'lite', clients are not liable to pay their own solicitor's costs or their own disbursements if the case is lost unless one of the exceptions in regulation 3A(5) applies. Most reputable after-the-event insurers sell products which indemnify clients for costs and disbursements for which they are liable to pay. As clients are not liable to pay disbursements under a CFA 'lite', however, no sum is recoverable for disbursements under the policy. This means that the need to pay for disbursements will fall on solicitors. As disbursements can be significant, this could well deter solicitors from using the CFA 'lite'. While it is provided in the rules that a lawyer can charge an increased uplift in respect of disbursements from the defendant, this situation is not ideal. APIL feels that what is needed is a simple CFA where there is a limit to recoverable charges but where the client is able to be charged or made liable for disbursements. In addition, it is our impression that claimant solicitors are nervous about using the CFA 'lite'. With the continuing costs war, there is a fear that insurers will assert new technical challenges. We understand that many would prefer to continue using the CFA 'standard', challenges of which have already been considered by the Court of Appeal.

9. It should be remembered, however, that many of the problems experienced within the personal injury market, and in particular, consumer problems, have arisen not from CFAs but from after-the-event insurance products and the layering of additional costs by claims intermediaries. These issues must also be addressed if CFAs are to be successful in delivering access to justice.

General

Following the Court of Appeal's judgment [in Hollins v Russell] of the 22 May 2003 is any additional legislative action necessary to provide that only material breaches of the CFA requirements should render agreements unenforceable and if so what changes would need to be made?

10. APIL believes that the current system of CFAs is too complex and this is largely due to the continued operation of the indemnity principle. In response to insurers' mischievous challenges based on the indemnity principle, the Government introduced the Conditional Fee Agreement (Miscellaneous Amendments) Regulations 2003. These regulations allow solicitors to agree with their clients that the client will only be liable to pay his fees and expenses if and to the extent that he recovers costs or damages from the proceedings.

11. These regulations only amend the indemnity principle, however, they do not abolish it. It remains illegal at common law to enter into a CFA and section 27 of the Access to Justice Act makes it clear that any attempt to charge a conditional fee outside the circumstances permitted in the relevant legislation will be unlawful and unenforceable. It remains possible for insurers to challenge a CFA on technical grounds. Government attempts to alleviate the problems caused by the indemnity principle can only, therefore, have limited effect. Whilst the Court of Appeal's recent judgment on technical challenges in Hollins v Russell has been helpful, public comments from the insurers

and their representatives have demonstrated that they still intend to make challenges. The underlying problems will remain for as long as the indemnity principle operates.

12. APIL believes that the system of CFAs should be simplified so that solicitors can feel confident about using CFAs and so that access to justice can be delivered. We have doubts, however, that this will be achieved by amending the existing system. Instead, primary legislation should be introduced to:

    - remove the indemnity principle; and
    - provide that only claimants can seek to challenge the validity of their CFAs.

    We acknowledge that parliamentary time may not allow the introduction of such primary legislation for quite some time, although we would like to see the matter expedited.

13. In the interim, therefore, APIL calls for the establishment of a 'statutory' form of CFA, as proposed by Master O'Hare at the recent Civil Justice Council costs forum. This could be achieved through secondary, rather than primary legislation, which would state that all CFAs would be deemed to include the provisions stated in secondary legislation. This system would be advantageous because it would be both simple and certain. The CFA would then incorporate by reference the statutory terms leaving only individual express terms (e.g. the amount of the success fee) for individual agreements. This should lead to both simpler documentation for clients to understand and far fewer opportunities for technical challenges for defendants.

To what extent do the existing professional rules provide the client with information appropriate to his or her needs?

14. APIL believes that the existing professional rules in relation to explaining CFAs are not specific to CFA, probably because of the existence of the current statutory regulations. APIL feels that the Law Society should significantly redraft the necessary rules, giving more specific guidance as to what a solicitor has to explain to the client and ideally this guidance should be illustrated via examples. If the indemnity principle was to be abrogated or a statutory CFA introduced, as we have suggested, CFAs would be simple and easier for solicitors to explain and for clients to understand.

To what extent has the combination of case law and legislation contributed to a change in client care needs?

15. Legislation and case law on the recoverability of both success fees and after-the-event insurance premiums have changed clients' care needs considerably. Clients are not exposed to the same magnitude of risk as they were in the pre-recoverability regime.

What elements of the contractual and consumer protection provisions should be regulated in secondary legislation and what can be governed by professional practice rules?

16. Many of the client protections contained within secondary legislation are aimed at the risks posed by CFAs without recoverability under the old pre-April 2000 regime. Whilst we believe that many of these contractual and client care safeguards remain necessary, it seems excessive for them to be enshrined in legislation. In view of the fact that recoverability has reduced the risks posed to clients by CFAs, it would be proportionate for many of the protections to be contained within the professional rules of conduct. Indeed these professional practice rules are extensive and include the Solicitor's Practice Rules

1990, Solicitors' Costs Information and Client Care Code 1999 and the recent Guide to the Professional Conduct of Solicitors. There seems to be little justification for placing tighter restrictions on solicitors using CFAs than on solicitors using alternate funding mechanisms.

17. Protections relating to the recovery of costs from damages (i.e. the cap) should, however, be included within secondary legislation. Damages are carefully calculated to meet an injured victim's losses and expenses, such as loss of earnings and the cost of nursing care. Damages should not, in APIL's view, be used to meet cost liabilities. As legislation allows this, however, secondary legislation should require lawyers to inform clients of their intentions in this respect from the outset. We also believe that secondary legislation should include provisions requiring the solicitor to specify whether there is a limit or cap on the amount of costs a solicitor can recover from his clients damages and, if so, what that cap is.

18. In considering consumer protection, the government should not, however, only look to the regulation of solicitors using CFAs. They must also consider the regulation of the sale of after-the-event insurance and the regulation of claims intermediaries.

Conditional Fee Agreement Regulations 2000

To what extent is regulation 2(1)(c) superfluous?

19. APIL believes that regulation 2(1)(c) is superfluous because, as stated in the consultation paper, regulation 2(1)(b) contains a general requirement to specify the circumstances in which the solicitor's fees are payable.

To what extent does regulation 2(1)(d) require a reference to damages?

20. It is essential that regulation 2(1)(d) continues to refer to damages.

What other changes to regulation 2 are desirable in the interests of justice?

21. APIL believes that regulation 2(2) should be removed. This states that:

> "A conditional fee agreement to which regulation 4 applies must contain a statement that the requirements of that regulation which apply in the case of that agreement have been complied with."
>
> This requirement is obtuse and should be removed.

Do you think that regulation 3(1)(b) should be amended to make clear that the requirement to disclose the compensatory element only applies where there actually is a compensatory element?

22. APIL believes that regulation 3(1)(b) should be amended to make it clear that the requirement to disclose the compensatory element applies only where there actually is a compensatory element. As noted in the consultation paper, it was not the intention of the drafter to require the solicitor to state that there was no compensatory element in the success fee. It would, therefore, be helpful to clarify this.

To what extent do regulations 3(2) and 3(3) continue to be relevant?

23. APIL believes that regulations 3(2) and 3(3) continue to be relevant. Regulation 3(2)(a) provides for the disclosure of the reasons for setting the success fee at the relevant level. As this involves the waiving of

privilege, it is important that this client protection remains within the secondary legislation.

24. Whilst regulations 3(2)(b) and (c) are relevant client protections, they should be included within professional rules of conduct rather than within the relevant secondary legislation.

Are the simplified contract and consumer protection requirements as substituted by 3A appropriate to the type of CFA provided for in 3A(1) or could these requirements be simplified further?

25. APIL does not believe that the consumer protection requirements, as substituted by regulation 3A should be simplified further. Amending the new CFA 'lite' will only lead to further confusion and will not tackle the actual problems within the system. The system of CFAs would still be too complex and the indemnity principle could continue to cause problems. APIL calls for the abrogation of the indemnity principle for personal injury claims and if this is achieved, the CFA 'simple' and the regulations allowing such agreements would become redundant.

Are additional requirements needed to provide for simple CFAs that are contingent on the recovery of damages and if so should these be provided for in regulations, practice rules or in some other way?

26. As noted, APIL believes that solicitors should be legally required to inform their clients if they intend to recover costs from their client's damages. The relevant secondary legislation should also specify a cap on the amount of damages from which costs can be recovered. We address this point in more detail below. We do not believe that any additional requirements are necessary.

To what extent could the simplified contract and consumer protection requirements be extended to all CFAs?

27. APIL does not have views about the use of CFAs in non-personal injury cases. For the reasons given above, APIL also doubts that extending the simplified contract and consumer protection requirements will solve the problems for the CFA regime.

Is it necessary for the Law Society guideline, that the amount recovered by way of success fee should be limited to 25% of the damages recovered, to be reintroduced to cater for those types of CFA where the agreement is contingent on the recovery of damages?

28. The imposition of the 25 per cent cap relates to the old regime, where a success fee was not recoverable from a defendant. In order to protect damages a voluntary cap of 25 per cent of the total damages was recommended by the Law Society. With the provisions of the Access to Justice Act 1999 that the success fee, in a winning case, should be recovered from the defendant the use of the 25 per cent cap is no longer appropriate. APIL proposes that if the claimant is liable for part of the success fee, then the solicitor should say whether or not the amount that might come out of damages should be capped. Unless it seems that for some reason the success fee will not be recovered from the Defendant, the level of this cap, however, should probably be below the 25 per cent suggested as it should only reflect the so-called 'compensatory' element of the success fee with the risk element being paid by the Defendant.

To what extent do the regulations 4(2)(a) to (d) provide the client with necessary information and therefore continue to have any relevance?

29. Regulations 4(2)(a) to (d) seek to ensure that clients are aware of their potential liability, that they are given the opportunity to make an informed choice from the range of available options and are not put to

any unnecessary expense, which might not be recovered. This information is extremely important and solicitors should continue to provide it to their clients. Indeed APIL feels that the solicitor should be under a duty to give advice to the client about why insurance is being recommended and what product and why at any time that they are advising a client to take it out; not just at the time a CFA is signed as is presently the case. The requirements should, however, appear within solicitors' professional rules of conduct rather than within secondary legislation.

To what extent is it necessary to single out insurance as a funding option?

30. APIL believes that it is necessary for insurance to be singled out as a funding option. It is important that the client is aware of the ability to minimize his liability through the use of insurance. This applies not only to CFAs but also to different types of insurance offered by different types of service providers, such as both sides costs insurance. The requirement should, however, appear within solicitors' professional rules of conduct rather than within secondary legislation.

To what extent is it necessary for the solicitor to declare any interest?

31. APIL believes that solicitors should declare any interests to their clients, so that their clients can make informed decisions. This requirement should, however, be placed within solicitors' professional rules of conduct rather than within secondary legislation.

Is there an argument for making the regulations less detailed in their requirements, given the continuing presence of professional obligations?

32. As APIL has outlined in this response, many of the current client protections contained within the regulations should be moved to professional rules of conduct. If this occurred, the regulations would be less detailed.

Collective Conditional Fee Regulations 2000

Although the CCFA regulations will be considered in the light of responses to the questions on the general regulations, are any changes required to the specific CCFA regulations, which would facilitate their use?

33. APIL welcomed the introduction of Collective Conditional Fee Agreements (CCFAs). These agreements allow funders, such as trade unions, to enter into one central CFA with solicitors. Further, section 30 allows prescribed membership organisations to recover, as part of the costs order, a sum which reflects the provision the organisation has made against the risk of meeting the liabilities of the member whose case it has underwritten. As such it should have been a powerful tool for the improvement of access to justice. Whereas, however, with individual CFAs the indemnity principle has been used as the basis for technical challenges, in the case of CCFAs the indemnity principle creates a further complication to the whole CCFA regime.

34. Whilst, under the indemnity principle, the costs 'belong' to the individual claimant, and since the funder is not a party to any Court action, then the funder has no right to indemnity in relation to costs. Accordingly, all client care documentation, and CCFAs themselves, have to be wholly unnecessarily complicated by the imposition on the individual client of a liability for costs followed by an indemnity from that funder to that individual. This leads to a situation where solicitors are obliged to try to explain these matters to lay clients where, whilst the documentation

imposes liability for costs, the true nature of the arrangement is such that the cost will be met by the funder.

35. The Government has recognized this problem in its response to the consultation on collective conditional fees:

"The Government recognises that clients are not always versed in legal proceedings and misconstrue the agreements they have entered into. The client having been told that they have no liability whatever the outcome of the case does not understand why the agreement states that there is a liability. This is a particular concern in cases funded by trade unions or membership organisations. The government believes that it is in the interests of all concerned for there to be complete clarity in the provision of these services. The operation of the indemnity principle clearly inhibits clarity."

36. The Government goes on to state:

"Although the introduction of CCFA regulations under section 58 of the Courts and Legal Services Act 1990 (as amended) abrogates the indemnity principle for CCFAs, the Government is persuaded that there is no longer any justification for the operation of the principle when assessing costs no matter how funded."

37. Notwithstanding the above paragraph, the Courts have held that the indemnity principle has not been abrogated for CCFAs. In Gliddon v Lloyd Maunder (Supreme Court Costs Office, unreported) the Costs Judge found that the indemnity principle applied to CCFAs meaning that all of the problems outlined in the first part of this response on CCFAs still exist. Yet, as stated by Master O'Hare in the Gliddon case, providing the CCFA complies with the regulations and statutes, it avoids breach. The result, regardless, is that CCFAs are not as effective as they could and should be in delivering access to justice. In

APIL's view the benefits of CCFAs will only be fully realized if and when the indemnity principle is abrogated.

Membership Organisation Regulations 2000

To what extent does the client need to be aware of the membership organisation's liability?

38. The client should be told the correct position in straightforward language, i.e. that the membership organization will meet any liability for Defendants' costs [and own disbursements once the legislation is amended] provided the member complies with the term's of the membership organisation's scheme.

To what extent are 3(3)(b), (c) and (d) superfluous given professional rules on client care?

39. APIL believes that sections 3(3)(b), (c) and (d) are superfluous.

Are any other changes necessary to facilitate the use of the regulations?

40. APIL believes that section 30 of the Access to Justice Act should be amended to make it clear that a membership organisation can recover a notional premium in respect of both Defendants' costs and own disbursements.

41. Section 29 of the Access to Justice Act 1999 states:

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

In Callery v Gray, the Court of Appeal found and the House of Lords agreed, that insurance premiums were recoverable under this section whether proceedings had been issued or not.

42. Section 30 deals with the recovery of the notional premium set by a membership organisation. This provision states:

"(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to subsection (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities."

The mention made in section 30, ss.2, of 'court proceedings' illustrates that the intention behind the drafting of the section was to differentiate between 'proceedings' and 'court proceedings'. Thus 'proceedings' within section 30 can be interpreted in the wider sense, meaning that 'proceedings' are analogous with the interpretation the Court of Appeal and House of Lords applied to the term in section 29 in Callery v Gray. The practical consequence of this interpretation is that proceedings in the context of both section 29 and section 30 means both pre- and post-issue.

APIL also believes that section 30 should be amended so that self insurance can be as extensive as after-the-event (ATE) insurance.