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A Modern Compensation System: Moving from Concept to Reality

Executive summary

The rise of the so called 'have a go culture'.

Recent research carried out by Norwich Union reveals that 96% of people believe claiming compensation is more prevalent now than 10 years ago.¹ The research also shows that people believe that family values and community spirit have decreased at the same rate as greed and individualism have increased.

This confirms that, whilst as a society we 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'.² It is, however, the community that has to foot the bill ultimately.

Access to Justice.

The Access to Justice Act was 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 uncontested cases we deal with (where liability and the sum to be paid are rarely questioned) incur costs of up to 65% of the damages paid.

No win, no fee.

These escalating costs are mainly due to the introduction of the no-win no-fee approach, under which if lawyers are successful in a case, they claim their fees from the losing side, via a success fee and for the hours undertaken to win the case.

No win no fee means solicitors are more likely to take cases they think are easy to win and are unlikely to take on cases that are difficult. The danger is that more complex cases, requiring a large amount of both serious legal input and time, could be rejected for the quick win cases that would guarantee a good success fee and would not require a large amount of work.

Changing the blame culture.

Norwich Union maintains that the challenge of access to justice is to maintain parity across society whilst limiting the "take" mentality. We need to move away from a culture of blame and encourage people to resort to non-legal means when they have cause for redress.

We want to find a way of settling straightforward claims direct with the claimant. We recognise this requires implicit trust from the public that they will get a fair deal, and that as an insurer, we might be charged with self-interest. We accept, therefore, that we must be better and quicker at dealing with claims, and where we are not, are financially punished for it.

Government must also play its part by helping to reinstate our ability, as citizens, to take responsibility and by sponsoring legal reform that concentrates on swifter conclusions, fairer payouts and introduces a non-monetary angle in the shape of rehabilitation.

¹Edgar-galek Research for Norwich Union May 2004

²Better Regulation Task Force: Better Routes to Redress May 2004

Six steps to implement change.

This paper sets out some specific ways in which that system can be created, and how it can be delivered. This is based on the following six principles:

1. Putting the claimant first by reducing the adversarial nature of the system
2. Placing rehabilitation at the centre of compensation
3. Reducing the cost of transaction for redress
4. Shortening of the investigation process for liability to deliver swift compensation
5. Delivery of care. We have to wrestle with public/private provision and competitive cost as challenged by the Chief Medical Officer
6. Staged (Periodic) payments, or the delivery of compensation for those seriously injured over their lifetime as opposed to in an up-front lump sum.

The issues surrounding the reform of compensation are complex and need joined up thinking by insurers, lawyers and government. If we create this modern compensation system however, the whole community will feel the benefits.

A Modern Compensation System: Moving from Concept to Reality

This report builds upon research Findings and Consultation papers.

Norwich Union Insurance has been a key contributor to debate on Compensation Seeking in the UK and participated in a range of Government consultations and workshops.

This report develops mechanisms for delivering significant and sustained changes to the UK system for helping those that suffer personal injury as a result of another person's negligent act.

It also provides a structure for ensuring that resources are engaged in a way that maintains efficiency and delivers a service that is responsive to claimants needs.

The problem with the UK's compensation system.

Since the appearance of Access to Justice on our statute books in 1999 the "cracks" in its market for delivery have been apparent.

As the Institute of Actuaries put it in their report *The Cost of Compensation Culture 2003*:

"A Practice Direction describing the procedures around CFAs came into effect from 3rd July 2000. However, much of the detail of how the new scheme should operate has been left to be established by test cases. For example, at point in legal proceedings is it reasonable to pursue a case on a "no win no fee" basis? If the party who is being sued agrees straight away that he is liable and happy to pay damages, is it fair that they have to pay a success fee uplift and the cost of an ATE (After the Event) premium?"

Claims management companies and solicitors have exploited claimant expectations in terms of what is compensatable and the amounts that might be achieved.

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. This has spawned much satellite litigation.

Again to quote the Institute of Actuaries:

"The ball-park cost of compensation is roughly £10bn per year. This cost has been increasing at 15% per year recently and is set to continue rising at over 10% per year. Over one third of the total is legal and administrative expenses. This seems a fundamentally inefficient way of delivering compensation."

Different groups are working on the problem.

There are a number of government initiatives that are looking to address a range of issues but they need to join up and work together.

The main ones are:

- Employers Liability Review
- Better Regulation Task Force report
- Department of Work and Pensions consultation on Rehabilitation
- Civil Justice Council work on costs
- Health and Safety Executive – "Securing Health Together" targeting reduction in working days lost
- Chief Medical Officer's report "Making Amends" reforming reparation in medical negligence and care.

Implication of the Woolf reforms.

Have the Woolf reforms speeded up the process of settlement? Many certainly feel they have, but looking at real cases, the actual time to settlement was largely unchanged; the shortening of the delay from receiving a medical report to settling the case being cancelled out by the increase in the time for claimant solicitors to make their first contact with defendants and to instruct a medical expert.

Has Woolf reduced costs? Again the evidence is inconclusive. For every saving made in one part of the process there appears to be additional cost somewhere else that offsets the saving. Whilst the evidence is that personal injury claims costs have continued to rise faster than retail inflation it is by no means clear how much of this, if any, is due to a failure of the Woolf reforms.

Has Woolf simplified matters? It is virtually impossible to isolate the impact of Woolf from the abolition of legal aid for most personal injury litigation and the growing use of CFAs. Several surveys have shown that the Woolf reforms are seen as making the litigation culture less adversarial, although all involved in the Law Society study said that far too much time is now spent arguing about costs. There is a view held by many within the legal profession and elsewhere, that the positive benefits of the Woolf regime have been undermined and possibly negated by the growing use of CFAs and continued uncertainty over the workings of the CFA regime.

(Source Institute of Actuaries report 2003)

So, attitudinally Woolf has probably created change, but there is no evidence that delivery for stakeholders has changed.

Change must happen.

Changing our compensation system would be disruptive, but the current financial dynamics, together with the lack of claimant focus, suggests that continuing the current approach is not a responsible option.

It is becoming clear that the public will not support significant increases in insurance premiums and taxes (central and local) because of compensation claims. Equally it is recognised that there are implications for employment within the legal sector.

*Statistics suggest that there is significant scope for change.***Access:**

- An estimated 1:3 do not claim when injured
- Almost 50% of those eligible to claim who chose not to blamed their ignorance and "not having a clue how to go about it".³

Support:

- Compared to most other developed countries the UK has a poor record in rehabilitation.

Cost:

- The compensation bill for the UK is £10bn. See appendix II for The Institute of Actuaries breakdown
- Legal costs account for £4bn, which equates to £16m for every working day
- Inflation on personal injury claims is running at 12% per annum.⁴

³Claims Standards Federation Survey 2003

⁴The Institute of Actuaries 2003

Behaviour:

- So called “low-level” compensation cases rose from 101,000 in 2002 to 110,000 in 2003 (9%)
- An estimated 1:10 of those are alleged to be bogus.⁵

What should be changed?

The key features of a transformed compensation system are:

- The wrongdoer should have the first, and unfettered, opportunity to resolve the claimant’s problem. This should be timebound
- No legal costs are payable where there is no dispute – legal costs are only payable for legal advice not for claims handling
- There should be complete transparency of the process, how damages are calculated, and, in particular, the damages for pain suffering and loss of amenity for the most commonly suffered injuries
- Help first and cash later. Rehabilitation has to be a first consideration and failure on the part of either the compensator or claimant to embrace this should be reflected in the settlement
- Shorter accident to restoration times. Compensation takes too long to be delivered. Fault lies with both claimants and compensators
- Broader, and more proportionate medical reporting. Consultants should be the exception
- Breakdowns in the process, whether about responsibility or amount, should be mediated before litigated
- Managers of workplaces and public places should evidence the learning from accidents in future reduction of risk. Penalties should apply if they do not.

‘Adversarial versus ‘consensual injury claims.

Norwich Union believes there is room for a more consensual, as opposed to adversarial, claims process.

“Adversarial” means each side prepares its own legal case and presents it to the other side and/or the arbitrator or the court. It is the traditional UK legal model and it can lead to a lot of duplication of work and costs, and to competitive technical behaviours that get in the way of prompt and efficient settlement.

“Consensual” means putting the Claimant at the centre of activity. The case for compensation being investigated by one body only and where the compensation payable is easily identifiable and not a bargaining process.

The current initiatives are moving us in the direction of a better, less complex and more cost efficient system.

Norwich Union is actively supporting the current initiatives and will continue to do so.

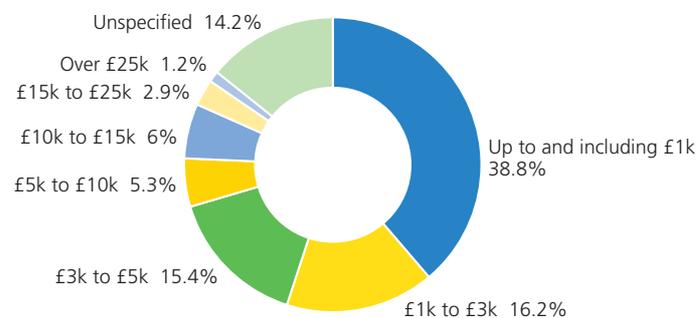
However, in the main they are incremental and not transformational. In addition, the initiatives need to be better co-ordinated. In some cases they are only really treating the symptoms as opposed to the cause of problems currently experienced. For example, legal costs are recognised as a significant burden on our compensation system. The Civil Justice Council’s work to create better proportionality will deliver some benefit. However, a non-contentious claim that has a settlement value of £3,000 will still attract legal costs of around £2,000. Norwich Union’s view is that in a transformational model there would be no need for solicitors in cases where the value is no more than £5,000.

In the case of the DWP sponsored Employers Liability process, the slimmer/faster process is a potential model, but it still accommodates legal involvement in cases where it adds no value, just cost.

⁵Lord Phillips, Master of the Rolls 2004

The following chart shows that 70% of litigated cases fall below £5,000. This is reflective of the volume that settles outside the litigation process and within that value band.

County courts: claims issued by amount of claim, 2002



Figures based on three months sample data from selected county courts and taken from Judicial Statistics 2002, Department for Constitutional Affairs.

Change is difficult and will take time. But change is necessary if the Compensation System is to meet the demands and expectations of the people it serves, and reduce the current disproportionate impact that legal costs have.

Difficult as it is to bring about, especially in an institutionalised sector such as the UK legal system, it is worth doing. Only by having the courage to reform our current system to fit a 21st century environment will we be able to pass on to future generations a UK legal system that is fair to all, with a better ability to meet the expectations of all.

Lord Falconer, Secretary of State for Constitutional affairs has set similar objectives for his department.

“As a secretary of State, as a set of ministers, as a department, we are here to address... public service delivery... that means a justice system which works, and a justice system in which people have faith: a justice system which delivers for victims, for defendants and for the community. And, frankly that means a justice system which needs radical reform.

“For too long, the courts, the law, the justice system and constitutional issues have been seen as the preserve of their key interest groups. They are not. They play a vital part in everyone’s daily lives.

“That doesn’t mean there isn’t an important role for judges, lawyers and constitutional thinkers. That doesn’t mean there isn’t an important leadership role for politicians and civil servants. But what it does mean, though, is that all our changes to the justice system and democratic system have to be measured by how they serve the public, and those who run or work in the system are there to give service to the public. This is a simple change in the work of my department – but a fundamental one.”

Lord Falconer of Thoroton 3.12.03

What practical steps are needed to transform the UK’s compensation system?

Re-setting the balance required in the exercise of individual “rights” with the taking of personal responsibility has to be a key objective.

It is important to recognise the current imbalance between the complexity of the issues and the cost of resolution.

Claims with a value of up to £5,000 – generally accepted to be 70% by volume.

Actions:

- Introduce a level below which damages are not recoverable, for example, a figure of £1,000, which would exclude contusions, bruises, simple, non-disfiguring cuts
- For claims up to £5,000 no legal costs are recoverable
- The small claims court limit to be raised to £5,000. This removes costs for the high volume of straightforward cases, the majority of which do not raise issues of either blame or value
- “Codify” the requirement for claimants to give the wrongdoer the opportunity to accept responsibility and agree the process by which compensation will be valued
- “Codify” the requirement for both the claimant and the wrongdoer to consider whether rehabilitation would be beneficial. If the claimant refuses rehabilitation unreasonably their damages will be reduced by the amount by which their recovery has been delayed and to a minimum figure of 10%. If the wrongdoer fails to offer reasonable rehabilitation, the claimant will be entitled to a 10% uplift in their damages
- The potential compensator shall be required to give the claimant a decision on responsibility for the accident within 60 days of being notified of the intention to claim
- There will be no contributory negligence arguments at this level of value other than where the claimant is required by law to take personal responsibility for his/her safety, for example, wearing a seat belt, or a crash helmet
- The nature and extent of the injury and the residual effects, if any, shall be assessed by a GP. There should be no need to engage consultants at this level. Request for medical records should only arise where there is clear indication of pre-existing conditions
- The medical practitioner should ascribe a percentage impairment and timescale to the injury and its after effects, which drives the valuation for pain, suffering and loss of amenity
- Create transparency in the damages for pain, suffering and loss of amenity for the most commonly suffered injuries. This can be achieved by the Department of Constitutional Affairs taking ownership of a damages assessment system, for example Colossus or Claims Outcome Advisor. The DCA can set and update values. Compensators can access the system on a “pay as you go” basis
- Create a specialist Alternative Dispute Resolution area of the Financial Services Ombudsman to mediate on cases disputed on responsibility or quantum. The decision to be binding on the wrongdoer but not the claimant who can litigate. The Claimant pays a mediation fee for the FSO service, which is recoverable if they win. The wrongdoer will pay the FSO in these circumstances
- The lifecycle of claims at this level should be no longer than 6 months from the date the wrongdoer is aware of the intention to claim. If the compensator is responsible for delay and this period is exceeded, interest on all damages is payable. Interest is triggered from the date of notification
- Claims should be made within 12 months of the date of knowledge that a right of action accrues
- Where a claim has been made, proceedings will need to be commenced within one year from the date of any mediation decision in the case of dispute over liability or quantum.

...But if the claim has a greater value than £5,000?

Actions for claims between £5,001 and £50,000 (that differ from previous bracket):

- Raise the “fast track” limit to all claims with a value up to £50,000
- Given that claimants are likely to seek **specialist** personal injury solicitor involvement, set a realistic and proportionate tariff for legal costs across the value bands
- “Codify” that if a solicitor is involved from the outset they should do no more than notify the claim, giving the wrongdoer the opportunity to investigate and communicate a decision on liability
- There will be no need for After the Event insurance at this stage as the “risk” in the case has not been calculated and will not until a liability decision is made.
- Solicitors should not “front load” costs by carrying out potentially unnecessary investigations
- The wrongdoer will acknowledge within 14 days
- Rehabilitation. Identical to the small claims (up to £5,000) process save for the penalty on the wrongdoer being at a level of 5%
- The potential compensator shall be required to give the claimant a decision on responsibility for the accident and injury within 90 days of being notified of the intention to claim. This recognises any potential additional complexity that might arise
- Contributory negligence will operate at the levels of 25/50/75% only, supporting an approach of “meaningful degree”
- The nature and extent of the injury and the residual effects, if any, shall be assessed by a GP, A&E Consultant or specialist (e.g. Orthopaedic) Consultant where appropriate
- Valuation of damages for pain suffering and loss of amenity, Identical to the small claims (up to £5,000) approach. This has the effective of removing dispute over the value of this element of the damages, but will also require compensators to set out how their offer is made up
- Mediation/ADR follows the same process as under £5,000 cases
- Unresolved disputes on liability or quantum follow the normal litigation process
- The lifecycle of claims at this level should be no longer than 12 months from the date the wrongdoer is aware of the intention to claim, or agreement between the parties, accepting that some medical conditions need time to stabilise. Where this period is exceeded interest on all damages is payable. If the delay rests with the wrongdoer, they pay. If the delay rests with the claimant/their solicitors, they pay. Interest is triggered from the date of notification
- Interim payments should be made as appropriate through the life of the claim, and against damages generally
- Limitation – Identical to the small claims (up to £5,000) process.

Surely expert advice should be available to claimants where they have suffered serious injury with consequences for their continued earning capacity and health?

Norwich Union agrees entirely that cases of serious injury require more specialist handling and management. Indeed if a claimant presented themselves to us without legal representation, we would insist that they approach a solicitor who has a good track record in this specialist area.

However, the fact that a solicitor has been introduced into the relationship does not mean that the process has to be adversarial. In fact, much more can be gained by focussing on the claimant and their family (in the most severe cases such as paraplegia the family needs support also) and carrying out a needs assessment in a consensual manner.

Case study: testimony of a claimant's mother

"Norwich Union also proposed the use of several independent experts through their early response initiatives. We used the recommended Case Managers who were fantastic and a great support throughout the following three years. Our case manager had our interests at heart, her advice, action and support helped me to support Andrew in becoming the independent, successful and happy young man that he is today. Unfortunately, I was quite suspicious of using all of Norwich Unions recommended experts. I thought we should have a balance, some of theirs, some of ours. I insisted on choosing our own architect. Today, I have to say that the only people to let us down were my chosen architects and builders, who caused delays and clearly were only concerned to make as much money from the work as they possibly could."

Claims with a value above £50,000.

- It is essential that all cases falling into this value band have involvement of a specialist personal injury solicitor. Often difficult decisions need to be made with and for claimants and their families, and it is right and proper that they should be guided through those
- "Codify" that the solicitor should do no more than notify the claim, giving the wrongdoer the opportunity to investigate and communicate a decision on liability. Same rationale as for under £50,000
- Acknowledgement same as under £50,000
- Rehabilitation should follow the same principle as both "small" and "fast" track; however, the services that are required will be much wider. Insurers can work with injured people and their representatives to identify appropriate expertise in all fields. If involved at each step, insurers can immediately agree funding needs or develop tailored solutions on an individual case-by-case basis. **This should be a requirement that is "codified"**
- Provision of care. The Chief Medical Officers report "Making Amends" calls for review of clause 2(4) of the Damages Act. Currently a compensator cannot take into account what services (and cost) might be provided by the NHS when looking at future care requirements. This should be changed to enable provision by any provider, public or private, of the appropriate and agreed regime at the most competitive price
- The principle underpinning both rehabilitation and care should be "the party that pays for the services, contracts for the services"
- Decision on responsibility for the accident and injury – the same as "fast track"
- Contributory negligence will operate as existing
- The most appropriate experts shall assess the nature and extent of the injury and the residual effects
- Valuation of damages for pain suffering and loss of amenity, same as the up to £5,000 process
- Mediation by an independently, qualified, mediator must be agreed by the parties as a first step to solving dispute
- Unresolved dispute on liability or quantum follows the normal litigation process
- The lifecycle of claims at this level should be no longer than thirty-six months from the date the wrongdoer is aware of the intention to claim, or agreement between the parties, accepting that some medical conditions need time to stabilise. Where this period is exceeded interest on all damages is payable, irrespective of whether litigation has been commenced. If the delay rests with the wrongdoer, they pay. If the delay rests with the claimant/their solicitor, they pay. Interest is triggered from the date of notification
- Interim payments should be made as appropriate through the life of the claim, and against damages generally
- Limitation – same as up to £5,000 process.

This raises some interesting points of independence.

Issues of independence are raised within the current culture and adversarial structure. We need to move on from this and create a system that is truly claimant centric and with the right checks and balances to ensure that they get a fair deal irrespective of whether they are legally represented or who instructs the medical or other experts that need to be involved.

The medical areas should stand or fall by their own allegiances to medical ethics and impartiality irrespective of from whom they take their instructions.

Ultimately, Access to Justice, and specifically the 'no win, no fee' approach, has placed pretty well the whole of the funding of the Civil Justice System in the hands of the insurers, and it requires the insurance industry and solicitors to manage that in a socially responsible way.

Rehabilitation remains central to any new model of compensation.

Norwich Union welcomes the DWP led Government response to the consultation on vocational rehabilitation published in October 2004.⁶

Norwich Union would like to see a consensual resolution of claims with rehabilitation at the core and the injured person at the centre of the process and in particular:

- A public education campaign to raise the awareness of the benefits of rehabilitation
- Early intimation of claims to the insurance process with obligations upon injured parties, employers and representatives to give immediate notification to insurers of potential injury claims. Norwich Union data shows us that on average it is nine months before we are notified as an insurer in an EL claim therefore missing early intervention and either prolonging disability or in some cases making them permanent
- Early intimation of claims to the insurance process by using various government agency databases to generate information to insurers about injury claims. Injury data is already gathered at various points by state agencies (for instance police accident records and A&E Dept registration). This information is currently used, in conjunction with the Motor Insurer's Database and with the Compensation Recovery Unit's information system, for the purposes of detecting vehicle excise offences and Benefit recoupment from Insurers. There should be an early warning system to engage insurers in the injury rehabilitation process. A&E registration would be ideal as it would ensure continued support following the acute phase
- Focus upon the employer's role in the rehabilitation process, e.g. embedding within the HSE, wellbeing in the workplace
- Focus upon Occupational Health assessment in the rehabilitation process, e.g. using occupational health physicians
- Government programmes to ensure we deliver sufficient trained specialists to support the capacity required, e.g. medical qualification to extend to rehabilitation techniques and medicines
- Government leading in requiring protocols of best rehabilitation practice and accreditation of rehabilitation practitioners
- DWP leading the engagement of other Government departments in joining together the rehabilitation process and providing adequate and proportionate funding
- That rehabilitation is economically funded and it cannot simply add to the burden of the insurance paying public. We would expect investment in rehabilitation to be balanced by the earlier return to work and consequential reduction in damages paid
- Any shortfall in compensators funding (e.g. legal liability disputes) is supplemented by local authority funding
- Using monies recovered for the treatment of road traffic and workplace victims are targeted towards their treatment and rehabilitation.

⁶Department of Work & Pensions Discussion Paper: "Developing a Framework for Vocational Rehabilitation" July 2004

Appendix 1:

Legislative and procedural changes

This section details the changes that need to be made, why they should be made and, which Statutes and procedures require change.

In working through this detail it was recognised that the law regarding personal injury is codified across at least five areas, for example The Damages Act, The Civil Procedures Act, The Limitation Act.

If this is to be a flagship piece of legislation that governs, not only the process by which people achieve fair compensation, but also the behaviours that society should expect of those accessing and operating the system, it should all be incorporated within one new piece of primary legislation.

The Personal Injuries (Compensation) Act, or, The Tort Act might be appropriate.

£0-£5,000 approach

What	Why	How
<ul style="list-style-type: none"> Introduce a level below which damages are not recoverable, for example, a figure of £1,000, which would exclude contusions, bruises, simple, non-disfiguring cuts. 	<p>Should people expect to be compensated for the bumps and knocks that occur in everyday life? Often an apology or other show of regret (flowers, free products) is perfectly acceptable. The cost of administering a compensation claim outweighs the value that it delivers. The JSB currently has only 5 categories of injury where damages start at under £1,000.</p> <p>Checks and balances need to be put in place that inhibit an industry growing up around inflating claims beyond this figure. That can be done by:</p> <ol style="list-style-type: none"> a properly tuned, DCA managed valuation system for pain suffering and loss of amenity. Financial losses must be supported. Medicals being evidenced based – NICE approach. 	<p>Part 27.1 (2) CPR and pre-action protocol.</p> <p>JSB guidelines.</p> <p>Common law decisions as per Nicholls v Rushton 1994 (mere shock and shaking up is not recoverable).</p>

£0-£5,000 approach

What	Why	How
<ul style="list-style-type: none"> The small claims court limit to be raised to £5,000. This removes costs for the high volume of straightforward cases, the majority of which do not raise issues of either blame or value. 	<p>The majority of work that is done by solicitors is claim handling not legal issue resolution. It is not done at a qualified level, and in the majority of cases is no more than “hand holding”. It adds cost not value.</p> <p>In a recent survey respondents made the following comments:</p> <ol style="list-style-type: none"> 1. Legal cover accelerated the involvement of solicitors who became case managers. 2. Solicitors were criticised for being slow, impersonal, not keeping them informed. 3. They were valued for recommendations on compensation such as, “reject the first offer”. 	<p>Civil Procedure Rules 1998. Remove the restriction that currently exists for personal injury at £1,000.</p> <p>Part 27.1 (2) CPR.</p>
<ul style="list-style-type: none"> “Codify” the requirement for claimants to give the wrongdoer the opportunity to accept responsibility and agree the process by which compensation will be valued. 	<p>The wrongdoer in this context is more often than not likely to be the insurer who “stands in the shoes” of their policyholder, or the Local Authority etc.</p>	<p>The Civil Procedure Rules 1998 – Personal Injury Pre-Action Protocol.</p> <p>Amendment of the Road Traffic Act 1998 and EL Statutes and Regs.</p>
<ul style="list-style-type: none"> “Codify” the requirement for both the claimant and the wrongdoer to consider whether rehabilitation would be beneficial. If the claimant refuses rehabilitation unreasonably their damages will be reduced by the amount by which their recovery has been delayed and to a minimum figure of 10%. If the wrongdoer fails to offer reasonable rehabilitation, the claimant will be entitled to a 10% uplift in their damages. 	<p>In a Futures Foundation survey (2004) respondents said:</p> <ol style="list-style-type: none"> 1. In the event of injury 97% thought that the priority was “getting better”. “At the end of the day it wasn’t really the money I was concerned with. Just being sound...I didn’t really want a compensation claim. But if it is offered to me I am not going to say no”. 2. In answer to who they would expect to play a part in getting them better they responded, in order: NHS, Insurer, Solicitor, Private Healthcare provider, Employer, Trade Union. <p>In answering what they needed to improve rehabilitation experience they said: More information about their policy, the treatment and alternatives, compensation and a report following treatment.</p>	<p>The Civil Procedure Rules 1998 – Personal injury Pre-Action Protocol.</p> <p>Amendment of the Road Traffic Act 1988 and EL Statutes and Regs.</p>

£0-£5,000 approach

What	Why	How
	<p>Getting people back to work and back to fulfilling their role within their family group will ease the burden on the public purse.</p> <p>Rehabilitation is an integral part of Compensation. It has to be viewed as such. It is not an 'add on'. It is a key element that enables a cash payment to be assessed.</p>	
<ul style="list-style-type: none"> The potential compensator shall be required to give the claimant a decision on responsibility for the accident within 60 days of being notified of the intention to claim. 	<p>This is a critical step in the restitution process.</p> <p>It gives rise to anxiety and if not quickly resolved can lead to entrenched views on both sides.</p> <p>Claims that fall within this value band should be capable of much speedier resolution than is currently the case.</p> <p>On Motor accidents, which represent the highest proportion of cases, responsibility is often clear in the early days following the event.</p> <p>Claimants are entitled to expect an early commitment from a wrongdoer.</p> <p>Where it is obvious from "day one" that liability attaches, the wrongdoer should say so, for example in rear shunt cases.</p>	<p>Insurers need to be clearer in their policy wordings regarding admission of liability. They should distinguish between an apology – simply a term of regret – and an admission of fault. In an obvious case of fault there can be no compromise of the policy conditions.</p> <p>The Civil Procedure Rules 1998 – Personal Injury Pre-Action Protocol amend Part 3.7 from 3 to 2 months.</p>
<ul style="list-style-type: none"> There will be no contributory negligence arguments at this level of value other than where the claimant is required by law to take personal responsibility for his/her safety, for example, wearing a seat belt, or wearing a crash helmet. 	<p>Much time and effort can be expended in negotiating a discount that frankly has a lesser value to the wrongdoer than the cost incurred in achieving it!</p> <p>It also leaves a claimant feeling a sense of injustice.</p> <p>However, it is wrong to absolve a claimant from taking responsibility for their own wellbeing and failure to wear a seat belt is something over which they have a direct control.</p>	<p>This is a common law issue but could be achieved via amendment of Road Traffic and EL Act /Regs.</p>

£0-£5,000 approach

What	Why	How
<ul style="list-style-type: none"> The nature and extent of the injury and the residual effects, if any, shall be assessed by a GP. There should be no need to engage consultants at this level. Request for medical records should only arise where there is clear indication of pre-existing conditions. Medics should ascribe a percentage impairment/timescale to the injury and its after effects, which drives the valuation for pain, suffering and loss of amenity, as already happens in some European Countries. 	<p>The cost of consultant’s reports for claims at this level is disproportionate to the damages amount for pain, suffering and loss of amenity; the key elements that they help to assess. Consultants do not see many, if any, of these cases such as whiplash and therefore do not add value.</p> <p>Physiotherapy is rapidly becoming the accepted early intervention approach for soft tissue injury and a simple report on conclusion of treatment should be capable of achieving the appropriate valuation in the majority of cases, and at a cost that is sustainable.</p> <p>This would have two benefits:</p> <ol style="list-style-type: none"> 1. Claimants would see the medical profession as directing the valuation of their damages as opposed to a heavy element of compensator interpretation. 2. It would enable a “table of damages” approach taking out the bargaining factor. 	<p>Practice Direction CPR 35.</p> <p>Rules and Pre-Action Protocol.</p>
<ul style="list-style-type: none"> Create transparency in the damages for pain, suffering and loss of amenity for the most commonly suffered injuries. This can be achieved by the Department of Constitutional Affairs taking ownership of a damage assessment system, for example Colossus or Claims Outcome Advisor. The DCA can set and update values. Compensators can access the system on a “pay as you go” basis. 	<p>Transparency and trust are critical to a modern, consensual approach.</p> <p>The valuation of pain and suffering is an emotive one and one that can give rise to inflated expectation.</p> <p>To create an approach that will generate a consistent value for the injury sustained irrespective of who seeks that valuation (claimant or compensator), will both manage expectation, and remove emotive and costly debate.</p>	<p>Damages Act 1996.</p> <p>The Civil Procedure Rules 1998 – Personal Injury Pre-Action Protocol.</p>

£0-£5,000 approach

What	Why	How
<ul style="list-style-type: none"> Create a specialist area of the Financial Services Ombudsman to mediate on cases disputed on responsibility or quantum. The decision to be binding on the wrongdoer but not the claimant who can litigate. The Claimant pays a mediation fee for the FSO service, which is recoverable if they win. The wrongdoer will pay the FSO in these circumstances. 	<p>We need a mediation before litigation approach.</p> <p>Currently, in the case of dissatisfaction with a policy decision on either indemnity or quantum, consumers of household and motor products are able to have a review by the Financial Services Ombudsman. It appears to be a service in which they have confidence, and it is seen as independent. A significant proportion of cases should be capable of resolution by an adjudicator (currently takes up to 12 weeks) with some having to get to an ombudsman (can take up to 15 months). Current cost to insurers is £600 a case. Both the issues of time and cost would need to be tackled for this option to be viable, particularly if the claimant has to foot the bill for an unsuccessful mediation.</p>	<p>The Civil Procedure Rules 1998 – Personal Injury Pre-Action Protocol.</p> <p>Financial Services Act.</p> <p>Arbitration Act 1996.</p>
<ul style="list-style-type: none"> For claims up to £5,000 no legal costs are recoverable. 	<p>Simply put, this is a solicitor free zone of resolution.</p> <p>The cost released is approximately £380m across this area of the compensation bill. This will help fund rehabilitation etc, which should not be seen as simply an add on cost for the insurance paying public to pick up. Any releases should balance additional demands on the system.</p>	<p>Amend Part 43.2 and 45.10 (2). Limiting recoverability.</p>
<ul style="list-style-type: none"> The lifecycle of claims at this level should be no longer than six months from the date the wrongdoer is aware of the intention to claim. If the wrongdoer is responsible for delay and this period is exceeded, interest on all damages is payable. Interest is triggered from the date of notification. 	<p>It is the interest of all parties for these high volume, low value, cases to be resolved swiftly.</p> <p>Claimants have their treatment and money and can get on with their lives. Insurers have earlier certainty around spend and can factor it into premiums, creating a smoother cycle.</p> <p>If compensators unreasonably delay then they should be penalised. This will facilitate a positive cultural shift.</p>	<p>The Civil Procedure Rules 1998 – Personal Injury Pre-Action Protocol.</p> <p>Limitation Act Section 11.</p>

£0-£5,000 approach

What	Why	How
<ul style="list-style-type: none"> Claims should be made within 12 months of the date of knowledge that a right of action accrues. 	<p>Most claims for injury (as opposed to illness or disease) are notified within a year of the accident. If injured people are to get the right support in the form of rehabilitation, early notification is essential. In Employers Liability a study showed that the average time to notify a claim following an accident was nine months. This period varied by the type of funding of the claimant.</p> <p>Cases of minor injury that are pursued two and a half years after the alleged fall in a supermarket, long after evidence and probably personnel have moved on, are unfair on the system and those that ultimately pay for it-the consumers.</p>	<p>Section 11 (4) Limitation Act 1980.</p> <p>Personal Injury Pre-Action Protocol.</p>
<ul style="list-style-type: none"> Where a claim has been made, proceedings will need to be commenced within one year from the date of any mediation decision in the case of dispute over liability or quantum. 	<p>It is right that claimants who have an adverse decision on responsibility to compensate should have time to review and collect the evidence that they believe will influence a court to review that decision.</p> <p>Splitting limitation in the way outlined focuses action on issues critical to swifter, more supportive, but less adversarial resolution.</p>	<p>Section 11 (4) Limitation Act 1980.</p>

£5,001-£50,000 approach

What	Why	How
<ul style="list-style-type: none"> The fast track limit to be raised to £50,000. 	<p>This has the dual benefit of speeding up the process and containing the cost of accessing compensation.</p> <p>The release from legal costs by introducing predictable costs to this level is £100m.</p> <p>A similar approach can be developed for Employers and Public Liability.</p> <p>Leaving aside all other influences this will have a percentage effect upon Motor and Liability premiums.</p>	<p>Follows small track but remove the restriction of £15,000 and replace it with £50,000.</p>
<ul style="list-style-type: none"> “Codify” the requirement for claimants to give the wrongdoer the opportunity to accept responsibility and agree the process by which compensation will be valued. 	<p>This avoids legal costs being needlessly incurred where liability is not in dispute. Where liability is in dispute it should narrow the issues and concentrate on the additional evidence that needs to be gathered.</p> <p>In the context of a predictable costs regime this might not be seen as a critical point (given that capping might limit the work that solicitors do anyway) but it is important to the cultural shift needed by both compensators and solicitors in moving to a more consensual approach.</p>	<p>Follows small track.</p>
<ul style="list-style-type: none"> “Codify” the requirement for both the claimant and the wrongdoer to consider whether rehabilitation would be beneficial. If the claimant refuses rehabilitation unreasonably their damages will be reduced by the amount by which their recovery has been delayed. If the wrongdoer fails to offer reasonable rehabilitation, the claimant will be entitled to a 5% uplift in their damages. If a solicitor has unreasonably inhibited the access to rehabilitation when it would have helped, they pay the uplift. 	<p>The only change here is the level of uplift for failure to offer, and the solicitor pays approach if they are guilty of inhibiting access.</p>	<p>Follows small track.</p>
<ul style="list-style-type: none"> The potential compensator shall be required to give the claimant a decision on responsibility for the accident within 90 days of being notified of the intention to claim. 	<p>A same principle as for under £5,000, but the liability decision period falls in line with the existing pre-action protocol rules.</p>	<p>Insurers need to be clearer in their policy wordings regarding admission of liability. They should distinguish between an apology – simply a term of regret – and an admission of fault. In an obvious case of fault there can be no compromise of the policy conditions.</p>

£5,001-£50,000 approach

What	Why	How
<p>Contributory negligence arguments at this level will fall into distinct bands of 25/50/75%. The same rules to apply on requirement to take personal responsibility.</p>	<p>Rationale same as small track. However with greater compensation values, it makes sense that claimants who have neglected to act with the right level of concern for their own safety and well-being share responsibility, including over acts like failure to wear a seat belt, which is something over which they make a clear elective decision. However this approach encourages the need for a “meaningful degree” to be established.</p>	<p>Follows small track.</p>
<ul style="list-style-type: none"> The nature and extent of the injury and the residual effects, if any, shall be assessed by a GP, A&E Consultant or specialist (e.g. Orthopaedic) Consultant where appropriate. Medics should ascribe a percentage invalidity/timescale score as already happens in some European Countries. 	<p>Specialist GPs should certainly be capable of reporting on the lower value cases. However, with more complex and multi injuries the A&E Consultants are more likely to have both the range of skills and the day to day practical experience that will facilitate an accurate assessment.</p> <p>Leaving aside the right skill level, the critical issues are, of course, the time to obtain a report and the cost of doing so.</p> <p>This would have two benefits:</p> <ol style="list-style-type: none"> 1. Claimants would see the medical profession as directing the valuation of their damages as opposed to a heavy element of compensator interpretation. 2. It would enable a “table of damages” approach taking out the bargaining factor. 	<p>Follows small track.</p>
<ul style="list-style-type: none"> Create transparency in the damages for pain, suffering and loss of amenity for the most commonly suffered injuries. This can be achieved by the Department of Constitutional Affairs taking ownership of a damage assessment system, for example Colossus or Claims Outcome Advisor. The DCA can set and update values. Compensators can access the system on a “pay as you go” basis. 	<p>Same rationale as under the small track process.</p>	<p>Follows small track.</p>

£5,001-£50,000 approach

What	Why	How
<ul style="list-style-type: none"> Mediation/ADR follows the same process as under £5,000 cases. 	We need a mediation before litigation approach.	Follows small track.
<ul style="list-style-type: none"> The lifecycle of claims at this level should be no longer than 12 months from the date the wrongdoer is aware of the intention to claim, or agreement between the parties, accepting that some medical conditions need time to stabilise. Where this period is exceeded interest on all damages is payable. If the delay rests with the wrongdoer, they pay. If the delay rests with the claimant/ solicitors, they pay. Interest is triggered from the date of notification. 	Same rationale as small track.	Follows small track.
<ul style="list-style-type: none"> Interim payments should be made as appropriate through the life of the claim, and against damages generally. 	Claimants should not have to make requests for interims on a "needs" basis. Ultimate potential value is capable of high-level assessment early in the life of the claim and it makes sense to release payments that help maintain the claimants lifestyle pending final settlement.	Civil Procedure Rules 1998 – Personal Injury pre-action protocols.
<ul style="list-style-type: none"> Claims should be made within 12 months of the date of knowledge that a right of action accrues. 	Same rationale as small track.	Follows small track.
<ul style="list-style-type: none"> Where a claim has been made, proceedings will need to be commenced within 1 year from the date of any mediation decision in the case of dispute over liability or quantum. 	Same rationale as small track.	Follows small track.

Over £50,000 approach

What	Why	How
<ul style="list-style-type: none"> It is essential that all cases falling into this value band have involvement of a specialist personal injury solicitor. Often difficult decisions need to be made with and for claimants and their families, and it is right and proper that they should be guided through those. 	<p>This is a complex and specialised field of personal injury where solicitors without the right experience should be inhibited from taking cases.</p> <p>Inexperience will almost certainly impede achieving the right outcome for claimants and their families in the timescale that is required.</p> <p>It is the case that inexperience is propped up by frequent and costly reference to Counsel.</p>	
<ul style="list-style-type: none"> Rehabilitation should follow the same principle as both “small” and “fast” track; however, the services that are required will be much wider. Insurers can work with injured people and their representatives to identify appropriate expertise in all fields. This should be a requirement that is “codified”. 	<p>If involved at each step, insurers can immediately agree funding needs or develop tailored solutions on an individual case-by-case basis.</p>	<p>Follows small and fast track.</p>
<ul style="list-style-type: none"> Provision of care. The Chief Medical Officers report “Making Amends” calls for review of clause 2(4) of the Damages Act. Currently a compensator cannot take into account what services (and cost) might be provided by the NHS when looking at future care requirements. This should be changed to enable provision by any provider, public or private, of the appropriate and agreed regime at the most competitive price. 	<p>The principle underpinning both rehabilitation and care should be “party that pays for the services, contracts for the services”.</p>	<p>Damages Act 1996 – Clause 2(4).</p>
<ul style="list-style-type: none"> Contributory negligence will operate as existing. 	<p>Even small findings of negligence at this level can be of value to a claimant and, however strong the evidence might be there sometimes exists a “litigation risk” which Compensators are happy to recognise on the principal that they would rather the claimant have some funds than it be consumed in a lengthy legal process. Compensators should not be inhibited from taking this action by having contributory negligence “hurdles” which would lock them into a higher payment than is either warranted or achievable.</p>	<p>No change required.</p>

Over £50,000 approach

What	Why	How
<ul style="list-style-type: none"> Medics should ascribe a percentage disability score as already happens in some European Countries and, of course, for the DSS. 	<p>This would have two benefits:</p> <ol style="list-style-type: none"> 1. Claimants would see the medical profession as directing the valuation of their damages as opposed to a heavy element of compensator interpretation 2. It would enable a “table of damages” approach taking out the bargaining factor. 	<p>Follows small and fast track.</p>
<ul style="list-style-type: none"> Disputes should in the first instance be mediated using an independently appointed, qualified, mediator. 	<p>We need a mediation before litigation approach. It will provide a swifter and more cost effective route.</p>	<p>Follows small and fast track.</p>
<ul style="list-style-type: none"> The lifecycle of claims at this level should be no longer than thirty-six months from the date the wrongdoer is aware of the intention to claim or agreement between the parties, accepting that some medical conditions need time to stabilise. There has to be an action plan to resolve. Where this period is exceeded interest on all damages is payable, irrespective of whether litigation has been commenced. If the delay rests with the wrongdoer, they pay. If the delay rests with the claimants/ solicitors, they pay. Interest is triggered from the date of notification. 	<p>Same rationale as small track.</p>	<p>Follows small and fast track.</p>

Appendix II

Rehabilitation in the UK

A report by the ABI 2004

- Research by Greenstreet Berman suggests that rehabilitation can reduce the costs of workplace compensation by 10-40%, depending on how programmes are structured and what obligations and incentives are chosen to encourage participation.
- In line with this research, a rehabilitation provider for a motor insurer estimated rehabilitation yielded savings of around 7.5-10%. For insurers, that 10% saving could be as much as £200m per year from reduced claims costs.
- For Government, the ABI estimates the saving could be £1.2bn, arising from higher taxes and lower benefit payments. This relies on assumptions about numbers of people on long-term benefits who might benefit from rehabilitation.

This report also identified obstacles to progress. Among those were:

- Legal System – Despite the “Woolf Reforms”, which have facilitated the compilation and exchange of information, the system is fundamentally adversarial. Moreover, although the aim of compensation is restitution, this is done almost exclusively by monetary payment. Currently there is no formal place in the present legal process for other ways of effecting restitution, including rehabilitation
- Notification – Linked to the legal process but also to health and safety management in firms, is the issue of notification. Insurers and indeed employers may not hear of an accident until the claim is formally presented. Due to the time it takes a claimant lawyer to investigate the incident, this can be many months, by which time it may be too late for rehabilitation to be effective, or more intensive intervention is necessary to arrest and reverse deterioration in condition. In addition, insurers and employers may be reluctant to offer rehabilitation within the current system because it may be interpreted as admitting liability whilst it is still being contested
- Participation – Perhaps the most important obstacle is the adversarial system undermining trust in either side. Some claimants see rehabilitation as an attempt to “short change” them, while some defendants would argue that claimants are wholly focussed on cash settlement at the expense of genuine offers to help recover them. Given that trust will take some time to build, the UK has to choose how it will encourage participation in rehabilitation. Across Europe the models in use place an obligation on employers, the state or insurers to provide rehabilitation. The claimant participates because it is part of an overall compensation package. In the UK, it seems the responsibility is being placed on the claimant to participate, in effect to seek out his or her own rehabilitation programme, because coverage is still far from comprehensive. However, mandatory participation by any party is probably undesirable, in part because it runs counter to cultural tradition, and may have a negative psychological impact on some participants which could limit a programmes effectiveness, but also because of the final obstacle to development of rehabilitation, capacity.

Appendix III

Summary of the cost of Compensation

Type of Compensation	Estimated 2001 Total Cost (£m)	Estimated Inflation p/y		Estimated Proportion of Legal Costs/Expenses
		97/01	01/06	
Insurance	7,100	15%	11%	40%
NHS	900	15%	10%	33%
Local/Education Authority	200	15%	15%	20%
Police/MOD	800	16%	15%	33%
CICA	375	N/A	10%	5%
Ministry of Agriculture	500	N/A	10%	5%
DTI	300	10%	10%	5%
Total	10,175	15%	11%	35%

Source: The Institute of Actuaries 2003



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