Independent Report
Review of Claims Management Regulation

Response from the Motor Accident Solicitors Society

November 2015

Introduction

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Susan Brown.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has 150 solicitor firm Members, representing over 2000 claims handlers. We estimate that member firms conduct upwards of 500,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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Executive Summary

MASS warmly welcomes this review of the regulation of Claims Management Companies (CMCs). Whilst the majority of the CMC market provide a good service, it is clear that there are both authorised and non-authorised CMCs whose activities may encourage potential claimants into making fraudulent or exaggerated claims of injury. MASS fully supports all measures that have the potential to reduce the opportunity of fraud. It has seriously tarnished the reputations of those in the legal sector that provide genuine accident victims with independent legal advice.

We believe that there are a number of areas in which the regulatory regime could be improved, both to tackle the recent growth in unwanted communications and to tackle the problem at source, by reducing the availability of personal data and information. There is unfortunately always likely to be a problem with overseas-based companies, but we believe that there are measures that could be taken to limit the opportunities for their operation in the UK.

The CMRU has undertaken its role effectively within the limits of its powers and capabilities, but has been under-resourced. Similarly the powers of the ICO should be enhanced to improve data protection. It is the view of MASS that the CMC regulator should be independent of a Government department and self-financing from the sector itself. Whatever the outcome of the Review, the Government needs to ensure that the CMC regulator has the tools it needs to police the industry properly, both in terms of the powers it is granted in legislation and the financial resources to police the sector.

The regulation of CMCs

Authorised and fully regulated CMCs are obviously perfectly entitled to conduct their business and have a role to play in the sector, but they require an appropriate regulatory regime. With 979 authorised specialist personal injury (PI) CMCs operating in the claims market, this represents 36% of the 2722 authorised CMCs.[1]

The Claims Management Regulation Unit (CMRU) has undertaken its role effectively within the limits of its powers, resources and capabilities. We particularly welcomed the new power, granted in December 2014, to impose significant turnover-calculated financial penalties on non-compliant CMCs and have been gratified to see the levels of fines imposed in several recent cases.

However, it is interesting that there has been a 27% increase in the turnover of PI CMCs since 2013-14, at the same time as the number of claims has started to increase again. This may suggest that the CMC market has evolved to formulate LASPO-compliant business models that may encourage the sorts of behaviour that the Government has sought to outlaw in recent years. The official numbers confirm our experience. The value of the PI sector of the CMC market is increasing, but the overall number of registered CMCs for PI is falling, as larger and more established companies increase their role in the market.

Overall, as CMCs engage directly in a greater proportion of legitimate claims this may well result in a reduction in the quality and independence of advice available to consumers about their rights and what they should claim for, especially if through unauthorised CMC's. In addition, this may also lead to an increase in fraud, as CMCs do not have the same professional obligations to assess the validity of a claim before bringing the case forward.

[1] Para 3, page 18, Claims Management Regulation, Annual Report 2014/2015, Ministry of Justice

CMCs will profit from every case and consequently some will encourage all claims, no matter how spurious. MASS is particularly concerned that CMCs will deduct their fee from the damages awarded in a successful case as there are no statutory guidelines for what fee can be charged by a CMC as is there is for the legal profession. We are also concerned that some CMCs are advising clients on funding and encouraging them to purchase After the Event (ATE) insurance cover when it is not necessary and not in the clients' best interests. Consequently MASS would urge that the same Statutory Rules and regulations are applied to all those who are involved in advising an accident victim (and receives payment for such advice) to ensure that a level playing field is applied throughout the industry so the consumer is protected at all times.

The PI legal sector, and specifically the firms of solicitors that we represent, are committed to combating all forms of fraud and the behaviour that may encourage or entice fraudulent claims to be submitted. MASS has welcomed many of the Government's initiatives to clean up the industry and reduce the opportunity for fraud, and we continue to engage in industry and Government discussions and negotiations.

As CMCs engaging in the PI market are unable to actively take on and settle a claim, their involvement is largely through marketing and providing the accident victim information of the options that are available to them to pursue a genuine claim. Whilst the majority (and especially those authorised companies) generally provide a good service, as some recent journalist investigations have uncovered, some CMCs – both authorised and non-authorised – are clearly engaging in behaviour that encourages potential claimants into making fraudulent or exaggerated claims of injury. This view of claimants as a commodity rather than victims with the right to seek address is an anathema to the legal sector. This bad practice has generated a general mistrust of the wider legal community as well as understandably widespread media condemnation and tarnished the reputations of those in the legal sector that do operate ethically and entirely within the law. It is essential that genuine accident victims can access independent legal advice and that they are not pressured into making claims.

MASS believes that it is critical that the wider sector adopts a more collaborative approach, with consistent rules for all sides, to tackle the corrosive issue of fraud. The strengthening of the regulatory regime for CMCs is an important element of this process.

Unwanted Communication

According to Ofcom[2], unwanted, so-called nuisance calls, relating to accident claims and compensation have increased from 2% in 2013 to 7% in 2015. Whilst still far behind calls about PPI claims (23%) and accompanied by calls about market research (9%), solar panels (8%), home improvements (8%) and insurance (6%), it is noteworthy that the increase in the proportion of PI calls is commensurate with the growth in profitability of the CMC market during the last two years. This figure is still too high which is why MASS has consistently campaigned for greater regulation around this form of marketing.

MASS recognises that nuisance calls cause serious reputational damage to the sector. Although not the most prolific sector, they are considered the most annoying type of nuisance call according to Ofcom research and this undoubtedly explains the high number of complaints about these types of calls received by the Information Commissioner's Office (ICO).

It is clear that the cycle of cold calls, data mining and the sale of data is highly profitable in the UK market. The telephone calls, text messages and emails would not occur if there was

[2] Figure 2.5, page 21, Ofcom's Landline Nuisance Calls Panel, Wave 3, January-February 2015

not a paying market for the claims they generate. At present there seems to be little or no regulation of CMCs of their capability and use of this form of marketing. However, solicitors are not allowed to take on claims generated by cold calls, but clearly some are accepting the generated claims from this source. This is unacceptable and we welcome the Solicitors Regulatory Authority's (SRA) recent warning to solicitors of the serious consequences and robust action if any firms or individuals are found to be doing so.

However, we would strongly defend the right of legal firms to protect the originating source of claims received on the grounds of commercially sensitive information. The legal PI market is highly competitive within the profession and companies compete online and through other forms of legitimate marketing to attract genuine claimants. This is particularly the case since the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, the banning of referral fees and the implementation of a direct client acquisition market in personal injury.

But there is also a proven danger that insurers seek to undermine the provision of independent legal advice through practices such as pre-medical offers and third-party capture, whereby they actively contact the accident victim direct, encouraging them to accept an offer without either seeking a medical examination or independent legal advice or speaking with their solicitor, who has already been assigned. This is unacceptable behaviour and is taking advantage of the vulnerable accident victim who is more than likely to be confused and uncertain of their rights.

The general experience of MASS member firms is that the worst offenders amongst CMCs, for unsolicited marketing and deliberately inaccurate advice on making a claim, are from unregulated CMCs, either based in the UK or offshore. Clearly these companies that operate "underground" or beyond the regulatory reach of UK authorities present the biggest challenge.

We believe that the following possible solutions merit careful consideration:

- There is a perception that it is still too easy to set up and operate a CMC. Seemingly as fast as the CMRU closes down one rogue CMC, it is reconstituted under a different name, and sometimes different directors, and is swiftly back in business. We suggest that the review includes an examination of the application procedure undertaken by CMRU under Part 2 of the Compensation Act 2006 to ensure that it remains fit for purpose post-LASPO.

- Ensure that the secondary legislation under the Compensation Act 2006 adequately defines the regulated sectors to capture all businesses that undertake unwanted communications (eg. marketing, telesales, data distribution firms).

- Consider the scope for extending the "unfit conduct" criteria for disqualification as a company director to include serious breaches of the CMC regulatory regime.

- There should be an extension of the ban on unsolicited texts and cold calls to everyone in the industry, both on the claimant and defendant side (including direct or indirect activity by insurance companies). In essence, it should be illegal to contact anyone directly without their express permission to do so or an expression of interest. There is anecdotal evidence that data is currently mined and sold by organisations as varied as insurers, price comparison websites, garages, care hire companies, towing companies and marketing/survey companies. Clearly a blanket ban is required across the claims industry and not just selecting individual sectors.

- Encourage the SRA to investigate and operate a "zero-tolerance" approach towards companies that take on claims obtained through unwanted communications.

- A standard excuse for UK-based CMCs when challenged over incidents of unwanted communications is that the calling/texting etc was conducted on behalf of them by an overseas-based company. The regulatory regime should be strengthened and clarified to ensure that the CMC or insurer is primarily responsible for the actions and use of data gathered by any overseas-based company with whom they have a contract. This would align the CMC regulatory regime with that imposed on other sectors (eg. the travel market).

- Technology and telecommunications firms should provide comprehensive and free of charge spam text filtering technology or call blocking services.

- The Telephone Preference Service (TPS) should be reviewed and be more robust to ensure that all consumers who register their telephone numbers with the service do not receive unwanted and unsolicited calls.

- Whilst the LASPO Act banned referral fees in 2012, between CMCs and solicitors, MASS believes that there should be much greater transparency across the PI sector about commissions, tie-ins and other forms of payment between parties. There should be a level playing field for all those involved.

- CMCs should be fined for pointless and vexatious submissions to the Financial Services Ombudsman. This would act as a powerful deterrent that bad behaviour will not be tolerated.

Data protection

Given the increasing problem of offshore-based, unregulated behaviour, it is vital that every effort is made to prevent the selling of personal contact information at source. Whilst it is unfortunately unrealistic to prevent data theft and leakage entirely, MASS believes that there are a number of potential actions that could be undertaken:

- Review the enforcement of existing relevant data protection and privacy legislation as it relates to the claims market (The Data Protection Act 1998, the Privacy and Electronic Communications Regulations 2003, the Communications Act 2003 and the Criminal Justice and Immigration Act 2008).

- Amend the Privacy and Electronic Communications Regulations 2003 to cover all forms of electronic mail, meaning any text, voice, sound or image. It is our view that this would strengthen the legislation and further protect consumers from the full range of possible electronic contacts both now and in the future.

- The default position on data privacy should be that your personal information will not be shared, or will be shared only if you explicitly allow it (opt-in). Data privacy should be up-front and centre on websites and 'hard copy' paperwork, not buried amongst complex Terms and Conditions that few people scrutinise.

- The current penalties for breaches of Section 55 of the Data Protection Act 1998 (making the knowing or reckless obtaining, disclosing or procuring the disclosure to another person of personal data a criminal offence) are woefully inadequate to deter the misuse of personal data. The Government should commence Section 77 of the Criminal Justice and Immigration Act 2008 which provides the Secretary of State power to make an order introducing custodial sentences of up to two years for offences under Section 55 of the DPA 1998, or if necessary, implement an alternative route to introducing custodial sentences.

- Consensual audits conducted by the ICO clearly have a role to play in encouraging good practice, but are insufficient to deal with committed offenders. The ICO should have the power to compel audits to private sector organisations to assess how effectively those organisations handle personal data. Section 41a of the DPA 2008 should be amended to extend the power of the ICO to conduct compulsory audits on private sector organisations, rather than its current limit to Government departments and designated public authorities.

- Review the legal regime to ensure that it is no longer possible to incorporate contractual provisions absolving firms of any legal responsibility for releasing personal data.

- Establishing a clear expiry date on personal consent, amending the current provisions in the Privacy and Electronic Communications Regulations 2003 which state that consent is 'for the time being'.

- Introduce a regime where consumers can withdraw consent from receiving unwanted calls from firms or their 'specially selected partners'.

- Require businesses that are engaged in direct marketing to demonstrate that consent has been obtained rather than the ICO having to 'prove a negative' by showing that the business does not have consent.

Reviewing the Regulatory Structure

The CMRU has undertaken its role effectively within the limits of its powers and capabilities. As a regulator it is clearly not properly resourced to regulate the activities of so many and varied companies. For instance, it was only able to conduct audits into around 6% of CMCs (102 out of 1,752 in 2014-15) involved in either marketing or receiving leads generated by their marketing activity.

It has a low profile with the public, but this could be enhanced with greater government-wide marketing of its function and role. It could play a greater role in encouraging the reporting of non-compliant behaviour, perhaps by the creation of a whistleblowing, dedicated telephone line, or financial rewards for information that leads to enforcement action. With so many different regulators it would be a simple process to produce a web page that clearly states which regulator is responsible for which sector and providing consumers with the appropriate contact details and guidelines for seeking advice or making a complaint.

The Review appears to focus primarily upon the functions of the CMRU and the Financial Conduct Authority (FCA), but Ofcom and the Information Commissioner's Office also have an important role to play on the cold-call and data protection aspects of CMC regulation. There is also a role for the Legal Services Ombudsman. It is vital that there is better communication and liaison between all the regulators, resulting in consistent and coordinated action.

Consequently it is our view that the most preferable outcome would be for the CMC regulator to be independent of a Government department and self-financing from the sector itself. At present the CMRU competes with bigger and wider issues as part of the Ministry of Justice. We believe that if the sector comes under the auspices of the FCA it is likely to be lost within the wide remit of the FCA. The financial and insurance sectors are themselves large and significant industries which have many issues that the FCA are required to monitor and regulate. By comparison the CMC industry is very small in size and impact. We would also have concerns that undue influence from the insurance sector in particular may have an

impact on the regulatory role of the FCA over CMCs. The current regime has been proven to be completely independent and has been successful in its role with the limited resources made available to them. Given time and perhaps by being independent of the Ministry of Justice, the current CMRU can build on its regulatory role and success.

Whatever the outcome of the Review, the Government needs to ensure that the CMC regulator has the tools it needs to police the industry properly, both in terms of the powers it is granted in legislation and the financial resources to police the sector.