Traditionally, D & O policies have been generally written on a board basis for a specific company or group (usually with separate policies for the company and its directors) but this has not been of very much help to the "professional director" who sits on the boards of several unconnected companies, probably of varying size and status. Whilst individual cover has been available, it is often more difficult to write and/or uneconomic. However, economical individual cover is now much more readily available with the fairly recent introduction of group schemes, such as that exclusive to members of the Institute of Directors and administered by Directors & Officers Limited. There can be little doubt that the demand for D & O cover, in one form or another, will continue to grow – even without the lessons to be learned from decided cases in due course – and so it should, as there are still far too many directors and officers at risk, whether they realise it or not.

REVIEW OF PERSONAL INJURIES LITIGATION
by Roger Doulton, Solicitor, Winward, Fearon & Co.

(This is Part 1 of our Non Marine Liability Correspondent's article; Part 2 will appear in the May issue).

The Lord Chancellor's Review of Personal Injuries Litigation and the reply to that Review by the National Consumer Council (about which I am asked to write) together total 88 pages. In an article of this length, therefore, it is possible only to cover some of the issues raised.

Broadly speaking there are four main propositions advanced by those who criticise the present system for compensating accident victims. These are:-

1. That too few of the persons injured are entitled to compensation. This has a near-identical twin namely that all persons injured in accidents should be entitled to compensation.

2. That too few of those who are entitled to claim compensation under the present system recover any.

3. That the system is fraught with delay; and

4. That the system is far too costly.

The Lord Chancellor's Review is not intended as a Pearson Royal Commission Mark 2. Its expressed objective is to improve the machinery for bringing claims on the basis of the existing law, i.e. tort. To be entitled to compensation the victim must prove that his injury was caused by the negligent conduct of another person or by breach of statutory duty.

Proposition 1, does not, therefore, fall within its terms of reference although there is an openly admitted preference for it on behalf of the National Consumer Council and, it is suggested, the proposals of the Lord Chancellor's team when dealing with small cases most certainly shift the goalposts in that direction.

I deal now with each of the other propositions in turn.

Too few of those who are entitled to claim compensation under the present system recover any.

Both the Lord Chancellor's team and the National Consumer Council; recommend greater publicity with the important and self-evident proviso from the Lord Chancellor's team that it "be made effective". The National Consumer Council also recommends that the Accident Leaflet Scheme should be extended and publicised through hospitals. They point out that doctors, trade unions, policemen, social workers and advice centres all have an important role to play here.

I have no doubt that increased publicity and better education would result in a significant increase in the number of Claimants. Better publicity has been one of the main reasons for the three-fold increase in the number of applications to the Criminal Injuries Compensation Board over the last ten years. Furthermore, and for example, it is certainly the case that many doctors are woefully ignorant of their patients' rights following an accident. It would be a simple matter to include just one relevant lecture in each medical students' course.

Whether or not the expense would be justified is a policy decision which falls to be made by a politician. Some of the publicity at the time of publication of the National Consumer Council's paper led one to believe that only 10% of persons entitled to recover compensation did so whereas that figure in fact relates to the percentage of persons recovering compensation through the tort system vis-a-vis the total number of accident victims each year, namely three million. Even the most pessimistic analysis that I have read (that of the Oxford Centre for Socio-Legal Studies) reveals that something in the region of 60% of those entitled to recover compensation do so. Furthermore, a significant percentage of non-claimants do not claim for what would appear to be entirely acceptable reasons such as "not seriously injured"; "it was just an accident"; "it was too much trouble"; etc. How large this percentage is would, of course, be fundamental evidence to any politician deciding how much money to spend on publicity and education. The Pearson Royal Commission and the Oxford Study produce dramatically different results,

which, unfortunately, I do not have the space to analyse herein. Suffice it to say that on one view, only 2.5% of all persons injured each year claim no compensation for non-acceptable reasons such as "did not know how to make a claim"; "thought it would cost too much"; etc. Even this comparatively low percentage translates into 75 thousand accident victims each year which many would consider far too high in any event.

The availability and size of alternative compensation is also most relevant. It is often forgotton that the failure to recover compensation through the tort system does not necessarily – or even usually – result in no compensation being paid. As the Pearson Royal Commission demonstrated so clearly something over 50% of all compensation paid comes through the Social Security system. A further 25% comes from occupational sick-pay schemes, occupational pensions, private insurance, Criminal Injuries Compensation and other forms of compensation. Only some 24.5% of compensation paid comes through the tort system which, nonetheless, retains its popularity because of its ability (insofar as it is possible with personal injuries) to compensate the claimant fully for his loss and, of course, the awards are in many cases much higher. Put simply, 10% of all accident victims recover 24.5% of all compensations paid.

The present system is fraught with delay.

The Lord Chancellor's Review puts forward three main proposals to reduce delay as follows:-

1. To reduce the limitation period of personal injury cases so as to require a Plaintiff to commence proceedings within twelve months of the accident.

2. To require Solicitors who handle personal injury litigation to obtain a special qualification without which they would not be entitled to conduct that work.

3. To oblige a Solicitor who is consulted by an accident victim to commence proceedings within a fixed period after the first consultation.

The National Consumer Council rejects the suggestion that only Solicitors with special qualifications should be able to conduct personal injury work on the basis that there is a need for a system of law and Court procedure that can be understood and operated by people of ordinary common sense and on the basis that a group of specialist lawyers would have a vested interest in ensuring that the compensation system stay so complicated that only they can understand it.

I have some sympathy with this view, but, on balance, I think it is wrong. Any Solicitor who has the least experience of acting for Insurers cannot fail but be horrified by the shameful ignorance of Court procedure shown by many Solicitors acting on behalf of Plaintiffs. This, in my opinion, is the main reason for unacceptable delay in personal injury litigation. I cannot see that the alternative suggestion put forward by the National Consumer Council would have much effect. That is to allow those Solicitors with proven expertise in personal injury litigation to advertise this fact. Two of the more disappointing aspects of being a Solicitor are (1) that so many Solicitors are prepared to take on work for which they are simply not qualified and (2) that so many Clients take less care in choosing an appropriate Solicitor for an appropriate task than they would in choosing a cabbage at a greengrocer on the completely incorrect assumption that all Solicitors are qualified to do everything. The insistence by the authorities of an equivalent qualification to F.R.C.S. or M.R.C.P. would, in my opinion, do very much to alleviate this problem.

I confess to being rather ambivalent about the proposals to reduce the limitation period and the National Consumer Council rejects this proposal on the grounds that they do not wish to see any change which makes claiming damages for personal injuries more difficult and on the grounds, also, that were long delays to occur it is often because victims are unaware of their rights or do not realise the long-term effects of their injuries. The Lord Chancellor's Review is also circumspect. They recognise that "ample allowance would need to be made for latency of injuries, the possibility of negligence by a Plaintiff's Solicitor and the extension of the period for other valid reasons." My own view is that there would be such a plethora of such claims that the reduction in the limitation period would probably be more trouble than it was worth. The difficulties encountered by the Courts in operating the present three-year system are ample evidence of that!

(To be continued.)

On 18 November 1986 we opened our 1986-87 series of lunchtime talks with a presentation entitled

"THE PRODUCT LIABILITY DIRECTIVE: TO BE OR NOT TO BE OR MUCH ADO ABOUT NOTHING."

This talk, given to another full house in Committee Room A at the ILU, 49, Leadenhall Street, London EC3, was by John G. Cowell, Deputy Secretary General of the Comité Européen des Assurances.