PRESIDENT'S LUNCHEON DECEMBER 11 1986
"REFORM IN CIVIL LITIGATION"
by Professor I.R. Scott

A. Introduction

I have been asked to speak about "Reform in Civil Litigation". That is an enormous subject and I only have a little time. I intend to tell you about three things. First I will say a little about the Lord Chancellor's Civil Justice Review. Then I will talk specifically about the study of personal injury cases undertaken as part of that Review. After that I will indicate what I would do about personal injuries cases if I were King, assuming that the tort system remains as the means of compensating victims of accidents.

B. The Civil Justice Review

First then the Civil Justice Review. In the Report of the Royal Commission on Legal Services (the Benson Commission) (Cmnd. 7649) published in October 1979 it was said (para. 43.1) that much of the evidence received by the Commission related, not to the matters with which the Commission was primarily concerned (i.e. the provision of legal services), but "to the substance and procedure of the law and the administration of justice". However, the Commission said (para. 43.3) that, because there is a close relationship between the rules of procedure and the duration and cost of litigation, they considered that the time had come for a "full appraisal of procedure and the operation in practice of our system of justice, in particular in all civil courts". It was suggested that the Law Commission, or a special body similarly constituted, should take on the task of such an appraisal.

The Government's response to the Benson Commission's Report was not published until November 1983 *(The Government Response to the Report of the Royal Commission on Legal Services* (Cmnd. 9077)*)*. In that White Paper it was said (p.31):

> The Lord Chancellor intends to undertake a complete and systematic review of civil procedures. The first steps will be a thorough going factual and statistical study of the business management of work at all stages of civil litigation. The main purpose of the review will be to develop the present system and, if necessary, to re-structure it, in order to achieve the most expeditious and convenient disposal of business.

Fifteen months later, in February 1985, came the next stage when the Lord Chancellor announced the establishment of an inquiry known as "The Civil

Justice Review" the purposes of which was "to improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration, and in particular to reduce delay, cost and complexity". In the intervening period it had been known that the Lord Chancellor did not favour the Benson Commission's idea that a full appraisal of civil procedures should be undertaken by the Law Commission or by a comparable body and it was made clear that in Government circles an in-house review carried out by officials was preferred. This caused some consternation and the matter was re-thought with the result that in his announcement Lord Hailsham said that he would direct the Review and that he would be assisted by factual studies commissioned from consultants and that he would be advised by an independent committee. That committee is known as the Civil Justice Review Advisory Committee. It has been in existence since early 1985: Bob Kerr of Guardian Royal Exchange and I serve on it and when we joined we knew that we were likely to have to serve a three year sentence. From what I have said you can see that the Review is constructed in a rather unusual way when contrasted with previous inquiries into the court system. It is rather like a three legged stool consisting of (i) a group of civil servants in the Lord Chancellor's Department, (ii) teams of management consultants hired to research particular aspects of the civil justice system, and (iii) the Advisory Committee.

That is the background. The Review has adopted what could be called a "cause of action" approach. If one looks at the work of the courts with civil jurisdiction you will see that the bulk of the business arising consists of debt cases and personal injury cases but, of course, the demands made on the court system by these categories of work differ significantly. Special studies by consultants were put in hand in order to find out more about the way in which these cases are handled and the problems involved. Special studies have also been commissioned into three other categories of work, they are, small claims cases, housing cases, and commercial court cases; these constitute identifiable categories of work with their own particular problems. Consultation Papers have been prepared and distributed for three of the five categories of work to which I have referred. The remaining two Papers will be released early in the New Year and a further Paper covering general issues will also be produced. At the end of the consultation process the Advisory Committee will prepare advice for the consideration of the Lord Chancellor. In relation to one category of work, that is to say, personal injuries cases, the full cycle has been completed.

C. Personal Injury Cases

This brings me to the second topic I said I would deal with, that is, the Review's investigation of personal injuries litigation.

The Lord Chancellor's Department received an enormous response to the Consultation Paper on this subject. You would not expect me to say anything about the Committee's advice to the Lord Chancellor on personal injuries but I am sure that as you are all members of the British Insurance Law Association you would not be particularly interested in hearing anything about the other forms of business studied under the Review. So, as I have already indicated, I will say something about the Review's findings in relation to personal injuries litigation and then give you my own views on this type of civil business. Before going on I should point out that I am no expert on the law of tortious liability and I do not know anything about insurance law. I can claim some expertise in court procedures and court administration, indeed, those subjects are my only stock in trade.

There is undoubtedly a problem with personal injuries litigation. I tend to talk in figures. I shall try to avoid doing that too much today; it is unforgivable to bombard an after luncheon audience with statistics. The study undertaken for the Review revealed (see *Civil Justice Review: Personal Injuries Litigation (February 1986)* p.34) serious delay and cost problems in personal injuries litigation.

In relation to delay it was shown:

(i) that High Court cases take four, five, six or more years from accident to conclusion;

(ii) that even county court cases where the amount in dispute is usually no more than £3,000 can take 3 years or more from accident to conclusion;

(iii) that cases which settle by agreement can take as long as those where there is a trial;

(iv) that it can take three years after the accident to get a case started;

(v) that even when a case is started it takes nearly two years in the High Court in London before the defendant is provided with details of the plaintiff's case; and

(vi) that when the two sides are all set for trial it takes the best part of a year in the High Court before a judge can be made available.

On the matter of costs the study told a sorry tale but I should add that the results I am about to mention were hotly contested by lawyers during the consulation phase. The study suggested:

(i) that in the High Court, for every £100 of damages awarded the costs add up to £50, or £70, depending on the basis of calculation; and

(ii) that in the county court the damages are less and the costs are less, but for every £100 awarded legal costs add up to £125, or £175, depending on the basis of calculation.

It seems that the system for providing adjudicatory services for civil disputes in the form of personal injury cases is expensive, in many respects it is "over-designed" and therefore complicated, and also it is slow in disposing of cases.

One of the curious things about the court system in England and Wales is that, although it can be seen as an organisation providing services, one could perhaps describe them as "adjudicatory services" and it is not evident that the way in which the organisation is designed, its structure and the processes it uses, are the result of any clearly defined policies. Indeed, in relation to courts there is no policy making body. Courts have no control over their input demand. Courts do not plan their responses to the demand. They have very little knowledge about the nature of their caseloads and, on the civil side, virtually no useful management information. In organisational terms courts are not in touch with their environments. Courts are the captives of the lawyers. On the whole courts do what lawyers find it profitable to have them do and available resources are consumed accordingly.

Now I know this is heresy and perhaps not easily stomached after lunch. You see, what I am saying is that in fact justice is rationed. At the moment, the resources available for adjudicatory services generally and perhaps for personal injuries cases in particular may be inadequate and I think they probably are. But it could also be argued that such resources as are available could be better deployed. What is needed is an attempt to formulate policies for the judicial branch. The key policy questions are: what proportion of resources should be allocated to the disposal of personal injury cases? what kind of adjudicatory service should the courts provide for these cases? if more resources were to be made available, what form would they take, would they simply be "more of the same" or something different?

It is my belief that when it comes to thinking about these questions we in England are far too unimaginative. When it comes to altering the legal system I concede that on the whole it pays to adopt an incremental approach. I remind you that when the Lord Chancellor set up the Civil Justice Review he said the main purpose of the Review will be "to develop the present system and, if necessary, to re-structure it, in order to achieve the most expeditious

and convenient disposal of business." I suspect that both he and his officials have a preference for "developing" rather than "re-structuring". But it may be the case that incremental approaches to the problems caused by personal injuries litigation will not save the tort system.

D. Reform

Now I come to the third matter I said I would talk about, that is, the reform of personal injuries litigation; what would I do if I were King?

It seems to me that in the reform of civil litigation generally, and of personal injuries litigation in particular there are two avenues that could be pursued with profit. Firstly there is the possibility of introducing effective caseflow management. Secondly, there is the idea of putting in place settlement programmes and alternative dispute resolution systems.

Let me say something briefly about each of these subjects.

1. Caseflow Management

First caseflow management. Caseflow management programmes (CFM) have taken hold in America and in some places have been astonishingly successful in reducing delays. In 1973 the ABA's Commission on Standards of Judicial Administration published "Caseflow Management in the Trial Court" a study prepared for the Commission. It is clear that it had an important influence on the Commission's proposals.

In the study it was said:

> Caseflow management is strictly a management process, encompassing all the functions that affect movement of the case toward disposition, regardless of the type of disposition. It embodies planning, organizing, directing and controlling these functions. Management of the flow of cases through the court brings together many resources and functions usually thought of as independent entities: ... . Caseflow management aims for the coordination of these interrelated resources in a manner designed to achieve a smooth and continuous flow of cases through the court.

I have not got time to go through the specification for individual CFM programmes. I will content myself with running through some of the main principles that were stated in the 1973 study and which seem to have stood the test of time.

The essential elements are said to include the following:

(i) the judges must accept collective and individual responsibility for court control and active management of the flow of all cases from filing to disposition;

(ii) the court should institute a process of continuing consultation among the judges, court staff, the bar, and other interested parties concerning the development and operation of the caseflow management system;

(iii) the judges in consultation with all involved participants must establish standard procedures governing the flow and processing of cases;

(iv) the caseflow management system must incorporate case processing time standards and system performance standards as explicit management goals;

(v) goal setting must be followed by continuing measurement of performance against the established standards and periodic review of procedures on the basis of feedback from the participants.

There is now a remarkable degree of agreement (supported by research evidence) as to the essential elements of a successful CFM programme. CFM is creeping into other common law jurisdictions with local variations being made to accommodate local conditions. It should be noted that CFM has the advantage not only of imposing discipline on the lawyers conducting cases but also of imposing discipline on the courts and that I believe is an important matter. It leads to a better understanding in government circles of the need for increased court resources.

I am an enthusiast for CFM but I seem to be alone in that respect in this country. I don't think the lawyers want it, I don't think the judges want to be responsible for CFM and I don't think the officials in the Lord Chancellor's Department want the judges to be messing with caseflow management.

2. Settlement Programmes and Alternative Dispute Resolution (ADR)

Let me turn to the second of the two matters I mentioned as being high on my list of priorities if I were King, that is settlement programmes and alternative dispute resolution. If there is to be a break-through in England in the handling of personal injury cases it seems to me that it could come in the form of new arrangements for pre-adjudication disposal of cases (PAD)

or by the introduction of forms of alternative dispute resolution (ADR). These two subjects, PAD and ADR, are related.

"Settlement" as presently understood is just one form of PAD. When judicial administration experts talk of "settlement programs" they mean a whole range of techniques, some of which could be correctly described as techniques aimed at getting a "settlement" (e.g. informal adjudication, early neutral evaluation (ENE), "mini-trails" and pre-recorded video-tape trials (PRVTT)). ADR systems are many and various and perhaps they are not properly described as "alternatives" to adjudication and should instead be seen as court sponsored methods designed to enhance negotiations between parties. Many jurisdictions around the world now have in place court-annexed arbitration programmes and some of them are designed specifically to cope with personal injuries cases.

There would seem to be at least four advantages in PAD and ADR; they are:

(i) the saving of costs to litigants and the saving of court resources,

(ii) the avoidance of mental anguish for parties,

(iii) the freeing up of lawyers' time enabling them to handle more cases,

(iv) the reduction of post-trial reviews and appeals.

I believe that PAD and ADR systems are useful and ought to be seriously considered for implementation in this country. But, again, I do not detect any great enthusiasm for these ideas. I should point out that there are two matters that do not arise in America but which we have to deal with in England and which tend to stand in the way of the introduction of PAD programmes and ADR systems. Those matters are the divided legal profession and the manner in which lawyers are remunerated for court related work. They are, of course, subjects in themselves and I cannot give further attention to them here.

As I indicated earlier, in talking about CFM, PAD and ADR, I have assumed throughout that the tort system will remain as the means for compensating accident victims. It may well be that we will see the introduction of no fault schemes of some kind in the future. In some common law jurisdictions abroad "partial" no-fault schemes have been introduced, not because of any real enthusiasm for no-fault, but purely for the purpose of relieving the courts of the stress of case overload. Usually

''partial'' no fault schemes are put in place to deal with the smaller personal injury cases. The study of personal injuries litigation undertaken for the Civil Justice Review indicated that a high proportion of the cases going to trial in the High Court settle or get judgment for relatively small amounts. If a no-fault scheme for road accident cases involving sums of up to (say) £10,000 was introduced the burden on the High Court might be reduced significantly. I hasten to add that this was not a matter canvassed by the Lord Chancellor in the Consultation Paper on Personal Injuries Litigation but my own view is that it is worth thinking about.

E. Conclusion

In conclusion let me express my surprise at the fact that in England the unsatisfactory manner in which personal injuries cases are handled does not seem to have become a matter of concern to insurers. In Australia and America the impulse for personal injuries litigation reform has come from the major insurers. In the State of Victoria, where the bulk of accident insurance is written by the Government Insurance Office, premium rates have become a political issue and the Government has acted to curb the amounts that insurers have to pay out in the form of lawyers' fees. In America at the moment an American Bar Association Commission has been notified that the big insurers are calling their lawyers to account and demanding to know why it is that they are not making full use of the settlement programmes and alternative dispute resolution systems now in place in so many U.S. jurisdictions. The lawyers have not yet replied. The Australian and American insurers seem to have at last woken up to the fact that lawyers are prone to run cases long or, at least, with a lack or urgency that suits their convenience, and that it is financially disadvantageous for insurers to tolerate the games lawyers play in this respect. Mr President, I conclude with the question: when are the British insurers going to wake up too? I suspect that the answer is that British insurers are indeed aware of the problem but, because only a very small proportion of claims made results in litigation of any consequence, they do not regard it as serious. Perhaps individual companies feel they can ignore the problem because they take the view that it is a matter that affects all companies equally and does not harm their particular competitive position in the insurance market place.