Will we have complete freedom of services very shortly? Will the various constituent parts of the London Insurance and Reinsurance Markets have to consider very carefully all their Market agreements, no matter of what standing and irrespective of whether or not these "agreements" are binding?

As always with the EC, issues seem to rumble on incessantly, only to erupt from time to time to shake us all into awareness and action. We have had the eruptions and now we must see how the land looks when the dust has settled. But one thing is to be expected: having pushed Freedom of Services and Competition right before our eyes the Commission will not let the issue simply go away. After all, it is only five years to 1992, by which time the Commission aims to have the Internal Market completed. There might be hectic times ahead.

Gordon Cornish

REVIEW OF PERSONAL INJURIES LITIGATION – Part 2
by Roger Doulton, Solicitor, Winward, Fearon & Co.

So far as the third proposition is concerned, I am also somewhat sceptical. When one is confronted by a Plaintiff with very serious injuries it is not always appropriate to issue proceedings within a short period of time after the first consultation. Even if it becomes appropriate to issue proceedings so that one can, for example, obtain an interim award it is not always then sensible to press on for a full hearing for some considerable period of time. Hopefully if proposition 2 were put into effect there would be no need for proposition 3!

Lastly and whilst on this subject of delay, very few of those surveyed cited the conduct of insurance companies as a cause of delay. Nonetheless this has not prevented the National Consumer Council from reasserting this proposition! Second, to Plaintiff's Solicitors the most important reasons for delay would appear to be:-

1. Plaintiff's own delay in seeking any expert advice;
2. Waiting for the Plaintiff's medical condition to stabilise;
3. Waiting to obtain medical report;
4. Waiting for trial.

So far as 4. is concerned the Courts are currently strenuously engaged in trying to reduce the period of time between setting an action down for trial and the trial itself. The other reasons are not, of course, primarily the result of a defective system of compensation.

The system is far too costly.

The Social Security system spends under 5% of its budget on administration. The Criminal Injuries Compensation Board just over 10%. The tort system spends at least 45% of its total budget on administration. In many County Court cases the total costs of the Plaintiff and Defendant significantly exceed the total amount of compensation recovered. Whether or not this huge discrepancy is justifiable within the context of a system of compensation of personal injury it seems to me the inevitable result of a system requiring one party to prove that another is at fault and the other to be given a fair opportunity to test that case. Almost any proposals one can think of that would significantly reduce the costs burden would also have the effect of putting the Courts in a position where the issue of fault would have to be dealt with much more superficially than heretofore.

This danger is clearly recognised by the Lord Chancellor's team who write as follows:-

"There is a body of cases which may require to be tried fully by a Judge either because of the seriousness of the subject matter, the complexity of the issues or the current state of the law;" and;

"It is unlikely that the full trial system can offer much scope for reducing costs and the main objective here must be to eliminate unnecessary delays."

But, as every lawyer knows, the size of the case has no necessary connection with the complexity of its subject matter and/or legal problems generated by it. This, precisely, is the reason that the tort system produces what many consider to be disproportionate costs. The decision to do away with the existing system for smaller cases looks very much like a policy decision that getting fault right is less important than providing a cheaper and quicker compensation system. Yet "getting fault right" is one of the main functions of the Courts. Under the proposals put forward by the Lord Chancellor's team it is easy to imagine cases where not much more than lip-service will be paid to establishing fault. If I am right in that, one result may be a substantial increase in bogus claims where the Plaintiff would have had little or no chance of establishing fault under the old systems.

I have not space in this article to set out what appear to be on the whole very sensible proposals for speeding up High Court procedure and Hearings. The proposals for smaller cases (all those where no more than £5,000 appears to be in issue i.e. 65% of all personal injury cases) are as follows:-

1. The Plaintiff would be required to furnish the Court and the Defendant with the statements of his witnesses in prescribed form together with relevant reports;

2. The Defendant would have a limited period within which to lodge counter-statements and other reports;

3. The statements and documents would be put in order and placed before an adjudicator to reach a decision on paper;

4. Either party would be entitled on receipt of the decision to call for an oral Hearing but not to adduce further evidence without leave; and

5. The adjudicator would have the power to switch the case to the full trial system proposed for more substantial cases on the grounds of special difficulty as to the law or the evaluation of evidence.

It is also proposed that such a system should be made available with the consent of both parties for any personal injury case.

The Lord Chancellor's team list two potential disadvantages:-

1. The adjudicator will not have the benefit of oral argument unless the case goes to a full Hearing;

2. The adjudicator will not have an opportunity to evaluate witnesses in person.

But the evaluation of witnesses in persons is, in my view, the very basis of a properly conducted tort system. Its absence would not so much be a "disadvantage" as the partial destruction of the system itself. It is precisely because so many witnesses do not "come up to proof" (and this applies equally to expert witnesses as lay witnesses) that examination-in-chief and cross-examination play such an important role.

In making their proposals, the Lord Chancellor's team use as their model the Criminal Injuries Compensation Board. Under that scheme decisions on papers are accepted in 90% of cases with the remainder going to a Hearing

for three members of the Board. But the task of the Criminal Injuries Compensation Board is fundamentally different from other of the proposed adjudicators.

The case before the adjudicator will be inter partes with conflicting evidence both on liability and quantum from both lay witnesses and expert witnesses. All the Criminal Injuries Compensation Board has to do is assess whether or not someone has been injured as a result of a crime of violence (a relatively simple task) and quantum on the basis of one set of medical reports. The adjudicator will be faced with conflicting evidence as to liability and/or conflicting evidence as to the significance of the injuries. I suppose the Lord Chancellor's team would suggest that it is precisely those cases which would be referred by the adjudicator to the full trial system but it is only those sort of cases that go to a full trial at present!

Nor does it seem to me right that it is only the adjudicator who will have the power to switch the case to a full trial. I do not think the system is appropriate in any event but if we are going to have it there must be some right of appeal.

The rights of the parties to call for an oral Hearing "but not to adduce further evidence without leave" require explanation. Does this mean only that no further witnesses should be introduced or does it mean that the existing witnesses will only be able to give evidence-in-chief in accordance with their written submissions?

How does an adjudicator assess which of two conflicting medical reports on paper is the correct one? In practice, very few cases go to a full Hearing on quantum where this is not the case. Indeed, the only situation in which I can see the proposals being appropriate is that in which liability is admitted and medical reports agreed. In practice again very few such cases go to a Hearing.

Nor am I completely convinced that the system would substantially reduce costs. Any Solicitor who has prepared Proofs of Evidence for Counsel will know that this is a most time-consuming business. If that statement is to be the sole basis upon which the adjudicator makes his decision then the time taken in preparing statements is likely to increase by at least as much as the time normally spend in Court for smaller personal injury cases. One can see one's Office Juinor running backwards and forwards to Counsel quite a few times!

The National Consumer Council opposes the proposals on the basis that Court staff would not only have to give advice to Clients but would have to

write to witnesses, a task which, by implication, at present the Court staff would be unable to fulfill: that the paper adjudication would replace final offers made by insurers and that the number of full trials would increase. They also say that the system proposed would involve the Courts in investigating cases in a way that they have never been involved before. It would prove very expensive in Court staff facilities. I agree.

They propose instead a system similar to Industrial Tribunals which they say are significantly cheaper and County Court cases. In my experience a properly conducted personal injury case is no more expensive than a Hearing before an Industrial Tribunal although I have very limited experience of the latter. I suspect the main reason that the National Consumer Council proposes a system similar to the Industrial Tribunal is that at an Industrical Tribunal settlement is only legally binding if a Conciliation Officer employed by ACAS has been involved in the case thereby preventing employers (or insurers) putting pressure on applicants to settle for unreasonably small amounts.

Before passing to my conclusions I feel obliged to refer to the proposal by the National Consumer Council that the present system for payment into Court should be abolished. Under the present system the Plaintiffs who recover less than that sum paid by the Defendant into Court have to pay the costs of the Defendant from the date of the payment in. In my view this is entirely sensible. The abolition of the present payment-in system would in many cases make it impossible for insurers to settle claims on a realistic basis and would clog up the system yet further.

Lastly, if there is to be the proposed system one would have to be assured that the Government would be prepared to employ sufficient staff to operate it properly. Otherwise we will simply have the same problems elsewhere. The Criminal Injuries Compensation Board is already concerned that sufficient funds may not be forthcoming for its much smaller operation.

CONCLUSIONS

There is nothing stronger than an idea whose time has come. Proposals for no-fault liability (at any rate for smaller personal injuries) are a worldwide phenomenon. In 1974, when no-fault compensation was introduced to New Zealand, insurers lost 30% of their annual premium income in year one. The Pearson Royal Commission recommended a system substantially based on state-funded compensation. It would seem, therefore, to be in insurers' interests to put a considerable amount of time and money into researching a system of compensation acceptable to the general public and run by themselves.

In particular, it seems to me, that there should be continuing research into the economic viability of a system whereunder The Road Traffic Act 1972 was amended so that all drivers must have compulsory no-fault insurance against damages arising from personal injury to themselves, their passengers and pedestrians but subject to a maximum amount. The increased cost of such a system might be partially met by further statutory amendment, as per the recommendations of The Pearson Royal Commission, that benefits paid under the Social Security system to accident victims would become fully deductible in assessing the amount to be paid by insurers and/or repayable on receipt of compensation from insurers.

Such a system is, of course, in operation in several states in the U.S.A. where larger claims are dealt with under the tort system. Would the introduction of this system in this country result in sufficient savings in administration and other costs that accident victims injured as a result of no-one's negligence could be compensated at much higher levels than presently either through the social security system or, alternatively, through a pool created by insurers or both?

Would it be acceptable as is again the case in certain states in the U.S.A., that no damages should be payable under the proposed scheme in respect of pain and suffering and loss of amenity for very minor injuries? Would such a provision result in a great increase of claims in the margin? Would such provision result in such an increase in the proportion of uninsured drivers that it would do more harm than good?

I cannot see the present system lasting much into the next century. It seems to me that it is up to Insurers to protect their share of the market.

* I am much indebted to my partner David Abraham for several helpful comments in respect of the above.