hinging on the doctrine of proximate cause. The proximate cause of the *insolvency* may well be an act of a director which is specifically excluded from indemnity, but mere insolvency is not *per se* a "loss" nor does it lead inevitably to wrongful trading, let alone the requirement to contribute to the deficiency which becomes the director's indemnifiable loss. The point is that there is a second and distinct wrongful act at the time when wrongful trading occurs, quite separate from the original circumstances (howsoever arising) that set the scene for it by directly or indirectly causing or worsening the insolvency.

Those directors who have shunned D&O cover until now will, perhaps, agree with the general view of those who provide it that the peril of wrongful trading is in itself sufficient reason to effect cover. However, it seems likely that a few more personal losses will be needed before the message really sinks in.

Lunchtime Address – 21st March 1989 "Procedure Abused is Justice Denied: The Challenge to Liability Insurance" by Iain Goldrein, Barrister, London and Liverpool

About a year ago, I was invited by your esteemed Chairman, Gordon Cornish, to deliver this lecture. Even allowing for the telescoping of the time which is a concomitant of professional practice, it seemed a long way ahead. How quickly the time has flown. In that time the government through its agencies has had published the reports of the Marre Commission, the Civil Justice Review and the "Green Paper". Surely not since the nineteenth century has there been such vigour brought to bear for the purposes of speedy law reforms.

The difference between the approach of the present administration, and that of previous administrations, is by reference both to orientation and expedition. By way of contrast for example, the Evershed Committee sat for 6 years. It could be argued that it said in 100 words what could have been reduced to 3. Its culminating achievement was the Summons for Directions. It proposed that by this means, there could be the eliciting of admissions and the clear distillation and identification of issues. By 1968, however, the Winn Committee reported that the Summons for Directions had effectively become a dead-letter and suggested "Automatic Directions". That took another 15 years to fall within the ambit of the Rules of the Supreme

Court.

Today, we live in what is described as "business Britain". How easy to attribute to that epithet, political overtones which distract one from a true analysis. For "business" always finds a way through. Business is the risk - taking industry. Business traditionally gives a lead - even at the risk of commercial failure. In the context of legal reform, do these concepts cast light upon the attitude and orientation of the present political administration?

Equally interesting is the reaction of the legal profession to the Marre Commission, the Civil Justice Review and the Green Paper.

With regard to the Marre Commission, there was considerable dismay at the Bar at the suggestion that there be extended rights of audience. But with advocates throughout the E.E.C. in due course being permitted by regulation to enjoy rights of audience across European national boundaries, the argument can powerfully be advanced: Is it perhaps misconceived that a Paris attorney may have rights of audience in the High Court in London - but not a London solicitor? Equally odd would be the multinational partnership with a New York base and a London office. The English solicitor would have rights of audience in the New York Supreme Court - but not in his own. And yet I suspect that the extension of the "right" of audience and its exercise, are entirely different matters. The Bill of Rights of 1688 gave us the right of Habeas Corpus. Yet how often is there recourse to that writ?

With regard to Civil Justice Review, its terms of reference were:

> "To improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedural court administration and in particular to reduce delay, costs and complexity."

It is salutory to note that statistics distilled for the purposes of that Review note:

(a) In the County Court, there was a delay of 3 years between the date of the accident and the date of trial to be contrasted with 5 years in the High Court.
(b) In the County Court, the costs were 125% of each pound recovered, and in the High Court, about 70%
(c) With regard to High Court trials, about 30% led to awards within the County Court limits.

Thus one may ask rhetorically: Why do insurers acquiesce in paying such levels of

costs *and* damages? Are insurers losing the initiative? Is this reflected in the following:

(a) In the context of the £1m. claim, they do battle on the plaintiff's chosen ground - where claims for nursing expenses and loss of future earnings by themselves so frequently exceed £500,000.
(b) Multiple claims in the nature of class actions with the prospect of discovery actions in the U.S.A. and "Mid Atlantic Settlements"?

However, the Civil Justice Review is behind us and forgotten - because of the Green Paper. The objectives read:

> "1.1. The government's overall objective in publishing this Green Paper is to see that the public has the best possible access to legal services and that those services are of the right quality for the particular need of the client. The government believes that this is best achieved by ensuring that:
>
> (a) A market providing legal services operates freely and efficiently so as to give clients the widest possible choice of cost effective services.
> (b) The public can be certain that those services are being supplied by people who have the necessary expertise to provide a service in the area in question."

In this preamble, there is no reference to "Justice". Could it be perhaps that our attention has been unduly distracted by the Green Paper? Since "Justice" is the topic at which the Civil Justice Review is expressly targeted, perhaps our concentration should be more closely centred upon that.

And so one is driven to ask the question - why suddenly, is the legal profession being subjected to this reforming spotlight? Answers may be advanced as follows:

(a) Firstly: post-war commerce is demanding legal services from a profession which is still regulated by pre-war standards. For example:

    (i) Legal Aid sucks people by the million into the litigation process.

    (ii) The abolition by a Labour Government of the doctrine of common employment, and equally the abolition of the doctrine that any contributory negligence barred a claim automatically increases dramatically the number of personal injury claims entering the system.

Accordingly, pre-war procedures are proving incapable of being re-vamped by committee process. Thus trials take 15% longer than they did in 1945 - notwithstanding that presently there is no jury.

(b) A result of the stagnation of civil procedure in the field of personal injuries was the Winn Committee of 1968 which inter alia recorded:

> "a perusal of the Rules of the Supreme Court Order 18 from end to end, with all notes and quotations, constituted a fascinating experience for the practitioner, in the nature of a trip through territory unknown to him in a climate which he has not experienced in his daily life. No set of rules could be more cogently expressed; practice all too regrettably often reveals little relationship to the Rules; though judicial comments pass unregarded".

Order 18 of the Rules of the Supreme Court deals with pleadings. The concept behind pleadings is the distillation and identification of issue. If practice reveals little relationship to Order 18 - it is a poor reflection on both sides of the profession. The proposition can be advanced - here in its clearest form is an opinion from greatly respected jurists that procedure has been abused. And as Sir Jack Jacob pointed out in his work "The Reform of Civil Procedural Law" (1982) Sweet & Maxwell, such abuse results in a denial of justice. How then, is that a challenge to liability insurers?

If in the present legal climate, where personal injury litigation is conducted desultorily, insurers may be losing the initiative - what happens when Plaintiff litigation is conducted more efficiently? And so the challenge to the insurers is to assess whether the reforms adumbrated by the Marre commission, the Civil Justice Review and the Green Paper will result in the more efficient conduct of litigation.

The legal profession's response to the Green Paper may be seen as falling into a standard historical pattern. Writing in 1889, David Dudley Field said:

> "Whenever any considerable amelioration has been obtained, either in the form or in the substance of the law, in procedure or in doctrine, it has come from a minority of lawyers supported by the voice of laymen. I do not complain of this. It is the nature of the profession. The lawyer becomes wedded to old things by the course of his daily avocations. He reposes upon the past. He is concerned with what is, not with what should be. The rights he defends are old rights, grounded, it may be, in the ages that have gone before him. Nor is this conservative tendency altogether to be regretted. Rooted in the past, and covered with the

> branches of many generations, the legal profession may be said to stand like the oak as a barrier and shelter in many an angry storm, though it may at the same time dwarf the growth. With its innumerable traditions and its sentiments of honour, it is one of the strong counteracting forces of civilisation, and we should hold fast to it, with all its good and in spite of its evil, though we may have occasions to combat and overcome its resistance to reforms as often as new wants and altered circumstances make them necessary."
> 1 Jurid. Rev. 18, 20 (1889).

In 1848, against resistance similar to that encountered by the Green Paper, the New York Legislation Code was enacted. 391 Sections were enacted within weeks. Less expedition might have imperilled the whole enterprise. Opposition to the measure was bitter and intense, among both lawyers and laymen. Given time for organisation, the "sons of Zeruiah" it was feared, might again, as in Cromwell's day, have been too strong for the spirit of law reform. But being once clothed with the authority of actual, operating law, the new movement was better able to make head against that "antipathy to reformation" which lawyers feel, and perhaps are bound to feel.

50 years later, reform of that Code fell for consideration. And the conservative forces of the Bar, so long and so bitterly opposed to the Code, were arrayed in its support.

So let us detach ourselves and look at England now with the benefit of that historical perspective. We can see that in the context of law reform, delay begets stagnation and expedition begets change. Reform is prompted by the overwhelming commercial needs of an age. One may gravitate to the conclusion that the thrust of the Government's reforming proposals may be expected substantially to be achieved earlier rather than later.

To find corroboration for this view, one needs look no further than the philosophy of what is popularly called "Thatcherism". It is perhaps not fully appreciated that government can rule by fear as effectively as by "Diktat". So it was that the passing of Austin Mitchell's Bill abolishing the solicitor's monopoly on conveyancing, resulted in the wholesale merger of firms of solicitors in the High Street - without any immediate competition whatsoever from licensed conveyancers. That merger was accentuated by cost - cutting tactics on the part of firms of solicitors which were virtually suicidal. (Was a precedent the slaughter of the English nobility at the Battle of Bosworth Field in 1485?) But merger of course generates the capacity for efficiency - was this perhaps the government's primary objective? There is a lesson to be learned in the personal injury field. May one expect to see firms of plaintiff solicitors merging, and having recourse to increasingly specialist computer systems

and specialist members of the Bar? If one were to glimpse into the future, perhaps one would see the following:

(a) Large personal injury plaintiff firms with extensive networks allowing for the cross fertilization of ideas, with computers driven on by "expert systems" - dedicated software. If this were to be the case, *all* heads of claim would be picked up - it would be like an infallible trawler net fishing its way through the insurance companies' balance sheets.

(b) Equally, one may anticipate in (perhaps many) years to come, a court administration which was computerised to the extent that pleadings were despatched to the court data base by electronic mail, rather than the present Dickensian system of some employee of a firm of solicitors actually walking to a court office with a cheque and draft pleading and handing it in over a counter.

(c) In the court room, one may except to see much greater recourse to paper presentation of a case - equivalent to the American trial brief, assisted by audio/visual computer aids.

(d) And the effect on the insurance markets - the same as fishing trawlers had on herring on the Dogger Bank. The Dogger Bank I recall featuring in my Prep school days as being one of the main centres for the herring industry. It is now, of course a geographical topic, the exclusive preserve of the history books.

This is the challenge to liability insurers: The present political administration, looking with dismay at the present shortcomings in the administration of justice, is seeking vigorously to reform the legal profession to achieve much greater efficiency. Such efficiency may be expected not only to reduce costs, but dramatically to increase the damages. What is to happen to tomorrow's insurance premiums when the Plaintiff litigation is conducted more efficiently? And one must also consider the impact of disaster claims, product liability claims - and indeed, legal negligence claims.

What is to be the insurer's response? Clearly, there has to be a strategy. In the context of the very substantial awards, insurers should immediately be working for rehabilitation (getting the plaintiff back on his feet, as it were, as early as possible) and structured settlements. In particular, with tetraplegic claims generating enormous awards for loss of earnings and the cost of nursing services, a strategy of rapidly deployed rehabilitation services may be seen as increasingly cost-effective. The insurers should be asking of their solicitors new ideas such as imaginative legal defences and revised litigation techniques. There may be perceived to be a need for greater answerability (a report on case explaining what has happened and some

advice as to how the future of the case should be conducted may be perceived as being inadequate). Perhaps insurers should ask for creative and imaginative solutions: how the processing of the immediate claim could be improved, what steps might be taken which have previously not been taken, how to break into new legal territory to the advantage of the insurer?)

In summary, consistent failure to follow the Rules of Court can be equated with the proposition "Procedure abused". If the rules are fashioned to achieve justice, their flouting must be a denial of justice. And the challenge to liability insurers? Surely this - that when a business-like political administration tackles the legal profession, business - like reforms may be expected to ensue. It is to be anticipated that such reforms will generate increased efficiency in the processing of plaintiff personal injury litigation to an extent which may, without hyperbole, be described as "dramatic". What then is to be the insurers' riposte?

LUNCHTIME ADDRESS
26th April 1989
"Strict Product Liability and Insurance: Recent Development in Australia"
by Peter Hopkins, Solicitor, Australian Commercial Disputes Centre Ltd., Sydney (Paper updated to July 1989)

In September, 1987 the Australian Attorney General issued to the Law Reform Commission a reference to review the existing state of product liability law in Australia and to make recommendations for the reform of that law. The Commission's Final Report was delivered to the Attorney General by the required date of 30th June, 1989, but will not be made public until tabled in Parliament later this year. Accordingly these comments (prepared in March and revised in July, 1989) are speculative. They relate in the main to two Discussion Papers issued by the Commission in August, 1988 and April, 1989, and to opinions expressed by members of the Commission, its staff and its critics at the many forums convened to discuss the issues raised by the Papers.

To the Commission's credit it has shown a preparedness to modify its provisional proposals in the light of criticisms it has received. It is not possible in this paper to canvass all the proposals made by the Commission, and it is pointless to make predictions as to what the Final Report will contain. Instead I will concentrate on only a few of the more controversial of the proposals, particularly where it appears the Commission has changed its thinking. In this way we can gain insight into the extent to which the process of reform of law may be influenced in and by the crucible of the