THE IMPACT OF THE WOOLF REFORMS UPON THE INSURANCE INDUSTRY

By Lord Woolf

In the past, civil procedure was a neglected subject. Delays, expense, inequality between litigants and uncertainty were all present. The situation was equally unhappy for plaintiffs and defendants. They all suffered. The same was and is true for insurers. The reforms I proposed in my report[1] are intended to address these problems.

I am optimistic we can bring about a dramatic change. We need to do so. The process has already started. For a time it appeared there was a danger that the new government would interfere with this process. However, from the Lord Chancellor's response to Sir Peter Middleton's report[2], it is now clear that the government is backing the process of reform with the same enthusiasm as was shown by the previous government. I am sure we now have an opportunity for once and for all tackling the basic defects in the system.

Some of my critics suggest that my reforms are weighted in favour of plaintiffs. Others say the opposite is true: that the proposals will benefit defendants and their insurers. I believe both sets of critics are wrong. In this article, I am going to focus primarily upon defendants and insurers in the comments which I make, because the support of the insurance industry is of great importance to the successful implementation of my reforms.

At different stages of my career I have had good reason to be grateful to insurers. They taught me most of what I know about advocacy. When I started at the Bar my bread, without much butter, came from representing defendants on motoring offences for their insurers in the magistrates' courts. One of my few clients at that time ran a substantial practice for insurers. The bottom of the market at the magistrates' court was looked after by two retired police inspectors who knew the magistrates' court scene in the Greater London area inside out. Their sensible, pragmatic advice I can remember to this day. When I graduated from the magistrates' courts, I was entrusted with civil actions - initially they were primarily accident cases. At that time I regarded insurers as my fairy godmothers. They seemed determined to keep the young lawyers in business

irrespective of their own interests. Case after case was vigorously defended, although it was inevitable either it would be settled or lost. What, I used to wonder, was the commercial logic in apparently refusing to accept the reality of the situation until the majority of the costs of the action had already been incurred? As far as I could ascertain, some if not a majority of the claims managers wanted, irrespective of the costs, to put off disposing of claims until it was too late to do so economically. Things are changing. Young barristers and solicitors may hope, looking at matters from their own personal point of view, that some of the old breed of claims managers will survive. I suspect if I was a young barrister I might share their view, but I know I would be wrong to do so because this sort of approach to litigation is indefensible and harms the administration of justice.

How are my reforms going to make it more difficult for the old breed to survive? One of my reforms is designed to eradicate the culture which gives rise to late settlement. Justice requires that valid claims should be disposed of expeditiously. Let me illustrate the problem from an account which was given to me by a large firm of solicitors specialising in industrial claims. I will deliberately avoid identifying those involved.

A very large factory was served by one county court. Well over 1,000 workers complained of similar injuries. They alleged they were due to the environment in the factory which the employers in breach of duty had tolerated. Through their union they all brought actions against the employers, who were of course insured in relation to those claims. As is often the situation with this type of claim, there were problems of causation as well as breach of duty which had to be overcome by the plaintiffs. The defendants denied liability. The arrival of this large volume of claims was a problem for the county court. The county court accepted the solution proposed by the lawyers on behalf of the plaintiffs and the defendants for dealing with the large influx of cases. The hearings of the cases would be staggered over a period of about 5 years. Each year the court would list over 200 cases spread out over the year. Apparently the plaintiffs' and the defendants' lawyers were happy with this arrangement. The defendants' insurers were happy with the arrangement. So, no doubt, were both parties' experts. But what about the clients?

Although I have no reason to think this was intended at the outset, very soon a cosy practice developed of only giving the cases attention a few days before they were listed for hearing. Then and only then would the cases be settled without an admission of liability on terms which included the defendants paying the plaintiffs' costs. The court was apparently happy with this arrangement because it never had to hear any of the cases and it had enough other work to keep it busy. The plaintiffs' solicitors were happy with the arrangement. They received their fees. So was the union because the union members received compensation and the union recovered its costs. The defendants' solicitors were apparently content with the arrangement because the insurers paid their fees. Apparently the insurers were happy with the arrangement because it allowed them to meet all the claims and costs over a number of years, which was no doubt financially convenient.

What is wrong with this arrangement? I believe there are two things wrong with it. One, a great many plaintiffs had to wait an inordinate time to receive their compensation. Secondly, cases were settled when the great majority of costs had been incurred and it is my belief that, if the cases had been settled before those costs had been incurred, the insurers, who are primarily interested in the global sum which they have to pay, could well have paid more to each individual plaintiff. In addition, insurers are not charitable institutions. Somebody has to pay for the litigation costs they incur in the form of premiums.

Under my recommendations, this long drawn out saga would never be repeated. When a court is faced with this situation, it would devise a strategy for dealing with the cases in conjunction with the parties' lawyers. If necessary, specimen cases would be selected to provide precedents as to both liability and quantum. There is no doubt in my mind that a great deal of time and costs could be saved in that way. The parties would have to face up to decisions as to whether the case was to be contested or settled at the start. This, I believe, produces a more just result. However, what happened, I strongly suspect, was that those plaintiffs who were articulate had their cases dealt with first. Whether that was right or not, there could be no justification for the process being drawn out in the way that it was.

Sensible court management, I believe, must be in the interests of everyone, and in particular the parties.

Cases can only be managed properly if there is early disclosure. Without early disclosure neither side can make a proper assessment of the merits and value of the claim. We want to achieve a position where valid claims are settled without litigation being necessary in the great majority of cases. Litigation should become the last resort and an action commenced only when there is a claim with a reasonable prospect of success which the proposed defendant is not prepared to compromise.

That is why one of my recommendations is to extend the scope of pre-action discovery. This is fundamental to my reforms. The culture must change so that parties can have access to the material which they need to evaluate a claim. This will not happen by itself. It needs a sufficient incentive. This is where my recommendation enabling both sides - I emphasise, both sides - to make offers to settle before the actions even commence comes in. Before commencing proceedings, the plaintiff will be able to make an offer to dispose of the case and the defendant will be able to do the same. The offers will be the equivalent of a Calderbank letter and will have consequences on costs and interest if they are not accepted, if subsequent events prove they should have been. The offers will be able to be made as to the whole case or part of the case, and may include interest and costs, although they need not do so. Orders will be for indemnity costs and high rates of interest, which will be an incentive to settle.

In the classes of cases which frequently give rise to litigation, there will be protocols of best practice as to pre-action discovery which, if departed from unreasonably, will also have an effect upon costs. What I have sought to achieve is to bring forward the aphrodisiac effects on settlement of seeing the door of the court to a time before litigation commences. This should result in much greater expedition, more economy and more consistency in the resolution of cases. Where this is likely to assist in achieving settlement, ADR should be available either in court or out of court. It is my belief that in personal injury litigation ADR could play a huge role in achieving my objectives.

Personal injury practitioners have, of course, vast experience at negotiating settlement of claims. However, all too often the negotiations do not begin until the trial is about to commence. The court could facilitate earlier negotiation by the use of mediators. The mediators could provide pre-trial assessment as to the probable outcome, which could be very influential upon the parties. At the very least, mediation will avoid the ritual during which each party awaits the overtures of the other before taking any action itself.

The protocols will also be relevant regarding one of my least understood reforms. That is, the use of single experts. One of the engines complicating litigation today is the support industry, of great sophistication, which is now available to provide expert assistance on every aspect of the entire field of litigation. Expert witnesses are becoming a second tier of advocates. There are situations where their present contribution is necessary and all that is required is for it to be made abundantly clear that their first responsibility is to the court and not to either party. But in many situations it is quite unnecessary to have more than one expert instructed by both sides. The only effect of having two experts is to drive the parties apart. Both parties can have access to the same expert for advice. I am well aware of the effect on an expert of hearing the story from only one side.

In the heavier cases, after litigation has commenced, my reforms are designed to involve the parties themselves - not their lawyers - in the case management process. I do not believe that case management will be taken seriously unless this happens. Both the plaintiff and a claims manager who is a position to take a real interest in the outcome of the case need to be at the case management conference. If they are not, case management will be a formality. Both sides need to take intelligent decisions.

In the course of case management, one of the responsibilities of the procedural judge will be to ensure, as far as this is practical, equality between the parties. This means that there has to be strict control over the way costs are being expended during the pre-trial process and at the trial itself. The procedural judge will want to be kept informed about the costs which have been incurred and will be incurred.

It will be important that cases are tried at the appropriate level. In the future I see only a minority of personal injury cases being tried by High Court judges. The majority will be tried by district or Circuit judges. As long as the judges are experienced, there is no real danger of any prejudice resulting to the parties. Most High Court judges already have such limited exposure to personal injury cases that they have less expertise than their county court brethren. Of course things can go wrong, and then there must be proportionate procedures for remedying this on appeal.

My reforms are designed to be a balanced package which is fair both to plaintiffs and defendants and their insurers. I was repeatedly assured by those lawyers who represent insurers and the insurers' own representatives that they are as enthusiastic as I am about resolving claims expeditiously, economically and realistically. If, as I accept, this is the position, then insurers should welcome my reforms.

There are other reasons why they should welcome the reforms. I believe that there is immense potential for insurers to be involved to a much greater extent than they are at present in providing their policy holders with cover for the cost of litigation, both as plaintiffs and defendants. The government has recently expressed enthusiasm for conditional fee arrangements. Conditional fee arrangements are dependent upon the plaintiff being able to insure against any order for costs which is made against him. Attractive premiums have been arranged in personal injury litigation. This is because the success rate is so high. In other classes of litigation the position is not so straightforward. In fact, many members of the public already carry insurance as part of a package, for example in relation to their home. However, members of the public are surprisingly ignorant about availability of this cover. A deterrent in the provision of cover is the uncertainty which surrounds litigation at the present time. If my proposals are implemented, a system of budget costs and standard practices will evolve which will help to provide that certainty.

It is, of course, on the fast track that the greatest certainty will be achieved. The ethos of the fast track is a pre-determined procedure at a fixed cost. This, I believe, should be welcomed by everyone, but in particular defendants in relation to modest claims. The Association of Personal Injury Lawyers contends that the

fast track will be an insurers' charter in that it will enable insurers to use their vast resources to defeat plaintiffs, who have to limit their costs because of the limit on the fees which they can recover. I do not accept that this is the situation. I can see no incentive to insurers to incur disproportionate costs. I do not understand how they will be able to flex their financial muscle in the controlled procedure. If, however, I am wrong, then the powers that procedural judges will have will be exercised to protect the claimant.

During the course of my Inquiry I was involved in many meetings with insurers and the lawyers who regularly act for them. I discussed their problems with them and have taken them into account in my recommendations. I recognise that my reforms are intended to make the courts more readily available to claimants than they are at present. My recommendations will be bolstered by the extension of conditional fees or the contingency legal aid scheme, if the scheme proposed by the Bar is taken up. Increased claims are not something which insurers welcome. However, the increase in the number of claims which could well happen in any event will, under my reforms, result in those claims being handled in an appropriate manner. If there is a liability then insurers should be able to, and should be required to, meet that liability promptly and fairly. If there is no liability, insurers should be able to contest liability without fearing to have to pay much more in costs if they successfully defend the case than they would have to do to settle the case.

Although my reforms are not dependent upon the co-operation of both sides of the profession and their clients, there is no doubt that they would work much more effectively and rapidly with that co-operation. I do not believe I am being unduly optimistic when I say that I am confident of that co-operation being provided. I hope the insurance industry will also provide enthusiastic support.

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[1] Access to Justice - Final Report to the Lord Chancellor on the civil justice in England and Wales [HMSO, July 1996]

[2] Review of Civil Justice and Legal Aid - Report to the Lord Chancellor by Sir Peter Middleton CGB [Lord Chancellor's Department, September 1997