MASTER OF THE ROLLS

APIL ANNUAL CONFERENCE 2008

KEYNOTE SPEECH

11 APRIL 2008

SIR ANTHONY CLARKE MR

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1. Good morning. It is a pleasure to be here today and to make a contribution to your annual conference. Churchill once said that the British are unique in that they are the only people who like to be told how bad things are – who like to be told the worst.[1] I thought I might buck the trend and, if Churchill is right, disappoint you by telling how good things are, although I cannot resist highlighting one or two of the problems. After all, any system has room for improvement.

2. With that in mind the first thing I want to talk about today is reform of the personal injury claims process.. As you all know in April 2007 the government issued a consultation paper on case track limits and the claims process for personal injury claims. With the consultation hot off the press Lord Falconer, then Lord Chancellor, outlined his ideas as to how the process ought to be reformed at your 2007 conference last April. He was undoubtedly correct when he said to you then that the personal injury claims process was an area '*where we all agree something needs to be done.*'[2] The problems with the present system were concisely summarised by the Association of British Insurers just a few weeks ago in March in *Adding Insult to Injury: the need for reform of the personal injury compensation scheme.*[3] The ABI put it this way:

   "*The personal injury compensation system is failing. It takes too long to get compensation to claimants, the legal costs are too high, and it undermines rehabilitation. In April 2007, the Government consulted on reforms to overhaul it. These reforms are essential to secure the delivery of justice. Every day that changes are delayed, more people enter a compensation system beset by delay and inefficiency. The Association of British Insurers urges the Government to act now.*"

[1] Churchill, "The British nation is unique in this respect. They are the only people who like to be told how bad things are, who like to be told the worst." (Hansard, 10 June 1941).
[2] Falconer LC, Speech to Association of Personal Injury Lawyers Conference (20 April 2007).
[3] Association of British Insurers (March 2008).

3. The ABI fleshed out its position by pointing out that under the current system compensation for road traffic accidents takes on average two years to reach a settlement, whereas work-related injuries take on average three years to settle. Those figures are, however, far from common ground. For example, Andrew Tambley of Amelans is reported in the Law Gazette to have described them as '*ridiculous*'.[4] Whatever the merits or otherwise of the figures no one can doubt that there are genuine issues as to delay in dealing with personal injury claims.

4. Delay in such cases as these is all the more problematic when, as you are all aware, the vast majority of them settle. The figures which highlight this are stark. Research carried out by the then DCA in 2006 demonstrated that 78% of claims run under conditional fee agreements (or CFAs) gave rise to no significant liability problems; in 2002 it stood at 80%.[5] Equally, it found in 2002 that in 85% of such cases causation was not in issue. In 2006 it was not in issue in 90% of such cases. These figures are stark. Any unnecessary delay in properly progressing such claims to quantum assessment either formally through the civil justice system or via settlement is unacceptable. I recognise of course that some delays are inevitable. For example, in some cases it will be far from obvious at the outset that liability and causation will not be in issue. In such cases some delay will be both necessary and inevitable. In other cases it will be clear to all from the outset that liability will either not be in issue or has already been conceded. In those cases the only genuine cause for delay will be in arriving at a proper assessment of damages.

5. Delay and expense are not the only problems. As the Citizens Advice Bureaux pointed out in their response to the government consultation, an overly complex system also militates against claims being resolved promptly. They also suggest that cost, delay and complexity put some genuine claimants off even attempting to obtain redress. The CAB give no figures for this, although they note that the '*actual number of claims for injuries following accidents has been on a downward trajectory for a decade.*' Their conclusion was based on information obtained from the Royal Society for the Prevention of Accidents.[6]

6. It seems to me that we can say with some confidence that the problems which the government's consultation aims to address in respect of personal injury claims are problems which those of us involved in the civil justice system as a whole are all too familiar. They are certainly not new. They are the problems which as Michael Zander pointed out in his 1999 Hamlyn lectures, underpinned '*the Evershed Report in 1953, the Report of the Winn Committee in 1968 [the focus of which was personal injury], the Cantley working party in 1979 [again focusing on personal injury], the Civil Justice Review in the late 1980s and then Woolf.*' As he then put it: "*The focus of such reports is always the same – how to reduce complexity, delay and cost of civil litigation. . . this is a subject that refuses to go away.*"[7] He would I am sure say the same today.

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[4] Rothwell, *Insurers slammed for 'cheap attack' ploy*, Law Gazette (28 March 2008).
[5] Fenn et al, *The Funding of personal injury litigation*, (DCA, 02/06) (February 2006) at (ii). In 2002 the figures related to CFAs; in 2006 to CFAs and CCFAs.
[6] *Case track limits and the claims process for personal injury claims* (Citizens Advice Bureaux, 24 August 2007).
[7] Zander, *The State of Justice*, (Sweet & Maxwell) (2000) at 27.

7. If it is a problem that refuses to go away, we must surely look carefully at it in order to assess what exactly the problems are, to identify their causes and to take steps to implement properly targeted reform. Past reform might teach us that there is no single silver bullet capable of resolving the difficulties that exist here. But that does not mean that a series of reforms, targeted to meet the issues which underline these problems cannot succeed. As Lord Falconer said to you last year about any possible reforms in this area '*. . . doing nothing is not an option*'.[8]

8. I would support this wholeheartedly: doing nothing would be an endorsement of the present system and the problems to which it gives rise. With that in mind I was happy to see it reported in the Financial Times on 26 March (2008) that the Ministry of Justice was on the verge of publishing its summary of responses to the 2007 consultation and the next steps it proposes to take. We should not however hold our breath. The government has been on the verge of doing something for a long time. I appreciate that genuine and sensible reform is not the product of a moment because it requires serious and considered thought. It is of course important that any reforms introduced are the right reforms. They must properly balance and protect the competing interests of those with genuine claims obtaining the correct level of compensation in as timely and cost-efficient manner as possible, whilst ensuring that defendants, whether in the shape of the insurance industry, employers, local government, schools or otherwise, are not troubled by bogus claims. I am sure that none of APIL's members represent those with bogus claims but exaggeration is not unknown among PI claimants.

9. Confidence in our justice system must stem from doing right and justice to all. Any reform must reflect that. Any reform must have at its heart the idea that justice is indivisible or, put another way, blind. I know that I am here among claimants' lawyers and that your role is to obtain justice for claimants. That does not of course mean that the claimant is always right. Justice may require that judgment be given for the defendant. I am sure you all agree with that, at any rate in principle.

10. One of my continuing worries is how much time and money are spent in litigation generally, including PI litigation, on satellite disputes. A classic example of such litigation was the extensive area of dispute arising out of the Conditional Fee Agreements Regulations 2000, which were, as Professor Zuckerman put it, in a piece of admirable understatement, '*complex*'. Not just complex they gave rise to, again in Professor Zuckerman's words '*much disagreement and litigation.*'[9]

11. I need only refer to a few cases to give a flavour of this, purely technical, litigation. You will all remember: *Callery v Gray (No.1 and 2)* [2002] 3 ALL ER 417; *Hollins v Russell* [2003] 4 ALL 590; *Re Claims Direct Test Cases* [2003] EWCA Civ 136; *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134; *Gaynor v Central West London Buses Ltd* [2006] EWCA Civ 1120; *Garrett v Halton Borough Council & Others* [2006] EWCA Civ 1017. I am delighted that the 2000 Regulations have now been repealed but the litigation is not yet finished, rather like long dead forms of action. In recent months the Court of Appeal has dealt with three more issues arising out of the 2000 Regulations in *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352; *Jones v Wrexham Borough Council* [2007] EWCA Civ 1356;

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[8] Falconer LC, *ibid*.

[9] Zuckerman, *Zuckerman on Civil Procedure*, (2nd Edition) (Sweet & Maxwell) (2006) at 1067.

Gloucestershire CC v Evans [2008] EWCA Civ 21. Only an optimist would expect them to be the last of their type. I am pleased to say that I personally have not been involved in any of it. So like Bill Stickers, I am innocent. Remember the poster: 'Bill Stickers will be prosecuted'. I once saw that poster with the words: 'Bill Stickers is innocent underneath.

12. The recollection of these brings me to two particular points I want to make this morning. The first is that time and money should not be spent on satellite litigation of that or any other kind; they should be spent on the merits of the dispute – first on attempts to settle and, if absolutely necessary, on litigation, but on no account on ancillary disputes.

13. The second point is to stress the critical importance of co-operation between the parties. This will be of great importance in the near future, when (we hope) the government publishes the way forward for the claims process. But first a general word. As we all know, litigation in England is an adversarial process. We no not leave issues to a judge to conduct an inquisitorial process but battle it out in a form of combat. This has sometimes inculcated a culture, not of co-operation, but of battle. I am not suggesting that this is what happens in every PI case. My own experience in practice was in commercial and maritime disputes. An example: 30 April 1992, 10th letter, which read "We are astonished not to have received a reply to our eighth letter of today".

14. Since I have been MR, I have been to a number of large, medium or small tents organized by the Civil justice Council, where previously warring factions have been brought together for discussion in a convivial atmosphere, with an experienced facilitator, notably Michael Napier. These have resulted in considerable co-operation and, indeed, agreement between, for example APIL and the ABI on a variety of different issues. I mention this because I am worried that the same may not occur when we have the Government proposals.

15. I urge all those interested, including of course APIL to approach the reforms, whatever they are, positively. There is no doubt that reform is coming, even if it is coming too slowly. Last year lord Falconer said this:

   "*. If we are to achieve confidence in the delivery of justice, for the individual and society, we need real reform. Reform which initiates a culture change. This will not come from changing the limit [by which he referred to the case track limits], but from changing behaviour.*"[10]

16. That is surely right. Effective reform will only come with a change in litigation culture. That was of course the message which Lord Woolf enunciated in his two Access to Justice reports and which underpin the CPR. With the tenth anniversary of the CPR's introduction coming upon us in the next twelve months it is perhaps all too easy for us to start to forget the lessons we were supposed to have learned from those reports and the recommendations they contain. Woolf put it this way in his Final Report:

   "*The new landscape will have the following features.*

[10] Falconer LC, *ibid*.

Litigation will be avoided wherever possible.

People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available."[11]

This, as you no doubt remember, built upon his endorsement in his Interim Report of the principle set out in the Heilbron/Hodge Report of 1993 that, "*the philosophy of litigation should be primarily to encourage early settlement of disputes*".[12] I am sure that everyone here agrees with that, but I continue to worry about the cost of litigation. I know that I am an old judge and that old judges have long forgotten fees earned in practice; but I am often astonished by the costs of, say half a day in the Court of Appeal. I will return to costs in a minute

17. The importance of early settlement has only recently been given a ringing endorsement by Lord Woolf's successor as both Master of the Rolls and Lord Chief Justice, Lord Phillips. In a speech given in India recently he had this to say:

"*It is madness to incur the considerable expense of litigation – in England usually disproportionate to the amount at stake – without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory. Litigation has a cost, not only for the litigants but for society, because judicial resources are limited and their cost is usually born – at least in part – by the state. Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the court.*

I believe that we are moving in that direction in England."[13]

18. Lord Phillips' remarks were made in the context of mediation. Mediation is but one form of alternative dispute resolution, but one means by which claims can reach settlement with recourse to formal litigation. It is, however, of considerable importance and I am very pleased to see that one of the topics to be discussed in the last slot before lunch is 'The Practical Use of Mediation'. I am hoping to be allowed to attend it and I look forward to hearing how much it is used in PI litigation and how you think the courts can or should encourage it. My own view is that it has a valuable role in most types of case, including PI cases and that the courts can play a valuable rule in promoting it, without any change in the present CPR.

19. In any event, quite apart from mediation, I can see no reason why at the present time both claimants and defendants, and their representatives, cannot work together to facilitate the early settlement of claims; especially where those claims give rise to no

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[11] Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996), section I at [9].

[12] Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995), chapter 2 at [7].

[13] Lord Phillips CJ, *Alternative Dispute Resolution: An English Viewpoint*, (India, 29 March 2008).

real liability issues. The resource savings alone from speedily and efficiently resolving such matters alone ought to provide an incentive to change.

20. Lord Woolf himself stressed that litigation was to be conducted in a less adversarial fashion. He put it this way in the Interim Report:

"*The specific objectives of case management . . . are:-*

the encouragement of a spirit of co-operation between the parties and the avoidance of unnecessary combativeness which is productive of unnecessary additional expense and delay;
the identification and reduction of issues as a basis for appropriate case preparation; and
when settlement cannot be achieved by negotiation, progressing cases to trial as speedily and at as little cost as is appropriate."[14]

21. This aspect of the reforms was, of course, embodied within the CPR by way of the duty imposed on litigants, and their advisors, to assist the court to further the overriding objective under CPR 1.3. Through this litigants and their advisors are expected to assist the court by actively taking steps to settle disputes without resort to litigation, through the various forms of negotiated settlement that comes under ADR's umbrella: see CPR 1.4 (2) (a) and (e). Whether proceedings are formally on foot, or whether matters are simply progressing under a pre-action protocol it seems to me that all sides are under a duty to co-operate with each other to promote settlement and to do so in a way which is straightforward, efficient and economical.

22. It must therefore come as a disappointment to all involved in the system that the CAB in their response to the government's consultation can still draw attention to what they see as, and I quote, '*Some lawyers and insurers fail[ing] to meet current timescales for pre-action protocols.*'.[15] It seems to me that there can be little excuse now, nearly ten years after the CPR's introduction for parties and their representatives failing to act consistently with the pre-action protocol. There can be little, if any excuse for failures such as those highlighted within the CAB's response where individuals are kept out of a proper and timely settlement of their claim due to a lack of proper communication from those processing claims.

23. This brings me back to co-operation. I was very disappointed to see the public stances recently adopted by the ABI on the one hand and the claimants' lawyers on the other. As I said earlier, the ABI produced their paper in March urging the Government to act on its original proposals. Shortly afterwards in the April edition of the Solicitors Gazette Amanda Stephens wrote an article making a number of particular points on behalf of claimants generally. It was not I think a direct response to the ABI paper.

24. However, there were those who responded more tartly. I have here a report in the Law Gazette dated Friday 28 March by Rachel Rothwell. It is entitled 'Insurers slammed for 'cheap attack ploy'. It includes the following:

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[14] Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995), chapter 5 at [17].

[15] *Case track limits and the claims process for personal injury claims* (Citizens Advice Bureaux, 24 August 2007).

> The Association of British Insurers (ABI) launched a report criticising Lawyers' costs in what solicitors claimed was a cynical attempt to flex its muscles and influence the outcome of the proposals.
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> The ABI said the current system was 'riddled' with high legal costs which were 'disproportionate to the work involved'. The report referred to 'spiralling' costs in small claims.
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> David Marshall, personal injury specialist and managing partner at London firm Anthony Gold, said: 'The ABI's comments are yet another throw away, cheap attack on lawyers.
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> 'The ABI's own study showed that the cost of lawyers has remained constant for the past ten years, so it cannot be said to be spiralling. These sort of comments are unhelpful. The ABI is trying to influence debate instead of coming up with a solution.'
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> Colin Ettinger, personal injury partner at national firm Irwin Mitchell said: 'I am sceptical about [the ABI's] motives. Insurers only want to bring down their costs and they know that without lawyers around they will have to pay out less.'
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> 'It's populist in its approach. Lawyers are not popular, and they think that if they play on that, it will strike a chord with people. But if costs are too high, insurers have only got themselves to blame by taking up so many unnecessary points with lawyers.'

The report continued in similar vein

25. Although both sides used colourful language, I hope that this kind of posturing will not be the approach of the various interested parties (sometimes called stakeholders) to the Government's proposals when they are finally available. It is to my mind of great importance for all those interested to give careful consideration to them and to iron out any differences they may have by co-operation and discussion in what has now become the time-honoured way, perhaps at a CJC tent.

26. This is important because everyone has to work together in the resolution of particular cases, which is not helped by over-adversarial posturing. I urge you all to work together in the future as in the past in order to provide a just and cost-effective system of compensating those I injured as a result of negligence or breach of duty.

27. Finally, we must remember that the Government's proposed new process is (as I understand it) likely to cover only cases pre-issue of proceedings, and is designed to identify quickly where liability is not in dispute and the only remaining question between the parties is quantum of damages. This is a narrow range of issues but will cover a large number of PI cases. There remain many other questions to consider, which I hope will then become the centre of attention. I have been worried about how long the CFA will last, if, for example the ATE market were to fail. It would then be necessary to consider further other types of funding; eg the CLAF, the SLAS or indeed contingency fees. If contingency fees were permitted, would there have to be

a change in the cost-shifting rule? If there were such a change, should the change cover all types of dispute or only some?

28. Many say that costs are often out of proportion to the amount recovered. Should we change our approach to the proportionality of costs? Should we have a much more robust rule, limiting the amount of costs to be recovered from the losing party to a figure which bears some relationship to the amount recovered? Do we spend much too much time and money assessing the costs? Should we now depart from the principle in *Lownds v Home Office* [2002] 1 WLR 2450? In the not too distant future I intend to set in train detailed consideration of some of these questions, which are troubling judges up and down the country.

29. You may think the prospect of moving forward by agreement is a counsel of perfection, or perhaps like the proverbial second marriage, a triumph of hope over experience. But perhaps I should give Churchill the final word on that, as when addressing the Lord Mayor's banquet in 1954 he said this:

    "*For myself I am an optimist – it does not seem to be much use being anything else.*"

    As they say in the Court of Appeal, I agree. I hope that we can all move forward by agreement in order to promote the interests of those who really matter, namely the parties.

    Thank you for having me.