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Special Supplement

Are they off their trolleys?

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Justice at a price

How many lawyers does it take to change a light bulb? (It's not a great joke, but bear with me, it *is* relevant). Like most jokes of this kind, there are numerous possible answers. For example, you could say three – one to change the bulb, another to shake the ladder and a third to sue the ladder company. Or you could say just the one, but that it will take two years and he (yes, I mean "he") will charge for every hour. But perhaps the best response is simply: how many can you afford? Whichever your favourite, the gist of the joke is the same – lawyers are money-grubbing, untrustworthy and unrepresentative of at least half of humankind.

Popular suspicion of the law is nothing new. In the 18th century, William Hogarth satirised the profession (either asleep or, worse, distracted by matters most uncourtly) just as he did politicians, aristocrats and the French. A century later, Charles Dickens wrote in *Bleak House*: "The one great principle of the English law is, to make business for itself". This and the other quotations on page vii are far from uncommon in their disgust and distrust for the law. When John Fitzpatrick, in this supplement's debate on "compensation culture" (page x), says that he "does not want to fall into the name, shame, blame and claim game by accusing personal injury lawyers of being exploitative, gravy-train-riding ambulance chasers", he encapsulates what many of us think. In short, the public at large has pretty poor relations with the legal profession.

We may like it that way, but it is bad news in terms of equal access to justice. While the rich and powerful have no fear of the profession because it is partly (if not wholly) just like them and serves their interests very well, the rest of us are encouraged, by this very fact, to steer well clear. Thus our different relationships with the law preserve fundamental divisions in society that, if still too tolerated, are less acceptable than in Hogarth's day.

So what's the solution? In an apparent attempt to find one, the government last year launched a review, being carried out by David Clementi, of the regulatory framework for legal services with the aim of "promoting competition" and "improving services for the customer". It all sounds horribly familiar. Are legal services, in the name of choice and innovation, to go the way of the railways and of the health and education services?

As Bob Sherwood explains (page iv), the review is expected to open the doors – or perhaps that should be floodgates – to "Tesco law", enabling us to buy legal services at the supermarket along with life's other necessities. This move may succeed in changing our perceptions of the law, but a common question raised in this supplement is whether it will do anything to improve access to justice for those who need it most. The appearance of a £50 bottle of wine on the supermarket shelves may strengthen the brand and increase its desirability, but that doesn't mean every shopper can afford to drink it. In a drive to cater for all, could legal services become available in varying qualities, quantities and prices: will Tesco law offer a no-frills option for some and a classier, "finest" range for others?

Several of the contributors express the concern that changes to how legal services are provided and how they are regulated could even make access to justice less equal than it already is – with providers cherry-picking easy, profitable cases, leaving growing deserts of supply which in effect exacerbate the need for help where it can be afforded least. There is little argument that legal services are not working for everyone at present, and that changes are necessary. But there is plenty of healthy debate about who will ultimately pay the price.

Emily Mann

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The best of times; the worst of times

Is it time for a legal revolution, asks **Terry Lindon**

It would be understandable for any independent observer to look at the recent headlines to emerge from the brave new world of post-legal aid personal injury litigation and question whether (to follow the quotation through) it is Dickens's age of wisdom or foolishness in which we currently reside.

Certainly there has been foolishness; the reverberations of the collapse of the ill-conceived and unchecked actions of companies such as the Accident Group are only starting to be felt. However, there is also wisdom and a clear path for private operators to follow that will create a properly regulated market and the potential for genuine access to justice. Now is the time for this wisdom to be set in legislative stone to ensure that our legal revolution was worth the pain.

With this process (hopefully) in hand, through the currently ongoing reviews of the provision of publicly funded legal services and of legal services regulation, it is time to consider the social dimension and how our justice system begins to engage with the people it is created to serve.

While we can replace the operational standards that legal aid maintained, no one has yet addressed the question of replacing what legal aid stood for in the minds of claimants. The franchise mark told claimants that they were entering a government-endorsed and regulated system that was based on the principle of social justice. This has been replaced by a rising tide of advertising, with each of the many companies concerned claiming the moral high ground. No recognisable standard mark or code of practice is available for the public to compare one with another or against which to measure the service they receive.

Member solicitors are still regulated by the Law Society, but claimants have little or no awareness of how they should be treated before their claim reaches that stage. Also ripe for improvement is the network of advice centres to which the public can turn for initial guidance. These are historically a mixture of quasi-public-funded operations staffed by a mixture of volunteers and professionals, and often reliant on charitable donations.

I believe this needs to be radically improved in a new-model legal system. The public needs an effective network of recognised and trusted advice centres, stepping into the role of dispensing "legal first-aid" for common problems before steering the public to the most relevant source of help.

The most likely means to deliver this improvement is through the private sector, in the same way that community pharmacists are being asked by the government to take on day-to-day health management services. My own company has made a start down this path, launching a business called WishSprite, providing members of the public with access to a pre-vetted panel of solicitors, offering personal injury, family and conveyancing services. These legal services sit alongside more day-to-day needs, such as insurance and access to a national database of bonded tradesmen.

To deliver a legal system that meets the public's needs, I have a wish list that I'd like those reviewing the delivery of justice to consider.

- Provide us with a strict series of guidelines that govern the private sector funding and management of personal injury claims.
- Give us a regulator with teeth that has the scope to cover not just legal matters, but also those insurance and financial services needed to make access to justice work.
- Deregulate the provision of legal services to allow the private sector to offer a joined-up service covering the various disciplines required to make it effective.
- Examine the necessary role of an advice shop, a free and easy entry point to the legal system.

A revolution in the legal arena is a possibility if the opportunity is seized, delivering genuine access to justice and filling an urgent social need.

Are they off their trolleys?

The government thinks we would like to buy legal services at the supermarket along with our weekly groceries, and has initiated a review that may lead the way to such a radical change. There may be trouble ahead. **BOB SHERWOOD** explains

You pick up your weekly groceries at a sprawling, out-of-town supermarket. You probably collect medicines there, too, and maybe even have a credit card or bank account with the same company. But would you trust it to help you buy a house? Or handle your divorce?

The government thinks you – or at least an important section of the population – would, given the chance. In the parlance of Lord Falconer of Thoroton, the reforming Lord Chancellor, that concept has become known as "Tesco law". But to enable it to happen requires a radical overhaul of the regulations governing the way lawyers practise. That is why Falconer has commissioned such a heavy hitter as Sir David Clementi, formerly deputy governor of the Bank of England and now chairman of the insurer Prudential, to spend this year reviewing the centuries-old way that solicitors and barristers conduct their business. It will not be uncontroversial.

While there has hardly been a public clamour for an overhaul of the way lawyers provide their services, one of the principal drivers for such fundamental change is the government's oft-repeated mantra of improving access to justice. It fears that the stuffy, formal manner that comes naturally to many solicitors, who are not renowned for plain speaking, intimidates many people and prevents them from ever seeking legal help for family or domestic issues. As Falconer said recently: "If, for example, we have Tesco law, will we discover that more people have a personal injuries claim? That more people are victims of domestic violence? And if we do, what does that tell us about the current market for legal services? Why are these people not going to solicitors at the moment?"

> It is feared that the stuffy, formal manner of many solicitors prevents people from seeking legal help

The flip side of that is ensuring legal practitioners can command the sort of trust that will enable wary members of the public to place the most distressing problems in their hands. That means regulation with teeth – something the solicitors' profession has notably lacked in recent years. The dismal record of the Law Society, the body that represents 90,000 solicitors in England and Wales, in handling complaints against high street practitioners has long been a source of embarrassment. Audits of the self-regulation system have damned the effectiveness of the society's procedures, and it appears that the government might finally have lost patience.

Last year, Falconer created a legal services complaints commissioner to oversee the Law Society's complaints arm – much to its disgust. In her most recent report, Zahida Manzoor, who is both the new complaints commissioner and the legal services ombudsman, said the backlog of complaints against solicitors had almost doubled in less than two years. However, the Law Society is pouring £21m over three years into its complaints arm, and there does appear to be an improvement in the number of cases being closed under the guiding hand of Janet Paraskeva, the society's chief executive. She wants more time for the results of the work on complaints to become clear before any drastic changes are imposed. But it may be too little, too late.

It is certainly difficult to argue that Britain's legal services, one of the most important facets of our democratic society, do not need clearer regulation. At the moment, there is a confusing maze of 22 different legal regulatory bodies, a system that even most lawyers do not really understand. Clementi will consider – and quite possibly recommend – stripping the Law Society and the Bar Council (its counterpart body for barristers) of their self-regulatory functions to make way for an overarching regulator along the lines of the Financial Services Authority. Not surprisingly, both organisations bridle at the suggestion – though even that threat has not brought the two bodies, never particularly friendly, closer together.

Stephen Irwin QC, the chairman of the Bar, recently raised the hackles of Paraskeva by suggesting that Clementi could propose revamping regulation for solicitors but leave barristers to be overseen by the Bar Council, whose system has managed to avoid condemnation from the ombudsman. "Why on earth should we do the thing well ourselves and yet pay for other people's mistakes?" he said in his first interview on taking up his post.

The Bar Council and the Law Society also fundamentally disagree on the notion of freeing lawyers to practise in different ways. The latter is backing Falconer's call for greater freedom for solicitors, believing that the tide for changing business practices in the law cannot be turned back. And there lies another of the fundamental drivers for change, which has little to do with access to justice and plenty to do with the bottom line. The existing restrictions on solicitors, some ▶

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▶ of them hundreds of years old, were not drawn up to handle a scenario where law firms are global businesses turning over more than a billion dollars a year. But that is happening, and the biggest corporate firms want greater commercial freedoms.

Currently, solicitors who are not part of a firm but are employed directly by a company are allowed to offer legal advice only to their employer, not to its customers. In addition, solicitors can form partnerships only with other solicitors, which prevents them from forming companies and floating on the stock markets. It also stops them linking up with accountants, surveyors or estate agents to offer one-stop business advice services. Taken together, these restrictions make Tesco law impossible. Many law firms, and other businesses, would certainly welcome such freedoms. Imagine, for example, the one-stop property shop with estate agents, lenders, surveyors and solicitors working together. Or a law firm selling shares to fund expansion. However, the debate is flying in the face of current commercial trends.

> One driver for change has little to do with access to justice and plenty to do with the bottom line

Multidisciplinary practices (as combined accounting and legal firms have been dubbed) seemed an inevitability just a few years ago, with the accountants Arthur Andersen leading the charge. But then came Enron. Andersen imploded and, with it, the dreams of the global business service, as auditors found themselves under pressure to axe even the other accounting and business advice services they provided to clients in order to avoid conflicts of interest. Just last year, KPMG, one of the "Big Four" accounting firms, announced it would split from its associated law firm, KLegal, because restrictions meant it was unable to share business – the very reason for the tie-up.

None the less, Falconer is unperturbed. He says Britain has often led the world in setting the standards for the practice of a common law system and there is no reason it should stop now. He has made clear that he expects Clementi to come up with some far-reaching proposals. He told the Law Society in a recent speech: "Multidisciplinary partnerships, the role of employed solicitors, the probate market – these are just some of the areas we should look at quickly and imaginatively to see how we can respond rapidly to consumers' needs while, of course, ensuring that their interests are properly protected."

Yet it is undeniable that a decision to allow full multidisciplinary partnerships would involve a shake-up so radical that it would have ramifications beyond the law and beyond these shores. The prospect of accountants or estate agents operating in partnership with lawyers raises questions of regulation, conflicts of interest and legal privilege. And what would be the point of an international law firm joining forces with accountants in Britain if they were still prevented from doing so in, say, the US?

A solution far easier to implement would be simply to ease the restrictions on solicitors' firms without going so far as to create full multidisciplinary practices. In the stilted jargon of lawyers, that model is known as a "similar-disciplinary practice", but it just means an existing law firm with a bit more freedom. This move would enable other lawyers, such as barristers or trademark attorneys, to become full partners in solicitors' firms along with finance, human resources and IT professionals. It could also strip away the outdated stipulation that such firms have to be 100 per cent owned by solicitors. That would allow the possibility of shareholders, or for companies including banks and supermarkets to take over and operate firms as subsidiaries, which could be regulated in the same way as other law firms. Tesco law in an instant.

Except that few companies seem terribly excited by the prospect. Ironically, the leading supermarket group Tesco has shown little interest in the concept and did nothing to seek the "Tesco law" tag. It is a little bemused by the appropriation of

its name but, like the nimble commercial organisation it is, has said it will monitor developments in the market in case they prove to be of interest to its customers, just as mortgage and credit card services have been. If it does eventually get involved in the law, it is certain to be in a simplified, restricted, easy-to-digest manner. That is just the sort of thing Falconer wants to see.

One of the few high-profile groups to have campaigned actively for a change is the motoring organisation RAC. It is determined to be first into the new market, offering legal representation for its members involved in disputes over road accidents, and maybe much more. It has been waiting a long time to be able to do so. Its legal services department opened in 1908 but has only been able to offer members informal advice or refer them to independent solicitors. After the Clementi review was announced, the RAC's head of legal services, Jonathan Gulliford, said: "We already offer advice up to a point for members, but this would mean we could bring a claim on their behalf or provide a defence for them. There's an obvious call from our members for it."

Speaking for the Bar, Irwin insists that lifting restrictions on the way solicitors operate would increase "Enron-style pressures" on lawyers, who might feel their commercial responsibilities to their employers conflicted with their ethical duties to their clients. The Law Society disagrees, accusing the Bar of taking a somewhat less than "contemporary" approach. Peter Williamson, its president, has said: "I just don't think there's any way that particular tide can be turned . . . The ability to have more investment in private practice apart from bank borrowing is a good idea because it will enable firms to spend more and invest more on things like IT."

> The chairman of the Bar insists that lifting restrictions on solicitors will increase "Enron-style pressures"

However, the society might not be speaking for all its members on this. Many high street solicitors are worried that the incursion of well-capitalised banks and supermarkets into the profitable areas of their practice – personal injury, conveyancing and divorce, for example – could force them out of business. But such companies will have no interest in the seamier side of the law: criminal and family legal aid work. If the high street lawyers – many of whom practise poorly rewarded legal aid work partly subsidised by their more profitable practice areas – are undercut and out-competed by new providers, that could create deserts of supply in some of the neediest parts of the country and exacerbate the crisis that is already growing in legal aid.

Falconer is only too aware that solicitors are abandoning legal aid work in droves because of the poor returns it offers, and he has insisted that the spiralling £1.9bn legal aid bill can swell no further. Despite the Law Society's support for a loosening of restrictions, Paraskeva has said she is concerned that "new entrants might cherry-pick the more profitable and less complex areas of work, threatening the viability of established local firms that offer a full range of services at the heart of their communities". Nevertheless, she believes new organisations will bring much-needed investment to the high street and ultimately create better, more secure job opportunities for younger solicitors.

Falconer will hope that proves to be case if the Clementi review does indeed call for the fundamental shake-up many expect. He might well sell the changes as a way of opening the door to the law for an under-represented segment of society. But that will ring hollow if it means slamming the door shut for others.

Bob Sherwood is legal correspondent of the Financial Times

Judgements on the law

Charles Dickens "The great principle of the English law is, to make business for itself."

Thomas Jefferson "It is the trade of lawyers to question everything, yield nothing, and talk by the hour."

Franz Kafka "A lawyer is a person who writes a 10,000-word document and calls it a brief."

Pierre Joseph Proudhon "Laws: we know what they are, and what they are worth. They are spider webs for the rich and mighty, steel chains for the poor and weak, fishing nets in the hands of the government."

J P Morgan "I don't want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do."

Cicero "The more laws, the less justice."

John Keats "I think we may class the lawyer in the natural history of monsters."

Clarence Darrow "The law does not pretend to punish everything that is dishonest. That would seriously interfere with business."

John Mortimer "No brilliance is required in law, just common sense and relatively clean fingernails."

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Caught in the crossfire

Hilary Meredith asks what happens to claimants in a legal revolution

As a solicitor specialising in cases where claimants have suffered serious spinal injuries, I have a different (and I would argue more accurate) view of "compensation culture" than most daily newspaper editors. However, the public and political debate seems more influenced by image than reality.

Even the Better Regulation Task Force seems to be taking many of its reference points from the tabloid view of litigation. This is a cause for concern at a time when the whole structure of our litigation and compensation system is under the spotlight.

At the heart of this debate is the issue of Conditional Fee Agreements (CFAs) and the now notorious cases to have emerged as a result of operators who are thankfully no longer with us.

We must make sure that any future changes in the litigation system are focused on the basic social need of providing recompense for people injured through the fault of others and ensuring that those responsible are held accountable for their actions.

The men and women I see trying to rebuild their lives rarely make the headlines. They often face a lengthy legal process, with significant hurdles placed in their way. The settlements they receive, although sometimes of a significant size as a whole, contain a relatively low sum for the injury itself.

> Any future changes in the litigation system must focus on the basic social need of providing recompense for people injured through the fault of others

In a recent case, I acted for a 19-year-old soldier who was rendered paraplegic for life and wheelchair-bound by a gunshot. This incident didn't take place on the battlefield, but at his barracks while he said goodbye to his girlfriend. The culprit was a guard "messing around" with his gun. It's hard to argue that this isn't a credible case.

In other Ministry of Defence cases, we are battling to challenge block exemption on claims against the MoD regardless of how or where an incident occurs.

This is hardly what you'd expect to find in a legal system that is allegedly at risk of "getting completely out of hand", as recently intimated by Teresa Graham (deputy chair of the Better Regulation Task Force).

Even if a claim does succeed, the size of the awards can often be enormously misleading. Taking a case similar to the one of the young soldier, the cost of looking after a wheelchair-bound young man for the rest of his life is about £2m. This includes adapted ground-floor accommodation, live-in care, occupational therapy, equipment, an adapted car, loss of earnings and pension rights.

The actual sum awarded for the injury itself would be approximately £110,000. Hardly a king's ransom for a young man facing a very different future to the one he had hoped for.

An additional challenge such people now face is the fact that the government saw fit to take away the right to a state-financed right to claim. The only course of action available to all but the most privileged is to work with a solicitor under a Conditional Fee Agreement (CFA).

While there is nothing wrong with CFAs in principle, the government's failure to think through the implications has caused enormous problems for claimants. With it left for the courts to interpret, we have been through a period of enormous confusion over how a CFA should be allowed to operate.

Caught in the middle have been the claimants who, at a time in their lives when they are most vulnerable, have been the unwitting guinea pigs in a great legal experiment.

The most affected are those people who need to make complicated and large claims, or those having to challenge legal precedents (such as the young soldier). The reason for this is the way CFAs work, with insurance policies used to cover the opponent's costs should the claim be unsuccessful. The harder the case, the higher the premium, due to the higher risk and costs involved. The test under legal aid used to be a greater-than 50 per cent chance of success. Under CFAs, access to justice has undoubtedly been reduced, with claims that would previously have been accepted now attracting insurance premiums that make them unviable.

A further complication is that lawyers aren't trained in risk assessment. Whereas previously there was an incentive to present their client's case in the best light, in order to qualify for legal aid, now solicitors are putting their clients at risk if they don't have the right level of insurance cover. After CFAs came, a failure to provide

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proper due diligence, combined with over-enthusiastic marketing to drive a high volume of claims, created a bubble that inevitably burst.

As a result, a number of insurers and funders who thought there was easy money to be made from this sector have had their fingers burnt and are now withdrawing or dramatically reducing the level of their involvement. They include NIG, First National Bank and HBOS. The new danger is that there will be too little funding available, further reducing access to redress through the courts for claimants. We need to get the right balance.

As a result, and despite the massive increase in marketing for personal injury services, the predicted increase in claims is remarkably low. In the only independent research conducted into this sector, Datamonitor predicted an average annual increase of just 0.4 per cent, hardly the claims explosion headline writers would have us believe.

This sector is urgently in need of effective regulation, presenting a clear model for future development. However, in considering this, we need to take into account the actual experience of lawyers and their clients rather than the inaccurate reporting of the situation in the national media.

We should also consider the models of insurance and funding that have worked to deliver effective access to justice. These, such as Invaro, base their model on proper due diligence and risk assessment, putting each claim through rigorous checks carried out by an in-house team of solicitors and, if necessary, consultant barristers. In this model, the due diligence is carried out by the same organisation that is providing the insurance cover, giving an in-built incentive for the claim to be accurately assessed at the start and at regular intervals during the legal process.

> We should consider models of insurance and funding based on proper due diligence and risk assessment of each claim

These models provide the certainty that the market needs. However, it still leaves unresolved the issue of widening access to justice to the harder cases. To achieve this, we will need more than regulation. We will need an active dialogue between government and the private companies leading this sector, to establish a system by which the profits made from the majority of cases handled go to subsidise the greater risks presented by the harder, but no less deserving, claims.

ns debate compensation culture

Is suing the new shopping?

JOHN FITZPATRICK, director of the University of Kent's Law Clinic, and **DAVID MARSHALL**, president of the Association of Personal Injury Lawyers, consider whether we are too eager to use or threaten the law

Bad luck happens: is someone always to blame?

Dear David,

I want to argue that society is becoming more litigious, and that this is something that should concern us. I do not want to fall into the name, shame, blame and claim game by accusing personal injury lawyers of being exploitative, gravy-train-riding ambulance chasers, or by accusing individual victims of being greedy, selfish, whingeing opportunists in pursuit of compensation.

I do not find the phrase "compensation culture" particularly useful, either. I would rather focus on the clearly growing eagerness to go to the law in the broadest sense. I refer not only to suing or claiming under threat of suing, but also to an eagerness to rely upon the law to resolve a wide range of problems and to provide a wide range of answers.

Claiming itself raises serious issues. Although the number of court actions has been tumbling for more than a decade, this appears to have been accompanied by a dramatic increase in the amount paid out in settlements, particularly by public bodies concerned with policing, health, local government and the army. We have also seen claims in new areas, more exacting standards applied by the courts in negligence cases, and a new sensitivity to enduring the stresses of life.

It is possible, no doubt, to see in all of this a less deferential citizenry, vigilant in the assertion of rights, and to welcome the development as affording greater justice to victims of wrongdoing, as a mechanism for holding wrongdoers to account and as a means of improving good practice especially in public services. I think we ought to consider a number of less attractive possibilities: that the cost of these claims is becoming an unfair burden on society as a whole, and in particular upon public services; that litigiousness will encourage not good practice but defensive practice; that the lack of public scrutiny of settlements poses a real threat to proper legal process; that these habits will nourish a culture of suspicion, mistrust, vulnerability and victimhood, and an excessive dependence upon the law in general.

Annual NHS clinical negligence expenditure rose from £1m in 1974-75 (£6.33m at 2002 prices) to £446m in 2001-02; the legal and administrative costs of settling claims exceed the money actually paid to the victim in the majority of claims under £45,000. Does this not signal a problem? I think it is admirable that there is an association devoted to improving the service provided to victims of accidents and clinical negligence. I think such an association has a duty to speak out not only for proper compensation for victims, but also at the excesses and dangers that attend the current culture.

Yours, John

Dear John,

I agree that the phrase "compensation culture" is unhelpful and misleading shorthand. You are right to note the fall in the number of cases coming before the courts in recent years. This is a result of the reforms made by the Lord Chief Justice, Lord Woolf – such as the pre-action protocols promoted by the Association of Personal Injury Lawyers – which stressed the "cards on the table" approach and the resolution of disputes prior to the issue of court proceedings wherever possible. And, leaving to one side the tiny proportion of such cases that are issued in court, the number of claims made to insurers for personal injuries is stable. All personal injury claims, when received by insurers, must be notified to the government's Compensation Recovery Unit. This unit reported that, in the year ending March 2003, the number of personal injury accident claims made to insurers had increased by only 0.2 per cent. So whether or not it is true that people are increasingly eager to go to law, this is not leading to increasing numbers of claims being made for personal injuries.

It is true, however, that on average more is being paid out in compensation in each case. The main reason for this is economic. Damages in the UK are "compensatory": a

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notional sum to reflect pain, suffering and loss of amenity, plus sums to reflect past and continuing income loss and expenses such as the care required. Injuring people is expensive. Life expectancy is increasing and, as we all know, the returns available on investments have fallen. So the damages needed to replace lost earnings and to pay for future care have therefore increased. Why should the injured individual be expected to bear this cost when someone else is to blame rather than the wrongdoer who can spread the cost widely through society by means of insurance? I would agree that the legal expenses incurred to obtain compensation must be reasonable and proportionate and, where they are not, my association is committed to working with government and other stakeholders to find solutions that are cost-effective without adversely diminishing access to justice.

The law only requires us to take reasonable care for the safety of those who might be affected by our acts or omissions. If people misunderstand the extent of this duty, perhaps it is a result of the climate of hysteria and fear created by those who perpetuate the "compensation culture" myth.

Rather than blaming people injured as the result of someone else's fault for asserting the rights given to them by parliament and the common law, surely a more fruitful way forward is to aim to prevent accidents happening in the first place and, when they do, to improve the UK's pitiful record in rehabilitating injured people back into work and society, consequently reducing the amounts needed to be paid out in compensation.

Yours, David

Dear David,

Ah, statistics! Well, Datamonitor's report *UK Personal Injury Litigation 2003* noted an increase of 2.6 per cent overall in personal injury claim numbers compared with the previous year, and "some sectors have suffered more than others. Public liability claims increased by 8.7 per cent, demonstrating the extent of the mounting problems faced by local authorities . . . Motor personal injury claims costs have been rising at 9.9 per cent a year over the last decade." The inexorable rise in claims and costs in personal injury cases is not, however, the central issue – although we should not downplay the fact that some of these figures, such as the 750 per cent rise in the cost of settling NHS claims in the ten years to 2002, are alarming in themselves.

It is important not to restrict our exchange to a simple extension of the old discussions about litigation costs, no-fault compensation schemes, the damages lottery, over-insurance and so on. The question about whether society is too litigious raises broader and relatively new issues. The readiness to use or threaten the law that is evident in the claiming culture is only one aspect of a bigger picture. What we are seeing is a general orientation to the law that expresses and promotes unhealthy ways of relating to each other. For every misfortune that befalls us, we feel there must be what you call a "wrongdoer". For behaviour we find objectionable – "there ought to be a law against it". For our moral and political ▶

Who would you sue?

A N Wilson A bishop once threatened to sue me and the paper in which I described his shady antics. He settled for £40,000 out of court and said he was paying it to a charity. I suppose charity begins at home, but investigation never did establish whether he had given away a single penny of the tax-free bonus he had thus acquired with the help of a lefty lawyer. I have many faults, but I never in my most tormented or malicious imaginings could conceive of suing anyone for libel or defamation. It is just money into lawyers' pockets, isn't it? I can imagine suing for the restoration of property. When I was once diddled out of a large sum by an English agent over a New York deal, my American publisher advised me that the sum I had lost, enough to keep me handsomely for 18 months, was about what it would cost to engage a lawyer to cover the case.

Ann Widdecombe I should like to sue any company that thinks I have got time to hold on to the telephone listening to a series of different options and solemnly pressing buttons like a performing monkey until the message finally says "For all other queries, press six". To add insult to injury, the greeting message will nearly always tell me of some new product or service I don't want. If I were to demand compensation, in a collective action against them all, for my time and telephone charges, I would be a rich woman; but if I could sue for compensation for sheer frustration, I would be a multimillionaire. What next? Perhaps the Church should try it. "Press one to make a donation, press two to say a prayer, press three to have a sin forgiven . . ." That would soon solve the problem of the shortage of priests. I predict that in ten years' time, some eager young businessman of the year will have a bright idea – let humans answer the telephones and speak to the customers. It will be quite an innovation and the older generation will be able to bore the younger with tales of "they used to do it when I was young".

Roger Scruton My response to your question is simple. I don't want to sue anyone. I think the litigation habit and the compensation culture that it feeds are social cancers. If not brought under control, they will undermine trust, destroy our capacity for risk-taking and, by rewarding the wimps, the sponges and the sneaks, fill the hearts of honest and responsible people with anger.

▶ uncertainties, we must seek the guidance of the law. We seem reluctant to accept that "bad luck" happens or to take responsibility for our own actions, and seek to legislate all risk from our lives as if that were possible or desirable.

A man dives into Folkestone harbour for a midnight swim, hits an underwater obstruction and is rendered tetraplegic. The court finds the harbour owner partly to blame for not having warning signs against swimming. A five-year-old boy is left unsupervised by his mother for a short time at a school sports day. He plays on some swings, falls and breaks his arm. He is awarded more than £4,000 against the school on the basis that the swings should have been secured. That these cases were successfully appealed is much less significant than that they were brought at all.

In the case concerning the conjoined twins from Malta, do you think it was appropriate for a health authority to ask a court to decide whether or not parents should be allowed to let nature take its course with their newborn babies? More recently, was it appropriate for the government to have asked a judge, Lord Hutton, to provide an answer to what was in fact a very complicated political question?

Yours, John

Dear John,

The Datamonitor report you quote covers both accident and disease cases. Disease claim numbers are very variable year on year – indeed, there were actually 4 per cent fewer claims in 2003 than in 2001. Accident claims tend to arise from single incidents and are usually notified quickly, making them a more reliable source of data in respect of trends. That is why I am quite confident that the numbers of accident claims brought are stable and have been so for several years.

A few years ago, Datamonitor did predict an exponential growth in claims that would reflect the societal changes you allege. However, when the increases in claim numbers did not materialise, they looked at the phenomenon more closely. They now conclude that "the fears of the UK turning to excessive litigiousness seem to hold little substance", and that "while Americans seem eager to shift responsibility for their own actions on to someone else, the British often find tales of such lawsuits distasteful".

The NHS does not often negligently cause permanent and catastrophic brain damage to babies, but, when it does, the cost is huge and growing. And in this area, there probably has been a loss of deference – the unquestioning belief 30 years ago when the doctor said "It's just one of those things" has been replaced with more rigorous scrutiny to see if it could have been prevented with the use of reasonable care. For me, this is a healthy consumerist challenge to professional privilege and obfuscation. And even the chief medical officer has recently recommended that doctors should have a duty of candour to patients when things have gone wrong. It might surprise people that there is no such duty already.

All of us take risks all of the time, and we should continue to do so. But we are entitled to expect that those whom we choose or are required to rely upon do take reasonable care for our safety, and that, if they do not, there is a legal remedy when our lives are ruined by their failures. In almost all cases, that cost of assuming the risk of legal liability can be and is spread widely through insurance. Evidently, a fault-based system will lead to challenges by both sides to extend or limit liability. The recent failed attempts by insurers to deprive claimants of compensation from admittedly negligent employers because it is scientifically impossible to prove which particular asbestos fibre caused their terminal illness is the other side of the coin to the cases you quote.

If we were able to agree whether all cases were going to succeed or not, and how much compensation should be paid, there would be no need for judges and courts. But life just isn't like that. Judges are acutely conscious that, in the hardest cases, social and political questions are inextricably linked with the law. To ensure the justice system deals with them appropriately, there needs to be proper and democratically accountable systems of appointment, training and appraisal of judges. But perhaps that's another debate!

Yours, David

Dear David,

I suspect we'd be in much closer agreement about the appointment of judges! Apart from noting the effect of including disease claims, you do not challenge the specific figures showing various rises in personal injury claims, or comment on the soaring costs in the NHS. So it is rather difficult to see the basis for your confidence that the number of accident claims has been "stable". I quite agree that there has been "a loss of deference" and that today we have "more rigorous scrutiny" – exactly, now wouldn't you expect that to have led to a rise in claims?

Most people accept that something new has been going on in the way people approach the law today. I think the claiming culture is best understood as part of that. You seem reluctant to broach the wider issues, but I do not think we will properly understand what is happening with claims simply in terms of tort law, insurance and costs distribution. We seem readier to sue or threaten to sue, to demand legal protections or proscriptions, and to ask the law to deliver moral and political judgements. This appears to reveal a society that is not at ease with itself, one in which people are mistrustful of one another, apprehensive about the risks and stresses of life, lacking in confidence in their own abilities and judgement.

As I said at the outset, this is not a matter of blaming either lawyers or claimants. It is about noticing that people use the law perhaps because they feel less in touch with each other, without the informal channels they may once have had for communicating and negotiating their way through life. Sometimes, too, we seem to be using the law when perhaps we should assume responsibility ourselves for addressing and resolving the issues that so concern us. The ready recourse to law seems at other times to be a matter of simply connecting in some way with society, with being listened to and noticed.

Only connect? A lawyer will put you in touch. I am not

suggesting that lawyers should abandon their clients, or individuals cease to defend themselves from wrongs. Nevertheless, we all have a responsibility to see the bigger picture.

Those claims arising out of the broken arm or the midnight swim are hardly examples of what you call "healthy consumerism". Furthermore, the consequences of taking the law to ever more risks can cause ever more problems. Take the record award of £7m against the NHS in 2002. This was for brain damage caused by the failure of the "crash" team to get to a woman in cardiac arrest while giving birth. The team did not know the code to the combination security lock that had been introduced on the birth suite door as a protection against baby-snatching incidents. A safety measure to reduce one sort of risk (of a rare event) had created a new one.

Yours, John

Dear John,

The statistics of the Compensation Recovery Unit show that overall numbers of accident claims have been constant for three years. Last year, work accident claims fell (perhaps because litigation is improving safety) and public liability claims rose, as you say. This might be because public authorities are not properly maintaining the public infrastructure, so making it more unsafe; but it may also have something to do with the activities of non-lawyer "accident management companies" such as Claims Direct and the Accident Group. Both have gone bust, so this is unlikely to be a long-term phenomenon. It is interesting to note the failure of these companies predicated on the alleged "compensation culture". Could it be that they misread the market, too?

I do agree that, over the long term, claims against the NHS have risen (although they have fallen by 20 per cent over the past few years). Loss of deference to doctors and consumerism seems as good an answer as any to this change in the context of the NHS – I don't think this applies to work, road or public liability accidents.

Why do people who suffer personal injuries sue? Because they were fit, healthy and able to work and look after themselves until someone acted without due care and thought for the consequences. What are they supposed to do – grin and bear it? The middle classes can afford to take out private insurance against risk; the poor are thrown back on the state. And "polluter pays" is government policy. Following a successful personal injury claim, state benefits are recouped from the wrongdoer's insurers, as are the NHS costs. As David Lammy said while health minister: "Wrongdoers should meet the costs of their actions in full. Extending the recovery of NHS costs to all personal injury claims will remove the burden from general taxpayers of subsidising part of the costs to a wrongdoer."

Increasing awareness that one should take care for the safety of others is good. If that leads to a fear of taking any risk at all, that is not good, but I believe it is the unfounded fear of a non-existent tide of litigation (the "compensation culture") that might lead to this reaction, not the litigation itself.

Yours, David

Who would you sue?

Simon Jenkins There is no one I want to sue. Murder, yes, but sue, never. Should the urge ever come over me, I hope family and friends will tie me in a straitjacket until it wears off. Litigation destroys all who live by it. Nor will the syndrome ever be cured until judges throw out vexatious cases and render litigants bankrupt. Indeed, perhaps the only appropriate application of the doctrine of tort should be by society in general against the legal profession in particular, for wasting public time, money and emotional energy.

Edwina Currie I'd like to sue the person who thought up the term "politically correct". Or, at least, all those who hide behind the idea of not giving offence, when what happens instead is a stifling of free speech and debate, the like of which we haven't seen since Vlad the Impaler decided to spike all those who disagreed with him. So we can't suggest that women who wear low-cut sweaters and micro-skirts in the office are giving out a single message, loud and clear, whether they intend to or not. We can't say that the reason boys do less well at school than girls, and black boys worst of all, is a stupidity culture that glorifies sex, footballers and gold chains over educational achievement. The politically correct explanation for all ills is poverty, caused by the state; we ignore an individual's personal responsibility to better himself whatever the circumstances. So we turn the world on its head, and then wonder why it doesn't make sense.

Bryan Appleyard The person I would most like to sue is me. I have serious and, I believe, remediable grievances against myself. I am subject, against my best interests, to mood swings that damage my earning capacity and defame me in the most appalling ways. I am grossly negligent in that I drive fast enough to endanger my life and frequently cross roads without the slightest idea that I am doing so. I am constantly endangering my health by disbelieving doctors, failing to have check-ups and blood tests, and, perversely, by exercising with such random fury that seizures or broken limbs are a perpetual risk. My blood pressure is constantly pushed to life-threatening levels by my conviction that Alastair Campbell is the Antichrist and by the ludicrous prices charged by toxic, so-called organic food in Notting Hill. And, finally, I keep stealing stuff from myself.

invaro

Reliable evidence?

Moves are afoot to firm up checks on doctors who give expert evidence in court, reports **Jon McLeod**

The recent decision by the Attorney General Lord Goldsmith QC to order a review of a number of child killings has thrown into sharp relief the issue of the quality and reliability of expert evidence given in courts by doctors. Lord Goldsmith (above right) was prompted by the overturning of the murder conviction of mother Angela Cannings; the episode saw the expert evidence of Professor Sir Roy Meadow on the syndrome Munchausen's by proxy called into question.

Clearly the role of such evidence can be central to the issues at stake in many criminal trials. But medical experts also play an important role in personal injury claims in the civil courts, and their role here, too, is coming under scrutiny.

The General Medical Council (GMC), which regulates doctors, has agreed changes, due to take effect from January 2005, to the process of "revalidating" doctors, effectively the MOT that gives them the continued licence to practise. The information that doctors will have to supply to secure revalidation will mostly accrue in the course of appraisals conducted in the "managed environment" of the NHS or within private practice, for example, in Bupa hospitals. Appraisals are the product of peer review, including patient feedback, and will also reflect on professional development activities undertaken by the doctor in question.

> Medical expert work is a fiercely competitive market, making peer review difficult

However, these measures will also apply to medical experts who make their living largely from giving evidence in court or work in producing medico-legal reports for personal injury claims. If not done in a managed environment, it will require revalidation via a "portfolio" assessment of performance.

The difficulty here is twofold: first, medical expert work is a fiercely competitive market, making peer review commercially difficult; and second, there is little involvement of the Royal Colleges or other professional oversight as to how such evidence is prepared and presented.

"All personal injury cases need a medical report. Yet there is no professional oversight, and no accepted standards have been set as to how this should be done: it is an unregulated market," according to Dr Sohail Bhatti, president of the Registration Council of Medical Experts (RCME) and also a director of legal services company Invaro. "There is a huge conflict of interest inherent here, which the Royal Colleges have been unable to address."

The British Orthopaedic Association and the British Medical Association (BMA) have themselves sought to provide templates for medical reports, but the fact remains that this is work done in a private market. The BMA even went so far as to suggest appropriate remuneration rates for "expert" work, that is, until the competition authorities became interested.

The problem is aggravated by the fact that there may be different types of specialist potentially offering expert evidence for the same injury: for whiplash you might get a GP, an accident and emergency consultant or an orthopaedic surgeon. Each looks to a different professional organisation to set standards.

The RCME was set up as a learned body to help set standards specifically for medical experts, and is keen to support the GMC's "portfolio revalidation" route. Impartial review of performance by experts will be achievable through anonymised reports and surveys of patients' and clients' views. "We are putting together a package to make it more straightforward for medical experts to secure revalidation, and thereby be licensed to continue with this aspect of their work," says Dr Bhatti. "The RCME is a medically led body, launched in late 2002. We are restructuring and will operate through an elected national council, and a series of regional teams and local support groups," he explains.

The RCME has a critical mass of 400 affiliated members, but is looking to build its membership base. It has the unique selling point of being a specialist medical experts agency, unlike some of its peer expert bodies, such as the Expert Witness Institute, the Academy of Experts and the Society of Expert Witnesses. "These bodies seem to focus on the needs of the solicitors who use their members' services, rather than on the requirements of the medics to maintain a validated and quality-assured practice," says one observer. "The fact is that doctors do not like to have their affairs run by non-medics, and it is essential to recognise that."

Dr Bhatti adds: "Invaro has a strong interest in seeing the work of the RCME develop. It stands to benefit from high standards of evidence provided by medical experts when it comes to assess the merits of a claim or the quality of their report. The RCME will provide an important pool of skilled individuals, practising to a high standard, from which it can draw and which is also externally validated. As a professional group, it can also recommend accepted prognoses for recovery, backed by critically appraised research, which the experts agree on, reducing variability and assisting judges in putting individual expert opinions within context."

Court on camera

To broadcast our legal system at work is not in the best interests of justice, writes **BOB MARSHALL-ANDREWS**

At first sight, the issue of cameras in court is an unimportant, almost agreeable diversion from the major problems of the criminal justice system and civil liberties. This is particularly so when those fundamental liberties are perpetually eroded by an authoritarian government. Short of bloody battlefields and sex, there is probably more fictional coverage of court proceedings than any other human activity. To broadcast the real thing appears to be no more than a short step in public enlightenment. Furthermore, to oppose it (which I do fundamentally, together with the vast majority of practising barristers) appears to be both illiberal and reactionary. As worryingly, I find that I am not in substantial disagreement with the view expressed by the former Lord Chancellor, Lord Irvine of Lairg, in 2001: "There is a great risk that the behaviour and judgement of lawyers, witnesses and the jury might be affected by the knowledge that they were participating in a live media event." He should have added "judges", as it is difficult to see why they would be immune from the process.

Fortunately there are no current proposals to televise (either on a live or edited basis) criminal or civil trials involving juries and witnesses in England and Wales. The next likely stage is to televise on a pilot basis an appeal hearing of a criminal case to see if such a situation lends itself to being broadcast live at some time in the future. The Scottish courts have been in advance of the English system on this issue. An experiment was started there with the filming of criminal trials in 1992, but it was discontinued. However, TV cameras were allowed to film live the Lockerbie appeal hearing in 2002, and this exercise was generally regarded as a success.

It is an admirable objective that the public should become more familiar with our criminal justice system, but that is unlikely to be the motivation of those broadcasters seeking to televise trials. They are principally interested in viewing figures. However, the British public is unlikely to be enthralled by senior appeal judges pronouncing at great length on the complex legal arguments for their decisions. Lord Hutton's recent television appearance summarising his report would be light relief in comparison.

What broadcasters really want is to televise live (and then edit) the latest high-profile criminal trial, be it Huntley, Shipman or the M25 rapist. We all believe ourselves to be fascinated by sex and violence, and yet, in court, murder, mayhem and rape are generally sad, tragic and dull. Jurors soon discover that the intricacies of commercial fraud are infinitely more fascinating. Advancement driven by greed tells us more about the human condition than violence driven by drink, lust or, most frequently, mental instabilities and illness.

> However unobtrusive the cameras, people would be aware they were being watched

Yet none of this will have the slightest effect on would-be broadcasters wedded to a perceived demand for prurience. In order to generate audiences, they will require the "really juicy bits" to complement tabloid coverage – complete with close-up shots of the defendant who has been vilified in the media for months before the trial has even started. They want the people to be able to see this personification of evil and they want him/her to suffer as part of a collective catharsis. They want trial by the media because it reinforces the myth that only the media truly represent the real feelings and interests of the British people.

Despite any attempt to make the camera as unobtrusive and unsensational as possible (as happens in the Commons), all those participating in a trial would nevertheless be aware that they were being watched – be they the judge, lawyers, defendant, jury, witnesses, court officials or the people in the public gallery. While it is unlikely that ushers will suddenly burst into amateur arias, behaviour will undoubtedly change. We hear much talk of "reality" television, but as soon as cameras intrude, a different "reality" is created. Commenting on the Scottish experiment with criminal trials, one lawyer said: "The main problem is that television distorts and trivialises, and puts pressure on witnesses and changes all of the dynamics of the court. The whole thing becomes part of a media circus." The televised trial of O J Simpson may have been entertaining, but it did not operate in the best interests of justice. Michael Jackson has already reduced his own trial to farce.

But don't the people have a right to see what's going on? Yes, but only if they attend upon the proceedings in person or via the written press, which is subject to the constraints of the medium in addition to the rules of the court. If we truly wish to remove the secrecy that supposedly surrounds our justice system and make it more accessible, there are more effective ways of doing so.

Citizenship education has a role, but most vital is the resolute defence of the most important audience of all – namely the jury. Ironically, it is the adversarial system of which the jury is the fundamental part that renders it attractive to the silver screen. The British public, however, do not need to view their justice through the crystal ball. They are part of the book.

Bob Marshall-Andrews QC is Labour MP for Medway

ns interview the lord chief justice

His turf wars with the government must leave him battle-weary, but he will struggle on to ensure the judiciary's independence

by MARY RIDDELL

The Lord Chief Justice had planned to retire soon after his 70th birthday last May. Instead, events dictated that, whatever thorny future awaited Harry Woolf, it would not encompass rose-pruning. His mission remains to stay on until he can leave the judiciary "in a tidy situation". This must be good news, I suggest politely. "Except, possibly, for me," he says, but he does not look especially downhearted.

A fortnight has passed since Lord Falconer, the Secretary of State for Constitutional Affairs, and Lord Woolf arrived at a concordat to protect judges' independence. The agreement followed months of tension in the wake of the government's announcement of a radical constitutional package, including abolishing the office of Lord Chancellor. Woolf was told "minutes, rather than days" before the release of a plan so alarming that his deputy, Lord Justice Judge, raised the spectre of Nazi Germany in his warning of political interference.

That threat, Woolf believes, has been staved off, at least for now. The independence of the judiciary will be enshrined, for the first time, in statute. The Lord Chief Justice is to become the constitutionally recognised leader of the judiciary and take the new title of president of the courts of England and Wales. Among other measures, the make-up of a judicial appointments commission has been settled. Woolf, discussing the package for the first time, feels "comfortable" with the result, if not the process.

> Does Woolf feel sorry for Hutton in light of the criticism of his report? "I have real concern for him"

"Lord Falconer and I never descended to blows, but he would agree, and I would not disguise, the fact that we had some very heated discussions." The result was promptly condemned by the Conservative Party, which decried the pact as an exercise in cronyism and "a wretched moment in history". Far from ordaining a balmy passage through the Lords for Blair's constitutional reform bill, Woolf says he will oppose its key measure.

"Unless and until there's new money to pay for a supreme court, I will be against it. I cannot believe that a worthwhile supreme court could be established for under £50m." Besides vital refurbishments for existing flagship courts, "there are courts up and down the country which don't give the proper message of the importance of justice. I am saying: priorities, please." While Woolf's opposition is financial, he warns, ominously, that ideologues could defeat the government. "It may be that the part of the bill dealing with the supreme court may not be established. There are at least as many [law lords] against the idea . . . as there are in favour."

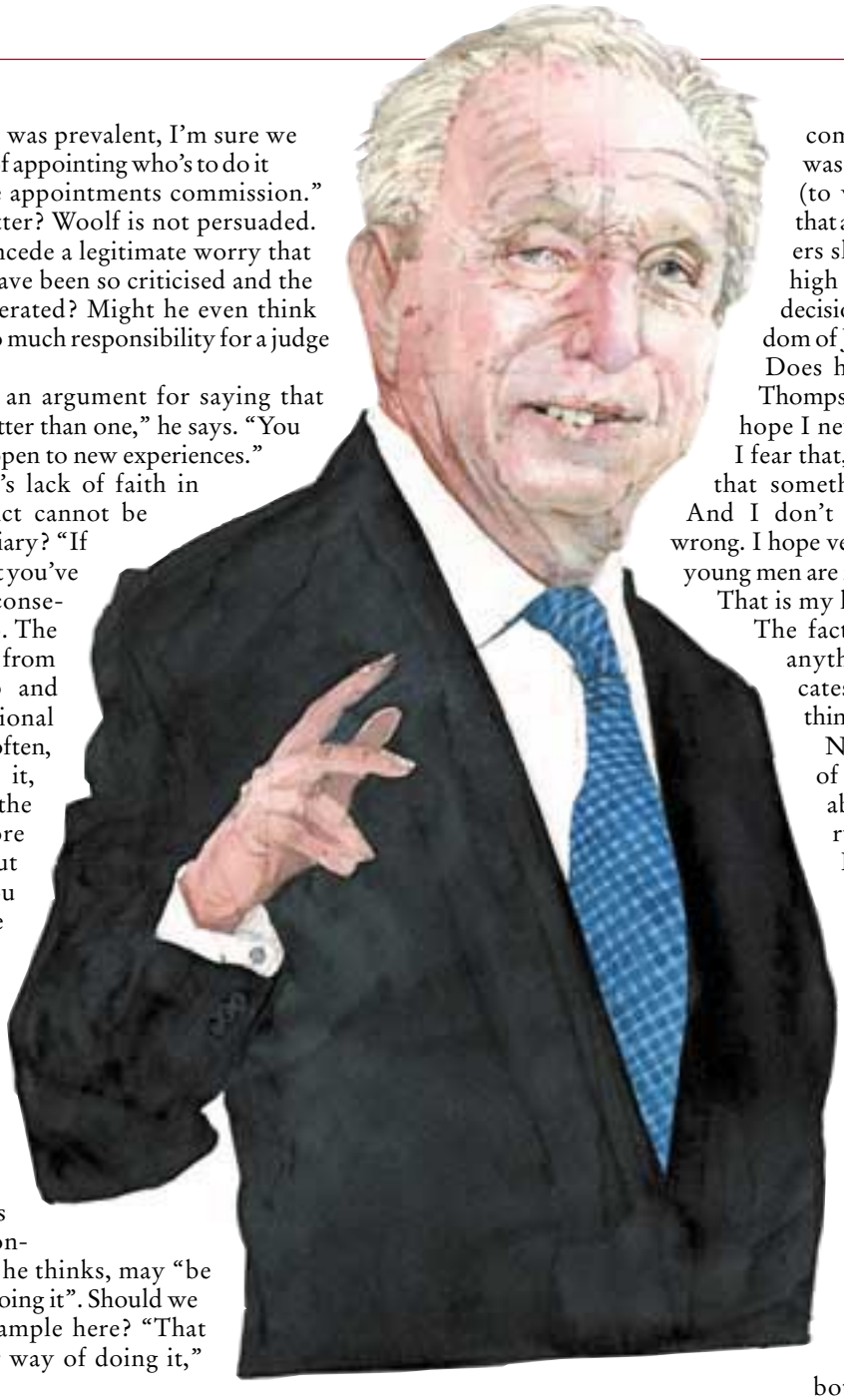
On independence, does he agree the need to dispense with a multitasking Lord Chancellor who sits in cabinet? Woolf is torn. There were "great virtues" in an office he never opposed "on doctrinaire grounds of separation of powers. My approach was: was it working? If so, there was no need to fix it. But I have to say . . . we were coming to the time when we would have had to face up to the problem. . . I think perhaps it was going to be more and more difficult for an individual to be both Lord Chancellor and Secretary of State."

The anomaly, one assumes, was exacerbated by the flamboyant ways of the previous incumbent, Lord Irvine. Woolf disagrees. "He thought it his duty to fight strongly within the cabinet to protect the judiciary. I think that, when history comes to be written, that may have been one of his problems in continuing as Lord Chancellor." Presumably Woolf is suggesting a fight to the death with the Home Secretary? If so, he could not possibly say.

But Woolf must be battle-weary, too. His tenure has also been marked by turf wars with the Home Office, as the rule of law gets batted between the Royal Courts of Justice and Queen Anne's Gate. Woolf, though combative, has trodden carefully, aware that judges stray into politics at their peril. We meet a few days after Lord Hutton's report demonstrated how fissile the combination can be. What lessons does Woolf see?

"Somebody like Lord Hutton, at the end of his judicial career, takes on that job because he's requested to do so by the Prime Minister, in the public interest. I can assure you that he will have done his best. I wish that some of those who are quick to criticise would bear in mind the contribution he was making by conducting the inquiry, and at great speed."

But is it fair, when the integrity of the Prime Minister is at stake, that he should have been able to select his referee?



MICHAEL McGUINNESS

"Well, if that view was prevalent, I'm sure we could give the job of appointing who's to do it to a body like the appointments commission." Would that be better? Woolf is not persuaded. Does he, then, concede a legitimate worry that the BBC should have been so criticised and the government exonerated? Might he even think such an inquiry too much responsibility for a judge sitting alone?

"There's always an argument for saying that three minds are better than one," he says. "You should always be open to new experiences." Surely the public's lack of faith in the Hutton verdict cannot be good for the judiciary? "If you're right in what you've said about those consequences, that is so. The judiciary are taken from their normal job and given these additional burdens because, often, who else can do it, and who would the public have more confidence in? But I do agree with you that it can, as the Hutton inquiry undoubtedly shows, involve the judge being subject to controversy. That is very undesirable. In America, they are not keen on judges doing this sort of thing." Non-judicial inquiries, he thinks, may "be the better way of doing it". Should we follow the US example here? "That may be the better way of doing it," he repeats.

Does Woolf feel sorry for Hutton? He hesitates, as if debating whether he should say anything and, if so, whether pity is too slight a response to Hutton's state of mind. His answer, when it finally comes, is carefully formulated. "I have real concern for him," he says. Have the two men spoken? Again, he appears to weigh his response before saying there has been no conversation. But it sounds as if Woolf's worry is based on the human toll exacted by criticism of Hutton's report. "Quite so."

If Woolf himself is ever afflicted by the loneliness and pressure of office, he wears it lightly. A populist and an easy communicator, his nadir was the draconian guidance (to which he still adheres) that all mobile-phone snatchers should be jailed, and his high point the controversial decision that ensured the freedom of James Bulger's killers.

Does he ever hear of Robert Thompson and Jon Venables? "I hope I never hear of them again. I fear that, if I did, it would mean that something had gone wrong. And I don't want anything to go wrong. I hope very much that those two young men are now leading useful lives. That is my hope, and time will tell. The fact that we haven't seen anything in the media indicates that, at the moment, things are going well."

Not long after the release of Thompson and Venables, a House of Lords ruling removed the Home Secretary's last, residual rights to fix tariffs for adult murderers. Almost immediately, the Home Secretary responded with "life means life" sentences for the most heinous killers and heavier terms for others. Woolf expects that the resulting law may be contested. "I would not be surprised if there was a challenge," he says.

Does Woolf agree with Sir David Ramsbotham, the former chief inspector of prisons, who suggested that the hopelessness engendered by a lifelong tariff might have been a factor in Harold Shipman's suicide?

"I won't comment on individual cases, but I think Sir David can legitimately point to disadvantages in life meaning life. I hasten to say that I will observe the law, but I think there are real disadvantages in whole-life sentences. There should always be a possibility of review. Sometimes somebody serving life commits an act of great bravery. I also think, on purely humanitarian grounds, we should look at the very elderly. Continuing to lock them up until ▶

▶ their last days is something that, if I was in parliament, I would not support. What we are talking about is a degree of mercy which enables someone responsible to say: enough is enough."

The sentencing guidelines council, chaired by Woolf, begins its work next month. Given that David Blunkett has already laid down his benchmarks, one might think the new body rather hamstrung. Still, Woolf is hopeful. Above all, the author of the Strangeways report wants more non-custodial sentences and an end to prison overcrowding.

Does he think Britain needs a written constitution? The answer is: not quite yet. "For the first time, the protection of the justice system will be enshrined in statute. If anyone is tinkering with it, they will have to introduce amending legislation. I would like to think that will be sufficient. However, if we can no longer rely on parliament preventing legislation inimical to the rule of law being passed, we would have to think again. It would be wrong to say I don't have worries. I am concerned that the voices who are speaking up for the rule of law are being drowned out by other voices."

One example is the move, enshrined in the asylum bill, to restrict rights to appeal. Would he also cite the Home Secretary's scheme for pre-emptive charges, secret trials and a lower burden of proof for terror suspects? Media reports of Blunkett's announcement have only just begun when we meet, and Woolf says he needs to see exactly what was said. "But obviously if [the reports] were right, it would be a matter of real concern . . . These are the sort of matters that might indicate the need for greater protection of our system." In other words, if the government flouts the rule of law, the Lord Chief Justice will be calling for a written constitution.

> "I've always been an enthusiast for opening up access to justice; the Clementi inquiry goes wider"

As Master of the Rolls, Woolf saw a seismic shake-up of civil justice. I ask what he thinks of the consumer choice revolution and David Clementi's forthcoming review of the regulation of the legal services market. "I've always been an enthusiast for opening up access to justice; the Clementi inquiry goes wider. All I would say is that, just as the independent judiciary is very important, so it is important that we have an independent legal profession. That is also a protection of the public."

On the future of the judiciary, Woolf has won the battle of independence, but not, perhaps, the war, nor yet the "tidy" outcome he hopes to bequeath to his successor. Retirement day for the Lord Chief Justice looks far from imminent.

Proceed with caution

JANET PARASKEVA, chief executive of the Law Society, delivers its verdict on the government's approach to transforming the legal system

Modernisation of the legal system is high on the government's agenda. One objective is to see legal services popularised and made easily and economically available to everyone. The government also wants to modernise the appointment system of judges to try to ensure a more diverse judiciary selected openly and separated formally from the executive and the legislature. And it is beginning to talk again about the need to ensure access to justice for all, something Clement Attlee's government heralded through the establishment of the legal aid system more than 50 years ago. If all three are achieved, we will really see a radical transformation of the legal system in this country.

What should the public expect from legal services in a civilised, democratic society? First, legal services need to be easily accessible, with information about rights and how to get help readily available. Second, there should be a range of choice about the legal services on offer, and consumers should be able to pick and choose what is most suitable for their needs. Third, legal services should be of a good quality and at an affordable price, and consumers should feel confident that if something goes wrong in any transaction, it will be put right quickly and without fuss. Fourth, but perhaps most importantly, people should be able to trust their lawyer to be honest, ethical and to put the consumer's interests first.

Most solicitors strive to achieve these aims. The Law Society helps them do that, and clamps down on those who fail. And so the profession has nothing to fear from the government's review of how legal services should be regulated in the future. We have a strong foundation, operating in the public interest, on which any new arrangement can be based.

The Law Society has been regulating solicitors since 1845, when a group of attorneys, as they were then known, decided that they needed to raise the standards of practice of solicitors and distinguish themselves from the less scrupulous operators. Since then, we've come a long way. The society now employs a staff of 1,200 and has an annual turnover of £90m, spending most of it on regulating solicitors at no cost to the taxpayer. The profession pays for it. But public expectation has changed significantly in the past decade or so, and consumers now demand a high level of service both from their

solicitor and from those who exercise regulatory functions. They rightly demand excellence rather than excuses.

The Law Society is committed to extending the range of ways in which solicitors can provide their services – and hence the way the public can access them – to the maximum degree possible, so long as proper consumer protection can be maintained. Going into a solicitor's practice on the high street in ten years' time could look very different, particularly if multi-disciplinary partnerships are established. This could mean that solicitors, estate agents and financial advisers would set up business to provide a seamless service to people buying houses. Legal services could be offered, perhaps alongside banking services, at local supermarkets. Many people do not approach a solicitor because they are put off by the image of the premises or their perception of how their problems might be dealt with. Some have found their contact with the legal profession daunting, complex and even alien. They are put off by an image that is, thankfully, dying out. Solicitors are learning to market themselves in a way that customers can understand and deal with. Video-booth consulting and telephone helplines are already on the way.

But whatever modernising strategies are used and however the approach to the public is changed, it is vital that the services on offer are effectively regulated to safeguard the public interest. Any new regulatory system must reaffirm the solicitor's primary duty to put the interests of the client, and the duty to the court, before any other consideration. David Clementi, charged by the government with reviewing the regulatory framework of legal services, will need to look critically at barriers to entry for solicitors. How can we drive down the cost of qualifying? He will also need to look at gaps in regulation and how to fill those gaps.

One important question will be whether self-regulation is past its sell-by date. If the government's target is to develop a legal market where everyone can get access to legal services at an affordable cost, the question must be how the profession can embrace the views of consumers best in order to deliver and regulate legal services to meet not just government desires but also public expectations.

The reality of the public's greater demand for accountability has also been recognised in the government's proposed constitutional reforms. The government has decided that it is no longer appropriate to have a cabinet member involved in selecting members of the senior judiciary, sitting as a judge and acting as a speaker of the House of Lords. It is not enough for the judiciary to be independent; it must be seen to be independent. And any new body for appointing judges should not look like a lawyers' cabal – the new judicial appointments commission should contain a majority of non-lawyers. There are those who say that there is nothing wrong with the current system: if it's not broken, why fix it? And it is certainly not the case that those who dominate the senior judiciary do a bad job – far from it. It is simply that there are many talented and able lawyers out there who are unfairly denied opportunities for appointment because they do not fit the mould.

But let me return to the government's commitment to reform and to their acknowledgement that there are customers' needs which the legal system is simply not yet meeting. There are people who cannot afford to seek legal advice now, and however we develop more accessible and cheaper options, there will still be people who cannot fill their trolley with the basic necessities to feed their families adequately, let alone think about paying for legal advice. If the government wants to complete its transformation of legal services, then something very radical needs to happen to the provision of legal aid.

> We are committed to extending the range of ways in which solicitors can provide their services

The business case for the Treasury is clear. Legal advice at the right time will cut spending on social support down the line. What happens to a family who have not been able to get legal advice to prevent them from being unfairly evicted? They have to be found bed-and-breakfast accommodation paid for by the state. Temporary accommodation and frequent moves often lead to truancy problems for children, who will then need greater care and support – again, provided by the state. This vast expenditure might have been avoided with a few hours of legal help. The sad reality is that, in the lifetime of this government, the availability of civil legal aid has been shrinking. There are now areas of the country where people in need simply cannot get help with, say, a housing problem. No one in government argues with the importance of improving the education system. No one argues with the principle of a demand-led health service. How can anyone argue with the principle that everyone in society is entitled to exercise their legal rights on crucial matters such as ensuring they have a roof over their head?

There is much to applaud in the government's approach to transforming the legal system. Significant progress has been made on two-thirds of that agenda, but what is missing is a strategy to fill the gaps where provision doesn't currently exist. Adequate resourcing for the delivery of legal aid must be included in their modernising strategy.

Outlaws: they gave up on a legal career

Julio Iglesias • Gabriel Garcia Marquez • Barry Humphries
Michael Howard • Charles Dickens • Henri Matisse • Gandhi
Henry James • Bob Mortimer • Petrarch • Saddam Hussein
Goethe • Gustave Flaubert • Oliver Cromwell • Franz Kafka
Jules Verne • Tchaikovsky • Voltaire • Paul Cézanne

invaro

Assuring access to justice post-legal aid

Terry Lindon, Chairman of legal services company Invaro, argues that radical new thinking is needed to ensure people get justice following the abolition of legal aid

The recent history of personal injury litigation in the wake of the abolition of legal aid for PI cases has been one of trial and error. The introduction of a "standards culture" in legal services funded by the Legal Aid Board in the 1990s was a force for positive changes in the practice management of many lawyer firms.

The pursuit of a legal aid franchise was a stimulus for practices wanting legal aid work to raise their games in terms of management standards. Invaro began its life as a company that provided practice management and IT consultancy to such firms, and has assisted some legal practices attain the franchise and its successor and related standards.

But when legal aid was abolished for PI cases by the Access to Justice Act 1999, the requirement for such quality standards as a condition of doing the work was removed at a stroke.

In an uncertain market, Conditional Fee Agreements (CFAs) were introduced, and non-lawyer claims handlers entered the fray in a free-for-all for clients, with aggressive upfront marketing and little in the way of management or legal controls.

Some operated fundamentally unstable business structures:

- insurers provided after-the-event insurance cover to fund cases in the event that they were lost, but ceded the decision-making about which cases were signed up to third-party claims handlers;
- claims handlers were in turn motivated by the business stimulus of signing up as many cases as possible, without regard to the prospects of success, as they could make their money in three ways – from selling insurance policies, from non-refundable signing-on fees charged to the lay clients, and from referral fees charged to solicitors for cases obtained from high street canvassing.

It was only a matter of time before the business model collapsed under the weight of the hopeless cases signed on with no prospect of success but still requiring funding. The true depth of the risk to which these companies had exposed themselves could not be known until the cases were settled – or, worse still, simply collapsed for want of quality control.

In addition, the law firms on the claims handlers' panels were not always quality-assured. The result has been the spectacular business failure of companies such as Claims Direct and the Accident Group.

There is now a desperate need to build confidence in the personal injury market, so that lawyers can be confident that they are being properly and responsibly supported, and also

Invaro case control methodology

Stage 1 – a case is referred to Invaro by one of its panel solicitors: basic details are established, including prima facie checks on liability and limitation dates

Stage 2 – instructions are issued to an Invaro agent, usually a retired police officer, who will visit the client in their home to verify facts and take detailed witness statements

Stage 3 – the information is passed to Invaro's detailed vetting department, for a review of liability and quantum: details are further checked by telephone and any missing documentation, such as medical reports, are obtained

Stage 4 – the case file is referred to counsel for an opinion of the case's prospects of success

Stage 5 – the file is then referred back to the panel solicitor who is then in a full position to make an effective decision on whether to progress the case on its merits

Stage 6 – if yes, the solicitor will clarify any final matters with the client before initiating the claim

that the public receives a credible and affordable service in relation to its claims.

Invaro is committed to building that confidence by:

- subjecting cases referred to it by panel solicitors to a rigorous quality control and case preparation process, freeing lawyers to do the lawyering;
- carrying out practice management spot-checks on its panel firms to ensure that robust management procedures are being followed in relation to all the cases being dealt with.

Crucially, Invaro both makes the decisions about which cases to fund through insurance and provides the cover. There is no separation of decisions about risk from liability for that risk. Invaro is in turn supported by substantial institutional investors, including Japanese pension funds and Japanese banking institutions.

Invaro charges no referral fees to its panel solicitors and makes its money solely from selling after-the-event insurance products. Its procedures make high street firms more financially secure by grooming their practices and the cases they handle, ensuring access to justice at local level for the widest public.

Invaro strongly believes that its business model is of relevance both to the Treasury / Department for Constitutional Affairs' review of supply and demand in the provision of public-funded legal services, and to the Clementi review of legal services regulation.

It shows how, in a developing and quality-assured market, law firms of good quality can be helped to deliver a sound and reliable service to the public.

Launched in 2002 with just 60 cases on its books, Invaro is based in Liverpool, and currently has 200 staff and some 208 firms on its panel. It is now handling 800 to 1,000 cases a day, and has dealt with 65,000 since its inception. Cases are quality-controlled and 45 per cent are rejected as being unlikely to succeed and are not taken any further.

By handling large volumes of quality-assured cases, the opportunity is provided for Invaro to provide process support for solicitors handling difficult but deserving cases, or cases where there are novel or untested areas of law. As such, the procedure brings with it strong benefits to the public interest.

Invaro has played a lead role in aiding the formation of the industry bodies the Claims Standards Association and the Personal Injury Foundation. It regards them as there to raise the standards in the support services provided to lawyers and para-legals handling PI claims. It is also in dialogue with the Law Society on the wider issue of how closer co-operation with solicitors can serve to broaden access to justice.

Invaro firmly wants to see the emerging sector in which it operates regulated in the public interest by any future Legal Services Authority.

At the same time, it wants to see the development of a competitive market for the provision of the types of services it offers. This will enable the generation of new ideas and innovation in service delivery, and broaden the funding base for the sector, as investors become aware of the stability of the model.

Invaro is currently a business-to-business brand aimed at solicitors. However, the company has begun the roll-out of a new consumer brand – WishSprite. This will offer to consumers a bundle of insurance-based products, including after-the-event (and before-the-event) legal insurance.

Promotional campaigns will drive consumers in the direction of those solicitors who have achieved the standards of case management and quality control required under the Invaro franchise.

Should we follow our neighbours?

Shock and horror have greeted Tesco law proposals in almost every western European state. **JOEL BENNATHAN** and **ANDY UNGER** ask if they are right and we are wrong

In inviting David Clementi to review the ways in which solicitors work, the government has made pretty clear that it wants change. In particular, we can expect to see an end to the restrictions that have prevented "Tesco law" becoming a reality in the past. At the moment, the only way solicitors can work outside the supervision of a law firm is as "in-house" lawyers providing advice to their employers but no one else. Tesco law means what it says – allowing companies such as Tesco or Barclays, which are not subject to the self-regulation of the legal profession, to offer legal services to the public in competition with traditional law firms.

So is there any harm in allowing supermarkets and banks to sell legal services alongside groceries and loans? Will it contribute to the government's avowed aims of driving down legal costs and providing access to justice? The most frequently heard objections to such changes are that the new players will "cherry-pick" – creaming off the easy profits from quick, simple work while leaving solicitors' firms to deal with the less profitable cases – or that such a new structure would create an unallowable conflict of interests. Does either complaint stand up to sensible scrutiny?

On the face of it, it is hard to see why those with a simple legal need, such as making a will or selling their home, should pay an excessive amount in order to cross-subsidise the more complex legal needs of those on low or modest incomes, yet this is the implicit suggestion behind the cherry-picking argument. While there certainly are many lawyers driven by a social conscience, most are also in it to make a living. The robust answer is that if the difficult cases are not adequately funded, that is a problem for the government and the legal profession to thrash out between themselves.

> It is possible to view the protestations of European lawyers with a degree of cynicism

The conflict of interest argument is more substantial and raises a number of concerns. Could lawyers employed by a supermarket's "law shop" ensure they concentrate on their overriding professional duty to do their best for their clients, now customers, or would they be under constant pressure to have regard to what best profits their employer? For example, would a Tesco lawyer with performance targets to reach have the time to identify the wider needs of a client seeking advice about welfare benefits, or to ensure that a client fully understands the implications of the advice they have been given? Will Tesco law produce a flood of negligence claims relating to house purchases and wills like those related to the misselling of pensions and mortgages in the 1980s?

The latter objection would command near-unanimous support among lawyers in the rest of Europe. Shock and horror have greeted Tesco law proposals in almost every western European state, where lawyerly independence is seen almost as part of the constitutional settlement. An extreme example of this occurred around 20 years ago, when the European Court of Justice held that only independent lawyers – in other words, not those operating "in-house" – could assert legal privilege to protect the advice given to their clients. The court, reflecting the view very widely held among states then in the European Community, placed great reliance on the belief that only those truly independent could be trusted to abide by their duty to the courts, not just that owed to their paymaster. This particular bit of law may now be on the way to being overturned, but European legal opinion is clearly light years away from allowing a row of supermarket-employed lawyers to dole out advice to anyone who walks through the door.

Yet the same shock and horror do not seem to have infected the attitude of English legal commentators. The profession is divided more on the practicalities, with younger lawyers and some leaders of the Law Society siding with the changes and high street practitioners tending to be against. The legal services ombudsman, Zahida Manzoor, has joined the debate, describing the changes under discussion as a "good thing", though adding that any new scheme would need to be "underpinned by appropriate safeguards for the consumer". The Bar Council remains quiet on the matter.

So are the Europeans right and the British government wrong? Not necessarily. It is possible to view the protestations of Continental lawyers with a degree of cynicism; one could believe that the towering achievement of European lawyers has been to protect their own positions rather than to protect the poor or the constitution. Lawyers across the channel occupy a privileged and exclusive professional space that is the envy of many English lawyers, and yet legal provision for the poor and vulnerable rarely approaches the quality of the service – for all its flaws – in Britain. A stark illustration of this is the case of a junior Belgian *avocat* who took his country to the European Court of Human Rights, his complaint being that trainee lawyers were required to represent defendants, without payment, in 99 per cent of all criminal cases. His attempt to claim that this amounted to "forced or compulsory labour" in breach of Article 4 of the European Convention on

Human Rights failed, though the case had the effect of shaming Belgium into some limited improvements. Against that sort of legal background, perhaps the British government feels it can shrug off such protests as it receives from abroad.

While it may be conceded that the house buyer and the testator need not subsidise the legal aid scheme, the proposals for Tesco law cannot be judged in isolation from the need to develop a coherent and comprehensive policy to address all unmet legal need in British society. Assuming that the necessary safeguards can be put in place to guarantee acceptable standards of service and fairness, we still need to concern ourselves about the wider issues of providing access to justice for all.

At present, the needs of the poor and vulnerable are met through the legal aid system. No other European country spends nearly as much as we do on legal aid. A recent report by the Law Society show that England and Wales spend about €2.6bn per year, followed at a considerable distance by Germany (€358m), France (€235m) and Scotland (€207m). That means England and Wales spend €49 per capita, followed by Scotland with €40 per capita, compared with €6 per capita in Germany and €3.99 per capita in France.

Given that similar European societies spend so much less than us on legal aid, are we worrying unduly about the consequences of Tesco law for legal aid work and access to justice? The answer is that we do not know. However, the experience of the house-selling reforms of the 1980s is instructive. The deregulation of conveyancing may not have led to a huge increase in dishonest or negligent conveyancing, but the consequent reduction in conveyancing costs had a disastrous impact on the high street firms that cross-subsidised their legal aid work from conveyancing profits.

Thus Tesco law seems unlikely to be a panacea for unmet legal need. Indeed, it may even generate new legal need, as the offer of affordable and approachable lawyers could attract those who, say, had not intended to go to the trouble of making a will, or those who were going to put up with their fractured arm without worrying about who they could sue for it. The shortfall in current provision, however, tends to occur in areas with high concentrations of poverty and deprivation – exactly those where large supermarkets would be unlikely to invest in shiny new cutting-edge legal services.

The government has been understandably enthusiastic in assessing how to reduce legal costs, but there has been no serious attempt to assess the costs to society of failing to meet poor people's legal needs. Clementi is due to report at the end of this year, and his conclusions will almost certainly lead to new ways in which we can buy legal services from the same companies that sell us cornflakes. But while shopping and suing will help some, it will not help everyone. Tesco law may be part of the solution, but it is not even close to being the whole answer.

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Yet another unrealised dream

Equal access to justice, like equal access to healthcare, was a cornerstone of the welfare state. Labour has abandoned the principle. By **GEOFFREY BINDMAN**

When, last July, Lord Falconer launched the Clementi review of the regulatory framework for legal services, he stated its aim as "promoting competition and innovation and improving services for the customer". This language of the marketplace fits the paying customer, but what about those relying on legal aid?

Many people get inadequate legal services or none at all because they cannot pay for what they need. Yet legal help can be as vital as medical help. Family, home, employment, liberty and even life itself may depend on it. That means public funding for legal aid. But David Clementi, according to Falconer's office, will not be concerned with legal aid. His focus will be on the restrictions on lawyers which limit their freedom of action as businessmen and women and which should be imposed to protect the public. The Legal Services Commission, which administers legal aid, will be considered only as one customer among those who purchase legal services.

The legal profession developed as an adjunct to business and the interests of property owners, and the lifestyle and aspirations of lawyers resembled those of their clients. For the rest, the great majority who could not afford lawyers, there was very little legal help. Public funding was minimal and the only other sources right up to the Second World War were a few charitable organisations that employed lawyers to give free advice and those lawyers who were prepared to work for some of their time unpaid.

The current legal aid scheme has its origin in the programme of Attlee's 1945 government. Whereas the NHS essentially converted the medical profession into a public service, legal aid did not transform the legal profession, which carried on its property and commercial activities as before. The basis of the scheme was purchase by the state of the services of those lawyers willing to participate. Most firms joined the scheme (it cost them nothing to do so), but in reality few established firms had the necessary skills or motivation; nor, for the most part, were their offices easily accessible to those who needed legal aid. So it was the high street firms that took up legal aid cases, together with new firms specialising in social welfare law.

In the 1960s, questions arose as to the suitability of the private legal profession to adapt its practices to cater for the new

▶ range of poor, working-class clients with legal problems often very different from those of their middle-class and business clients. Their offices were alien and intimidating; the manner of the lawyers equally off-putting. Local authorities and charities started funding law centres in poor neighbourhoods, using salaried lawyers. They have helped to fill the gap where there were too few lawyers in private practice but there are only 54 in the country and still 92 per cent of legal aid is provided by the private profession.

Gradually, the original scheme was eroded. Rates of payment did not rise with inflation. While the earnings of commercial lawyers rocketed, legal aid lawyers struggled to survive or, increasingly, gave up the struggle. Yet the cost of the scheme went up. It was demand-led, anathema to the Treasury. In 1999, the government's Access to Justice Act scrapped it. The new Legal Services Commission was to plan (in other words, reduce) expenditure and monitor quality of service. A Criminal Defence Service was to develop a salaried body of public defenders and a Community Legal Service was to be responsible for advice and representation in civil matters. By 1999, only around 20 per cent of the population were eligible for legal aid compared to about 80 per cent when the scheme started. Since 1999, eligibility for assistance has declined even further. The Community Legal Service is so far little more than a slogan.

The government recognises the importance of legal aid, rhetorically at least. In 1992, Tony Blair, then shadow home secretary, said that "any attempt to slash the legal aid budget would be disastrous for the legal system and for the ordinary citizen for whom access to justice would be denied". As opposition leader, he said: "Labour's goal of improving access to justice is an essential part of our commitment to social justice." A few weeks ago, Lord Falconer assured the Law Society of his intention to support the vital public service provided by legal aid lawyers in tackling social exclusion and protecting the fundamental rights of some of society's most vulnerable members.

But it is important to note the language. Legal aid is linked to "social exclusion". Government responsibility for healthcare is not limited to those on the margins of society. When it comes to access to justice, we have come a very long way from the egalitarian vision of the Attlee government of 1945. Then equal access through legal aid, like equal access to healthcare through the NHS, was a cornerstone of the welfare state.

The government has abandoned this fundamental principle. Labour has speeded up the withdrawal from subsidising the private legal profession to deliver legal services and has so far failed to provide any satisfactory alternative. There is no more legal aid for personal injuries or other money claims, and legal aid for housing, immigration, family and judicial review is available only under a contracting system that severely limits fees to rates far below those charged to private clients. Tight bureaucratic controls make legal aid work less and less profitable and attractive to law firms. The drift of solicitors away from legal aid has left "advice deserts" throughout the country. The Law Society has reported a number of cases where desperate people have been unable to get help.

Britain has for centuries led the world in its devotion to the rule of law before which, we are told, all are equal. In the noble words of Magna Carta: "To no one will we sell, to no one will we refuse or delay, right or justice." A recent study by a law professor at University College London, Hazel Genn, found that the most common problems relate to money, injuries, health, neighbours, employment, and divorce and separation. About 40 per cent of the population experienced at least one of these problems during the period of the survey. Other problems encountered by the public are faulty goods and services, while confrontations with the police and the criminal law affect a great many people.

Some try to resolve these problems themselves, but those on the other side of the dispute – corporations and public authorities – promptly reach for their lawyers. Those lawyers are not constrained by lack of resources, and the procedural reforms introduced by the Lord Chief Justice, Lord Woolf, have so far failed to reduce significantly the complexity and cost of litigation. Equal access to justice means a level playing field. That is impossible unless the state can ensure matching skill on both sides of the argument.

The truth is that legal aid fees in vital areas of law are too low to maintain adequate standards, while private fees are often absurdly high. There is a real dilemma. Public money cannot and should not be used to pay lawyers at extravagant City rates in order to secure equality of representation. Nor is it easy to see how the excessive earnings of City firms can be reduced so long as the clients are willing to pay.

Government policy, Treasury-driven, has tried to shift the focus of public funding from subsidising lawyers in private practice to advice services which generally employ advisers without formal legal qualifications. While many such skilled and admirable people give valuable help to those with legal problems, it is obvious, as Falconer recognises, that justice cannot be done without a body of skilled lawyers, publicly funded to match the forces ranged against the ordinary citizen by rich and powerful institutions, including the government.

In the public mind, lawyers are all tarred with the same brush. The shifty and grasping stereotype is applied to legal aid and commercial lawyers alike, and perhaps fairly to some in both categories. But a real Community Legal Service needs lawyers who deserve and receive the respect given to other honourable public servants, and who do not expect any greater rewards. There is no shortage of lawyers willing to commit themselves to public service. What is needed is the right framework in which they can be employed and the resources to fund it. Equal access to justice remains an unrealised dream, but we can do better.

Geoffrey Bindman started one of the first legal aid practices in London in 1963. He is a visiting professor of law at University College London and London South Bank University. In November 2003, he received the Law Society Gazette Centenary Award for Lifetime Human Rights Achievement

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Car trouble

Are we about to see major changes in the way the insurance industry deals with difficult areas such as employers' liability and uninsured drivers? By **Jon McLeod**

As motorists slid about on the ice during January's cold snap, they were probably counting on an insurance company to cover the cost of any collision they might end up in. But it is an alarming fact that the UK has a steadily growing problem of uninsured motorists on the road – 1.25 million at the last count – a phenomenon driven in part by the steadily increasing cost of cover.

The little-known Motor Insurers' Bureau was set up in 1946 by the insurance industry to broker agreements with the government over compensation for victims of uninsured and untraced ("hit-and-run") drivers. Legislation, most recently the Road Traffic Act 1988, requires every insurer underwriting compulsory motor insurance to be a member of the Bureau, and to fund its operations and payouts, now running at £500m annually. Such is the problem of uninsured drivers that, in Liverpool, the Motor Insurers' Bureau is known as the city's biggest insurer.

Stung by the rising cost of running the Bureau, the Association of British Insurers has just launched tough new proposals to clamp down on the uninsured. The industry has also funded a database of insured drivers (required by EU law) to make it easier for the police to run spot-checks on drivers. And the Labour MP for Leigh, Andy Burnham, recently introduced a bill (unlikely to become law) requiring French-style insurance stickers – vignettes – to be carried on all car windscreens next to the tax disc. He told the Commons that 87 per cent of the public backed the idea.

The government has asked the University of Nottingham to conduct a review of the issue.

One possible solution would be to move away from a system of liability towards one of "eligibility": drivers would be entitled to receive payouts provided that they were themselves insured. This would put an end to the situation of the uninsured, with a bad driving record, being able to coin it in if their vehicle is struck by an insured party. "Many people see this as a just alternative to the present system, which gives a free ride to those who don't bother with insurance at all, but still are able to claim against others who admit liability," says the solicitor and claims expert Tony Summers.

A related idea is a new, non-legal tribunal to settle motoring disputes, with reduced legal costs, and a system of payments based on a tariff scheme, similar to that which exists for criminal injuries compensation.

Legal costs are also a big concern for claims arising under employers' liability insurance, another form of compulsory insurance honoured in the breach. A routine claim for compensation of the order of £5,000 can imply costs of between £10,000 and £15,000. Before his days as a back-bench heavyweight, Nick Brown, while minister for work, published a review of the compulsory scheme of employers' liability insurance. The 2003 report was prompted by significant prices increases in the market for such insurance, which have also caused the Office of Fair Trading to look into the UK liability insurance market as a whole.

The government wants premiums to bear more relation to the actual risk involved at the workplace. It also wants an increased use of alternative dispute resolution, when employees make claims against their employers under such insurance, as legal costs are dwarfing the value of awards or settlements made, making a nonsense of the process.

One option also under consideration is to separate out industrial and occupational disease claims from more routine accident risks. The government also wants rehabilitation to play more of a role in the system of compensation, with a greater emphasis on getting people back to work, and to crack down on rogue businesses who don't bother with cover at all. According to Tony Summers: "Employers' liability insurance is another area where an informal tribunal and a system of compensation payments based on eligibility according to fixed tariffs would save everyone involved a lot of time, money and stress."

England's dying art

In today's courts, more energy is spent on negotiating a speech's length than on its delivery. **MICHAEL BELOFF** exposes the dangers posed by the decline of oral advocacy

The 20th century may be seen not only as the golden but as the last age of advocacy. Those born with silver tongues in their mouths could once achieve a celebrity status nowadays accorded to a singer's sibling, a footballer's one-night stand or anyone, male or female, who combines the maximum of physical charms with the minimum of designer clothing. Silks could save men from the gallows, destroy reputations or – as in the Archer-Shee case, the real-life version of Terrence Rattigan's *The Winslow Boy* – stand up for justice against the power of the establishment. F E Smith, Edward Carson, Rufus Isaacs, Marshall Hall, Norman Birkett and Patrick Hastings were household names. A Pollock or a Pannick among the contemporary Bar may emulate their talents, but who in recent times, apart from the late George Carman, has had a public profile higher than that of an average premier league footballer, let alone an annual income greater than a fraction of the latter's transfer fee? (Well, on second thoughts, Pollock, maybe.)

How has this come about? Partly, at least, because in legal terms England is no longer an offshore island. The indirect effect of the Europeanisation of English law on practice and procedure may prove profound. In the European Court of Justice, of which the English Euro-advocate has by now three decades of experience, oral submissions are treated as a kind of pre-prandial aperitif. More energy is spent on negotiating over speech length before the hearing begins than on delivering the speech itself ("Twenty minutes, Monsieur Beloff? Perhaps fifteen, now? We have read it all already"). Interrogation is rare, rights of reply better not exercised. Once, in embarking on rebuttal, I provoked a single question: "Monsieur Beloff, are you sure you will finish by lunch?" The odds against being able to catch the midday flight from Luxembourg to London are rarely worse than evens.

In the European Court of Human Rights, the right of freedom of expression is given greater respect; but even in this forum, a hearing will be measured in hours rather than days. A case that migrates from the Strand to Strasbourg will undergo a process of forensic miniaturisation: honey, they've shrunk my speech.

It is not only the example of Europe but also economic reality that spurred the switch from oral to written advocacy in the late 1980s. Lord Donaldson, then Master of the Rolls (the senior civil judge), was as enthusiastic for case management as for law-making. It was through his initiative that skeleton arguments developed from an optional extra to a sine qua non – or as the Lord Chief Justice might prefer me to say, less clearly, "without which not". These were originally intended to be a mere platform for oral presentation, but they have developed obese proportions. Oh, for a Lord Atkin's diet!

Such skeletons, intended to be a support, have become a snare. With some judges, fidelity to the skeleton will prompt the retort "I've already read this"; with others, any departure from it risks the testy question "Where is this in your skeleton?". By contrast, when I was called to the Bar in 1967, some judges made it an article of faith never to read any of the papers before they entered the courtroom in case doing so prejudiced their minds. They expected – indeed, wanted – counsel to shape the analysis for them.

The pressure for change is coming from on high and from below. In a series of trenchant observations in the appellate committee of the House of Lords, Lord Templeman (known to the Bar as "Sid Vicious") excoriated "torrents of words" and proclaimed that it was not "the duty of counsel to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner". Down at the Bailey, it is no longer just a case of the Mad Bull and Mr Justice Graves asking Rumpole whether he wished to cross-examine at all the fine upstanding police officer who had given evidence for the prosecution. There are efforts to cut counsels' legal aid fees on post-trial taxation (the process by which barristers' fees are assessed by officers of the court) as a sanction against uncontrolled advocacy.

> As Mr Justice Megarry said three decades ago: "Argued law is tough law"

The review of civil justice published in 1996 by the Lord Chief Justice, Lord Woolf – the foundation of the Civil Procedure Rules that came into effect in 1999 – emphasised the virtues of speed, economy and judicial control. Judges increasingly consider it their role to persuade parties not to litigate, rather than to decide litigants' disputes. Alternative dispute resolution (arbitration, conciliation, mediation) is the flavour of the decade; settlement rather than adjudication is the name of the game. A party who resists mediation may be mulcted in costs. Even in public law cases, where judgements often have implications for a far wider constituency than the particular litigants, the Lord Chief Justice has stressed "the paramount importance of avoiding litigation wherever this is possible".

A great advocate: Rumpole of the Bailey (John Mortimer's creation played by Leo McKern)

EPA/PA PHOTOS

Lady Hale, who became the first female law lord last year, is a particular enthusiast for alternative dispute resolution. In one speech she said: "We should beware of equating access to justice with access to litigation"; in another she noted sardonically that asking the Bar to support such moves was like "urging turkeys to vote for Christmas".

As pressures intensify on the public purse and legal aid is cut to the bone, executive eyes turn to the prospect of making the courts more user-friendly to litigants themselves – but with the odd exception of an Arthur Scargill or a Tony Benn, the advocacy of the non-professional is rarely a success.

Behind all this, there is a hidden agenda. The relegation of oral advocacy to the margins would represent a victory for the solicitors' profession in the last battle of the so-called Bar wars. Having won from Lords Mackay and Irvine advocacy rights in the highest courts but made (with a few exceptions) little impact there, solicitors are thinking, if you can't join them, beat them. And their weapon of choice is the written page. Is this to be the era of the last hurrah, not only for silks, but for the Bar itself?

I, for one, should regret it if the trend became unstoppable, and not just because of a sentimental attachment to an ancient craft, like thatching or morris dancing, now under threat. The development of the common law – like the English language, one of England's major contributions to civilisation – has been the product of a constant dialogue between Bar and Bench. No experienced advocate doubts that cases can change shape, sometimes dramatically, when what seemed an impeccably logical submission is tested to destruction, or not, by the judge. As Lord Justice Laws said in a recent decision: "That judges in fact change their mind under the influence of oral argument is not an arcane feature of the system; it is central to it." Or as Mr Justice Megarry put it, still more succinctly, three decades ago: "Argued law is tough law."

Where written advocacy is substituted for oral, an assumption has to be made, sometimes unjustified, not only that the judge has read the argument, but also that he or she has understood it. And even if both those assumptions are correct, the true advocate wishes to engage with a judge who disagrees with it. The media still depict the Bar as peopled by Rumpoles and Kavanaghs, and trials as theatre; and for some reason, QCs in soap operas are often given knighthoods. Paradoxically, it may be only if television is actually allowed into the courts that fresh impetus will be given to advocacy.

In the US Supreme Court, counsel is allowed only 30 minutes for his oral submissions with no extra time for interruptions. I once observed Chief Justice Rhenquist – who had mysteriously disappeared, while the advocate was in full flow, behind the black curtain that is the backcloth to the Bench – return to cut him off mid-sentence because his time had expired. In his classic peep into the judicial corridors of power, *The Brethren: inside the Supreme Court*, the Pulitzer Prize-winning journalist Bob Woodward emphasised the role played by judicial assistants in crafting judgements, a role that may be as important after a hearing as that of counsel during it. Is this to happen in our proposed supreme court now that the law lords have had an early taste of judicial court assistants?

As Lord Justice Sedley – no conservative he – once declared, to let the oral tradition die "would be a tragedy for a skill in which this country had for generations been a world leader". In the conventional phrase of a junior judge in the Court of Appeal: "I agree and have nothing to add."

Michael Beloff QC is President of Trinity College, Oxford, and practises from Blackstone Chambers

The poor relation

Our civil courts have been neglected compared to the criminal justice system, writes **GEORGINA SQUIRE**

It is becoming increasingly apparent that, in the push for continual reform of the criminal justice system, the government is neglecting the civil justice system. There is no argument with the importance of reforming the criminal justice system, but this should not be at the expense of maintaining an efficient civil justice system able to cope with the vast array of civil cases, from claims for damaged goods or personal injury to property and commercial disputes.

The civil courts have both a public and a private role – providing a public service and frequently offering redress for private individuals. Since the early 1990s, it has been government policy that the civil courts should be funded almost entirely from the court fees people pay. This is surely wrong. It is an additional tax on those who wish or need to use the civil justice system, and it has led to substantial underfunding of the civil courts.

The Law Society sends regular questionnaires to a network of solicitors on how the Civil Procedure Rules, which came into force in 1999, are working. Solicitors state consistently that the system is prevented from working efficiently by delays and inefficiencies of court administration due to under-resourcing. Those who work in the courts do a fantastic job. However, it is impossible for them to provide a service of decent quality when they are understaffed, have to operate with antiquated systems in old, dilapidated premises, and are overburdened with work.

The Court Service recently announced that £75m has been made available for modernising the civil courts over the next three years. It is very good news, so far as it goes. It may sound a large amount but, considering the size of the civil justice system, it is only a fraction of what is needed. It has no prospect of delivering a modern civil court system. It is believed that the cash boost may help satisfy some basic IT requirements, but the courts will still be years behind in the level of technology available. In short, the civil courts are suffering badly from a long period of underinvestment and this now appears to be approaching crisis levels.

The crisis is felt throughout the civil justice system. There is a large network of local county courts and district registries attempting to service the needs of those around the country. Significant numbers of these local courts have been closed in an attempt to reduce overheads and consolidate staff. Those wishing to use a court may now have to travel 25 miles or more to the nearest one. When they arrive, they find it understaffed and suffer long delays in the production of documentation, hearings and so on. There are some pilot projects under way which aim to improve the business of the courts using the internet and e-mail, but in general there is little, if any, IT support.

> Many local courts have been closed; others are understaffed leading to long delays

Beyond the county courts and district registries, the infrastructure of the commercial courts in London is creaking at the seams. It has been described as "a public disgrace". This is not simply a case of inconveniencing the lawyers and judges who work every day in these courts. A recent survey of what influenced London's success as a financial centre showed that the single most important factor was the legal services infrastructure, which was regarded as more important than cost. No companies need operate from London, and the law is not immune to market forces. Our ability to make companies want to base themselves and the law of their business in England and Wales will be severely compromised unless we provide adequate commercial court facilities.

In 2002, UK legal services exports amounted to around £1.4bn. A Court Service survey of the same year showed that, in 80 per cent of cases heard in the commercial courts, one party was international; in 52 per cent of cases, two parties were international. We cannot be complacent. France, Belgium and Germany have specialised commercial courts, and Paris is a serious contender for the international legal market. Dublin, as part of positioning Ireland as an e-hub, has recently made considerable investment in modernising its court service to provide state-of-the-art facilities.

At present, companies continue to choose to litigate in London, and our commercial courts benefit from the many international contracts that contain England and Wales jurisdiction clauses, but how much longer will this last? If firms compare our shoddy facilities – including the lack of courtrooms large enough to host complex multi-party commercial actions – with those offered by competing EU member states, it is difficult to imagine why they would choose London.

Unless we rise to the challenge and provide a modern civil court service with the facilities expected by today's sophisticated consumers, then our current international pre-eminence as a place of choice for the resolution of civil disputes will be lost, together with our long-held tradition of access to justice.

Georgina Squire is a partner at Rosling King Solicitors and chair of the Law Society's Civil Litigation Committee

The case for the defence

It's easy to forget, when considering access to justice, that there are two sides to the story, writes **Paul Large**

The introduction of Conditional Fee Arrangements (CFAs) has created as much turmoil and disruption for the insurance industry (the traditional defendants in the majority of cases) as it has for the claimants.

Initially we saw the floodgates open, with claims management companies initiating an increasing number of claims and finding new and imaginative ways to increase their share of the costs.

The lack of coherent guidelines resulted in a wave of satellite litigation from defendants challenging these activities that clogged up the courts but managed to rein in the excesses, causing the actual number of claims to be processed to decrease.

Although this led to a growing body of case law that created a more level playing field, it led to undesirable delays and increased expenditure on financing test cases.

> It is not in the best interests of anyone concerned to create higher cost or lengthen the process unduly

In the currently ongoing review of the justice system, defendants are also looking for the introduction of clarity and certainty. More than that, they are looking for an opponent that they can work with to come to mutually acceptable settlements.

It is my belief that those of us making CFAs work need to get away from the traditional, highly confrontational approach to litigation. It is not in the best interests of anyone concerned to create higher costs or lengthen the process unduly.

Greater control and regulation of those advising and funding claimants can only help. We need to maintain strong quality control over the claims accepted and there needs to be a clear set of rules for what is and isn't acceptable in terms of costs.

An effective system of justice can only work when the government lays down clear rules of engagement so that those representing the interests of both claimant and defendant can begin to work together for a fairer and more efficient solution.

Breaking the boundaries

GREG BERMAN on an unconventional approach to improving access to justice in Red Hook, New York

In 1992, Red Hook, a low-income neighbourhood in south-west Brooklyn, hit rock bottom. In the minds of many New Yorkers, it was a neighbourhood under siege, grappling with drugs, crime and disorder. This impression was solidified when Patrick Daly, a local school principal, was accidentally murdered in the middle of the day in a shoot-out between rival drug dealers. This moment of crisis opened up a window of opportunity. Red Hook received an unprecedented level of attention from criminal justice officials in New York and the idea was floated of creating a neighbourhood-based courthouse that would work to improve public safety in Red Hook.

Today, the Red Hook Community Justice Centre is a well-established neighbourhood institution. Red Hook has gone an entire year without a homicide for the first time in more than a generation. Levels of community fear are down, public confidence in justice is up, and the Community Justice Centre is being looked at as a model by cities across the US and the UK.

How did this happen? The answer is complicated, but it starts with a commitment to rethinking the relationship between government and citizens. Along the way, the centre has taken an unconventional approach to improving access to justice. Instead of treating residents as passive recipients of justice services, it has actively sought to engage them in the conception, planning and implementation of an innovative criminal justice experiment.

Planning for the justice centre began with focus groups. Separate discussions were held with community leaders, social service providers, young people and single mums. They were asked a series questions. What are the major problems in Red Hook? How might a local justice centre help address them? What should be the centre's priorities?

It emerged that, despite Red Hook's reputation for drugs and serious violence, quality-of-life conditions – graffiti, litter, noise violations, loitering – also weighed heavily on the minds of residents, and that they had problems which took them to the family and housing courts as well as the criminal court. Several participants lamented the jurisdictional boundaries of New York's court system. One said: "You can't divide a person up. You have to have a comprehensive look at the whole person. The community court could do that." Such comments suggested that a justice centre in a neighbourhood like Red Hook should be multi-jurisdictional, addressing the full range of legal issues faced by local residents, not just criminal matters. Finally, participants in the focus groups urged the justice centre to be as aggressive as possible in providing social services. One recommended that the court look at "the total picture – spousal abuse, victim services, teenagers, mentor programmes, mock court, parenting skills". It became clear that the justice centre should provide services to everyone touched by crime in Red Hook – defendants, victims and walk-ins from the community.

> The justice centre addresses the full range of legal issues faced by local residents

The focus groups unearthed much valuable data about community attitudes and expectations. They were also a useful tool for building support in a neighbourhood that is deeply sceptical about government initiatives, thanks to a history of government neglect and unwanted intervention. By launching the planning process with a series of focus groups, the justice centre sent a powerful message to the community: your voice counts.

What emerged from this process was a vision for a community justice centre with five principal components:

- solving underlying problems through on-site social services to prevent individuals from coming back to court again and again;
- promoting accountability by making sure that low-level offenders receive some form of sanction;
- repairing conditions of disorder through community service projects to create a climate that deters more serious offending;
- engaging the community to improve trust in justice and promote voluntary adherence to social norms;
- making justice visible by locating a courthouse in the community.

The people who live and work in Red Hook play a crucial role in all of this. At its core, the justice centre is an effort to create new links between the criminal justice system and a crime-plagued neighbourhood. Sometimes the links are formal, such as when public housing tenants sit on a task force designed to improve local parks alongside justice centre officials. And sometimes the links are informal, such as when local prosecutors and defence attorneys coach local young people in a baseball league sponsored by the justice centre.

Whether formal or informal, the goal is the same: to help close the gap that has emerged between the justice system and the communities it is intended to serve.

While it is too soon to pass final judgement on the Red Hook experiment, the early signs are encouraging. By engaging local residents in doing justice, the justice centre has shown that it is possible to reduce levels of fear, repair conditions of disorder and improve public trust in government.

Greg Berman is director of the Centre for Court Innovation in New York

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