

PARLIAMENT OF NEW SOUTH WALES, LEGISLATIVE COUNCIL
STANDING COMMITTEE ON LAW & JUSTICE

MOTOR ACCIDENTS SCHEME
(COMPULSORY THIRD PARTY INSURANCE)

STUDY TOUR

20 AUGUST 1997 TO 12 SEPTEMBER 1997

THE HON BRYAN VAUGHAN, MLC

CHAIRMAN

THE HON REV FRED NILE, MLC

MEMBER

MS VICKI MULLEN

SENIOR PROJECT OFFICER

THE HON HELEN SHAM-HO, MLC

MEMBER

(ATTENDED IN TORONTO - 1/9/97 TO 3/9/97)

OCTOBER 1997

From 20 August to 12 September 1997, the Hon Bryan Vaughan MLC (Chairman of the Law and Justice Committee), Reverend the Hon Fred Nile MLC (Member of the Law and Justice Committee), and Ms Vicki Mullen (Senior Project Officer to the Law and Justice Committee) undertook an overseas study tour. The Hon Helen Sham-Ho, MLC (Member of the Law and Justice Committee) joined the delegation from 1 September to 3 September 1997 inclusive whilst visiting Toronto.

This tour was conducted in relation to the Committee's reference on the NSW Motor Accidents Scheme (Compulsory Third Party Insurance) for the purpose of investigating in detail certain issues which remain outstanding from the Interim Report (tabled in December 1996) for this reference.

The primary focus of the study tour was the investigation of the use of structured settlements in overseas jurisdictions as a highly beneficial compensation mechanism for the seriously and catastrophically injured. The Committee also investigated the control of legal costs in civil litigation, in response to concerns in NSW that legal costs associated with personal injury litigation have been rising beyond expectations under the 1994 reforms to the NSW legal profession.

The Committee delegation held meetings in the following countries:

- United States of America (San Francisco, Cincinnati and Washington);
- Canada (Toronto); and
- England (London).

The following is a list of the people with whom we met and a summary of the ideas and information that the delegation gathered.

UNITED STATES OF AMERICA

San Francisco

- **Mr Thomas Todd, Attorney at Law**

Issue: *Structured Settlements*

Mr Todd is one of the leading attorneys in California and the United States with a practice related to the periodic payment of judgments under legislative schemes. In California, the *Periodic Payment of Judgments Act* applies only to compensation for medical malpractice cases. This legislation came about in California as a result of a 'medical malpractice crisis' in California in 1974, which occurred when claims exceeded the premium pool available, and doctors went on strike when their insurance premiums increased rapidly by up to 400%. The Act places a limit on the damages available for pain and suffering, and mandates the periodic payment of any judicial award in medical malpractice claims.

Mr Todd was of the view that the Californian legislation has succeeded because of its relative simplicity and lack of detail. Much of Mr Todd's work under this Act therefore involves, on behalf of the defendant, preparing a motion for the judiciary as to the complex details of periodic payments under the Act for particular cases.

The question was asked as to why the Californian legislation had not been extended to motor accident and other personal injury cases. Mr Todd was of the view that the availability of voluntary structured settlements in the United States had 'caught up' and essentially eliminated the need for a legislative scheme for the periodic payment of a compensation amount. This has been particularly the case with the erosion of 'plaintiff lawyer resistance' to voluntary structured settlements in recent years because of the need to advise plaintiffs about the tax advantages and the financial benefits of a structured settlement.

- **Professor Mary Kay Kane (Dean); Professor David Levine; Professor Stephen Lind: Hastings College of the Law, University of California**

Issue: *Structured Settlements*

The Committee delegation had a fairly brief meeting with Professors from the Hastings College of the Law.

The discussions centred around the benefits of structured settlements as well as the need to have certain protective measures in place such as: solvent insurers; transparent calculations of a structured settlement; competitive bidding between life insurance companies; relevant consumer laws; judicial review of a structured settlement in certain circumstances; and the availability of objective advice for the claimant.

- **Judge Eugene Lynch (recently retired federal District Court Judge): JAMS Endispute**

Issue: *Structured Settlements*

Judge Lynch had been referred to the Committee delegation as someone with judicial experience of the use of structured settlements in personal injury compensation. Judge Lynch was generally very much in favour of structured settlements as a compensation mechanism. He noted the advantages of structured settlements as being the tax advantage and the certainty of income for life. However, he noted that they were less popular in times of low interest rates.

Judge Lynch also noted the need for an ‘up-front’ payment to cover medical and lawyer’s fees, as well as satisfying the ‘mental element’ of the need for a substantial amount of money as soon as the case is settled.

Cincinnati

- **Mr Patrick Hindert, President; Mr Matt Garretson, Account Executive; Ms Linda Johnson, Director of Case Management: Benefit Designs, Inc (Structured Settlement Brokers)**
- **Mr Mike Tucker, Vice President and Manager of Life Annuities: Safeco Life Insurance**

Issue: *Structured Settlements*

The Committee spent a whole day meeting the people above at the offices of Benefit Designs, Inc. The President of Benefit Designs, Mr Patrick Hindert was one of the pioneers of the structured settlements industry in the United States in the early 1980's.

The services offered by Benefit Designs include periodic payment program development; training and education; case analysis (which includes structured settlement quotes); economic loss analysis; trial testimony; advice concerning periodic

payment judgments; case closing; record keeping and technical assistance. Their services are generally described as follows:

Benefit Designs, Inc. offers comprehensive services to assist casualty insurance companies and self-insureds in managing successful periodic payment programs, negotiating cost-effective settlements and analysing the new rules created by periodic payment judgments. Benefit Designs, Inc. provides all regular services without any direct charge. Benefit Designs, Inc.'s compensation derives from commissions for the financing used in periodic payments.¹

These meetings gave the Committee delegation a particular insight into the theory and practice of structured settlements in the United States, as well as the extent of the industry. In relation to the industry generally, the Committee learned that:

- Safeco Life Insurance has about 12% of the national market, being approximately 60,000 policies in force and \$US5 billion assets under management in relation to structured settlement annuities;
- the *average* structured settlement case size is about \$US80,000, with approximately half of a settlement going to the claimant as 'up-front' cash;
- structured settlements are particularly popular where minors or adolescents are the claimants, and the annuity can be adapted to provide a college fund;
- there are about 22 life insurance companies (out of about 2000) that provide structured settlements annuity products;
- there are currently about 250,000-300,000 structured settlement annuities in force in the United States; and
- life insurance companies have developed specialised knowledge of 'mortality', and are therefore better equipped to match the liabilities under a structured settlement annuity with returns on investment.

In relation to taxation issues in the United States, the Committee learned that:

- for a structured settlement annuity to be treated as tax free under the relevant laws in the United States, it must be owned by the general insurer (the property and casualty insurer), as purchased from a life insurance company in favour of the claimant;

¹ From a Benefit Designs, Inc. brochure.

- if the annuity was purchased directly by the claimant, payments under the annuity would be taxable, and the payments would be subject to creditor laws, and therefore accessible by creditors of the plaintiff; and
- for the industry to work, the general (property and casualty) insurer must be able to claim a tax deduction for the purchase price of the annuity, and the life insurance company must be able to make a tax deduction for the payments under the annuity.

The Committee was also informed of the following aspects of the industry in the United States:

- State Guarantee Funds exist which partially protect (to varying degrees depending on the State) the claimant from the negative results of a general insurer becoming insolvent;
- as a result of problems in the industry of actual and potential insolvencies, the practice has evolved whereby the general insurer will pass the legal ownership of the annuity to an 'assignee' company which has no creditors other than the claimant, and therefore cannot become insolvent; further, the claimant becomes a secured creditor of the assignee company and has legal rights in relation to the annuity without losing the tax advantage;
- cost savings can be made through the use of a structured settlement such as savings in legal costs; welfare savings for the federal Government; and lower costs for general insurers in meeting their claims liabilities;
- a plaintiff attorney will calculate their fees as a percentage of the amount settled in a structured settlement (for example, a standard fee might be 25% of an amount paid under a structured settlement, and 33.3% of a judgment if the case goes to trial);
- suspicions of the plaintiff bar in relation to the use of structured settlements have eased in the 1990's with an increased understanding that they are a good tool to prevent the abuse of an award, and in a time of current low interest rates, that structured settlements are not merely a tool for defendant insurers to save money; and
- courts must approve the use of a structured settlement where a minor or a mentally incompetent adult is the claimant.

- **Mr Joe Dehner, Attorney at Law**

Issue: *Structured Settlements*

Joe Dehner is the co-author, with Patrick Hindert, of the leading text in the United States on Structured Settlements and Periodic Payment Judgments. Patrick Hindert had organised a meeting for the Committee delegation with Mr Dehner, for the purposes of discovering the lawyer's perspective on structured settlements.

Mr Dehner similarly indicated that plaintiff lawyers in the United States had initially thought that structured settlements were a conspiracy by insurers to save money. However, today, many plaintiff lawyers 'get good advice from plaintiff brokers'. In addition, there has been a growth in the profession of life care planners and expertise in assessing the finances needed for the long term care of a seriously injured claimant.

Mr Dehner also noted the need to consider the relationship between probate laws and structured settlements if they were to be used in Australia, as well as the need to protect claimants against the risk of insurer insolvencies. In this regard he noted the need to specify the rating of life insurance companies who could offer structured settlement annuity products.

Washington

- **Jim Corman, former Congressman and Member of the House Ways and Means Committee (responsible for tax reform issues); currently Legislative Counsel to the National Structured Settlement Trade Association**

Issue: *Structured Settlements*

Whilst a Member of the United States House of Representatives, Jim Corman was a 'key agitator' for tax reforms in the early 1980's, which enabled structured settlements to become a viable compensation mechanism in the United States.

Mr Corman noted that there was minimal opposition to the relevant tax reforms, as the legislation merely carried into legal effect, the private letter ruling of the Inland Revenue Service of the United States. However, the law had to take up the theory of 'constructive receipt', whereby to get the tax advantage, the annuity must be legally owned by someone other than the claimant.

Mr Corman also noted that the use of structured settlements have not caused huge revenue losses for the federal Government: much of the annuity goes towards medical costs, which would otherwise be tax deductible.

In terms of a relevant lobbying strategy for Australia, Mr Corman noted that structured settlements were simply very good public policy; however, they were technically difficult in their detail (as the Committee discovered at the next meeting in Washington).

- **Mr Bill Neff; Mr Craig Ulman, Attorneys at Law: Hogan & Hartson**

Issue: *Structured Settlements*

Hogan & Hartson is an old and well established Washington law firm.

Bill Neff is a tax expert. Craig Ulman's expertise is insolvency, and he had been closely involved with the work of the National Structured Settlement Trade Association in negotiating for the rights of claimants with structured settlement annuities, in the wake of the collapse of a Canadian insurer involved in the market in the United States.

The following issues were noted in this meeting:

- as indicated in the MAA proposal, if the annuity in Australia is to be legally owned by the claimant, there is a need to consider the issue of protecting payments under the annuity from creditors, and the possibility of the claimant assigning their rights to payments to someone else;
 - the need to ensure that claimants are properly protected from potential insolvencies as a means of preventing the opposition of plaintiff lawyers; and
 - the potential for the use of trust vehicles as a means of protecting minors and people with mental incapacities.
- **Mr Randy Dyer, Executive Vice President, National Structured Settlements Trade Association**

Issue: *Structured Settlements*

The National Structured Settlements Trade Association (NSSTA) is an organisation composed of more than 500 Members which negotiate and implement structured settlements of cases involving persons with serious, long-term physical injuries. Founded in 1986, NSSTA's mission is to advance the use of structured settlements as a means of resolving injury, Workers Compensation, and other claims utilizing periodic payments.

Its primary role is to promote the structured settlements industry through the education of industry members; the monitoring of legislative and regulatory developments; and the protection of the reputation of the industry, for example, by preventing loss to plaintiffs through the insolvency of insurers.

Members of the NSSTA include businesses primarily based in the United States, as well as some Canadian and British insurers and brokers.

One of the issues that is currently being monitored by the NSSTA in the United States is the growth of the 'grey market' in structured settlements. This market has been described as a 'growing trend of unregulated brokers and investors purchasing periodic settlement payments from injured tort claimants.' The NSSTA has a direct interest in this issue due to the serious risk that such a practice could 'deter the future use of structured settlements.'²

The above demonstrates the benefits of having a central trade association to protect the interests of the industry. Indeed, the Committee noted that if structured settlements become a viable financial product for the catastrophically injured in Australia, the relevant insurance companies and brokers should also have the benefit of a similar trade association, or a branch of the NSSTA.

- **Mr Mark Chrislip; Mr Phil Buchen: Association of Trial Lawyers of America**

Issue: *Automobile Insurance; Structured Settlements*

The Association of Trial Lawyers of America is a 'plaintiff, contingent, civil lawyers' association'.

During this meeting, Mr Chrislip and Mr Buchen gave a presentation on the types of automobile insurance laws between the States, and outlined their views on the fault/no-fault dichotomy. They were essentially of the view that no-fault schemes are much more expensive to fund (therefore higher premiums), with lower compensation for the injured.

In relation to structured settlements, the view of the Association was relatively lukewarm. Their main concern was the security of the ongoing payments over a long period of time, particularly if a company responsible for the payments is merged, or becomes insolvent.

² Dyer, R, 'Growth of a Damaging Market', *Legal Times*, Week of June 2, 1997.

- **David Korsh, Legislative Counsel for the National Association of Insurance Commissioners**
- **Robert Gordon, Counsel, US House of Representatives Committee on Commerce**

Issue: *Structured Settlements; Legal Costs*

The National Association of Insurance Commissioners is a private organisation that represents the official State Insurance Commissioners.

The Committee was told of the string of insolvencies that occurred in the late 1980's and that the insurance industry in the United States has now stabilised.

The Committee also heard that there was growing pressure from certain interest groups for reform of the contingency fee method of charging for legal fees in the United States. Congress will possibly be considering next year the introduction of a cap or control of contingency fees, particularly with respect to class actions, where there have been some notorious cases of lawyers fees being extraordinarily out of proportion to the level of work involved.

- **John Womack, Assistant Chief Counsel; Otto Matheke, Trial Attorney: National Highway Traffic Administration**

Issue: *Traffic Safety in the United States*

At this meeting, general issues relevant to traffic safety in the United States were discussed, such as the growing use of airbags and the regulation of the wearing of seatbelts.

- **Ms Janet Bachman, Vice President-Claims Administration: American Insurance Association**

Issues: *Structured Settlements; Legal Costs*

The American Insurance Association represents Property and Casualty insurers (general insurance companies only). They represent approximately 25% of the Property and Casualty market; unlike the Insurance Council of Australia, which is the peak representative body for the insurance industry as a whole in Australia.

Ms Bachman spoke generally about the attitudes of property and casualty insurance companies in the United States towards structured settlements. In particular, she noted the following:

- the claims departments of P&C companies will make quarterly assessments of the security/solvency ratings of life insurance companies to ensure that the annuities on offer are secure/solvent;
- structured settlements enable a P&C company to tailor a settlement to individual needs;
- structured settlements are a useful bargaining tool which may assist in preventing the case from going to trial;
- they are also a useful tool to 'close down an exposure'; and
- where major injuries are concerned, approximately 50% of cases are structured.

On the issue of legal fees in the United States, the AIA does not get directly involved in lobbying for the reform of contingency fees. Ms Bachman indicated that the regulation of legal fees raises a separation of powers issue to the extent that the Judiciary is responsible for monitoring/managing the legal profession.

She also mentioned that it is not 'politically viable' to become involved in the debate over the control of contingency fees, due to the AIA's general support for a laissez faire approach to fees.

CANADA

Toronto

- **Mr Alex Turko, Legal Services Counsel, Ontario Insurance Commission**

Issues: *Motor Accident Insurance in Ontario; Designated Assessment Centres*

At the Ontario Insurance Commission, the Committee delegation received briefings on:

- (1) CTP insurance in Ontario (including levels of associated legal costs); and
- (2) the Designated Assessment Centre system.

Mr Alex Turko described the history and details of the scheme for motor accident insurance in Ontario, which currently provides for a mixed no-fault and fault based scheme.

The current scheme, which is titled the 'Ontario Motorist Protection Plan' or 'OMP', was introduced in 1990 as a result of 'upward pressures' on premiums. From 1990, no common law action was available unless an injury was serious and met a verbal threshold test. This system was introduced to eliminate small claims as fault based claims. The scheme was substantially amended in 1994, and again in November 1996. The 1996 reforms have introduced a cap on certain compensation amounts and have introduced a deductible, for the purposes of constraining costs. It became clear from these discussions that the compensation scheme in Ontario has experienced similar cycles in terms of its capacity to properly compensate the seriously injured, and maintain the viability of the scheme, as has the NSW Scheme.

In relation to legal costs, the Committee learned that in Ontario, as a rough guide, insurers will pay about 15% of a settlement to cover party/party costs, and in addition, lawyers will charge a further 15% directly to the claimant to cover solicitor/client costs. If a case goes to trial, a costs order is made by the Judge, and the bill of costs will go to a court officer for assessment according to a test of 'reasonably necessary'.

The Committee was given a brief description of how the Designated Assessment Centres operate in Ontario, for the purposes of assessing all aspects of a no-fault claim, such as disability, medical and rehabilitation needs, attendant care needs and residual earning capacity. Whilst not flawless, apparently the DACs operate with the general support of all parties involved. Guidelines exist for the operation of DACs, and rules exist for the prevention of conflicts of interest which may arise.

- **Justice Blair; Justice Coo and Justice Wilkins: Ontario Court of Justice**

Issues: *Legal Costs; Structured Settlements*

Justice Blair was a Co-Chair of the Civil Justice Review, which was established in 1994 at the joint initiative of the former Chief Justice of the Ontario Court of Justice and the former Attorney General for Ontario. The Review's mandate was to 'develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice.' Of interest to the Committee is the work of this Review in the area of caseload management. The Review has made recommendations in favour of 'tracks' for cases: that is, a standard and a fast track, which would be similar to certain recommendations in Lord Woolf's report in the United Kingdom.

The Committee also noted the practice in Ontario under Rule 49 of the Civil Procedure Rules, where Judges can make a costs order which takes into account formal offers of settlement from both parties to a civil dispute, and the reasonableness or otherwise of parties rejecting an offer, and proceeding to trial. Potential adverse costs orders can provide a powerful incentive for parties to accept reasonable offers of settlement.

The Committee also noted the interesting comment that was made concerning the use of juries in civil cases. One of the Judges remarked that, due to some high profile fraud cases in Ontario, civil juries were generally not plaintiff sympathetic in personal injury cases.

Justice Blair kindly presented the Committee with a signed copy of the Final Report of the Civil Justice Review, which would warrant close examination for the purposes of formulating the final recommendations to be made by the Law and Justice Committee in relation to the control of legal costs in the NSW Motor Accidents Scheme.

In relation to structured settlements, all three of the Judges were in favour of them as a suitable compensation mechanism for claimants with serious injuries.

Meetings hosted by the Insurance Bureau of Canada

- **Ralph Fenik and John Rousseau, McKellar Structured Settlements**

Issue: *Structured Settlements*

McKellar Structured Settlements 'pioneered' the industry in Canada in 1979. Frank McKellar had previously worked for Revenue Canada.

Under the Canadian scheme, a casualty company purchases an annuity for a life insurance company on behalf of the claimant, and the payments are 'irrevocably' directed to the plaintiff. In other words, the payments to the plaintiff under the annuity are 'non-assignable, non-commutable and non-transferable'. It was pointed out that the plaintiff enjoys a greater level of security in Canada than in the United States. There is no potential for a grey market, as in the United States, as the payments are irrevocably directed to the plaintiff.

In relation to security issues, the Committee also learned that life insurance companies offering structured settlement annuities in Canada must have \$15 billion asset backing and must have a AA+ rating. There are 6-8 life insurance companies in Ontario that are used for structured settlement annuities. A further security measure for the plaintiff, is

that the liabilities for the annuity payments revert to the casualty company (defendant insurer) in the event that the relevant life insurer becomes insolvent. Finally, a national guarantee fund exists (the Life and Health Compensation Corporation) which is 95% funded by the life insurance industry in Canada.

Court approval is required in Canada for structured settlements in favour of minors and people with a mental incapacity.

- **Lee Samis, Barrister: Samis, Blouin, Dunn**

Mr Samis is a barrister acting primarily for the defence in personal injury matters.

Mr Samis noted the growing practice of the courts to take into consideration the effect of tax on potential investment returns on a lump sum compensation award. As a result, the Courts have started to 'gross up' the value of a lump sum award, on the assumption that the lump sum would be wisely invested by the plaintiff.

Mr Samis also noted that plaintiff lawyers in Canada have a 'slight edge' in the power balance between the plaintiff and the defence, compared with their contemporaries in the United States. As a result, McKellars, as structured settlement brokers, would get references from both plaintiff and defence lawyers.

Mr Samis also spoke about the difference between the 'top-down' and the 'bottom-up' approach in structuring a settlement. For example, he explained that plaintiff lawyers, in negotiations will argue that they could get \$X if the case went to trial. They will then approach a broker to get a structured settlement that has a present value of 10% less than a possible judicial award. This contrasts with the 'bottom-up' approach which is more directly connected to the actual needs for life of the plaintiff.

Mr Samis noted that plaintiff lawyers will often refer the claimant to a financial adviser in relation to the benefits of a structured settlement, as compared with other investments.

- **Mr Robert Baxter: Baxter Structures**

Baxter Structures have been involved in the industry for nearly 20 years.

Mr Baxter noted the following:

- the plaintiff will often be present at structured settlement negotiations, even if they have an acquired brain injury, which gives the defence an opportunity to see the plaintiff;
- the role of the structured settlement broker varies so that they may be strictly

plaintiff or defence: however, Baxter Structures work for both sides;

- structured settlements can save insurance companies millions of dollars, particularly in the context of large awards in Canada now being 'grossed up' by the courts to take account of the income tax that would be payable by the plaintiff on the investment income that could be earned; indeed it was suggested that there were approximate savings to insurers in Canada of around 30%;
 - broker commissions are 3% in relation to the actual amount that goes to the life insurance company to purchase the annuity;
 - in relation to the role of plaintiff lawyers, there has been a successful suit against a plaintiff lawyer in Ontario for not bringing the option of a structured settlement to the attention of the plaintiff; and
 - about 90% of catastrophic cases would be settled with a structured settlement.
- **Mr David Sampson: Henderson Structured Settlements Inc**
 - **Mr Jerome Morse: Leading Plaintiff's Lawyer, Lerner & Co**

Henderson Structured Settlements also operate as brokers. Approximately 40% of their referrals come from plaintiffs; and 60% from the defendant insurance company.

Mr Sampson noted that for the purposes of risk spreading, a structured settlement may be placed with more than one life insurance company, particularly where the present value is more than \$100,000.

Mr Sampson noted that in his experience, approximately 75% of the amount available for compensation will go towards the purchase of a structured settlement.

The Committee received a valuable perspective from Mr Morse, who whilst an advocate of structured settlements, believed that there is inherent inflexibility in the product. Therefore, where large sums are concerned, Mr Morse will advise clients to consider an 'appropriate mix' of investments between a structured annuity and more traditional investments which could potentially result in much higher returns (perhaps a 60/40 split).

Mr Morse noted that he will always involve a financial adviser and a structured settlement broker in negotiations.

He also noted that CPI linked structured settlements are available.

ENGLAND

London

- **Mr Peter Hurst, Chief Taxing Master, Supreme Court Taxing Office**

Issue: *Legal Costs*

Mr Hurst has been involved at a policy level with the Lord Woolf proposals for reform of civil litigation in England and Wales. As an officer of the Court, Mr Hurst has an objective view on the issue of costs.

In this discussion, it became clear that England and Wales are facing similar, if not identical costs issues in civil litigation.

In an unpublished paper written by and presented by Mr Hurst to the Committee, he identified the central problem of costs as being one of 'proportionality', such as the disproportionate amount of costs generated by smaller claims, and the complex procedures required to ascertain those costs. The disproportionate amount of costs associated with small claims in the Motor Accidents Scheme in NSW, has been a major problem identified in NSW by the Insurance Council of Australia.

Mr Hurst noted that in Britain, the split between party/party costs and solicitor/client costs would be approximately 75%/25%, which does not represent full indemnity. It would therefore seem that Britain is not yet facing the problems associated with full or almost full indemnity costs for personal injury compensation, which some would argue are causing unacceptable rises in legal fees payable by the 'losing' party in NSW. The existence in England and Wales of only partial indemnity may be due to the fact that costs are still assessed by officers of the court. Indeed, Mr Hurst stressed the need for *independent costs assessment*.

Mr Hurst spoke generally about the Woolf proposals for reform, and a quote from his paper would best summarise his views on Lord Woolf's report as follows:

With the advent of the Woolf reforms the pace of change will accelerate rapidly and, although it may be rash to try and forecast developments, it seems likely that the fast track fixed costs regime will rapidly expand;...It is in respect of costs on the multi track that the unresolved problems relating to the indemnity principle in the English system, remain. Such problems have largely been eliminated in those jurisdictions where there is a prescribed tariff which does not purport to provide a full indemnity. The view in England and Wales, with which the writer agrees, is that while a limited costs regime is appropriate for smaller cases, it is not so for weighty, complex, high value cases or cases of public importance.

- **Mr Peter Stokes: Insurance and Special Risks Division, Inland Revenue**

Issue: *Structured Settlements*

Mr Stokes described in some detail the history of tax and associated legislative reform in the development of the structured settlements industry in the United Kingdom.

He noted that in the late 1980s, Michael Newstead from Inland Revenue was instrumental in advocating the tax free status of payments under a structured settlement. In 1987, the Association of British Insurers and the Inland Revenue developed a model agreement, which if followed by insurers and brokers, could be relied upon to support the tax free status of payments under a structured settlement.

In 1992, the Law Commission issued a consultation document concerning structured settlements which raised various technical issues, and described the existing barriers to the use of structured settlements which existed under the informal arrangements that dated back to 1987.

In 1994, the Law Commission recommended, amongst other things, that the tax law should be formally amended to allow annuities bought by the defendant for the benefit of the plaintiff in personal injury cases to be tax free. The Law Commission also recommended that similar treatment should apply to annuities bought to meet the terms of a structured award of damages by a Court.

In 1995, legislation was passed that allowed annuities purchased under a structured settlement agreement to be paid tax free. This legislation was amended and improved in 1996 by further legislation, so that the tax exemption was extended to periodic payments made under a Court order, as well as payments made under the Criminal Injuries Compensation Scheme or by the Motor Insurers' Bureau. In tandem with the 1996 reforms to the tax legislation, the *Damages Act 1996* was passed, which enabled courts, with the consent of parties, to make an order for periodical payments. The *Damages Act 1996* also extended the protection of the *Policyholders Protection Act 1975* to payments under a structured settlement, which protects the payments in the event of the liquidation of a particular insurer.

- **Mr Tim Humphreys, Mr Alistair Kinley, Mr Tony Baker, Mr Benedict McHugo: Association of British Insurers**

Issue: *Structured Settlements*

A range of issues in relation to structured settlements were discussed at this meeting from the insurer's perspective.

The difference between the 'top-down' and the 'bottom-up' approach in negotiating a structured settlement was discussed.

It was generally noted that the insurance industry in the United Kingdom was in favour of structured settlements and that 'for the purposes of limiting expenses and better compensating victims, insurers are becoming more creative in looking at ways of financing liabilities in relation to personal injury.'

The benefits of having access to index-linked securities in the United Kingdom were also discussed.

The issue of revenue savings was raised, and whilst the ABI did not have statistics on the number of structured settlements that were in force in the United Kingdom, it noted that there is a tax advantage to the government to the extent that if structured settlements make it cheaper for insurers to properly compensate victims of personal injury, then the insurers are claiming lower amounts as tax deductions for compensation expenses.

- **Mrs Suzanne Burn, Mr Greg Lewis: The Law Society of England and Wales**

Issues: *Structured Settlements; Legal Costs*

The Law Society publishes comprehensive Structured Settlement Guidelines for Solicitors.

The views of the Law Society in relation to structured settlements were discussed and the following points were made:

- the move to the use of structured settlements was welcomed by the legal profession, particularly in relation to the major catastrophic claims;
- the use of structured settlements is growing; however, the number of structured settlements in the United Kingdom would still only be hundreds (rather than thousands as in the US) per year;

- structured settlements have never been seen as a threat to the level of the profession's fees: the legal profession in the United Kingdom has been in the 'driving seat' with the insurers and brokers as the industry has developed;
- a structured settlement is 'an option, not a solution in its own right';
- structured settlements have encouraged lawyers and insurers to be more co-operative on the basis of assessing and funding the long term care needs of the plaintiff before the settlement;
- there has been a growth in the use of rehabilitation specialists who work for both sides; and
- if litigation has actually commenced in a personal injury case, the court's approval is required to 'close' the litigation process, by a consent order, which sets out the terms of the settlement: therefore technically, a court could reject a structured settlement agreement.

The issue of the control of legal costs in civil litigation in the United Kingdom was also discussed. The Committee learned that conditional uplift fees are used in the United Kingdom which can only be a maximum of 25% of the damages, and this fee cannot be assessed as a party/party cost. Party/party costs will generally be assessed as 60-90% of the overall costs.

The Law Society also discussed the Lord Woolf proposals. It was noted that the fast track proposals for small claims are fairly controversial, although the proposals for 'fixed costs' has the Society's 'in principle' support for small claims.

In relation to the cost of medical reports, it was noted that the Legal Aid Board is considering the introduction of bands for fees in this area. Under the Woolf reforms, only 2 reports would be allowed in smaller claims.

- **Professor Hazel Genn: Faculty of Laws, University College**

Issue: *Legal Costs*

Professor Hazel Genn was recommended to the Committee by Professor Ted Wright as a useful contact in relation to the issue of the control of legal costs. Professor Genn conducted a costs survey in relation to the proposals under the Woolf Report.

The following points were made by Professor Genn during this meeting:

- legal costs are most 'out of proportion' at the small claims end;
 - the 'set pattern' to process a claim for compensation is complex and expensive;
 - to cut legal and associated costs, there is a need to consider the standard of proof, and all the various steps and reports that are required; processes must be simplified, as complex processes add to the costs;
 - insurance companies are not always as keen to settle quickly, contrary to claims; indeed some insurance companies admit that they rely on the complex procedures to slow the settlement process for the purpose of 'wearing the plaintiff down';
 - the problem with putting a cap on the legal costs is an alteration of the balance of power which could harm the interests of the plaintiff; and
 - the best way to cut legal costs is to 'cut down on procedure'.
- **Mr Mike Adie: Structured Settlement Services**

Issue: *Structured Settlements*

Structured Settlement Services act as brokers in the industry, who work mostly for defendant insurance companies rather than plaintiffs. Mr Adie was very much an advocate of the 'bottom-up' approach in negotiating a structured settlement, which he believed truly reflected the purpose of structured settlements in properly compensating the needs of a catastrophically injured plaintiff.

In Mr Adie's experience, about 40% of a compensation amount will be paid as an up-front lump sum, and the remaining 60% will go towards funding the structured settlement.

Structured Settlement Services have approximately 30 structured settlements under management, with an average value of GBP600,000. Mr Adie noted that a typical case would be someone in their 20s or 30s with a spinal cord injury or a head injury as a result of a motor accident. Structured Settlement Services have an approximate success rate of brokering a structured settlement in 25% of catastrophic cases.

- **Ms Helen Hall: The Law Commission**

Issue: *Structured Settlements*

Ms Hall discussed generally the history behind, and the responses to the Law Commission report on Structured Settlements and Interim and Provisional Damages.

She noted that during the consultation process for the report, nobody queried that structured settlements were a good idea, however some plaintiff lawyers questioned whether they were a good idea in all cases, and they also queried the claims of costs savings. There was also doubt whether they were always financially advantageous to the plaintiff.

Ms Hall also noted that plaintiffs now have much better security protection with coverage under the *Policyholders Protection Act*.

- **Mr John Frenkel, Mr Stephen Ashcroft, Mr Brian Stanley: Frenkel Topping Structured Settlements Limited**

Issue: *Structured Settlements*

Frenkel Topping is the largest structured settlement broker in the United Kingdom, and was the 'pioneer' of the product in this jurisdiction. Indeed, they were instrumental in bringing about the legislative reforms to formally sanction the tax free status of payments, through the use of a professional firm of political lobbyists. In their most recent newsletter, they have described the state of their practice as follows:

The past six months or so have seen a great deal of activity...[and] despite the Court of Appeal decision in *Wells v Wells*, damages awards still seem to be increasing and we have recently completed what we believe to be the largest Structure in the UK with [GBP] 2 million being invested in the Structure. At the same time, we have implemented several Structures where [GBP] 100,000 or less was used, since more and more Plaintiffs are coming to realise the benefit of a guaranteed, tax-free, index-linked income as part of their damages award. We have also completed a couple of very interesting international Structures...

The Committee learned the following in the meeting with Frenkel Topping about their practice and the structured settlements industry in the United Kingdom:

- the majority of cases are still being settled according to the 'top-down' approach;
- there is a growth in the use of joint conferences;

- if the plaintiff considers the option of a structured settlement very late in the course of the claim, they may have unreal expectations in relation to the lump sum that would be available for compensation;
 - under the recent amendments to the *Finance Act*, if an annuitant dies, the tax free status of the payments under the annuity does not extend to the estate;
 - Frenkel Topping is responsible for approximately 75-80% of all structures in the UK;
 - there are about 600 structures currently under management in the UK; in 1996, Frenkel Topping brokered 100 structures; so far in 1997, they have brokered 80 (at the beginning of September);
 - in catastrophic cases, Frenkel Topping is successful in brokering a structure in about 60% of cases;
 - Frenkel Topping has played an active role in educating the relevant interest groups about structured settlements: they regularly address consumer and lawyer groups on the issue; and they have received Law Society approval to give formal legal education;
 - there is a much higher success rate in settling with a structure if the plaintiff, or a representative are actually present at the negotiations and they are consulted 'face to face'; and
 - Frenkel Topping provides a 'post-settlement' monitoring service to check that the relevant parties are satisfied on an ongoing basis with the structure; and in a few years time they intend to invite an impartial commentator to inspect their files and compile a 'satisfaction report'.
- **Mr Rodney Nunn: Public Trust Office**

Issue: *Structured Settlements*

The Committee met very briefly with Mr Nunn at the Public Trust Office which has a role in monitoring the compensation of people with a mental incapacity. Mr Nunn noted that any compensation settlement involving people who are mentally incompetent must be approved by the Protective Court. The Protective Court employs investment officers who will consider the structure in the interests of the mentally incompetent person.

Mr Nunn noted that even though structures are index-linked, they are not necessarily capable of keeping up with the costs of medical services over time, which are 'hyper-inflated'. He also noted the inflexibility of a structured settlement.

Finally, he noted that the guardian of a mentally incompetent person must file accounts with the Protective Office which detail how the periodic payments have been spent.

- **Ms Alison Taylor, Director: Chase de Vere Investments**

Issue: *Structured Settlements*

Chase de Vere broker structured settlements, as well as having a primary practice in the provision of personal investment advice. They have been advising on the investment of compensation awards or settlements since 1983.

They act exclusively for the plaintiff, and rather than charging a commission, they charge a fixed fee of GBP 3,000 (+VAT) for brokering a structure, irrespective of whether the plaintiff chooses to accept the structure or not. As a result of their lower fees, they are capturing a greater share of the market. They currently have about 20% of the market.

Ms Taylor also noted that the 'bottom-up' approach was the minority approach. In practice, plaintiff lawyers will still negotiate according to the 'top-down' approach to get the best value for the plaintiff. Indeed, Chase de Vere also favours this approach due to greater flexibility, and the capacity to invest part of the settlement outside the structure in equities or a balanced fund.

- **The Right Honourable The Lord Woolf, Master of the Rolls: Royal Courts of Justice**

Issue: *Legal Costs*

Lord Woolf is the author of the *Access to Justice* report, which details a number of wide-ranging recommendations for reform of civil litigation in England and Wales. Some of the key recommendations include proposals for fast track procedures and fixed costs for small claims.

Lord Woolf noted that an effective way of discouraging parties from commencing litigation is the use of costs orders which link the final award to any formal offers of settlement. Therefore, if a reasonable offer is refused, a costs order can be made accordingly.

Lord Woolf also noted the following:

- a good means of controlling costs, is to fix a trial date very early in the proceedings;
- indicative hearings can assist in controlling costs by giving parties an early

indication of the potential award;

- the need for proportionality in costs; and
- in taxing costs, the test of reasonableness should be applied in relation to what is reasonable from both the plaintiff's and the defendant's point of view.