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Liability Procedures: The Position Applying in the United Kingdom

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1. Present Rules, Procedures and Trends

Each year around three million people suffer personal injury in the UK by accidental means, perhaps 20,000 of them dying in consequence. If a victim, or his estate, in a fatal case, can show that the misfortune resulted from a legal fault of another our machinery of justice will ensure that he is compensated by that other. This paper attempts to outline the legal parameters a claimant must satisfy for success and the basis in which the award is quantified. It also provides details of a number of recent decisions in our courts with particulars on the global figures actually awarded together with the individual sums granted under each head of damage.

Personal injury may sometimes result from disease, perhaps as a slow insidious invasion of the body by exposure to harmful substances in the atmosphere, rather than by the trauma of a sudden assault to the person.

1.1. Basis of Legal Liability for Personal Injury

1.1.1. A Duty of Care must exist

In Britain it could be said that our courts in the 19th century were dedicated to laying down the principles that underlie the law of contract whilst in this century judicial energies have channelled into the other part of the law of civil obligations, namely tort. Compensating B for harm, including personal injury, that results from A's wrongful act or omission is a function of tort, a concept that has underpinned the common law for a long time. Over the last fifty years or so, the criteria employed in deciding the extent of A's duty have greatly expanded, their modern growth stemming from *Donoghue v Stevenson* [1932] AC 562. In that seminal decision a three-two majority of the House of Lords extended the horizons of A's duty of care to include everyone whom he had to regard as a legal neighbour, i.e. "...persons who are so closely and directly affected by (A's) act that (he) ought reasonably to have them in contemplation as being so affected when (he) is directing (his) mind to the acts or omissions which are called in question."

Those words came from Lord Atkin's speech but significant also was Lord McMillan's stress upon the open-ended concept of an action in negligence since his Lordship said: "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaption to altering social conditions and standards. The categories of negligence are never closed." Illustrations of that last quoted sentence abound. Actions that middle-of-the-road legal opinion would have regarded as speculative a score of years ago may become part of today's orthodoxy. *McLoughlin v O'Brian & Others* [1982] 2 AII ER 298 arose from a serious road accident involving Mrs. McLoughlin's husband and children. She was not physically involved and had no knowledge of the misfortune until an hour after its occurrence when someone called at her home with the sad tidings. She was then taken to a hospital some eight to ten miles away where she saw injured members of her family and heard that her daughter had been killed in the crash. The effects of her harrowing experience transcended normal grief and sorrow; she suffered nervous shock, organic depression and a change in personality, suing the negligent driver for those consequences. The House of Lords took a view different from that unanimously adopted in the lower courts by holding that given such circumstances the plaintiff's harm should have been reasonably foreseeable to the defendant driver, altough it occurred not through presence at or witnessing of the accident but arose out of its aftermath.

Currently the Crown Proceedings (Armed Forces) Bill is receiving Government support. Its passing will repeal S 10 of the Crown Proceedings Act 1947 by allowing forces personnel to seek redress for death or injury caused by fellow members of the Services whilst on duty. In a Parliamentary debate on February, 13th 1987 it was claimed that the general climate of public opinion in human and civil rights had changed considerably in recent years. It rankled that the awards made in the courts to civilians who were the victims of negligence far outstripped, sometimes by a factor of 10 or more, such compensation as was available to a Serviceman. The Bill's sponsor (Mr. Winston Churchil MP) also added that almost half of the total provision of £ 20 million estimated as the yearly cost of operating the Bill was likely to go on legal fees and administration; the Treasury Solicitors' Department proposed to take on a quite sizeable extra staff (52) to cope with the pending change.

Public policy may limit litigation. In *Hill v Chief Constable of West Yorkshire Police* the Court of Appeal in 1987 confirmed that the plaintiff's claim should be struck out. Mrs. Hill was the mother and personal representative of a 20 year old girl who was attacked in the street by Peter Sutcliffe and thereby suffered injuries from which she died later on the same day. It was the plaintiff's case that Sutcliffe had committed a series of offences against young women, mostly in the metropolitan police area of West Yorkshire, and that it was the duty of the Chief Constable and his officers to exercise all reasonable given care to apprehend the perpetrators of the crime. The defendant had failed in that obligation because Sutcliffe had not been arrested by November 1980 when he murdered Miss Hill, although he had been involved in no less than twelve previous murders and eight attempted ones. No precedent could be cited of any instance in the UK, or Commonwealth, or the US jurisdictions where the police had been made liable for the acts of a criminal on the grounds that they should previously have apprehended him. The risk of injury to a citizen if a violent criminal was not arrested was foreseeable but that of itself did not give rise to the duty of care without some special relationship between the parties.

That special relationship did not exist; the police had a general duty to the public at large to suppress crime but that did not imply such a relationship with all possible victims of the perpetrator of a crime under investigation. The position had been different in *Dorset Yacht Co v The Home Office* [1970] AC 1004 where the House of Lords had on a preliminary issue held that the officers of a Borstal Remand Home owed the residents of the neighbourhood, to which they had brought a party of youths under their charge for a holiday, a responsibility to prevent them from causing damage, of which there was a manifest risk if they neglected that duty. The fact that the boys were in the officers' custody was the basis of the special relationship that existed there.

1.1.2. The Standard of Care

In practice the most usual cause of dispute is whether a defendant's conduct amounted to negligence, nearly always a question of fact. The burden of proof is on a plaintiff, save in limited circumstances when the res ipsa loquitur (the thing speaks for itself) rule shifts the onus because a plaintiff has brought evidence of facts which suggest prima facie a lack of reasonable care. Then the defendant will lose unless he rebuts the inference by contrary evidence.

The standard of care looked for by a court is that of the notional "reasonable man", except where children are concerned. "Notional" because there is little room within that

judicial creation for such human qualities as momentary lapses of attention or forgetfulness or other everyday failings to which the flesh is heir. The legal requirement for a driver, for instance, is that "He must drive in as good a manner as a driver of skill, experience and care, who is sound in mind and limb, who makes no errors of judgment, has good eyesight and hearing and is free from any infirmity..." (Lord Denning MR in *Nettleship v Weston* [1971] 3 All ER 581).

Just as the burden of proving negligence customarily rests with a plaintiff, so when an allegation is made that the latter himself contributed to his injury through his own want of care it is for the defendant to prove his assertion. The Law Reform (Contributory Negligence) Act 1945 substantially altered the pattern of UK litigation by amending the old common law rule that if a plaintiff was partly to blame, his share of culpability, even if small, was a complete answer to his claim. Since 1945 partial fault no longer is a complete barrier but merely a reason to reduce the damages appropriate to full liability by the extent to which there was contributory negligence.

1.1.3. The "No Fault" Alternative to Tort

The common law designates a small part of its terrain as an area of strict liability where legal fault may arise without negligence. Originating in the tort of nuisance, the Rule in *Rylands v Fletcher* ([1868] LR 3HL 330) has occupied its own special niche. It states that anyone who for his own purposes brings on his land and collects and keeps there anything likely to do mischief of it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. "Damage" has been held, after some controversy, to include personal injuries (*Perry v Kendricks Transport Ltd* [1956] 1 All ER 85).

There are those (including the late Sir Eric Sachs, a Lord Justice of Appeal from 1966-1973 – see his foreword to PI Claims (The Role of the MIB), Third Edition, by Barry Rose) who hold that the common law took a wrong turning when the internal combustion engine made its public appearance in failing to treat the bringing of vehicles onto a highway as coming within an offshoot of the Rule in Rylands and Fletcher. As it is, responsibility for a collision on land is determined as in any other civil dispute.

In 1986 the British Medical Association called for a state-funded scheme to provide compensation on a "no fault" basis for victims of medical negligence. It suggested that their members were increasingly practising "defensive medicine" to protect themselves from being sued. The number of complaints from National Health Service patients is steadily rising (16,000 in 1982, 22,000 in 1986). A registered charity, Action for Victims of Medical Accidents, was set up in 1982 and has dealt so far with some 2,000 claims, only 25% of which have involved lawyers, and is said to be faced with an increasing workload.

"No fault" schemes in Sweden and New Zealand have been investigated by the BMA, and a working party of members has recommended adoption of a similar system here. It is understood that the Association is not seeking to abolish a patient's right to sue his medical adviser but to bring into being an alternative that would avoid the expense, delays and the capriciousness of the orthodox approach. The BMA recommends that such a scheme should be state-financed from taxation, inevitably bringing prominently into lay minds that professional indemnity insurance costs have risen sharply in this decade.

1.1.4 The Impact of Liability Insurance

Very closely related to the development of liability for negligence has been the growth of liability insurance. The latter is obviously in a plaintiff's interest as well as a defendant's. Motorists and employers, the two sources of most personal injury litigation in the UK, have to insure against liability for personal injuries, Parliament's recognition of the importance of seeing that victims of accidents on the road and at work shall reap the fruits of favourable judgments.

Mandatory liability cover does not end with these two giant categories of risks. The Riding Establishments Act 1970 and the Dangerous Wild Animals Act 1976 both contain compulsory third party insurance provisions. Many professions make it a condition of practising that their members should take out adequate insurance against the possibility of a wrongful act or omission stemming from the exercise of their calling so that in practice the safety net that insurance provides is extensive.

With over 20 million licensed vehicle drivers UK highways are congested enough, but there is a further small unrecorded proportion that disregards formal excise and insurance requirements. Only a tiny majority of road users is able personally to satisfy an adverse third party judgment. Hence it is all the more important to the public that a victim should be able to count upon getting his money if injured in circumstances that give him a good case. The Road Traffic Act 1972, like its predecessors, was designed to ensure that result, granting a third party in certain circumstances direct rights against the insurer who may be statutorily debarred from refusing to meet a judgment even if justified by a breach in the terms of the contract of insurance. In such circumstances there is a right of reimbursement from an insured who has broken his contract but for practical purposes that is often of little or no value.

And what if a negligent road user is uninsured? The creation of the Motor Insurers' Bureau (MIB) by an agreement between a government minister and the insurance industry in 1946 has effectively plugged whatever gaps there might be in compulsory motor insurance arrangements. The Bureau by a long established precedent may be nominated as defendant by someone injured in a motor accident and if on the merits of the accident he obtains judgment he is certain of his damages. That this position is a legal anomaly was highlighted in the judgment of Diplock LJ in *Gurtner v Circuit* [1968] 1 All ER 328 when his Lordship said: "...insurers...acting in agreement with the Minister of Transport, formed a company, the MIB, to assume liability to satisfy judgments... To this contract, for that is all that it is in law, no unsatisfied judgment creditor is a party. Although clearly intended by both parties to be for the benefit of such creditors the Minister did not enter into it other than as a principal. He was not purporting to act as agent so as to make it capable within the law of ratification by those whom it was intended to benefit... The only person entitled to enforce the contract is the Minister... It confers no right of action against the MIB on any unsatisfied judgment creditor..."

Perhaps the creation of an equivalent of the MIB suitable for individual States would inhibit the spread of liquor law liability which is understood to be a growing feature in some parts of the USA. There a host, who may be a commercial seller or merely social, can sometimes be held liable for a customer's or a guest's negligence which results from intoxication. Over here the chances of that type of liability being recognised are remote, though the drunken driver would be sued and his insurers, or the MIB, would have to meet the bill.

In Britain an employer must insure his liability to employees in respect of accidents at work under the Employers Liability (Compulsory Insurance) Act 1969. By the Employers' Liability (Compulsory Insurance) General Regulations 1971, insurers are prohibited from contracting in their policies for certain requirements, for example, that claims will not be admitted unless reasonable care is exercised to protect employees against the risk of injury or disease, but without prejudice to an employer having to reimburse the insurers if the latter does have to meet a claim despite a breach of condition. Unlike compulsory motor insurance, however, the 1969 Act does not give the person injured at work the same rights that a running-down victim has to sue the insurers direct and neither has an employers' liability insurers' bureau been established.

All third parties have the power to sue an insurer direct in the event of a policyholder of that insurer becoming bankrupt (Third Parties (Rights against Insurers) Act 1930). There is also the benefit of the Policyholder's Protection Act 1975 should an insurer go into liquidation.

1.1.5. State Aid for the Injured in the Form of Social Security Benefits

If this century has seen considerable development in the UK tort law, the expansion of provision by the State for the injured may be said to have been even greater. In fact the movement started in 1897 with the first Workmen's Compensation Act which imposed upon an employer the duty to pay compensation to any of his work people injured accidentally in the course of their employment in certain hazardous industries. Subsequent legislation extended the principle to all forms of work, gradually adding industrial diseases to its scope. The significance of these measures was that they were on a no fault basis and were not means-tested. The National Insurance Act of 1911 was another precursory symbol of the modern British Welfare State which came fully into flower in 1946 when proposals in the Beveridge Report on Social Insurance and Allied Services, published in 1942, were implemented. The Workmen's Compensation system was dismantled and replaced by the National Insurance (Industrial Injuries) Act 1946 by which effectively the State became, from 1948, the sole agency for the collection of employers' and employees' contributions and the source of benefit payments.

In the post-war years the various social security benefits have been kept under constant review – by the Social Security Act 1975 such benefits must be reviewed once in each tax year – and new features, including special payments to help the severely disabled and their families, have been introduced.

The various Acts of Parliament passed since 1946 in the United Kingdom have implemented a Social Insurance Scheme of a comprehensive nature to provide benefits, mainly in the form of weekly payments, to members of the public who have become incapacitated through accident, injury, sickness or unemployment, after they have left school or have completed their education at University and regardless of the cause of their incapacity. The Social Insurance Scheme also provides for payment of a weekly pension at aged 60 for women and aged 65 for men.

The fund from which these compensatory and pension payments are made is obtained by contribution deducted from the weekly wages/salaries of employees and by contributions made by employers for each employee on their pay roll. A number of the benefits only become payable after a minimum of weekly National Insurance premium contributions

have been paid whilst for other of the benefits there is a required "lead in" period before the claimant is entitled to benefit.

In addition to the right to these automatic benefits under the Social Insurance Scheme, any individual is entitled under the United Kingdom common law to claim compensation from any tort feasor owing him a duty of care who through negligence has caused personal injury or damage. For example, an individual who is injured at work or in a road accident or as a result of a defect in some product he has purchased, will be entitled to the automatic weekly compensation benefits under the Social Insurance Scheme, and if he can prove negligence on the part of a third party who is responsible for his injury, he will obtain in addition to the Social Insurance benefits a lump sum awarded by the Courts as compensation payable by the third party tort feasor (or in practice his insurers).

These common law damages will be assessed as described in Chapter 3 and, where relevant, will include past and future loss of earnings resulting from the event which is the subject of the claim. It was originally suggested that an individual was entitled as a right to receive the Social Insurance Act benefits and that they should not be required to be offset against loss of earnings included as an item of a common law claim. An equally strong view was put forward that these benefits represented, to the extent of their value, a duplication of the claimant's economic loss and therefore should be taken into account. This controversy was decided by the passing of various Acts of Parliament and Regulations from 1948 onwards establishing the position as follows:

A plaintiff whose earning capacity has been affected by his injuries is entitled in a common law action to include in that claim the following items *in addition to* the social insurance benefits he will receive separately from the State:

(i) any loss of earnings which has accrued or probably will accrue to him from the injuries *less*

(ii) one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of any of the following benefits under the Social Security Act 1975 namely –
Sickness benefit, invalidity benefit, severe disablement allowance, injury benefit and industrial disablement benefit – for a period of five years beginning with the time when the cause of action accrued.

There is now no evidence available to indicate why this 50% figure was agreed and it is generally believed that when it was first introduced in 1948 it was arrived at on a compromise basis.

In a more recent court case (*Jackman v Corbett* [1987] 2 All ER 699) it was held by the Court of Appeal that the five year period applies to known pre-trial loss of earnings and probable post-trial loss of earnings and exhaustively defines the maximum period during which this provision applies. By Section 2(1) of the Law Reform (Personal Injuries) Act 1948, as amended, the five years commence from the time that the cause of action accrues.

The treatment of social security benefits in cases where tort damages are also awarded is governed by a range of Statute and case law. Damages are reduced by the value of some benefits in full, by half the value of some benefits whilst other benefits are ignored altogether. Appendix I sets out all of the social insurance benefits that are available and indicates the action applying to each separate benefit in the assessment of tort damages.

Appendix II provides details of the actual amount applying in 1987 to the major items of social insurance benefit available to claimants in common law actions.

Since the circumstances of each individual claimant will vary it is not possible to identify the true extent to which plaintiffs' increased financial advantage on the one hand is offset by their decreased financial advantage on the other hand.

These details illustrate how in the second half of this century the variety and extent of the various forms of social security relief have steadily grown. When entitlement to one of them arises following an accident, the impact of lowered or eliminated earnings is lessened accordingly. Should that effect be ignored in a subsequent common law claim, to that extent an injured person will be doubly compensated. There are a number of decisions where the issue has been over whether or not such benefits are deductible from loss of earnings. A recent one, *Palfrey v Greater London Council* [1985] ICR 347 questioned whether statutory sick pay under the Social Security and Housing Benefits Act 1982 should be taken into account in reduction of damages. It was held that it should, Mr. Piers Ashworth QC, who sat as a Deputy High Court Judge, holding that there was no distinction between sickness benefit on the one hand and unemployment benefit, supplementary benefit and similar benefits on the other. Just as unemployment benefit (*Nabi v British Leyland UK Ltd* [1980] 1 All ER 667) and supplementary benefits (*Lincoln v Hayman* [1982] 2 All ER 819) are brought into the reckoning, so also should statutory sick pay.

Some commercial firms offer to the work force contracts of employment which provide that in the event of incapacity as the result of an industrial accident full pay for a certain period would be continued, perhaps reducing on a graduated scale were the disability lengthy or permanent. Such schemes may be backed and supplemented by a permanent health insurance policy which the employer has arranged. The question of whether an injured workman would be then entitled to his wages loss, ignoring altogether the sickness benefit paid under such a scheme, was canvassed in *Hussain v New Taplow Paper Mills Ltd* [1987] 1 All ER 417. The Court of Appeal, reversing the trial judge, held that such sickness benefits were of the same nature as the earnings which the plaintiff claimed to have lost and should therefore be brought into account and deducted from the sums sought for the pretrial and future loss of earnigs. In the context of this particular case the ruling lowered a global award of damages (on a full liability basis) by £ 34,688.

In 1978 the Pearson Royal Commission on Civil Liability and Compensation for Personal Injury pointed out: "The overall scope for the duplication of compensation is substantial" (Volume 1 Para 171) and made the recommendation that "relevant social security benefit should be deducted in full" when calculating damages for past pecuniary loss (Volume 1 Para 634).

The background to the Hussain case was that the defendants had taken out a permanent health insurance policy to cover themselves under the liability they had accepted under their standard contract of employment to pay long-term sickness benefit to injured employees. The entire cost of the insurance scheme was borne by the defendants but there was no evidence that the plaintiff's wages would have been any higher if the scheme had not existed. Had the plaintiff himself purchased insurance privately any benefit he received could not be offset. *Bradburn v Great Western Railway* [1874] LRIO Ex Ch 1 established that clearly. Neither are purely charitable payments deductible; like the proceeds of personally arranged policies, they are too remote in law to be brought into account, representing

a novus actus interveniens after the commission of a defendant's tort. But, "If an employee is injured in the course of his employment and his employers make him an immediate ex gratia payment, as any good employer might, I see no reason why such a payment should not be taken into account in reduction of any damages to which the employer may ultimately be held liable. Employers should be encouraged to make ex gratia payments in such circumstances. If so, then public policy would seem to require that such payments be brought into account" (*Hussain v New Taplow Paper Mills Ltd*, per Lloyd LJ).

A 1986 Report from the National Audit Office bore the title, ominous for tortfeasors and their insurers, "Recovery of social security benefits when damages in tort are awarded". It urged the Government to change the UK law as a matter of urgency, estimating that if arrangements were made to recover benefits payable, for up to five years from the date of an accident, around £ 150 million would be recouped each year. As it is, a wrongdoer is relieved by the taxpayers of the cost of part of the victim's treatment and economic support.

In many European countries this subrogation right exists. Amending the law in Britain, something that has been under consideration since 1978, would mean most of the anticipated £ 150 million at stake would be a charge on the insurance market here.

1.2. Paying for Litigation

1.2.1. The Civil Justice Review Proposals

Our legal system is widely admired for its impartiality and fairness and is served by judges of undisputed integrity. But increasingly in recent years improvements in the machinery of civil justice have been called for, particularly in regard to delay, expense and complexity. As a result the Lord Chancellor's Department initiated a Civil Justice Review and its proposals were published early in 1987.

A great deal of criticism from those outside the legal profession had in particular been targeted at the heavy expense of engaging in litigation and some of the suggestions from the Department are aimed at lowering costs. For instance, it is recommended that in all cases there should as a matter of course be full pre-trial disclosure of evidence, including the exchange of witness statements. The British adversarial court procedure in which each side presses its respective view point while the judge acts as umpire, is a feature of common law systems. It contrasts with the inquisitorial method followed by many other nations where the search for truth proceeds by way of an enquiry into the facts conducted by the judge and where the latter takes the initiative, rather than leaving it to the parties. The adversarial formula is traditional here but it seems likely that it often adds appreciably to the expense of a trial.

That is so particularly in actions where only a relatively small sum is involved; the Civil Justice Review brought that out starkly when 199 County Court cases were examined – in that venue damages must be restricted to a maximum of £ 5,000 – and it was found that in 85% the plaintiff's costs alone accounted for more than 50% of his compensation. The average costs on both sides in 284 recent High Court cases sampled worked out at £ 6,830. There of course the average award would be much higher. The more serious the injury the smaller costs tend to be as a proportion of the amount at stake. The Lord Chancellor's Department has recommended that there should be a new in-court arbitration structure to cover cases where the claim is between £ 1,000 and £ 5,000. That would mean adjudication

on a less formal basis and a shift away from the gladitorial legal combat of the full scale trial. The idea seems a logical extension of the small claims court, itself resulting from a successful experiment introduced some years ago to encourage the parties themselves to bring their differences to arbitration. At present there is an upper limit of £ 500 attaching to the small claims procedure and the idea is that the present limit should be doubled along with the setting up of the new facility for cases between £ 1,000 and £ 5,000.

Much more use would be made of the less expensive, though still costly, County Court; nearly all personal injury claims would start and be processed there taking a great deal of pressure off the High Court. At some stage near a trial the parties could then certify that the case was of sufficient weight to be transferred into the High Court, or if they were not in agreement on the point, a Registrar could give directions for a High Court trial should he decide it necessary.

1.2.2. Legal Aid

Many years ago the late Lord Justice Darling was moved to remark that, like the Ritz Hotel, the English courts were open to all. That jibe lost much of its point since a State backed Legal Aid Fund was introduced in 1949 and is available, subject to a means test, to help individual applicants. Its purpose is to assist those who need legal help and are unable to pay for it. A citizen should not be deprived of justice merely because he lacks the means to have his case presented and argued adequately, factors that could become of significance to the outcome in a dispute where the legal merits on either side are more or less evenly matched.

On the 26th March 1987 the Government issued a White Paper aimed at ensuring that the scheme is run as efficiently and effectively as possible and that it "provides the best possible value for money". One of the proposals is that an unaided party in a civil dispute should have the new right to argue that it would in the circumstances be inequitable to grant Legal Aid to his opponent. Another is the setting up of a new Legal Aid Board to control the fund, instead of leaving the running of the scheme to the Law Society, as at present. The introduction of standard fixed fees for certain types of work instead of the usual charge by time spent is also mooted, as is the idea that gradually some of the more routine advice work should be taken over by agencies other than solicitors, for example helpers at various Citizens' Advice Bureaux throughout the country.

From the outset, the greater share of support has gone to criminal cases, but there are signs in the present decade that civil legal aid is claiming an increasing proportion. The Civil Justice Review estimated that by 1984/5 the amount expended in the two areas had become approximately equal; in that particular twelve months there were 332,000 applications for civil aid of which 238,000 were granted. It is anticipated that thc cost of legal aid overall for 1986/7 will be around £ 400 million.

The expansion of the scheme has increased the numbers of practising lawyers. Some 25,000 solicitors and 2,500 barristers in 1971 had grown by the end of 1985 to over 45,000 and 5,000 respectively. The Lord Chancellor's Department puts some emphasis upon the introduction of a system of payment by standard fee, rather than the individually taxed bill that is routine procedure at present and which is thought to be responsible for some of the delay in completing civil cases that are aided.

1.2.3. Privatised Legal Aid

Costs are the life's blood of the legal profession. The figures quoted in the previous section illustrate the fillip that came with the scheme. There are other ways whereby costs might be increased and one of them is at present under consideration by a sub-committee appointed by the Law Society to look into the possibility of introducing a variant over here of the contingency fee system. Common law in the UK regarded financial support for the litigation of others as a form of intermeddling in the legal process, the offence of maintenance which was abolished by the Criminal Law Act 1967. Thereby a climate was introduced more favourable to a form of insurance business established in Western Europe earlier in this century but previously not thought to be legally acceptable here.

Legal Protection Insurance (LPI) therefore did not come to Britain until the 1970s. Despite a rather slow start, it has steadily increased a market share that is still modest, but it seems tailor made for the needs of citizens who would be ineligible for legal aid on financial grounds yet are not sufficiently well off to afford the heavy and escalating costs of bringing or defending a personal injury claim. Defence may not pose such a problem because the mandatory insurance requirements for road users and employers include cover for lawyers' bills as well as for the award.

There is a parallel with private medical care. Both involve purchasing advice that may prove expensive not only in regard to the services of the expert most directly involved but also in a number of related areas, whether it is for the appearance of specialised technical witnesses or the supply of costly drugs. There is a well established National Health Service in the UK, a cornerstone of its welfare state, but that has not prevented a number of private medical care insurance schemes flourishing. There is no State legal service – arguably in a complex society far the most important need after National Health care – and for all but the relatively poor, who should be able to fall back on legal aid, and the very rich, to whom the price is not a serious consideration, legal expenses insurance should fill an important gap.

There is currently a debate about whether multiple professional partnerships should be allowed to practice; should a number of professional skills be available to the consumer in one office? It seems unlikely within the foreseeable future that if such mixed practices were permitted insurers could be included, but it may become possible for insurers increasingly to recruit qualified lawyers for their staff and be able to supply full legal protection cover on a "in-house" basis.

That raises the wider issue of whether the liability insurance market should, in view of the rising costs of outside legal services, be more ready to recruit its own professional lawyers, at least as far as solicitors are concerned, in the hope of more closely controlling the steeply rising expense of routine personal injury litigation.

One impact of LPI here has been the growing number of uninsured loss claims by motorists; it seems likely that the market now has to deal with a number of relatively minor personal injury cases arising out of road accidents that before the days of LPI would probably have been thought not worth taking to an outside solicitor.

1.3. The Assessment of Damages for Personal Injury

1.3.1. Not a Jury Matter

A full Court of Appeal, five members instead of the more usual three, (only two in a limited number of cases) considered in *Ward v James* [1965] 1 All ER 563, the issue of

whether a plaintiff's claim for compensation for injury should be tried by a judge and jury, or by a judge alone. The case is important because it decided that as a general principle personal injury actions should be left to a judge alone. That was a distinct break with the past because previously the court could exercise its directions to allow a jury trial, at the conclusion of which, subject to the Court's directions on law, the twelve lay persons would decide liability and, if they found for the plaintiff, the amount of his damages. It can be argued strongly that an amalgam of the views of twelve ordinary men and women as to what is fair compensation for pain and suffering, loss of amenity and for effects of a particular injury on the plaintiff's way of life comes better from fellow citizens than from a specialist judge. That in fact is the argument that so far has succeeded in retaining jury trial in Northern Ireland and to some extent in Scotland. For England and Wales, however, the use of juries has virtually disappeared in this class of civil litigation.

The attempt to put a price on personal injury must be a calculation lacking a foundation in reality, for the same reason that the indemnity principle cannot be applied to life and personal accident insurances. In *Ward v James* the Court admitted that the problem of compensating for such loss in monetary terms was insoluble. "To meet it, the judges had evolved a conventional measure. They go by their experience in comparable cases. But the juries have nothing to go by" (per Lord Denning MR). His Lordship considered that assessing damages was almost as difficult as determining the sentences of those who had broken the criminal code.

It is difficult on this side of the Atlantic to suppress a surmise that were it possible to modify use of juries in personal injury trials in other common law jurisdictions some significant changes in results might be anticipated.

1.3.2. Non-Pecuniary Loss

There is no limit in theory to the amount that may be awarded for a non-pecuniary loss but in practice at the present time it is unlikely that for injuries of the utmost severity the sum under this particular head will exceed £ 100,000. The judicial tariff, although unwritten, is in fact well known to practitioners from the day-to-day output of the courts and consequently those advising litigants can predict with reasonable expectation of some measure of accuracy the sum likely to be awarded in a particular case, a feature that encourages settlements out of court. In the days of jury trials the range of possibilities was much greater, the conventional view being that a lay tribunal was likely to be swayed by sympathy in the plaintiff's favour.

The limited abrogation of the common law rule 'actio personalis moritur cum persona' in favour of stipulated dependants ensures that for fatal accidents the legal issues, given a defendant's liability, largely consist of working out the extent of the pecuniary loss from the sudden withdrawal of the deceased's support (see 3 below). By S 1 A of the Fatal Accidents Act 1976 a restricted claim for damages for bereavement may be made; at present it is limited to £ 3,500.

1.3.3. Pecuniary Loss

The principle of restitutio in integrum applies to items of damage that are capable of arithmetical calculation. Broadly this is the same sort of measuring stick that insurers use in regard to first party claims under fire, theft and similar types of indemnity policy, making due allowance for "new for old" covers, agreed values and other pre-arranged modifications.

If the financial item claimed is in a less definite category than, for example, loss of post-accident earnings, the court still has to make the best attempt it can at a fair and reasonable evaluation. Thus a plaintiff prevented by injury from taking an opportunity to be a candidate in a competition is entitled to be compensated if the court, on the evidence, considers he had some chance, but was by no means certain, of success. In such a case the judge will estimate the degree of financial loss which it is felt that the plaintiff was likely to sustain.

Assessment of damages in fatal cases is largely a question of calculating the financial loss sustained by those dependants who, by the terms of the Fatal Accident Act 1976, are entitled to bring proceedings against the wrongdoer based upon deprivation of their financial support from the deceased. In that type of calculation, as in cases of permanent incapacity for a living plaintiff, the multiplier method is normally used. The victim's annual reduction in earnings, net of income tax and any other deductible receipts, is the multiplicand to which a multiplier, largely depending upon age, but possibly influenced marginally by other factors, such as reduced life expectation from causes unconnected with the accident, is applied. That gives the figure for the future earnings loss.

The multiplier takes account of the fact that a plaintiff is being paid in advance by a lump sum to offset his future losses. There is also provision against the ordinary chances and hazards of life, for example that a plaintiff might die prematurely from a contigency unconnected with his injury. The theory in the UK courts is that the conventional range of multipliers, unlikely to exceed 18 at the top end, does produce a sufficient sum, when prudently invested, to yield an income equivalent to the one lost over the relevant period; the capital gradually diminishes as the years go by but is supplemented by the interest that the untouched part is earning.

The tacit assumption underlying the conventional table of multipliers is that the plaintiff will obtain a return of 4.1/2% per annum on his investment net of tax and taking account of inflation. That assumption, which stems from the speech of Lord Diplock in *Mallett v McMonagle* [1969] 2 All ER 178, continues to hold sway in the courts despite the considerable economic changes that have taken place in Britain over the last two decades. From time to time a plaintiff will call actuarial evidence to suggest that multipliers are inadequate, a view which receives some support from the index linked Government stock now available. Such stock takes care of the effects of inflation but it is significant that the rates of interest afforded are under 4.1/2%. Rather the yield is 2.1/2% to 3%, and subject to income tax.

There was strong criticism of the present multipliers from a Pearson Royal Commission majority in 1978, supplemented in 1984 by a Report from the Government Actuaries Department on "Personal Injury and Fatal Accident Cases". An inter-professional working party of actuaries and lawyers chaired by Michael Ogden QC then produced a set of actuarial tables which were suggested as being more likely to do justice in this type of case. As with the Pearson Commission's proposals the use of such tables would mean a significant rise in the level of multipliers and so in that of damages for a given future financial loss.

1.3.4. Compensation, Not Punishment

It is only in the most exceptional cases that a civil court will award exemplary damages, i.e. damages by way of punishment of the defendant in excess of what would ordinarily be deemed necessary to compensate the plaintiff for the harm done to him. Broadly speaking,

damages that include a punitive element are not given in personal injury actions, however gross the negligence. Their use is largely confined to wrongdoing with an element of deliberate malice. Lord Reid stated in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 that: "... I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already covered by authority", and Lord Hailsham and Lord Diplock expressed similar views. It is therefore unlikely that punitive damages will be given in Britain to an injured plaintiff. The court's object is to compensate him for what he has suffered but not to wreak vengeance. Should the tortfeasor have done something that transgresses the criminal code then he is open to prosecution by the State, or indeed to a private prosection, and if found guilty will be duly punished in the separate criminal proceedings.

The fact remains that in practice a tribunal may be swayed in quantifying damages in a particular case by its facts. If the negligence has amounted almost to recklessness in circumstances that were fraught with unavoidable and obvious dangers for the plaintiff, damages tend to be as high as the conventional judicial scale permits; each stage of that scale tends not to be a single fixed figure but rather a bracket enclosing an upper and lower limit, leaving it for the individual judge to use his discretion as to where, within a particular range, the plaintiff should appropriately be placed.

1.3.5. Interim and Provisional Payments

For many years a procedure has existed (under S 20 of the Administration of Justice Act 1960 and Order 29, Rule 12 of the Rules of the Supreme Court) by which a plaintiff may apply to the court for an interim payment on account of the damages in pursuit of which he has started an action against the defendant. The applicant has to show, if the defendant has not already admitted liability, that if the suit does come to trial he is likely to obtain judgment for "substantial" damages. The fact that the defendant may be denying all liability, and/or alleging a high degree of contributory negligence, is not necessarily a barrier. If a payment is made, it is, of course, set off against the award at trial. Furthermore, where a defendant has paid into court that sum which he thinks should satisfy the plaintiff's claim, if subsequently an interim advance is sought it is possible to arrange for the money lodged to be wholly or partly released for that purpose, without detriment to the defendant's protection from his payment in.

This depositing of money with the court by a defendant is for him a very valuable device, a means by which he is able to put a plaintiff on risk for the further costs of the action, the Rules providing that if the payment in is not accepted then should no greater sum be awarded at the hearing, the plaintiff will be on risk for costs, both the defendant's and his own, from the time of the payment in. Some plaintiffs' solicitors make a point of not giving too much detailed information to insurers about their client's losses in the early stages for fear that, when they issue proceedings, that knowledge of the financial dimension of the plaintiff's case will be used to make a well judged payment into court as soon as the acknowledgement of service of the writ is filed. "Personal Injury Litigation" by John Pritchard at p. 28 (5th edition, Longman Professional) provides some evidence for that statement.

The courts have had the power to award provisional damages since 1985, an exception, made only in respect of personal injury or disease claims, to the common law rule that adjudication of settlement brings down the final curtain and discharges the cause of action.

Parliament made this change when S 6 of the Administration of Justice Act 1982 added an extra section, S 32 A, to the Supreme Court Act 1981. The latter provides that if there is "a chance" at some future date that the victim of a tort will suffer serious deterioration in his physical or mental condition or develop some serious disease, provisional damages can be awarded at trial, on the basis that the worsening will not occur. The judgment will set out a specified time period within which if misgivings are fulfilled, the plaintiff can return to the court for a reassessment of a final award. The Lord Chancellor was delegated with authority to bring the provisional damages procedure into effect by Order which was made in 1985.

Despite that, there seems as yet little firm evidence about the effect of the change. Some suspect that because victims usually prefer to tidy up their affairs with a "once and for all" conclusion what may be happening is that in the relatively small proportion of cases where provisional damages could be sought, such an award is applied for as a negotiating ploy with an eye to eventual settlement, perhaps for an above average figure, on the traditional basis. That course may favour a plaintiff. The usual (i. e. conclusive) award for damages would include something for the risk of recurring trouble in the future, and by electing to have a provisional award a plaintiff who did not in fact suffer any deterioration would probably be worse off.

1.4. The Current Campaign to Limit Damages

1.4.1. Existing Limitation of Liability

The UK is a party to a number of international transport conventions such as the one made in Athens on the Carriage of Passengers and Their Luggage in 1974. Under its terms shipping lines may limit their liability to sums prescribed in international currency whose fluctuating sterling values are periodically set out in the UK by Order in Council. Under the Athens Convention damages for death or injury to a passenger is currently restricted to just over £ 38,000. The Athens Convention is given force of law by the Merchant Shipping Act 1979.

Before the Zeebrugge disaster to the ferry "Herald of Free Enterprise" earlier this year there was some pressure to increase the convention limits and the movement was considerably reinforced by the tragedy. Some countries, including the USA, declined to ratify the Convention because its limits were considered inadequate, whilst elsewhere, in West Germany, for example, the Convention was adopted by domestic law but with more generous limits.

The Unfair Contract Terms Act 1977 outlawed the exclusion or restriction, by contract or by notice, of liability for negligence arising in a business context and resulting in death or personal injury but by S. 28 did make some exceptions from its rigours in respect of international conventions to which the UK is party. Hence carriers may effectively restrict their liabilities to the Athens Convention limits, though the Government has recently made public its intention to increase them substantially soon.

The history of such maritime limitation for Britain stretches back over two centuries but there are more recent examples in other areas. By the Nuclear Installations Act 1965, in conjunction with the Energy Act 1983, strict liability is imposed on the operator of a nuclear plant with a ceiling of £ 20 million, the State contributing to a topping-up fund to supplement its limit.

In implementing the EEC Directive on liability for defective products, although member states are permitted to restrict the producers' responsibility for death or personal injury to around the equivalent of £ 40 million the UK government in its current Consumer Protection Bill does not apparently contemplate incorporating any limits in the legislation. The omission appears to go against the general pattern in that where liability is to be strict, without proof of fault, as under the new Act, it is not unusual for an upper boundary to be put on damages, although more readily perhaps in the case of harm to property rather than to the person.

Historically the conception of limiting damages may have arisen in Britain before the device of the limited liability company was introduced. It was thought that private enterprise should be encouraged in a trading nation and that a single misadventure of a merchant should not necessarily bring him to personal ruin.

1.4.2. The Professions in Revolt

Whilst limiting damages seems to have been accepted in regard to international transport or for the potentially giant risks associated with the development of nuclear energy, it is against the general pattern in the UK. From time to time there is a reminder from the courts that damages for non-pecuniary loss are without limit (see *Mustart v Post Office,* The Times February 11th, 1982 for example), although the unwritten judicial convention referred to in Chapter 3.2. does in practice keep levels moderate.

Nevertheless the larger global sums being awarded in the UK within the last year or two in personal injury claims have raised comment from the professions and initiated a concerted campaign by them to bring in statutory protection for some restriction on damages at the more costly end of the range of negligence claims that are now being brought. The impetus for the movement has come from the swingeing increases in professional indemnity premiums that the poor experience over the last few years has caused insurers to impose. The Institute of Chartered Accountants last year asked the Government for an enquiry to be instituted about the possibility of imposing a limit on the amount of damages in professional negligence cases. Nearly all actions against accountants would be unlikely to involve personal injury of course but for other professions now up in arms, particularly medicine, injuries are the dominant feature. The accountants' request was turned down but the concerted campaign by all the professions now underway was the next move.

Architects were recently at its forefront, and there was a House of Lords debate in March 1987 during which the Duke of Gloucester spoke of the very heavy cost of getting insurance protection, with premiums in many instances representing more than the profit of a practice and therefore an enormous drain on practitioners. Deteriorating results have hardened the UK liability market, and another speaker in the debate, Lord Hacking, commented that there was a capacity problem among insurers that had arisen because "the judiciary had immensely widened the scope of the law of negligence, and claims could be brought now separately from the law of contract". His Lordship was obviously underlining the seminal effect that *Hedley Bryne & Co v Heller & Partners* has produced on this area of litigation.

All professions are particularly concerned because their respective disciplinary bodies do not allow a practice the privilege of a corporation as a limited liability company and thus the architect, accountant, lawyer or doctor is personally liable for the full amount of a judgment against him. Should he have been unable to protect himself by insurance his personal assets and property are at risk.

The highest individual award, so far, in Britain of damages of just over £ 1 million for medical negligence (*Samir Aboul-Hosn v Grant and Others*, July 19th 1987, the details appear later in Part II in Category 4) may have influenced the Government's agreement, notified shortly thereafter, to consider the setting up of a Royal Commission on the subject of compensation for medical accidents. The fact that the organisation known as Action for Victims of Medical Accidents is holding a one-day seminar on the theme of medical negligence litigation in the autumn of 1987 is an indication of increasing public awareness of this type of claim.

It may not be simply a question of legal fault on the part of a practitioner. In recent years in the National Health Service a greater amount of control has been vested in non-medical administrators and managers. Decisions made by those officials may affect patients.

In the Court of Appeal recently Sir Nicholas Browne-Wilkinson QC stated: "In my judgment, a health authority which so conducts its hospital that it fails to provide doctors of sufficient skill and experience to give the treatment offered at the hospital may be directly liable in negligence to the patient. Although we are told in argument that no case has ever been decided on this ground and that it is not the practice to formulate claims in this way, I can see no reason why, in principle, the health authority should not be so liable if its organisation is at fault" (*Wilsher v Essex Area Health Authority* [1986] 3 All ER 801).

1.4.3. Objections to Imposing Damages Limits

Outside the professions the demand for limiting damages is less obvious. All tort claims are founded on the same principles and where liability is established damages are assessed on a common formula. The levels of compensation have undoubtedly increased in real terms, mainly because in the last two decades or so the courts have been readier to bring into the pecuniary loss reckoning a number of items, such as voluntary care for an injured person by a member of his family, on which previously it might not have put a price tag. And there is the substantial alteration in the mores of UK society wrought by the consumer movement, coupled with the strong influence in the same direction generated by lawyers who in general have performed thoroughly their duty in helping clients pursue claims based upon wrongful advice given by members of other professions. To the layman it may seem invidious, when UK law demands unlimited insurance cover against third party injury on the roads and, for all practical purpose, for accidents at work, to restrict damages that compensate for professional negligence.

There might be a somewhat more encouraging public response if a limitation were applied only to cases that did not involve personal injury.

1.4.4. Keeping the Balance

The solution to many legal problems in a common law system involves a balancing of the respective rights and duties of the parties in conflict. At some stage in the affairs of

mankind it seems necessary to say "Thus far and no further", a sentiment much better expressed by Stephenson LJ when he said (in *Lambert v Lewis* [1980] 1 All ER 978): "There comes a point where the logical extension of the boundaries of duty and damage is halted by the barrier of commercial sense and practical convenience". Some years earlier (in *Taylor v Bristol Omnibus Co Ltd* [1975] 2 All ER 1107) a former Master of the Rolls, Lord Denning, had indicated his approval of an overall award of £ 63,500 to a child who had suffered gross and permanent crippling injuries when only 3.1/2 and would require close care and supervision for the rest of his days; the child's expectancy of life was reduced by no more than 5 to 10 % of normal. In upholding the award in the Court of Appeal his Lordship stated: "I would like to say that these huge lump sums give food for thought". The judgment went on to say that the present system of assessing and awarding compensation for severe injuries called for "radical re-appraisement".

Lord Justice Stephenson was again to counsel balanced moderation (in *McLoughlin v O'Brian* [1981] 1 All ER 809) when he said: "...the courts have recognised that in an imperfect world there cannot be perfect compensation and that judicial limits must be placed on those who can recover damages for the fault of another and on what damages they can recover; there must be restraint in doing justice to the wronged out of fairness to the wrongdoers, even when they are insured". In the same case Lord Justice Griffiths pointed out that: "Every system of law must set some bounds to the consequences for which a wrongdoer must make reparation. If the burden is too great it cannot and will not be met, the law will fall into disrepute, and it will be a disservice to those victims who might reasonably have expected compensation. In any state of society it is ultimately a question of policy to decide the limits of liability".

It seems not inconceivable that an overall individual limit for all types of actions for compensation for negligence set at £ 500,000 might prove acceptable within the UK. That is the figure in fact that was suggested for accountants, doctors and lawyers in the campaign they are waging, although only one half of that amount was projected as a limit for cases brought against architects, engineers and surveyors.

1.5. Calls for Other Reforms Affecting United Kingdom Tort Law

1.5.1. Shortening the Law's Delays

The cry from the professions for a damages ceiling in awards for breach of duty in the exercise of a calling is only one voice among the many currently to be heard urging changes. Lawyers and laymen alike seem to vie in seeking reforms of our legal system. The Lord Chancellor's civil justice review has previously been mentioned (Chapter 2.1). Reactions to its proposals within the legal profession tend to polarise, cautious approval from solicitors but a lack of enthusiasm from judiciary and bar.

Lawyers are united, however, in recognising that delay is one of the gravest defects in our civil justice machinery. It is built into our adversarial system of litigation that the court of itself does not set the pace at which proceedings progress. The parties make the running in passing through the various procedural steps from issue of writ to day of trial. In practice, since a plaintiff has to prove his case, his side largely dictates the speed.

Under the Rules of the Supreme Court a defendant is given a right to apply for proceedings against him to be struck out for want of prosecution on the grounds of "inordinate

and inexcusable" delay. That is additional to the court's inherent jurisdiction to that end. The House of Lords in *Birkett v James* [1978] AC 297 decided that where the delay at the date of an application to dismiss was not long enough to take the plaintiff outside his limitation period (because he was still in time to start fresh proceedings by a new writ) it would be pointless that his existing suit should be struck out.

That ruling was applied recently by the Court of Appeal in *Westminster City Council v Clifford Culpin and Partners and Another* (The Times June 20, 1987), but with an accompanying call from Lord Justice Kerr for the regime of *Birkett v James* to be replaced by a system of rules which were much stricter, more effective and simpler to apply. His Lordship thought it "highly questionable" whether plaintiffs should be allowed the benefit of the full periods of limitation where there was no obstacle to speedy institution and prosecution of claims, and considered that there were insufficient sanctions against those responsible for dilatory and inefficient conduct of litigation, namely lawyers (usually) but also insurers (sometimes).

Personal injury was not involved in the Westminster City Council case, but when it is a feature occasionally there is a tendency to blame any slowness in concluding the litigation upon the defendant or his insurers. Since essentially it is the bringer of the action that has greater control of the rate of progress to trial, such criticism is often unjustified. The most prominent factor causing slowness usually comes from the genuine medical problems that may face doctors on either side in putting forward a firm prognosis of a plaintiff's condition until several years after an accident. Administrative streamlining of the legal system cannot resolve that medical difficulty, but the enforced wait may be eased by an interim payment on account (Chapter 3.5).

The introduction of provisional awards may also help when it is found impossible to give a firm medical opinion on whether a future deterioration will or will not take place.

A few weeks after the Westminster decision the Appeal Court granted an application to strike out an action for medical negligence in *Mansouri v Bloomsbury Health Authority* (The Times July 20, 1987). The alleged basis for the claim arose in June 1979 and a writ was issued just inside the three year time limit but not served until a few days before its expiry, which would have occurred on the first anniversary of its date of issue. Nearly two years later very little had been done by the plaintiff's advisers to get her action underway, and the defendants applied to have it struck out.

A factor in allowing the application was the lapse of time before the issue of the writ. That, added to the further delay after the proceedings had started, was, in the judgment of the Court of Appeal, "inordinate". Lord Justice Mustill hinted strongly that Mrs. Mansouri might have a remedy against those advising her.

The National Consumer Council published in August 1987 a paper critical of the civil justice machinery on a number of points and suggesting, inter alia, that the courts should sit longer, and more flexible hours, including some evenings. A gesture in this direction has already been made by arranging for the Appeal Court to operate on a limited basis during August and September 1987, months of the hallowed "long vacation" when the courts traditionally are shut down, reputedly a legacy from medieval times when judges left their forensic labors to superintend the gathering of the harvest at their farms.

Proposals from the Lord Chancellor's Department envisage longer working days for the Bench. Lord Lane, the Lord Chief Justice, is on record as saying that the answer to delays is to provide more courtrooms and more judges.

4.5.2. Cutting Litigation Costs

The expense of going to law has down the centuries often been seen by litigants as likely to be ruinous. The National Consumer Council's recent paper contends that fear of the financial consequences is one of the greatest deterrents to would-be litigants. That has long been a consumer complaint which the launching on June 29th, 1987 by the Law Society of its ALAS scheme was intended partly to answer. The Society's Accident Legal Advice Service operates in England and Wales by offering a free initial interview with one of the 2,400 participating solicitors to advise if a good cause of action exists.

The prime target of ALAS is officially described (by the President of the Law Society) as the estimated 70% of accident victims whom it is said, could claim compensation but fail to do so. The National Consumer Council tops that assessment by suggesting that about 85% of such victims do not make claims. UK liability insurers may find it hard to accept that in this day and age little more than those forming the tip of an iceberg of the injured attempt to pursue their legal rights, something that insurers' claims records appear not to support.

1.5.3. Seeking Greater Certainty

If delay and cost are two of the major drawbacks in UK civil litigation, it is surely the lack of certainty about the outcome of a dispute that completes a trinity of serious handicaps.

Towards the end of his term of office as Lord Chancellor, Lord Hailsham said (on May 12, 1987): "Institutions, like states, decay and lose their vitality. Something of the sort has, in my view, happened to our legal system". Delays and costs are the main subjects for attack in his Department's civil justice review, but it might be argued that a further worthy target is presented by the obscurity that clouds the phraseology of some modern legislation. Many UK insurers have become converts to the cause of plain English and have redrafted their policies accordingly. Parliamentary draughtsmen can point to their own contributions to clarity in the wording of some statutes, notably the original Sale of Goods Act 1893, but inevitably the complex issues of the modern world present great problems to those faced with putting on paper agreements that Parliament has reached, perhaps after long debate, during which the original purposes of the proposed legislation may have undergone much modification. A movement towards greater clarity could sometimes save much subsequent lengthy and costly legal argument. Lawyers will not advise clients to argue a point that clearly cannot be sustained. It is the grey areas of Acts and statutory instruments that produce problems of interpretation. More black and white could mean less legal uncertainty and a corresponding reduction in litigation.

1.5.4. Paying Damages by Instalments

In the UK the possibility of paying compensation for serious personal injuries by regular periodic instalments instead of on the conventional once for all lump sum basis has been under consideration for some years. The Law Commission's working Paper No. 41 (October 1971) discussed the proposition, as did the Pearson Royal Commission later (1978). In either forum the attractions of such an arrangement were appreciated but it was thought impractical to legislate for it. Possibly the fact that a victim could be expected to be entitled to some form of weekly benefit from a State agency, the DHSS, independently of common law damages, put a brake on enthusiasm.

As lump sum awards have risen, in many instances well ahead of inflation, (Chapter 4) the point has assumed greater importance. A successful plaintiff may have been transported into an entirely different financial position by his award. He would, of course, be able to seek professional investment advice, but even so could be faced with the kind of problems that may come to any winner of a substantial cash prize, but handicapped with the grave physical or mental disadvantages that his injuries have left.

One possible drawback to instalments was connected with the Government's fiscal policy. The Inland Revenue treats lump sum awards as exempt from income tax; it was feared that periodic payments might be less favourably regarded. That possible hurdle has just disappeared as a result of negotiations between the Association of British Insurers and the Revenue from which agreement has emerged that periodic payments, together with acceptable items of special damages such as the cost of medical treatment and applicances, will be untaxed.

The arrangement will be of benefit not only to victims who opt for it, instead of a lump sum, but also to a composite office whose life department could issue an annuity policy in the appropriate amount. Non-life insurers will have to effect the annuity with an outside life insurer. The annuity policy will be held in trust by the liability insurer on behalf of the victim.

This is a new development for the UK and follows a pattern long established in Germany, Western Australia and other countries including the USA. It is enlarged upon in Appendix III.

1.5.5. Introducing the Class Action

An area where a USA conception may provide a model for the UK is in regard to the class action. For half a century or so US courts have accepted that where there are multiple victims from the same one disaster, all the resultant claims may be dealt with at one fell swoop. That does not happen in the UK where the machinery of justice works on the basis that each individual plaintiff has his own entirely separate action against a defendant who may be the subject of similar proceedings by many other claimants injured at the same time for a similar reason arising out of the same one event.

Davies v Eli Lilly and Co and Others was before the Court of Appeal on June 3, 1987 on an interlocutory issue arising from litigation in which the plaintiff, Joseph Owen Davies, is one of some 1,500 who are suing the defendants for the alleged ill-effects of a drug marketed as Opren. The Court upheld the ruling that all the plaintiffs must contribute rateably towards the legal costs if only a few "lead actions" were pursued at trial. Two-thirds of claimants were legally aided, but the remaining third were not, and the plan was by joining together in a scheme (under an Opren Action Committee) to contest a small number of legally aided cases. Success with those would enable all members of the scheme to qualify for compensation. Group action in such circumstances is common in the US but in English law the combining of assisted with self-funded litigants is not at present permissible by the Appeal Court's ruling.

The decision has roused much public interest and a call for two reforms, the introduction of a viable means to handle group actions for damages, (proposals for which are now under discussion with the Law Society) and an adjustment in the existing balance of the law in favour of the individual citizen when his interests conflict with those of a large cor-

poration. In practice any hardship in this particular matter was largely negatived by financial backing being volunteered to the non-aided litigants by a wealthy philanthropist.

The UK class action may soon be a legal reality.

1.6. Shifting the Loss

The social significance of liability insurance in a modern community has already been stressed (Chapter 1.4). It is ironic that had there been greater demand for first party cover in the form of personal accident insurance, itself a by-product of a fear of accidents associated with the coming of the steam engine, there might have been a great tendency towards acceptance of some restriction on third party damages.

As it is, however, with or without limitation of liability, insurance is an effective way of compensation spreading. Those in business are able to pass on their insurance costs to costumers but obviously problems arise if, as with some professions, those premiums have escalated or, for certain risks, cover is no longer available.

Policyholders may occasionally overlook the fact that they have bought protection against vexatious as well as well-founded litigation. If a plaintiff commences proceedings in which he manifestly has no chance of success it is open to the defendant to apply to have the case struck out, and the lawyers whom insurers will have appointed to represent him would be experienced in invoking the relevant court rules. In the UK a losing party will usually be penalised by having to pay the victor's costs, as well as his own, and that can help to contain frivolous litigation.

Insurance protects against a crippling financial burden that may stem from a momentary act of negligence to which it may be difficult to attribute any moral blame whatsoever yet could result in a liability entirely disproportionate to the degree of fault. The transfer of such burdens to a fund collected and administered by an insurer on behalf of those who contribute to it is an effective, socially valuable, and deeply rooted idea. It is under threat only in regard to risks where the cost of possible claims is out of all proportion to the premiums that an insurer has collected, something that could occur if the "balanced moderation" that the UK courts traditionally have practised were upset by sudden enlargement of the ambit of the legal duty of care, owed by a citizen to his fellows. The nightmare of UK insurers would be an exposure of their policyholders "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class". That spectre of the removal of all legal restraints on the number of plaintiffs and the size of their claims (originally conjured up by Chief Justice Cardozo in *Ultramares Corporation v Touche* [1931] 174 NE 441) is behind the currently cautious mood of the professional indemnity insurance market and the fears of some potential clients that affordable protection may become unavailable.

2. The Level of Compensatory Awards for Different Categories of Injury or Disease

2.1. General Comments on the United Kingdom Common Law System

The following details relate to actual cases brought before UK courts in recent years where substantial damages have been agreed by way of compensation for personal injury and/or disease in the following categories:

Category 1. Private automobile injuries

Category 2. Industrial injuries including at least one case where defective equipment or a defective product was involved

Category 3. Industrial pollution accidents

Category 4. Medical treatment injuries/diseases.

The case summaries on the following pages set out the approach and the views of judges in the High Court, the Appeal Court and the House of Lords (the ultimate court) in reaching decisions upon the levels of compensation to be paid for personal injuries or disease which have had a very severe influence upon the health, circumstances and lifestyle of the injured plaintiffs.

Approximately 250,000 tort claims in respect of personal injury are made each year in the United Kingdom of which approximately 47% relate to work injuries or illnesses and 41% to automobile injuries. Of those claims where some form of compensation is paid approximately 85% are settled without recourse to the courts.

The basis of the common law system is that in the majority of cases which are not capable of settlement outside the courts a decision upon liability and the amount of compensation to be paid is made by a High Court judge using his experience of trying common law cases for many years and based upon guidelines laid down by the Court of Appeal and the House of Lords. It has been traditional for compensation to be assessed in the form of a lump sum accumulated under various heads of damages which have increased over the years. Even so, there is recognition that this method of compensating injured parties is not perfect in every case as mentioned by Mr. Justice Hirst in making the award in the case of *Samir Aboul-Hosn v the Italian Hospital and Another.*

In recent years Parliament has made efforts to overcome the dissatisfaction felt by many legal authorities at this method of assessing compensation. Details have been given in Chapter 1.3.5., of interim and provisional payments under the Administration of Justice Act 1982 and the power given to the courts since 1985 to award provisional damages at the trial, and where there is "a chance" that the victim of a tort will suffer serious deterioration at a future date in his physical or mental condition, etc., a further approach can be made at the appropriate time to the court for a re-assessment and the making of a final award. Very few awards have been made on this basis since 1985. The main reason for this is considered to be the preference of the plaintiff to gain possession of as large a capital sum as possible at the outset.

Since 1986 insurers representing defendants in the United Kingdom have begun to offer compensation by an alternative method to the total capital sum payment or the provisional "chance" award. The alternative is to offer a *structured settlement* and details of the type of arrangement put forward are set out in Appendix III.

Levels of compensation in terms of lump sum awards increased quite considerably during 1985 and 1986 but have accelerated at an even greater rate during the first half of 1987. This has applied particularly to awards coming within Category 4 – Medical Treatment Injuries/Diseases. Whilst the level of damages under this heading is still comparatively small (£ 1 million) compared with the level of damages for similar cases awarded in some US courts, it is nevertheless very high for the United Kingdom and is already causing considerable concern especially amongst junior doctors whose premium levels for medical malpractice insurance cover are rising at an alarming rate in proportion to their annual earnings.

2.2. Private Automobile Injuries

(i) *Thirtle v Suckling (1985)*

Date of accident 24th December 1979.

The plaintiff, Kenneth Thirtle, was 33 years of age at the time of the accident. As a child he had little intellect. He had no formal education qualifications and had spent some time at a special school for backward children. At the age of 17 a psychiatrist's report described him as a "high grade mentally sub-normal patient". At best he could be described as having no more than average intelligence. He married at the age of 17 and was divorced, then married again and divorced again. He had a variety of jobs, mainly in the scrap metal business. Prior to the accident he was employed as a burner i. e. cutting up scrap metal with a burning torch. His employers considered him a good worker. His weekly wage was £ 80 net of tax and social insurance deductions. There were good prospects for him to gain promotion to a higher grade and an increased weekly wage of £ 120. However, in some of the years prior to the accident (1972-1975) his returns for income tax purposes showed his earnings as nil and therefore threw some doubt on the full extent of his work activities.

The accident occurred when the plaintiff was knocked down on a pedestrian crossing by a motor car driven by the defendant.

The injuries sustained were major fractures of the right arm and right leg which were treated over a period of three years and left some residual permanent disability. The main injury was a fracture of the skull with cerebral contusions and brain damage which is permanent and irreversible so that the plaintiff will always suffer from headaches, insomnia, dizziness and loss of balance to the extent that it is unwise for him to go out alone or to climb stairs. He also suffers from lack of concentration and a reduction in his pre-accident mental level. His memory is poor, he suffers from depression and sometimes indulges in anti-social behaviour. He was incontinent for some time. He can wash, shave, dress and feed himself and occasionally will help his father in the garden but not for long. He is intolerant of noise e. g. from traffic or children playing and in view of this his parents moved house to another quieter part of the country although this made it essential for them to have the use of a car. There is no chance of him returning to work but he does enjoy outings and his parents even took him to Australia to visit his sister; however as a result of his condition he fell over and had to be brought back to the United Kingdom for treatment.

His expectation of life has only been reduced by five years but he is dependent upon his parents to look after him – which both of them do with devotion, but both are elderly (approximately aged 65) and are already suffering strain and stress from their efforts to date. It is certain he will require to pay for professional nursing care once one of his parents is no longer able to carry on and he will need such care for the rest of his life.

Liability was admitted on behalf of the defendant. The only dispute before the court being the level of damages to be awarded.

Damages. The judge in this case considered in great detail all the various heads of damages and in conclusion drew up a comparison of the figures suggested by both sides and those which he actually awarded. This type of schedule is known as a Moser Schedule – see Kemp & Kemp Volume 2 page 1799 paragraph 1-721. The appropriate figures are set out in Table 1.

TABLE 1

ITEM	PLAINTIFF	DEFENDANT	COURT AWARD
1. Pain & suffering and loss of amenity	£ 50,000 - 55,000	£ 40,000 - 45,000	£ 50,000
2. Special damages			
a) Loss of wages to date of trial	£ 29,851	£ 18,528	£ 24,359
b) Past care by parents	£ 33,960	£ 16,780	£ 28,300
c) Miscellaneous items	£ 11,564	£ 6,749	£ 9,049
3. Future loss of wages	£ 96,460	£ 49,870	£ 76,135
4. Future care			
a) By parents	£ 28,250	£ 28,000	£ 28,250
b) By others	£ 99,970	£ 33,739	£ 79,970
5. Accommodation	£ 14 700	£ 3,780	£ 14,700
6. Future use of vehicles	£ 24,000	£ 5,000	£ 17,500
7. Cost of holidays for plaintiff	£ 7,500	Nil	Nil
8. Court of Protection	£ 12,500	£ 12,500	£ 12,500
9. Loss of expectation of life	£ 1,500	£ 1,500	£ 1,500
10. Interest awarded			£ 13,875
Total amount of damages and interest			£ 356,125
Legal costs of the plaintiff			£ 43,930
Legal costs of the defendant			£ 33,182
Total overall cost			£ 433,237

Notes, Table 1

1. Included in the calculation of the item for special damages is an amount of £ 2,579 representing 50% of certain specified social insurance benefits for a period of five years from the date of the accident which the plaintiff received in addition to the full amount of these social insurance benefits claimed separately under the Social Insurance Acts.
2. Item 2(c) Miscellaneous items, includes such items as money spent on searching for a bungalow in a quiet part of the country, the net cost of cars for travelling and part of the cost of the visit to Australia. It also includes meals and other travelling expenses.
3. Item 3, Future loss of wages, which is a figure which was arrived at by the judge after reducing the originally calculated amount by 15% because of the uncertainty regarding the previous employment record of the plaintiff.

Additional Information. This case is of particular interest as liability was admitted by the defendant and the case came before the court solely as a result of the inability of the parties to agree the amount of compensation. This is therefore an example of the type of litigation still likely to apply in the UK even if any form of "no fault" system of legal liability were to be introduced. Although the case was not heard until five years after the accident, the delay was caused partly by the plaintiff's solicitors' desire to establish the full extent of the permanent disability sustained by their client as well as the time taken by the parties in trying to reach an agreed settlement without recourse to the courts. It should also be noted that in any event interim payments totalling £ 52,000 were made to the plaintiff before the commencement of the trial.

(ii) *Housecroft v Burnett (1985)*

Date of Accident 20th February 1980.

This is an Appeal Court decision following an appeal by the plaintiff against the judgment made by the judge in the lower court on the grounds that the amount of damages awarded by the lower court in 1983 was inadequate.

The plaintiff, Tracey Dawn Housecroft, was 16 years of age when she was injured in an accident on 20th February, 1980 whilst travelling as a passenger in a motor car driven by Howard Burnett whose negligent driving caused the accident. She was a girl of high intelligence with every prospect of entering university and both sides agreed at the trial that on graduating at the age of 22 (in 1986) she could have expected to be earning a commencing annual salary of £ 5,600. She was also an attractive looking, vivacious girl who could have expected to marry and have children had she so desired.

The injuries which she sustained were an injury to the head, although not a severe one, a fracture of two ribs and the right shoulder blade and a fracture dislocation of the fifth cervical vertebra with damage to the spinal cord. This last injury resulted in almost complete tetraplegia. She has lost all use of her hands and legs, there is no sensation from the waist down, she cannot turn in bed nor get out of bed, she is totally incontinent, she cannot dress herself. She has slight movement in both arms and is able, with difficulty, to propel a wheelchair very slowly for a short distance. She can feed herself if the food is cut up and spoon or fork is strapped to her hand. There was no brain damage and she therefore has complete awareness of the almost total destruction of her life style and of all prospects of marriage and motherhood. Her expectation of life has been reduced to 27 years, throughout which period she will need constant nursing care and attention. She is relatively free from physical pain but her mental anguish is incalculable.

The original court case. All of the above points were emphasised by the judge in the lower court before awarding damages as follows (Table 2):

TABLE 2

1.	Pain, suffering and loss of amenity	£ 80,000
2.	Loss of expectation of life	£ 1,250
3.	Future motoring expenses to provide for outdoor mobility	£ 14,000
4.	Miscellaneous expenses for future holiday, heating of home, services of a gardener. (Agreed at £ 1,050 per annum, to which the judge applied multiplier of 13)	£ 13,650

5.	Provision of therapeutic equipment, telephone, future medical expenses	£ 12,000
6.	Future physiotherapy	£ 600
7.	Alterations to parents house to assist future care	£ 20,000
8.	Special damages agreed at	£ 7,000
9.	Past care	£ 10,000
10.	Future care	£ 108,550
11.	Future loss of earnings	£ 56,000
12.	Interest awarded	£ 4,867
	Total amount of award	£ 327,917
	Legal cost of the plaintiff	£ 32,600
	Legal cost of the defendants	£ 18,665
	Total overall cost	£ 379,182

No social insurance benefits were received by the plaintiff as she was a schoolgirl at the time of the accident.

Note, Table 2

Included in the defendants legal costs is a sum of approximately £ 1,000 relating to defendants' solicitors' costs in connection with the appeal and it is expected that this amount will be recovered from the plaintiff. Not shown in the above figures is a sum of £ 6,497 representing the defendant's Counsel's appeal costs as these also were expected to be recovered from the plaintiff. The plaintiff's legal costs for the appeal are not known.

The appeal. This was put forward on the following grounds:

(a) That the award of £ 80,000 for pain, suffering and loss of amenities, although the largest amount awarded for tetraplegia up to that date was inadequate and did not properly take into account the levels of inflation during the preceding years. It was alleged that a six figure award should have been made under this heading.

(b) In calculating the award of £ 108,550 for future care, the judge used a multiplicand of £ 8,350 and a multiplier of 13. It was alleged the judge (i) made no provision for some things which called for an award and (ii) he considerably under-valued the services of the plaintiff's mother.

(c) The judge awarded £ 56,000 for future loss of earnings and assessed expectation of life at 27 years but he did not make any award for the "lost years". It was claimed that such an award should have been made.

The defendant gave notice that if the court decided to vary the awards under (b) and/or (c) above the defendant would contend that the award in (a) above was too high and the total award should not be increased.

Judgment of the Appeal Court. The appeal was dismissed on the following grounds:

(a) The sum of £ 80,000 was considered by the Appeal Court to be too much. Whilst appreciating the lower court's judge's feelings of sympathy for the plight of the plaintiff, the Appeal Court considered this case to be an average example of tetraplegia and on this basis considered an award of £ 70,000 under this head would have been adequate bearing in mind that it formed only one part of a much larger total award.

(b) The Appeal Court considered this item in very great detail, referring specifically to previous decisions on the subject i. e. *Donnelly v Joyce* [1973] and *Lim Poh Choo v Camden & Islington Area Health Authority* [1979]. Eventually the Appeal Court concluded that whilst the judge in the lower court may have under-estimated slightly the award for the mother's future services, the amount when capitalised amounted to £ 7,000 which was less than the amount by which the Appeal Court considered the judge had over-provided under (a) above. No alteration to the award under (b) was therefore made.

(c) The Appeal Court pointed out that the judge in the lower court in making the award of £ 56,000 provided fully for the loss of prospect of marriage and in view of the multiplier used by the judge it was considered that the "lost years" had been adequately provided for and no increase was justified.

The total amount of the compensation awarded therefore remained unaltered.

Additional Information. This case is of particular interest because the award was sustained in the Appeal Court despite efforts to uplift the amount of damages for what is a very distressing case involving such a severe injury to an intelligent and attractive girl in the prime of life.

In particular it highlights the concern of both the lower and the upper court to maintain a reasonable approach to the level of damages over a period of years in which quite high levels of inflation had applied.

The following two points are of particular interest:

(1) The comments made by the judge in the lower court before announcing his awards were emphasised in the Court of Appeal, especially the following:

"It is right that I should say something further about the appropriate figure for general damages to be awarded for pain and suffering and loss of amenities. Were it not for the fact that I am very conscious that the Court of Appeal over and over again and the House of Lords on several occasions have said that some sort of conformity is essential, some sort of certainty is vital in the economy of the insurance world than in the professional world of solicitor and counsel called on to advise, I would, left to my own have awarded a considerably higher figure than that which I am about to award".

(2) In reaching its decision the Court of Appeal referred specifically to the principles governing the amount of such awards as set out by Lord Diplock in *Wright v British Railways Board* [1983] of which the following extract is especially relevant:

"Guidelines laid down by an appellate court are addressed directly to judges who try personal injury actions; but confidence that trial judges will apply them means that all those who are engaged in settling out of court the many thousands of claims that never reach the stage of litigation at all or, if they do, do not proceed as far as trial, will know very broadly speaking what the claim is likely to be worth if 100% liability is established. The Court of Appeal with its considerable case load of appeals in personal injury actions and the relatively recent experience of many of its members in trying such cases themselves is, generally speaking, the tribunal best qualified to set guidelines for judges currently trying such actions and this House (the House of Lords) should hesitate before deciding to depart from them, particularly if the departure will make the guideline less general in its applicability or less simple to apply. A guideline as to quantum is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change... but though guidelines should be altered if circumstances relative to the particular guideline change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial".

(3) The Appeal Court also took the opportunity provided by this case to set, as at April 1985, a guideline figure of £ 75,000 for pain, suffering and loss of amenities for an average case of tetraplegia.

(iii) *Dukelow v Carson* [1986]

Date of accident 1st June, 1982

The Plaintiff, Wendy Dukelow, was aged 16 at the time of the accident, had just left school and was intending to seek employment either as a shorthand typist or in the jewellery trade.

The accident occurred when the plaintiff, whilst crossing the road, was struck by a motor car driven by the defendant.

The injuries consisted of various fractures, lacerations and bruising but the principal injury was to her head resulting in devastating brain damage resulting in tetraplegia. She spent one year in hospital, was in a coma for several months and is now almost totally paralysed. She has a very small amount of movement in her left arm and some fingers and in the left toes. She can also turn her head but otherwise cannot control it although she has some control over the direction of her eyes and can raise the left eyebrow. She can see and hear but cannot speak other than the prolongation of a cough on some occasions. She can understand simple commands. She is totally incontinent and has to be fed semi-solid food which she can only swallow with difficulty. She is totally dependent upon others, notably her parents, and she has almost total loss of amenity. She has a very limited ability to think but fortunately for her she is not in pain and there is no reason to suppose that she is aware of her predicament. There has only been a very slight improvement in her condition since the accident. There still might possibly be some further slight improvement but to all intents and purposes she will remain much as she is now for the rest of her life, the expectancy of which is reduced to 14 years.

The plaintiff's medical treatment in hospital included a tracheotomy to assist her breathing and she had to be fed through a naso-gastric tube. She also was given anti-convulsant drugs. When she was discharged into the care of her parents they embarked upon the

"Philadelphia Programme" which is an intensive regime of therapy, very time consuming and labour intensive, and aims to improve brain function. Included in the plaintiff's claim was an item for the cost of this programme, both past and future, but it was held by the court that the continuation of the programme was not reasonably necessary for the comfort and support in the future preservation of the life of the plaintiff so that this element of the claim was disallowed.

Liability was decided on the basis that the defendant was 85 % liable with 15 % contributory negligence on the part of the plaintiff. The damages were awarded on this basis (Table 3).

TABLE 3

Damages awarded to the plaintiff

1. *Pain, suffering and loss of amenity*	*£ 55,250*
2. Special damages	£ 127,500
3. Future loss of earnings	£ 10,200
4. Future care	£ 311,100
5. Incidental items including interest	£ 29,231
Total amount of damages	£ 533,381
Combined legal costs of plaintiff and defendant	£ 156,000
Total overall cost	£ 689,281

Additional Social Insurance Benefits. The plaintiff was still a schoolgirl when the accident occurred and remained in hospital for a considerable time thereafter. When she was discharged from hospital to her home she was paid an invalid care allowance which up to the date of the trial amounted to a total of £ 4,837.05. After the date of the trial she continued to receive this benefit at the rate of £ 37.15 per week.

Additional Information. In this case the plaintiff's life is almost completely dependent upon her mother and father who went to extraordinary lengths in nursing and caring for her upon her release from hospital. They sought the advice of the British Institution for Brain Injured Children, and the "Philadelphia Programme" upon which they embarked entailed considerable time and effort on their part, some of the treatments being controversial and one in particular involves the plaintiff being strung upside down and rotated. As many as five people at a time were needed for this exercise. The total amount originally claimed on behalf of the plaintiff was £ 1,500,000.

(iv) *Brightman v Johnson (1985)*

Date of accident 29th August, 1981.

The Plaintiff Beverly Brightman was aged 18 at the time of the accident. She was an active single vigorous young girl with a bright future working as a clerical assistant and described as having "the bloom and self confidence of a young adult at peace with life".

The accident occurred when she was travelling as a passenger in a car driven by the defendant and became trapped in the wreckage.

The injuries sustained were severe injuries to the neck and throat, a compression fracture of the sixth cervical vertebra with dislocation of the seventh together with a pulmonary contusion. There was damage to the larynx causing breathing problems, tetraplegia involving complete paralysis from the sixth cervical vertebra downwards with only limited movement in her shoulders and biceps muscles in her arms. The otherwise permanent paralysis has left her with total incontinence. An operation was carried out to remove the larynx and to excise the upper trachea leaving the plaintiff with a permanent tracheostoma and no voice at all. Due to the paralysis of the chest and the permanent tracheostomy it is necessary for mucus to be sucked out of her mechanically approximately every two hours to prevent her from choking. In addition the plaintiff has had to have an operation for removal of kidney stones and plastic surgery for bedsores. It is not surprising that she has suffered very severe bouts of despair and depression. As she has no voice she has to have special equipment to raise an alarm and needs 24 hours care. She is just able to make sounds with her lips but is not easily understood. She can feed herself with aids strapped to her hands and can just manage to write her name.

Her life expectancy is reduced to 20 years during which period she will require constant care and attendance. She now lives in a specially converted flat near to her parents with a resident housekeeper and two nurses working in shifts. Whilst at one stage she often expressed the wish that she had been killed in the accident, she had faced up to her disabilities with remarkable courage and whilst at Stoke Mandeville Hospital (which specialises in the treatment of this type of severe injury) had won the hospital's gold medal award presented to the bravest patient of the year. The judge described her as "a shining example of the capacity of the human spirit to fight and triumph against almost overwhelming physical odds."

Liability was admitted on behalf of the defendant.

Damages. The court held in this case that the combination of the plaintiff's injuries were rare and exceptional to the extent that the conventional figure for damages for pain and suffering and loss of amenities laid down in *Housecroft v Burnett* (see previous pages) should be exceeded (Table 4).

TABLE 4

Item	Amount
1. Pain, suffering and loss of amenities	£ 95,000
2. Special damages	
a) loss of earnings to date of trial	£ 9,216
b) loss of parents earnings to date of trial	£ 15,000
c) nursing care to date of trial	£ 16,755
3. Special nursing equipment	£ 7,450
4. Future loss of earnings (multiplier 14)	£ 63,000
5. Future nursing care	£ 318,500

6.	Future housing costs	£ 36,400
7.	Loss of expectation of life	£ 1,375
8.	Various agreed miscellaneous items including 50% of social insurance benefits	£ 7,601
9.	Other miscellaneous items including housing costs	£ 3,150
10.	Interest awarded	£ 7,100
	Total amount of award	£ 580,000
	Legal costs of the plaintiff	£ 40,556
	Legal costs of the defendant	£ 34,156
	Overall total cost	£ 655,259

Additional Information. This award which was made on 16th December, 1985 is still the highest total award made in the United Kingdom in respect of an injury arising out of an automobile accident. Traditionally in the United Kingdom the amount of damages awarded for automobile injuries have been higher than those awarded for injuries at work or as a result of the use of defective products and this has generally been regarded as having arisen from the frequently horrific nature and extent of injuries in automobile accidents. However this situation has changed in two recent cases heard in 1987 and referred to later in this report – *Cook v Berec*, where the total amount of damages and costs exceeded £ 1 million for the first time, and *Samir Aboul-Hosn v The Italian Hospital and Another*, where damages have exceeded £ 1 million for the first time and costs are expected to be a further substantial amount.

2.3. Industrial Injuries including Defective Products

(i) *Shornyk v Neal Bros. (1985)*

Date of accident 10th February 1978.

The plaintiff Victor Anton Shornyk was aged 21 years 9 months at the time of the accident and had worked as an export packer with the defendants Neal Bros. (Leicester) Ltd. from the age of 17. His health had been normal apart from hayfever and he had led a normally active social life. He was single and had a number of girlfriends.

The accident occurred whilst he was nailing up a packing case when a load of timber fell from an overhead crane onto his head and back.

The injuries sustained were a fracture and dislocation of the eleventh/twelfth thoracic vertebrae resulting in paraplegia involving loss of power in his lower limbs, loss of sensation, loss of bladder, bowel and sexual functions. Initially he suffered from severe depression and some suicidal tendencies but eventually he was able to come to terms with his disabilities very well. He is able to walk but only in parallel bars. He gets around the house in a

wheelchair and he drives a small car with hand controls. In 1983 he moved into a bungalow where he now lives with a female companion who has a small child. The companion works part time and helps him in the house and with shopping, etc. He is out of work and spends his time minding the companion's child, watching television and making models. He is also interested in philately. His expectation of life is assessed at 40 years from the date of the accident – a reduction of 7 years from the normal. It is unlikely he will be able to obtain any form of employment in the foreseeable future.

Liability. The plaintiff was an innocent party, there being no firm evidence of any contributory negligence. His case was supported by a detailed assessment of his future needs by the Spinal Injuries Association, a body specialising in catering for the well-being of spinal injury patients.

Settlement. The case came before Nottingham Crown court on 28th June, 1985 and agreement to a settlement was reached between the parties just as the case was about to open. The total amount of agreed damages was £ 260,000 under the following heads (Table 5):

TABLE 5

1.	Pain, suffering, loss of amenity and loss of expectation of life	£ 42,500
2.	Special damages	£ 21,000
3.	Loss of earnings to date of trial (including 50 % of social insurance benefits)	£ 19,186
4.	Future loss of earnings (agreed at £ 85.82 per week with a 15 years multiplier)	£ 70,000
5.	Cost of purchasing plaintiff's bungalow	£ 48,950
6.	Cost of necessary alterations to bungalow	£ 10,000
7.	Cost of car, wheelchair and other nursing appliances and equipment	£ 18,500
8.	Future cost of travel and vehicle repair and replacement	£ 4,900
9.	Future cost of nursing aids and appliances	£ 15,214
10.	Future cost of house maintenance and of holidays	£ 9,750
	Total amount of damages agreed	£ 260,000
	Legal costs of the plaintiff	£ 19,000
	Legal costs of the defendant	£ 5,490
	Experts' fees for the defendant	£ 770
	Total overall cost	£ 285,260

Additional Social Insurance Benefits. Up to the time of trial the plaintiff was receiving the following social insurance benefits:

(a)	Mobility allowance	£ 19.00 per week
(b)	Attendance allowance	£ 18.15 per week
(c)	Invalidity benefit	£ 39,75 per week
(d)	Industrial injury benefit	£ 55.60 per week

The plaintiff would have received these amounts in full from the Department of Health and Social Security with effect from the date of the accident and would continue to draw these benefits for as long as he satisfies the conditions for qualification (see Appendix II) but, for example, benefits (b) and (c) would automatically cease if he were to obtain employment.

In addition to receiving these benefits from the Department of Health and Social Security, the plaintiff would be entitled to claim 50% of the benefits for a five year period from the date that the action accrued and this amount has been included in the damages awarded to him by the court in his common law action.

Additional Information.

(1) This case was not settled until 7 years after the accident. This did not necessarily have an adverse effect on the plaintiff. Much of the delay was on the part of his own solicitors and medical advisers who wished to be certain his condition and circumstances would not deteriorate further. The first offer of settlement on behalf of the defendants was made in 1983 at a figure of £ 110,000.

(2) An interim payment of £ 11,241 was made in July 1980 to assist the plaintiff with expenses incurred up to that time. A further interim payment of £ 50,000 was made on behalf of the defendants in July 1983 to enable the plaintiff to purchase his bungalow.

(c) In addition to the support and advice which the plaintiff received from the Spinal Injuries Association on how best to cope with his injuries and put forward his claim, the defendants also engaged an independent rehabilitation specialist and the benefit of this specialist's advices were also made available to the plaintiff.

(ii) *Hills, Mullarkey, Page, Ruane and Finn v Edmund Nuttall Ltd. (1982)*

Date of accident January 1978.

Details of each plaintiff set out below.

The accident occurred when the plaintiffs who were part of a team of tunnelling miners were descending in a lift to their place of work underground. The lift suspension rope snapped and the safety mechanisms in the lift failed causing the lift to drop 150 ft. to the bottom of the shaft.

Liability was placed primarily upon the employers and operators of the lift, Edmund Nuttall Ltd., but the manufacturers of the lift accepted a degree of liability and paid 12% of the total damages awarded to each plaintiff and of each plaintiff's legal costs.

All the plaintiffs were tunnelling miners of high reputation and would move from one contract to another within a very specialised industry. They could have expected to maintain reasonably full employment in the future but to take account of the likelihood of gaps between contracts a 48 week year was assumed. No provision was made for any "lost years" as each of the plaintiffs could reasonably expect to reach the age of 65. However the judge did take into account the prospects of an early retirement from actual mining and of promotion leading to higher earnings. The plaintiffs would all have difficulty in finding work in the future as a result of their injuries.

Details of Injuries and Amounts Awarded

Hills. Aged 32 at date of trial. Married with two children and two step-children. Commenced work as pit-bottom banksman in March 1977. Would have stayed in tunnel mining and have worked wherever necessary. Good handyman who did much of the "do it yourself" (D. I. Y.) decorating and painting around his home.

He sustained fractures of the sternum, lower shaft of the left femur, right tibia and fibula; compound fracture of the lower left tibia and fibula; compound fracture and dislocation of the right elbow; wedge fracture of the bodies of lumbar vertebrae. Treatment included the insertion of a prosthesis in the right elbow and correction of the bowing of the right tibia. He has been left with a substantial shortening of the right leg for which a raised shoe is required resulting in a limp; constant pain in the right ankle; back pain due to fractures of the lumbar disc, aggravated by the limp; increase in weight; headaches which were improving; and substantial limitation in movement of the left elbow necessitating help to get dressed. He has little recollection of the accident itself. From 1981 he had worked as a clerical officer earning £ 64 per week with the prospect of a pension.

Damages awarded (Table 6):

TABLE 6

1. Damages for pain, suffering and loss of amenity	£ 20,000
2. Special damages	£ 14,781
3. Future loss of earnings (multiplier 15)	£ 103,800
4. Loss of D. I. Y. ability	£ 2,250
5. Interest	£ 2,000
Total	£ 142,831

Mullarkey. Aged 32 at date of trial. Married with three children. Started as a tunnel miner in 1972, would have been promoted to leading miner and pit boss perhaps eventually to shift foreman. Owns own house and carries out much D. I. Y. work upon it.

He sustained an injury to his head and concussion, fractures of the left mandible, body of the third lumbar vertebra with compression, the shaft of the right femur, the left tibia and fibula, the right ankle; there was a lacerated wound of skin on his right ankle; right popliteal nerve palsy; he developed a pulmonary embolism due to vein thrombosis for which anti-coagulation treatment was required and he suffers from nightmares.

His disabilities are shortening and deformity of the left leg; limitation of movement of the right ankle and toes; degenerative changes in the left foot; severe back trouble; hypersensitivity and numbness in the right foot. He can walk up to about three quarters of a mile but cannot walk at all on uneven ground. He has to obtain relief from pain by alternately standing and sitting. He is nervous but has obtained a job working for a firm of builders merchants checking goods and at the time of trial was earning £ 80 per week.

Damages awarded (Table 7):

TABLE 7

1. Damages for pain, suffering and loss of amenity	£ 25,000
2. Special damages	£ 37,729
3. Future loss of earnings (multiplier 15)	£ 132,000
4. Loss of D. I. Y. ability	£ 3,000
5. Interest	£ 2,500
Total	£ 200,229

Page. Aged 36 at date of trial. Married with three children, one of which was conceived and born after the accident. Eldest daughter was being educated privately. He had been a tunnelling miner for some three years before the accident, was a highly intelligent and articulate man willing to move about the country who would probably have reached the top of the industry.

He sustained fractures of the fourth to eighth ribs on the right and the second and third ribs on the left, breaks of both femurs, comminuted compound fractures of distal tibia and fibula on right with disorganisation of the ankle joint, bleeding of the nose, ecchymosis of the left eye, bruising of the right sides of the chest and abdomen. In connection with this plaintiff the judge commented that it was not an exaggeration to say that the had been smashed to pieces. The disabilities he is left with are constant pain for which he has to take a number of pain killers; after fifteen operations he has lost five inches in height which has led to serious digestive and respiratory problems; he has been left with highly abnormal hips and although he has been supplied with prosthesis they are not very effective and will cause further problems. His ankles and feet are grossly abnormal and he cannot walk without shoes; there is constant pain in the left ankle and there is a likelihood of further operations and problems. No likelihood of improvement although he is able to drive a car. His spine is subject to a pelvic tilt with scoliosis of the lower thoracic spine. His injuries in total are broadly comparable with those of a paraplegic but with the variation of a slightly greater degree of mobility but with a great deal more pain and exhaustion.

Damages awarded (Table 8):

TABLE 8

1. Damages for pain, suffering and loss of amenity	£ 50,000
2. Special damages	£ 59,729
3. Future loss of earnings (multiplier 15)	£ 208,080
4. Future expenses	£ 31,500
5. Interest	£ 5,000
Total	£ 354,309

Ruane. Aged 49 at date of trial. Married with two children. He had been a tunnel miner since 1963 and held the position of a leading miner at the time of the accident. He was an expert man at his job, always in demand in the industry. Owned his own home and had received planning permission to extend it. He would have done some of this work himself.

Injuries sustained: fractures of eighth to eleventh ribs on the left side, flail chest, undisplaced fracture of the right acetabulum; fractures of both tibiae and fibulae, the left being a compound fracture and the right involving the ankle. Much loss of height with consequent respiratory and digestive difficulties. He is left with disabilities of a severe nature to his back and is in continuous pain. He has to wear a corset permanently and can only walk up to half a mile at a time. His chest pain is only relieved by certain exercises and he remembers with horror the graphic details of the accident. He has obtained a number of menial jobs since the accident and at the time of trial was a security man at a disused factory. He was unlikely to ge a better job.

Damages awarded (Table 9):

TABLE 9

1. Damages for pain, suffering and loss of amenity	£ 27,000
2. Special damages	£ 50,423
3. Future loss of earnings (multiplier 10)	£ 104,560
4. Future expenses (including gardening D.I.Y.)	£ 5,500
5. Interest	£ 2,700
Total	£ 190,183

Finn. Aged 26 at date of trial. He was a civil engineering works trainee at the time of the accident who had been sent to acquire tunnelling experience. He intended to stay in tunnel mining and the judge found that he would have succeeded in that industry.

He sustained fractures of the body of the fourth lumbar vertebra, the right seventh and eights ribs, the second, third, and fourth metatarsals of the left foot; a fracture of the lower third of the shaft of the left tibia, fracture of the right ankle and head of the right fibula, an undisplaced fracture of the shaft of the right ulna, open fracture dislocation of the right elbow, fracture of the decranon and dislocation of the head of the radius. The disabilities with which he is left are stiff ankles at the start of the day causing a limp; if he walks too far or stands for too long his ankles swell and become uncomfortable, the toes of his left foot are all elevated markedly and rub on his shoes, when he is walking he gets pins and needles above the left foot near the base of the toes; in his left ankle, foot and toes degenerative changes are almost certain to take place in future. His ankles may be subject to future osteo-arthritis which would require operative treatment. He has tried to qualify and work as a quantity surveyor but without success. He now works for the Age Concern organisation advising the long term unemployed on gardening and decorating and earns wages of £ 81 per week. He may obtain a better job when economic conditions improve. The judge found that if he had stayed in tunnel mining he would have risen to a senior position. He still vividly recalls the accident and the general damages were increased by 20% on this account.

Damages awarded (Table 10):

TABLE 10

1. Damages for pain, suffering and loss of amenity	£ 18,000
2. Special damages	£ 32,875
3. Future loss of earnings (multiplier 16)	£ 132,608
4. Interest	£ 1,000
Total	£ 185,283

Social Insurance Benefits. Included in the damages awarded to each plaintiff would have been the benefit of 50% of the social insurance benefits receivable by each plaintiff up to the date of trial. The precise amount awarded to each plaintiff under this heading is not known.

TABLE 11

Total amount of damages awarded to all five plaintiffs	£ 1,072,835
Legal costs of the defendants	£ 13,385
Legal costs of all of the plaintiffs	£ 38,748
Total overall cost	£ 1,125,168

Additional Information.

At the time of the trial (9th December, 1982) this was the largest award made in respect of any industrial accident in the United Kingdom mainly because of the very severe injuries and the fact that five workmen were injured in the same accident.

(iii) *Cook v Engelhard Industries Ltd, Berec Micro-Batteries Ltd. & Johnson Matthey Ltd. (1987)*

Date of accident 19 November, 1982.

The plaintiff Graham Alan Cook was aged 29 at the time of the accident, married without children. He had had a good education which he continued after leaving school eventually obtaining a Higher National Certificate in chemistry. At the time of the accident he was employed as a Supervisor by the first defendants at a plant for the extraction of precious metals from industrial waste. He had worked for the same employers for eleven years and had good prospects of advancement.

The accident occurred whilst the plaintiff was personally engaged in supervising a chemical process for the extraction of silver from waste battery products. It was a process which he had supervised on many previous occasions but on the day of the accident there was a sudden and unexpected emission of hydrogen sulphide gas which enveloped the plaintiff and although he was wearing appropriate protective clothing he collapsed. The material upon which work was being carried out was waste battery material supplied by the second defendants to the first defendants but after there had been some previous extraction carried out upon it by the third defendants.

The injuries arose from the exposure to hydrogen sulphide. The plaintiff suffered from oxygen starvation for a period of approximately fifteen minutes and it is thought that he

possibly also sustained cardiac arrest but attempts at resuscitation were made by the works nurse and succeeded to the extent that he was still alive when he arrived at the intensive care unit in a nearby hospital. As a result of the oxygen starvation he sustained very severe brain damage producing near total physical paralysis although those parts of the brain subserving memory and intellect were largely unaffected by the hydrogen sulphide gas poisoning. He has general paralysis of the body from the neck down but he is able to move his head slightly. He can also swallow food and drink put into his mouth but feeding is a long process and he frequently chokes on his own saliva. He knows when his bladder is full but can only make a wailing noise or call for attention by operating electronic alarm equipment. He can read but very slowly and by movements of his head can type answers to questions put to him which he normally seems to understand quite clearly. His disability is permanent and he will need constant nursing care and attention for the remainder of his life. His life expectancy was assessed at a maximum of 15 years. Following the accident he encountered difficulties with his wife who eventually divorced him but during the course of his treatment in hospital he had met and become engaged to another lady. They hope to marry and she would play a large part in his future care.

Liability was in dispute as between the three defendants. The process upon which the plaintiff was engaged at the time of the accident was a standard process which had been followed on many previous occasions. On the previous occasions the same type of waste material had been obtained by Engelhard Industries Ltd. from Berec Batteries Ltd. and had also previously been subjected to processing by Johnson Matthey Ltd. However in their extraction process Johnson Matthey occasionally use iron pyrites containing an element of sulphur. Johnson Matthey had advised Berec Batteries Ltd. of the possibility that they might use this substance but Berec Batteries had failed to convey this information to Engelhard Industries and indeed previous consignments of the waste material supplied to Engelhard by Berec were free from iron pyrites. The judge decided that liability rested on Berec Batteries Ltd. because they had supplied defective material to Engelhard Industries and had failed to give notice to that company of the iron pyrites content. Damages were therefore awarded against the second defendants.

TABLE 12

1.	General damages for pain, suffering and loss amenity	£ 130,000
2.	Loss of earnings to date of trial	£ 6,968
3.	Future loss of earnings (multiplicand £ 8,640 multiplier 12)	£ 103,680
4.	Provision for "lost years" (based on 60 % of loss of earnings multiplicand £ 5,184 multiplier 4)	£ 20,736
5.	Loss of pension in "lost years"	£ 1,500
6.	Wife's loss of earnigs and travelling to hospital	£ 9,000
7.	Cost of conversion and adaption to housing needs	£ 25,000
8.	Future cost of nursing care (multiplicand £ 29,000 multiplier 11)	£ 319,000
9.	Medical and miscellaneous aids and costs to date of trial	£ 4,000
10.	Future medical and miscellaneous aids and costs	£ 44,000
11.	Cost of providing computer facilities to date of trial	£ 23,076
12.	Future cost of computer facilities (multiplicand £ 4,000 multiplier 12)	£ 48,000

13.	Cost of past holidays	£ 14,255
14.	Cost of future holidays (2 per annum) (multiplicand £ 5,704 multiplier 12)	£ 68,488
15.	Future capital costs of motoring	£ 8,400
16.	Loss of expectation of life	£ 1,750
17.	Interest	
	on general damages	£ 7,800
	on special damages	£ 14,387
	Total amount of damages and interest	£ 850,000

A provision for additional social insurance benefits is included in the heads of damages for past and future loss of earnings but the specific amount is not known. The plaintiff will be likely to receive in addition to damages those social insurance benefits set out in Appendix II for the remainder of his life.

Legal costs of the plaintiff and defendants have not yet been finally quantified but are estimated to be in the region of £ 150,000

Total estimated cost £ 1,000,000

2.4. Industrial Pollution Accidents

Extensive enquiries have failed to identify any cases in the United Kingdom where substantial damages have been awarded for personal injury resulting from an industrial pollution accident such as would arise from the escape of a cloud of toxic gas or the contamination of food or water. Whilst industrial pollution accidents of this type have occurred, any substantial damage or injury that has followed has related only to damage to livestock or fish supplies or property. The cases reported below are the only ones that have been identified where there has been the possibility of some industrial pollution which has resulted in the award of substantial damages for personal injury and/or death.

(i) *Thomas Heaton & Others v F. W. Woolworth & Co.*

The accident occurred on 8th May, 1979 when fire broke out on the second storey of Woolworth's five storey department store in Manchester. Ten people died in the fire. The exact cause of the fire was not established but it occurred in an area where furniture was displayed including stocks of polyurethane beds and mattresses which had been stacked vertically i.e. standing on their ends, thus creating a chimney effect for the heat from the fire. The existence of so much polyurethane material produced large volumes of dense black smoke and very great heat causing a flash-over effect and igniting other materials in the vicinity. A cloud of dense black smoke and fumes spread rapidly across the area obscuring windows and internal lights. The intensity of the healt built up very rapidly causing the windows to shatter and air assisted the spread of flame and forced the smoke and fumes in the direction of the exit doors. Nearly all of the fatalities occurred near to these doors. It is considered the whole area would have become untenable in a matter of minutes after the fire was first noticed but it may not have been noticed immediately as it is believed to have started behind some of the stacked furniture.

A number of the deceased persons were elderly or had no dependants but there were also young women amongst the dead who left husbands and young children as well as older dependent relatives.

Liability was not accepted by the defendants. Extensive investigations were carried out by leading forensic experts, also by the local fire brigade and by an enquiry team set up by the Government. None of these experts were able to establish definitely how the fire started but one possible area was suggested as being the internal electrical wiring in the building.

Settlement costs and compensation. The amount paid as a result of the various claims made against the defendants were as follows (Table 13):

TABLE 13

Agreed damages to the various claimants	£ 98,610.89
Plaintiffs' solicitors' costs	£ 7,229.15
Defendants' solicitors' cost	£ 12,043.66
Forensic experts' fees and incidential items	£ 2,643.93
Social insurance – death benefit only estimated at	£ 500.00
Total	£ 121,037.63

Additional information. The majority of the claims were settled by the end of 1982. As a result of this tragedy a public subscription was raised and a sum in excess of £ 100,000 was placed in a trust fund for the benefit of the dependants of those who suffered in the fire. No information is available regarding the payments made out of this charitable trust fund.

(ii) *W. E. Buzza, E. S. Craddock, M. V. Philipps & F. Sleeman v English China Clays Ltd. (1980)*

The plaintiffs were employees of English China Clays Ltd. a company specialising in the mining, cleaning and drying of china clay. The plaintiffs had all been engaged in work involving the drying process and shovelling the dried china clay powder into bags prior to despatch. As a result of a routine chest X-ray in 1960 Buzza was informed that he was suffering from pneumoconiosis which produced a permanent condition of shortness of breath. He was awarded a 10% permanent disability award but continued to work in the same process. Similar advice was given to the other three plaintiffs at different periods in time. By 1976 these plaintiffs and a number of other employees considered that their health was deteriorating to such an extent that they engaged solicitors to pursue a common law claim against their employers. The employers contended that in all of the cases the period of time which had elapsed between the date of the first diagnosis and the date of the intimation of a claim against the employer was such as to make any action statute barred by virtue of the Limitation Acts. Actions were therefore commenced in 1977 in the names of the four above mentioned plaintiffs as test cases to establish the legal position regarding the application of the Limitation Acts in these circumstances. Investigations, medical examination, discussions and negotiations took place and eventually the cases were brought before the court in 1980 where eventually an agreed settlement was reached on the following basis (Table 14):

TABLE 14

Total amount of compensation accepted by the four plaintiffs	£ 13,901.00
Plaintiffs' legal costs	£ 9,822.00
Defendants' legal costs	£ 16,995.00
Total overall cost	£ 40,718.00

As a result of the actions commenced by these four plaintiffs many other employees and former employees made claims against English China Clays Ltd. on the grounds that they were suffering from kaolinosis as a result of exposure to china clay dust arising out of and in the course of their employment. During the period 1976 to 1983 in all 142 such claims were notified and settled at a total overall cost of £ 602,946. This total cost figure includes the legal costs of both the claimants and the employers estimated at £ 40,000 in respect of plaintiffs' legal costs and £ 20,000 in defendants' legal costs.

Additional information. This case is quoted as it is typical of the many claims made by employees against their employers on the grounds of industrial disease caused by pollution of the working environment by dust or fibres from materials used in the work process. These claims have resulted in the payment of quite substantial sums spread over a period of years for industrial diseases such as asbestosis and byssinosis and in a similar fashion substantial amounts have also been paid for industrial deafness, Reynaud's Phenomena and repetitive strain injuries including tenosynovitis. In the main claims of this nature do not become apparent until a period of many years has elapsed after the employee was first exposed to the hazard which eventually causes his injury. This has produced considerable problems for insurers since very many employees in the same workplace are likely to put forward claims and even more importantly it is extremely difficult for insurers to accurately assess at any given time the number and total cost of claims from these types of disease which they are likely to have to meet. These difficulties are aggravated further in periods when an economy is affected by high levels of inflation. In the United Kingdom the problems have fallen mainly upon employers liability insurers and their reinsurers, whilst in the United States actions have concentrated on the manufacturers and suppliers of the materials and goods responsible for producing these diseases e. g. asbestos.

(iii) *D. Hill and Others v Shell UK Exploration & Production Ltd. (1986)*

Date of accident 3rd March, 1983, on a North Sea rig.

The accident was a result of a needle valve on an after-cooler vessel being partially open. This caused nearby equipment to become frosted over including the hazardous closed drains header to the drains intercepter tank. The frosting took place over a length of some 40 ft. to 50 ft. of a 6 inch line. Vapourising liquid and gas was cooled forming hydrates and frozen water in the pipework which formed a solid plug. A period of six or seven hours elapsed from the time of discovery of the frosting of the drains until the cause of the frosting was discovered and the partially opened needle valve was closed. When the valve was closed the pipeline gradually thawed allowing the blockage to melt and violently releasing the trapped quantity of gas (which had been held under pressure) into the drains intercepter tank. The gas was also able to spread into other neighbouring areas, some of which were classified as non-hazardous areas and contained sources of ignition e. g. hot water boilers. An explosion of considerable force occurred followed by fires from a number of sources in the affected area.

The injuries. The first three of the following mentioned employees died as a result of the explosion and the fourth was very severely burned.

E. Dawson. He was born in 1947 and was survived by a wife five years younger than himself, with two children born in 1975 and 1980.

P. McKenna. He was born in 1953, was employed as an instrument engineer and was survived by a wife and four children.

A. Maxwell. Born in 1948 and survived by a wife and two children.

D. Hill. He sustained extensive burns to approximately 80% of his body area and whilst he has recovered, it is unlikely that he will be able to resume his previous employment or indeed obtain any other employment in the foreseeable future.

Litigation. Very shortly after the accident representatives of American attorneys operating out of Texas contacted the dependants of the deceased and visited Mr. Hill whilst he was in hospital and obtained mandates from all of them and authorisations to conduct litigation in Texas in accordance with the terms of local Texas law and their interpretations of the Jones Act and the Death on the High Seas Act. Solicitors acting for the defendants made it clear that the matter of jurisdiction would be challenged and after further deliberation all of the plaintiffs decided to instruct Scottish solicitors and proceedings were issued in an English court so far as the case of Dawson is concerned and in the Scottish court for the other three cases.

Liability was not admitted although it was accepted that there was no evidence of contributory negligence on the part of any of the employees. Negotiations continued in the United Kingdom and agreement was reached on the undermentioned level of damages before trial proceedings were concluded. The amounts agreed by way of settlement have all been recorded by the British courts.

In concluding settlements of all four cases it was necessary for the parties to take into account the intervention of American attorneys in view of the fact that in Texas law it is well established that a contigency fee agreement gives the attorney a right of action since he effectively has a percentage of the claim itself. Before any settlement of these British cases could be concluded therefore the interest of the American attorneys had to be bought out in each case. The actual amounts involved in each settlement are as follows (Table 15).

TABLE 15

D. Hill		
Plaintiff's claim including Plaintiff's US costs	£ 150,000	
Plaintiff's UK costs	£ 7,500	
Defendant's US costs	£ 1,864	
Defendant's UK costs	£ 5,962	
Total compensation and costs		£ 165,326

A. Maxwell

Compensation agreed	£ 207,000	
Cost to plaintiff of buying out US attorneys interest	£ 24,000	
Defendant's US costs	£ 6,268	
Defendant's UK costs and other items still outstanding relating to US and UK costs	£ 20,000	
Total compensation and costs		£ 257,268

E. Dawson

Compensation to deceased's widow	£ 117,350	
Compensation in respect of two children	£ 30,000	
Plaintiff's costs to buy out US attorneys interest	£ 14,474	
Defendant's US costs	£ 15,000	
Defendant's UK costs	£ 4,824	
Total compensation and costs		£ 181,641

P. D. McKenna

Total amount of compensation for deceased's widow including her costs of buying out US attorneys interest	£ 255,000	
Defendant's US costs	£ 3,513	
Defendant's UK costs	£ 6,700	
Total compensation and costs		£ 265,213
Total payment overall in respect of compensation and costs		£ 869,455

Additional information. This case is included as in addition to the fatalities and severe injuries caused due to the escape of gas and its spreading into areas of the drainage system of the rig where it was not supposed to be, it also provides evidence of the impact on the United Kingdom levels of compensation caused by the intervention of US attorneys and the impact of US laws applicable in the State of Texas, especially the contingency fee system of legal charges and the right it apparently gives to US attorneys in the State of Texas to be compensated as a result of the misfortune of others.

2.5. Medical Treatment – Injuries/Diseases

(i) *Thomas v Wignall and South Glamorgan Health Authority (1985)*

Date of accident 25th March, 1976.

The plaintiff Linda Thomas was born 10th October, 1958. She had a normal childhood and schooling. On leaving school she obtained work as a sales assistant in a chemist's shop

where she did well and was sent on a beautician's course which she passed. On her sixteenth birthday she became engaged to her boyfriend who she had known for two years. She married at the age of 17 and had only just returned from her honeymoon when her injury occurred.

The accident occurred in the University Hospital of Wales in Cardiff where the plaintiff had gone for an operation for the removal of her tonsils. In the course of the operation, as the result of cerebal anoxia, she sustained severe permanent brain damage.

The injuries and medical condition. As the result of the mishap during the operation the severe brain damage which she suffered produced a number of neurological and behavioural problems. Whilst at first she appeared to make some recovery, her condition became worse after approximately two years and she exhibited a very disturbed and even aggressive behaviour. Whilst she is very severely intellectually and physically disabled it was the behavioural problems which caused the greatest difficulties in nursing and in planning and managing her future. In 1982 she was examined by a consultant who reported her to be a difficult patient whose "strength, weight and belligerence had complicated the delivery of the basic nursing she requires." She was also said to have "been physically and verbally offensive to relatives and nurses alike... to have thrown a coffee table at a fellow patient on one occasion and on another to have lunged at her mother's face with a dining fork. Her language is frequently obscene and she has been turned away by several therapeutic agencies because of her anti-social behaviour." Her speech was very slurred and she was given to parrot-like pattern repetition of the last four or five words of everything said to her. A psychological assessment of her condition in November 1978 revealed a full scale IQ of 45, the test for vocabulary and reading comprehension giving a mental age of no more than 7 with reading accuracy of an 11 year old. In August 1980 a further test showed a full scale IQ of 59 with a slight improvement in intellectual capacity and reading comprehension although the degree of intellectual and memory impairment remained severe. At a further assessment in 1982 the full scale IQ was 54 – still in the "mental defective" range. Her treatment to this date had been at hospitals in Cardiff but in 1984 she was sent to St. Andrews Hospital in Northampton where an attempt was made to establish a basis for training and rehabilitation. After three months assessment the following report was given by the consultant neuro-psychologist:

> "*Physical.* There was an increased tone of all four limbs. Hip extension was absent on the right and limited on the left. Ankle movements also were difficult to produce. She had voluntary movement in both arms but could not isolate movement in her hands very well and had problems with fine motor control of her hands which made dressing, especially doing up buttons, difficult and interfered very considerably with her ability to write. She could walk between parallel bars but her gait was very poor with the right leg extended and her left foot plantar-flexed and inverted. Her right heel never touched the ground and her left heel barely did so. For practical purposes she was confined to a wheelchair. The conclusion however was that she had more physical ability than she would use.
>
> *Mental and Intellectual.* She could comprehend language but had difficulty with expression and though capable of sensible and quite humorous conversation at times, on other occasions she refused to make any intelligible speech sounds at all. In this connection she was apt to behave in a manipulative manner. She was able to read quite

readily, even words which were upside down, but could not write in any useful sense. Her memory was impaired but the fact that she was unwilling to make an effort made accurate measurement of the degree of impairment difficult. Her behaviour was disruptive, took no account of the presence or needs of other people, and exhibited manipulative and childish tendencies. She was indifferent to reward and found to be unsuitable to the sort of pressured environment and intensive rehabilitation provided at St. Andrews Hospital. The conclusion was, however, that her abilities exceeded her performance and that her behavioural symptoms were particularly characteristic of diffuse brain damage of the sort she had suffered."

A further consultant's report was carried out in October 1985. Her average daytime pattern was described as follows:

"Awoken at 8.00 am and taken to breakfeast. Her teeth are then brushed for her by the nurse and she is bathed every day. If she is in a good mood and if the nurse is experienced then one person will help her from the wheelchair into the bath but usually this requires two people. She does not like being bathed and this is a time when she can be noisy, screaming and shouting. She does not indicate her toilet needs and can sit on the toilet for twenty minutes, get up and wet the carpet and her knickers. She laughs when this happens. She loves eating and will eat independently if her food is cut up for her. However she is messy and spills and drops her food. She needs help with dressing for every garment. After breakfast she follows a recreational programme, has lunch with other patients and a recreational programme in the afternoon. She has tea and supper with the other patients and then joins in the communal activities of the unit until bedtime. She enjoys company. Her physical health is good. Her weight has decreased from 16 stone to just over 11 stone by a moderate restriction of calorie intake. For most of the time she has a cheerful, possibly euphoric personality with an infectious laugh and a good sense of humour. Her bad moods can last from an hour to half a day when she screams, shouts and stands up with arms outstretched and is very unsteady. She grabs rather than punches and is very strong. At these times two people are required to manage her. She is not able to use a walking frame because of her unsteadyness. She normally uses a wheelchair and when she does walk on her own she requires one competent and strong person to steady her. Even then she can only walk a few yards."

It was confirmed that there was no hope of any further improvement in her condition and in view of the severe nature of her disability, considerable difficulty was experienced in agreeing the most suitable means of providing for future care. The judge assessed that her life expectancy would be to age 55. It was considered impossible for her parents to look after her and eventually accepted that she would need to have her own house specially adapted to suit her needs; that she would need to employ a husband and wife team of qualified housekeepers supported by one additional nurse, whose services might not always be required for night-time attendance, if the comparatively low level of night-time incontinence did not deteriorate.

Liability was admitted by the defendants, the anaesthetist and the South Glamorgan Health Authority in 1984 and the court was only required to decide upon the level of damages to be awarded.

Damages. These were awarded under the following headings (Table 16):

TABLE 16

1.	General damages	£ 60,000
2.	Interest on general damages	£ 6,396
3.	Special damages	
	a) cost of care to the date when special accommodation became available	£ 67,568
	b) cost of parental visits to hospitals	£ 6,896
	c) cost of special equipment	£ 834
	d) cost of damage to parents home caused by the plaintiff's behaviour	£ 1,000
	e) loss of earnings to date of trial	£ 10,000
4.	Future loss of earnings	£ 39,000
5.	Cost of special housing	£ 25,000
6.	Cost of special furnishings for housing	£ 2,000
7.	Court of Protection costs and interest on special damages	£ 25,570
8.	Cost of future care	£ 435,000
	Total amount awarded	£ 679,264
	Plaintiff's legal costs	£ 55,000
	Defendants' legal costs	Not obtainable
	Total cost of settlement	£ 734,264
	Plus defendants' legal costs	

General Information

1) No provision has been included within the award for 50% of social insurance benefits for the first five years after the accident since all of this time was spent by the patient in hospital and no benefit would have been directly received by her.

2) In arriving at the provision for the cost of future care the judge assessed the annual cost of residential daytime care at £ 24,000 per annum. He accepted that this figure would increase to £ 34,000 per annum if regular night-time nursing was required but as the degree of night-time incontinence was comparatively small he decided that regular night-time attendance would not be necessary for the remainder of the plaintiff's life. He agreed a multiplier of 15 and applied this on the basis of 7.1/2 to £ 34,000 per annum and 7.1/2 to £ 24,000 per annum.

3) Although at the time of the award (December 1985) these were the highest damages ever awarded for personal injury in the United Kingdom, the plaintiff appealed on the grounds that the awards in respect of future care and loss of past and future earning were insufficient. The appeal was heard on 10th December, 1986 and after detailed consideration the judges of the Appeal Court concluded that the amount of damages awarded under these headings was fair and reasonable and the appeal was therefore dismissed.

(ii) *Krishnamurthy v East Anglian Regional Health Authority (1985)*

The plaintiff, a boy who was aged 10 years at the date of the hearing.

The injury occurred as a result of cerebral hypoxia during prolonged labour at his birth. He was born suffering from athetoid spastic quadraplegia. This entailed permanent paralysis of all four limbs. With some effort he was able to obtain sufficient grip with his left hand to move a switch and this enabled him to operate certain electronic equipment. He suffers almost continuous involuntary movements of limbs and spasms of his trunk. He is unable to control his head movement, can see and hear but cannot speak. He is occasionally incontinent, is unable to feed or dress himself. He is confined to a wheelchair and totally dependent upon others for his well being. His intelligence is unimpaired so that he is aware of his surroundings and perceptive of his condition. He had attended a special school and had learned to read and could also type approximately 70 words. His life expectancy was put at 45 years. He was under the care of his parents and there was no possibility of any future institutional care.

TABLE 17

1. Pain and suffering and loss of amenities	£ 60,000
2. Loss of future earnings (based on multiplier of 5 and multiplicand falling between average net industrial wage and plaintiff's father's average net earnings)	£ 30,000
3. Cost of future care (based on multiplier of 14 where appropriate)	
a) personal and domestic assistance including parents attendance	£ 121,170
b) conversion of accommodation and removal expenses	£ 35,000
c) adaptions to motor transport and running expenses	£ 22,400
d) medical supplies, equipment and aid	£ 22,760
e) additional heating	£ 4,200
f) holidays, special clothing and cleaning	£ 5,516
4. Cost of physiotherapy	£ 14,000
5. Cost of electronic equipment	£ 15,000
6. Cost of administering trust for plaintiff	£ 10,000
7. Other special damages and interest	£ 7,500
Total damages	£ 340,000
Plaintiff's legal costs	£ 28,000
Defendants' legal costs	Not obtainable
Total cost	£ 368,000
Plus defendants' legal costs	

(iii) *Samir Aboul-Hosn v The Trustees of the Italian Hospital, London and Others (1987)*

Date of accident September 1982.

The plaintiff Samir Aboul-Hosn was aged 19 at the time of the accident. He had had an exceedingly successful academic career, having obtained 12 Ordinary level passes in the General Certificate of Education followed by 4 Advanced level passes and was about to commence a degree course in biochemical engineering at University College London. He had also become an accomplished sportsman.

The injuries occurred after he had entered the London National Hospital for an operation to remove a colloidal cyst from his brain. The operation was carried out successfully and he was transferred to the Italian Hospital in London. Whilst at that hospital his condition began to deteriorate. The cause of the deterioration was correctly diagnosed but unfortunately there was negligence in applying the treatment prescribed to cure the condition as a result of which the plaintiff suffered catastrophic and irreversible brain damage, removing from him completely all possibility of future work, of marriage or of any participation in intellectual pursuits or share of any of the activities or mature emotions of a normal life. His mental age had been reduced to that of a 2 year old, he is unable to speak apart from the occasional utterance of a monosyllable and his eyesight is drastically impaired. It is only with the greatest difficulty that he is able to feed himself or drink from a cup and he will need care for 24 hours every day for the rest of his life.

Liability was denied by the Italian Hospital but was admitted by the doctors responsible for the negligent treatment.

Damages were awarded on the following basis (Table 18):

TABLE 18

1. Pain, suffering and loss of amenity	£ 85,000
2. Cost of past care and expenditure by parents	£ 100,700
3. Cost of future care	£ 400,000
4. Provision of specialised housing needs	£ 48,100
5. Loss of future earnings including cost of motor transport	£ 331,000
6. Court of Protection fees	£ 34,850
7. Interest	£ 32,740
Total	£ 1,032,390

Under a separate action the plaintiff's father was awarded in his own right £ 7,742.

Total amount of damages awarded: £ 1,040,132.

Legal costs not available.

Additional Information. This case represents the highest level of damages awarded for any individual personal injury in the United Kingdom to date. The award was made on 10th July, 1987 and it is not yet known whether an appeal will be lodged. Legal costs have not been finally quantified. As the plaintiff was still a student at the time of the accident there

was no item for pre-accident loss of earnings and whilst some provision would have been made in the calculation of the heads of damages for additional social insurance benefits, no specific quantification has been released.

In the concluding remarks to his judgment, the judge made the following comment:

"This is an enormous sum and it may be useful if in conclusion I explain very briefly how it is made up. Less than 10% is in respect of pain, suffering and loss of amenity. This figure is fixed in accordance with awards in comparable cases and only a fraction of the amount he would recover under this head in some other jurisdiction, for example, in the United States of America.

Well over 50% is attributable to care, rehabilitation and housing needs, past and future. The great bulk of the remainder is attributable to future loss of earnings. Future care, future rehabilitation, future housing needs and future loss of earnings together absorb nearly 80% of the award. These are estimates based on the evidence as to Samir's expectation of life. If he dies sooner they will be too much, if he outlives his expectation of life, the money for care will probably have run out since it is calculated on the footing that both capital and income would be exhausted by the end of that period.

Under the present law I am compelled to award damages on a once for all basis and there is no scope (in this type of case) for a continuous assessment either of need or of loss of earnings to be decided from time to time as Samir's future unfolds. This case therefore only serves to highlight once again the crying need for a review of this branch of the law which judges have so frequently urged but which only Parliament can undertake."

APPENDIX 1

Treatment of Social Security Benefits in the Assessment of Tort Damages

Benefit	Treatment in the assessment of damages	Authority
Constant Attendance Allowance	Not taken into account	Law Reform (Personal Injuries) Act 1948
Attendance Allowance	Not taken into account	Case Law
Family Income Supplement	Deducted in full	Case Law
Housing Benefit	Uncertain. Not in Act. No Case Law.	—
Industrial Death Benefit	Not taken into account	1948 Act
Industrial Disablement Benefit	50% offset	1948 Act
Injury Benefit	50% offset	1948 Act
Invalid Care Allowance	Not taken into account	—
Invalidity Benefit	50% offset	National Insurance Act 1971
Mobility Allowance	No taken into account	Case Law
Retirement Pension	Not taken into account	Case Law (England and Wales) Administration of Justice Act, 1982 (Scotland)
Sickness Benefit	50% offset	1948 Act
Severe Disablement Allowance	50% offset	Health & Social Security Act 1984
Supplementary Benefit	Benefit paid up to date of damages award. Thereafter not taken into account	Case Law (England and Wales) Administration of Justice Act 1982 (Scotland)
Unemployment Benefit	Deducted in full	Case Law (England and Wales) Administration of Justice Act 1982 (Scotland)
Statutory Sick Pay (SSP)	Deducted in full	Case Law

Note (a): SSP is paid by employers who recover amounts paid by deduction from National Insurance Contributions they are required to pay to the National Insurance Fund.

Note (b): These benefits are not all available at the same time neither are they necessarily all available to a single claimant.

APPENDIX 2

Major Social Insurance Benefits Available to Eligible Claimants in the United Kingdom for Sickness, Accidental Injury, Unemployment, etc.

1. *Statutory Sick Pay*

This benefit is payable for a period up to 28 weeks on the following scale:

a) £ 46.75 per week if the pre-injury/sickness earnings averaged £ 75 or more per week.
b) £ 31.60 per week if pre-injury/sickness earnings averaged £ 38 and £ 55.50 per week.
c) No benefit if the earnings averaged less than £ 38 per week.

Income tax and National Insurance contributions are deducted from these payments.

2. *Sickness Benefit*

A person who does not qualify for Statutory Sick Pay can obtain sickness benefit (which is free of tax) for a period up to 28 weeks if they have paid an adequate number of National Insurance contributions. The benefit payable is £ 29.45 per week plus £ 18.20 per week for an adult dependant and if the claimant is a pensioner a further £ 8.05 per week for each dependent child.

3. *Invalidity Benefit*

This comes under two headings:

a) *Invalidity Pension.* This is payable when benefits 1 and 2 above have been received for 28 weeks and the claimant is still unable to work. It amounts to £ 38.70 per week plus £ 23.25 per week for an adult dependant and £ 8.05 per week for each dependent child.

b) *Invalidity Allowance.* This is an extra payment of £ 8.15 per week if incapacity began before the claimant was aged 40 or £ 5.20 per week if incapacity began before the claimant reached age 50 or £ 2.60 per week if incapacity began before the age of 60 for a man or 55 for a woman.

These benefits are free of tax.

4. *Severe Disablement Allowance*

This is payable to a claimant of working age who has been unable to work for 28 weeks but is not entitled to sickness or invalidity benefit because he or she has not paid a sufficient number of National Insurance contributions. A claimant who first becomes incapable of work after age 20 can only get this benefit if he or she is at least 80% disabled.

The benefit is tax free and amounts to £ 23.25 per week maximum plus £ 13.90 per week for a dependent wife or husband and £ 8.05 per week for each child.

5. *Industrial Disablement Benefit*

This benefit is payable irrespective of the number of National Insurance contributions made. The benefit can be received in the event of disability due to accidental injury of specified disease at work. The amount of weekly benefit is in accordance with a scale which depends upon the degree of disability assessed. The maximum amount of benefit is £ 63.20 per week for 100% disability i.e. for 50% disability it would be £ 31.60 per week. If the disability is assessed at 20% or less a lump sum is paid. This benefit applies only to people eligible for industrial benefit at the time of the accident within Great Britain. A claimant does not qualify for this benefit until 90 days have elapsed since the date of the accident or

the onset of the disease. The amount of benefit and the period for which it is payable is made by an adjudicating medical authority and may be reviewed by them from time to time or discontinued if the claimant's health recovers.

6. *Other Benefits which may be obtainable*

a) Housing benefit towards payment of rent or rates.
b) Mobility allowance if the claimant is unable to walk. This benefit may be as much as £ 21.65 per week.
c) Supplementary benefit if the claimant has less than £ 3,000 cash savings.

APPENDIX 3

Structured Settlements in the United Kingdom as an Alternative to a Total Lump Sum Compensation Award

The circumstances relate to a specific automobile accident where a plaintiff aged approximately 20 years of age at the time of the accident suffered severe injuries producing tetraplegia.

At the time of the accident the plaintiff was working as a junior reporter with a provincial newspaper and it was accepted that by the time of trial six years later he would have advanced in his chosen profession to have reached the status of senior reporter with five years experience in his profession and that by that time his earnings would have been in the bracket of £ 6,266 to £ 7,098 gross per annum. It was also accepted that he could have made further progress in the years ahead to have added approximately a further £ 1,600 to his gross annual earnings. As a result of the accident his expectation of life was reduced to 25 years.

In putting before the legal representatives of the plaintiff their suggestions for a structured settlement the defendants' insurers and legal advisers firstly set out their carefully considered assessment of the lump sum compensation likely to be awarded by the courts if the case were to go to trial. The total amount was arrived at under the following heads of damages (Table 19):

TABLE 19

Item	Amount
1) Pain, suffering and loss of amenity. This was assessed on the basis laid down in the case of *Housecroft v Burnett* (1985)	£ 75,000
Interest on this amount 2 % per annum	£ 7,250
2. Loss of earnings to date of trial, actual amount after allowing for 50 % of social insurance benefits amounting to £ 10,890	£ 12,964
3. Future loss of earnings based on multiplicand of £ 6,000 per annum and a multiplier of 12 from the date of trial	£ 72,000
4. Miscellaneous items, clothing, hospital visits, etc.	£ 940
5. Additional costs of altering house to suit plaintiff's requirements	£ 11,250
6. Additional cost of motor transport before and after trial	£ 10,000
7. Cost of nursing and general care by parents and possibly at some future date by others	£ 42,500
8. Cost of future nursing aids	£ 2,510
Total	£ 234,414

Defendants' representatives expressed the belief that a court might be willing to allow some set off against the amount suggested for pain, suffering and loss of amenity as there is some element of duplication in this award and in the award relating to future loss of earnings but they were prepared to ignore this possibility and any other possibility of a reduction in the total sum mentioned above and indeed would be willing to conclude a settlement on a lump sum basis at an all inclusive figure of £ 240,000.

In setting out their suggestions for a structured settlement they emphasised that

(i) the plaintiff had already received lump sum interim payments totalling £ 86,892, and

(ii) the total amount of social insurance benefits which the plaintiff would be likely to obtain was £ 10,000 per annum.

The structured settlement is based on the Inland Revenue Department having agreed in principle to a scheme whereby the plaintiff is able to acquire income that is tax free. The Inland Revenue are prepared to presume that the annual income provided by an annuity is "delayed damages" and is not therefore taxable in the plaintiff's hands. An important feature is that the plaintiff must allow the insurer who is paying on behalf of the tort feasor to provide the annual annuity payments and that some of what would otherwise be the capital sum of damages is used to purchase that annuity.

The benefit to the plaintiff is obvious in that he would acquire a tax free income for the remainder of his life and subject to the annuity form arrangements could be made for his annual income to be index linked. The structured settlement basis was considered to be most applicable in this particular case as the plaintiff had already received in cash substantial interim payments and would receive the benefit of substantial weekly social insurance benefit payments.

The structured settlement was put forward on the following basis:

Total assessed lump sum payment	£ 240,000
Less interim payments already received	£ 87,000
Further lump sum payment to plaintiff to be invested by him	£ 28,000
Balance remaining to be utilised to purchase an annuity from the defendants' insurers	£ 125,000

The income obtainable by the plaintiff from these sources would be as follows:

(i) £ 28,000 invested in general Post Office savings account at current rate of 11 %	£ 3,080
(ii) One of the following three types of annuity	
a) fixed income annuity £ 125,000 purchase price. Fixed annual amount receivable	£ 15,000
b) index linked annuity £ 125,000 purchase price. Annuity income increasing by 5 % per annum until date of death and guaranted for minimum period of five years	£ 9,875
c) index linked annuity £ 125,000 purchase price with annuity increasing in accordance with inflation index to the year 2020 and then increasing at 5 % per annum until death, annual payments guaranteed for minimum period of 5 years form inception	£ 7,211

These options would provide the plaintiff with an annual income within the range £ 10,291 to £ 18,080 depending upon the type of annuity selected, and these payments would be in addition to the annual income of £ 10,000 received separately by means of social insurance benefits. In other words, the plaintiff's choice ranges between total index linked income commencing at £ 20,291 per annum up to a choice of a fixed annual income of £ 28,080 per annum, a substantial proportion of which would be free of income tax.

APPENDIX 4

A Note on Forum Shopping

"Conflict of Laws" is the description sometimes applied to that part of the national civil law of a country concerned with rules for dealing with issues that involve a foreign element. Vastly improved communications, the activities of multinational corporations, the popularity of holidays abroad, all imply a shrinking world, but they have not yet unified differing national legal systems. Hence when a UK citizen is involved in personal injury litigation with someone domiciled in another sovereign state, questions may arise as to which jurisdiction is competent to decide the dispute, which system of law should be applied, and where the resulting judgment should be enforced.

If there is a possible choice of venue a plaintiff naturally will wish to invoke a court of the country that seems likely to regard his cause with the most favour; the defendant will prefer the alternative forum. A homely example for UK lawyers arose in *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625. The plaintiff sought damages from his employer based on a works accident in a Scottish factory. The sole non-Scottish feature was that the defendant company happened to have a head office in England; all the witnesses resided locally and the proceedings could have been served conveniently at the plaintiff's Scottish place of work.

Mr. MacShannon started his action in England where his solicitors, appointed by his trade union, had their offices. He was advised that damages from an English court would be higher than those awarded in Scotland. The Court of Appeal upheld the refusal at first instance to stay the English action on the basis that Scotland was the appropriate venue, one where the plaintiff was at liberty to sue.

That decision was over-ruled by the House of Lords. Lord Diplock set out the principle: "In order to justify a stay two conditions must be satisfied... (a) The Defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be open to him if he invoked the jurisdiction of the English court". The first condition was clearly met since trial in Scotland at the local Sheriff's Court or at the Court of Session would be less costly. As to (b), their Lordships held that the lower courts had erred in law in concluding that the unproven belief of the plaintiff's solicitors that their client would do better in an action in England than Scotland provided a sufficient ground for refusing a stay.

In an earlier case, *Chaplin v Boys* [1962] 2 All ER 1085, three of the House of Lords speeches had referred to "the danger of forum shopping". Mr. Boys, an RAF technician, received a fractured skull whilst riding pillion on a motor cycle in Malta where he, like the

defendant – the latter serving there with a Royal Naval Air Squadron – was stationed. Both men were later transferred to England where Mr. Boys, who made a reasonable recovery, started proceedings. Negligence was admitted but the contentious point was over which system of law should be applied by the English court in assessing damages. The economic loss was only £ 53, and under Maltese law no general damages for pain, suffering and loss of amenity would have been recoverable. Under English law £ 2,50 would have been assessed under that head, and that amount represented the practical difference between the two legal systems. The House of Lords held that the law of the place of trial (the lex fori) should prevail. Both parties were British subjects temporarily living in Malta, and to that extent the place where the tort occurred was overshadowed by their identities and circumstances. Compensation for pain and suffering was merely one item in the quantification of the total damages, a matter for the lex fori, and accordingly the plaintiff's award of £ 2,303 was confirmed.

Forum shopping on a less restricted scale was featured in a case involving much more serious injuries, *Castanho v Brown and Root (UK) Ltd and Another* [1981] 1 All ER 143. The plaintiff, a Portuguese national, was employed on one of their ships by the second defendants who like the first defendants, were part of a large Texan group of companies. Whilst the vessel was docked at a UK port the plaintiff sustained injuries of maximum severity for which the second defendants admitted liability in proceedings started on Mr. Castanho's behalf in England. Subsequently two interim payments totalling £ 27,250 were made. In the interval between those two advances the plaintiff was approached by a firm of American lawyers for permission to bring his case in a US court on a contingency fee basis. That approach was reinforced by later discussion with the English solicitors whom the plaintiff had originally instructed, and eventually, some 17 months after the UK action had begun, further proceedings started in a Texas court.

The defendants applied to the English court for an injunction to restrain the plaintiff from prosecuting or continuing his suit in America. His reaction was to give Notice of Discontinuance of his UK litigation. At first instance the plaintiff was required to proceed in England but the Court of Appeal and later the House of Lords allowed him to go ahead in Texas. The Diplock tests set out in *MacShannon v Rockware Glass* were applied. No question arose over (a) but did over (b). It was held that to restrain Mr. Castanho from proceeding in Texas would deprive him of "a legitimate personal or juridical advantage" since he was likely to recover a much larger award of damages, including a punitive element, there. Leave to discontinue the UK action was given, the interim payments already made to be refunded. The US attorneys were willing to advance £ 27,250 to their client to ensure compliance with that last direction.

Castanho v Brown and Root UK Ltd if tried in an English court would have resulted in an award of, say, £ 250,000. It is understood that it was in fact settled out of court for the approximate equivalent of £ 1.1/2 million by the US attorneys, of which sume the plaintiff had contracted to pay his American advisers 40% on a contingency basis for their fees and expenses.

The UK is a party to international conventions for the reciprocal enforcement of civil judgments by which a judgment in one country can be enforced against a defendant domiciled in another. A Brussels Convention of 1968 on Enforcement of Judgments in Civil and Commercial Matters regulates as between EEC States the general rules governing the

jurisdiction of the courts of those states in civil proceedings and in reciprocal recognition and enforcement of judgments. The Convention was given effect in the UK by the Civil Jurisdiction and Judgments Act 1982, which came into operation on January, 1987.

APPENDIX 5

Acknowledgements

In addition to references made in the text the authors gratefully acknowledge the assistance obtained from the following sources:

All England Law Reports, Department of Health & Social Security, Hytner Opinion: City of Salford Enquiry, Kemp & Kemp, Loss Prevention Council, National Audit Office – Report on Recovery of Social Security Benefits when Damages in tort are Awarded, and various United Kingdom Solicitors, Insurers, Reinsurers and Lloyds Underwriters.