
Developments in UK Damages and Divorce **Allan C Martin**
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This paper considers recent developments in the provision of actuarial advice in the fields of damages and divorce. The paper is somewhat unsurprisingly divided into two sections, both based on recent publications by and involving the author -

Section 1. ***Divorce:*** This is taken from an ACM article in Benefits and Compensation International. The article has been updated to reflect progress since November 1996 and to reflect the current drafting of a new Family Law Bill.

Section 2. ***Damages:*** This is a summary of the discussion paper by a Faculty/Institute Actuarial Working Group - Messrs A C Martin (Chairman), Beardmore, Gallop, Kennedy, McKenzie, Owen, Patel, Pettengell and Wright, presented at a seminar at Staple Inn, London in December 1997. This is supplemented by some further comments on a key appeal case and the expected determination by the government in setting the crucial discount rate.

In both cases I would welcome the comments of practitioners throughout the world on the approach, problems encountered and legislative trends in various jurisdictions.

Explained terms and abbreviations are printed in bold on the first occasion they are used.

SECTION 1 - UK: DIVORCE CHANGES FOR PENSIONS

The last 3 years have seen very significant developments in the area of pensions and divorce in the UK. In this section the historic position is reviewed and the Pensions Act 1995 Regulations of June and July 1996 are examined to consider the practical position for affected members, family law practitioners and pension scheme administrators. A question and answer format is used to develop the subject - *in case you have a friend with a question!*

Q1. Before the very recent divorce legislation what pension provisions applied?

In England and Wales divorce law is covered by the Matrimonial Causes Act 1973 MCA. Historically MCA 73, S25 has required the Court to consider benefits lost to either party as a result of the divorce. In practice this provision was only applied to those within 10 years of retirement and only considered the value of spouse's benefits (on death in service, lump sums and spouse's pensions, and spouse's benefits on death in retirement). Values over £50,000 were rare. Pension scheme trustees and administrators were even more rarely involved, only occasionally providing information to members/spouses and their professional advisers. No benefits from the pension scheme were assigned or transferred to the divorcing spouse, the credit provided to the spouse was funded by the distribution of non pension assets. The position was basically unfair to the non earning non pensioned spouse, usually the wife.

Q2. And the position in Scotland?

In Scotland divorce law is covered by the Family Law (Scotland) Act 1985 (FLSA). For the last decade FLSA, S10 required the value of occupational pension scheme benefits of both parties to be taken into account in the dividing up of all "matrimonial property." The values covered the member's pension and spouse's benefits and were applicable to all ages of member and spouse. No change to pensions legislation however accompanied this 1985 divorce law and a frequent settlement of a case was, "*he keeps his pension and she gets the house*". This apparently sexist comment merely reflecting the normal gender of breadwinner and spouse.

Q3. What were the pressures for change?

In May 1991 The Law Society's Family Law Committee in their report "Maintenance and Capital Provision on Divorce" recommended amendments to the Matrimonial Causes Act 1973 in England and Wales, including making allowance for the full pension values, on a similar basis to the Scottish legislation. This topic was taken up by the Pensions Management Institute (PMI) and a Working Group formed. The author represented the ACA on this influential reporting group. The PMI Working Group reported in May 1993, shortly before the Pensions Law Review Committee PLRC (known as the Goode Committee after the Chairman Professor Roy Goode). The PLRC were reviewing the whole UK pensions framework following the Maxwell pensions scandal. The PLRC endorsed the PMI suggestion of reform, namely that the full value of pension benefits should be taken into account (as in Scotland) and that the actual pension benefits should be "split".

Q4. What is "Splitting"?

Splitting is the immediate subdivision of pension funds to create a new entitlement within the pension scheme for a divorcing spouse or by paying a transfer value to the spouse. Two totally separate "members" benefits would be paid in future. (This would leave the member with half the pension and half the house!)

Q5. Any other factors?

In addition, the profile of pensions and divorce was raised by a **House of Lords** (as the UK supreme court) case - Brooks v Brooks June 1995. This involved a director scheme in surplus. The circumstances of the case were special, however, several sets of pension scheme documents and many policy wordings have been checked since!

Q6. And legislation?

The Pensions Bill in 1994 did not take up the suggested reform and it was only amendments to this draft legislation in early 1995 which prompted limited concessions from the Government. The concession was the introduction of "earmarking".

Q7. What's earmarking?

Earmarking is the payment of benefits to a different party if or when benefits come into payment. [Earmarking is also referred to as "attachment", arguably more politically correct, but inconsistent with occasional legislative slang e.g. "whistle-blowing"!].

Potential earmarked benefits include pension instalments (England & Wales only) or part of a lump sum on death or retirement. Pension scheme administrators are already familiar with the comparable "arrestment of wages" orders which may be put in place for maintenance payments. The benefit remains the property of the member and in the case of a pension payment, is taxed as such. This limited concession by the government reflected fears over the taxation and public borrowing implications of splitting. At the time the government was also in the middle of difficult political problems with family law legislation regarding child support benefits and payments. To date very few "earmarking" orders have been made.

Q8. What exactly was introduced by the Pensions Act 1995?

Crucially the Act, or rather the English Regulations thereunder, introduced the whole value of pension benefits into the assets considered in divorce. As recommended by the influential PMI report, the value of benefits is normally established via cash equivalent transfer values (CETVs). As well as changing family law the Pensions Act 1995 also, for the first time, allowed spouses to get their hands on money directly from the pension fund, albeit only to a limited extent. This access is comparable to the US Qualified Domestic Relations Order, thereby avoiding the pitfalls of rules preventing assignation in pensions legislation.

Section 166 introduced earmarking of benefits (in payment) in England and Wales. This came into effect from 1 July 1996. Benefits earmarked include the members' pension, the lump sum payable on death or retirement, but not the spouses' pension. [It was rumoured that a large number of divorce petitions were filed on 30 June before the legislation become effective!]

Section 167 covers Scotland and allowed earmarking of lump sum benefits only. (Scottish family law is just different in this regard). This came into effect from 19 August 1996.

Q9. *And Northern Ireland?*

For the final part of the UK, separate legislation mirroring the (English) MCA applies.

Q10. *So values are established via the cash equivalent transfer value*

Although past service reserves or the "continuing service" valuation method had been used in Scotland for almost 10 years, the CETV won the debate as to which measure of value should apply. This approach was advocated by the PMI. [Any alternative would allegedly require the greater involvement of actuaries to assist in the calculations! Whilst lawyers are accused of being available to argue any figure, for a fee, life would be worse with actuaries producing actuarial bases to justify any figure!] Case law has however recognised the limitations of CETVs especially for schemes involving early retirement ages. A crucial case considered in the Court of Session, Scotland's highest court, involved a police officer close to retirement (at age 50). The judge rejected the CETV which (1) assumed he had left service (he hadn't) and (2) envisaged uplift of benefits at age 60.

CETVs are now much more equitable with the maturity of UK pensions preservation legislation. In particular the post 1985 and 1990 indexation or revaluation of all the pension in deferment is vital to a fair value. The CETV approach will also simplify matters and allow the pension scheme's existing systems to complete the arithmetic. The availability of CETV quotations free of charge from pension scheme administrators may also have been a factor! A caveat however, the "simplification" may mean that the transfer value does not exactly reflect the value of pension rights built up during the period of marriage.

Q11. When will the CETV approach give problems?

Difficulties will arise in respect of (1) the valuation of pensions in payment, (2) schemes where discretionary benefits are excluded from the CETV and (3) schemes less than 100% funded where this is reflected in the CETV. As identified in existing case law, for schemes with deferred benefits paid at a later age than applies for active members retiring (eg police, fire and armed forces), the CETVs will be downright inequitable to the ex-spouse. Scrutiny of another assumption, the "proportion married", assuming exact marital status is not taken into account in the CETV calculation, seems guaranteed. The Regulations do not immediately suggest that CETVs can be questioned but given that regard must be had to the Disclosure of Information Regulations it is only a matter of time until a CETV approach is questioned on the above grounds. The CETV approach will however be practical for perhaps at least 90% of cases with only a small proportion giving rise to problems requiring additional input from pension practitioners.

The CETV is, per the Scottish Regulations (only), to be explicitly adjusted by a simple formula " $A \times B/C$ " - to reflect the period of marriage in relation to the period of pensionable service. Experienced pension practitioners will immediately spot the potential inequity arising from transfers in, additional voluntary contributions or from an increased rate of benefit accrual. If this was not enough there is the virtual necessity of CETVs being requested for Scottish cases at dates other than the date of calculation. Values are required at the "Relevant Date", the date of separation.

In England & Wales there is no explicit proportioning of the benefit to the period of marriage. This reflects the Courts jealously guarded wish to look at the whole picture, for example to reflect a period of co-habitation prior to marriage. The practical difficulty of not limiting the picture to the period of marriage is of course the position of more than one marriage. It would be hoped that multiple marriages would not result in more than 100% of the benefit being earmarked!

Q12. For recent divorces what will happen in practice?

Most divorce cases will continue to be settled with pragmatic family lawyers negotiating an "out of court" settlement between the parties. Most pension values are expected to be taken into account via a disproportionate split of other assets, usually the house. Again the typical emerging position will be "*she gets the house, he keeps his pension*". Pension scheme administrators will continue to have to deal with earmarked benefits from only a very small proportion of the 150,000+ divorces each year in the whole of the UK.

Q13. But which members will be most affected?

Only for couples close to or in retirement or perhaps those with no other realisable assets is earmarking likely. The most common order is likely to cover death in service lump sums, where this protection is useful to cover death whilst maintenance or aliment continues for the children.

Q14. What form will the earmarking orders take?

The Lord Chancellor's Department (the office of the chief law officer in England & Wales) has issued guidance to judges on the subject. This is not however publicly available. With so few earmarking orders being available it is hoped that they will address the following -

- whether a **fixed** monetary amount of benefit or a **percentage** (of accrued?) benefit is earmarked. (With current low inflation there may be a temptation to go for monetary amounts, however, for benefits payable 5 or 10 or more years in the future some form of indexation is desirable, both in deferment and in payment). A straight percentage of benefit however leaves the spouse gaining or losing from salary increases after the divorce.
- **taxation**. (This will have to be taken into account as paying out 75% of a gross pension will be difficult for a pensioner subject to 40% tax. This may be ever more difficult if tax rates change!)
- **early or late retirement**. (Reduced benefits on early retirement could obviously present problems of expectation. Enhanced benefits on ill health early retirement might be less of a problem, initially!)

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- **transfer.** (It is difficult for members to trace benefits - think of the problems for the ex-spouse one step removed.)

Some of these potential problems will be overcome by the Regulations (e.g transfer) and by the opportunity to return to court to vary the original order (tax and early retirement).

An approach of earmarking a fixed percentage of the accrued "leaving service" benefit at date of divorce is one of the suggested solutions (by the author!). This "gross" benefit would then be subject to tax at the member's (total) tax rate with the tax penalty being shared by both parties. This approach would facilitate application of standard scheme revaluation during deferment and could be linked with indexation in payment on the normal scheme basis.

The earmarking of lump sums is arguably easier but the wording of the Court Order could be harder still. The capital taxes, Inheritance Tax (IHT), position may also prove problematic, albeit the Lord Chancellor's Department have confirmed that they envisage no disruption to the IHT free distribution of lump sums. Death benefit lump sums will however always be subject to the practical constraints of cover ceasing on leaving service and the potential of uninsurability. A "return of fund" protection from personal pension transfers may be good advice in some circumstances!

Q15. What action should pension scheme administrators take?

UK Administrators will have to take steps to cover the disclosure requirements and will have to watch out for subsequent transfers. Administrators, members and their former spouses will have to consider carefully the position on early or late retirement. For earmarking orders received, some form of duplicate record will be useful, perhaps consistent with systems used to "flag" retained benefits or additional voluntary contributions AVCs.

Q16. What emerged from the Family Law Act 1996?

The PMI Working Group, and most other pensions practitioners, are in favour of "splitting". The Government concession to provide only "earmarking" in the Pensions Act 1995 was prompted by government fears on the taxation implications and the pressure on the public sector borrowing requirement (**PSBR**) from additional transfers from unfunded public sector schemes. [All readers will of course be sympathetic with civil servants deliberately divorcing just to exacerbate the PSBR!] The Family Law Act 1996 however concedes the principle of splitting.

Q17. And the splitting legislation?

A discussion or consultation paper on this subject was issued on 29 July 1996. Peter Lilley, the previous government minister responsible, confirmed "Our aim is to develop comprehensive arrangements for pensions splitting throughout the UK which will make clean break settlements easier and mean courts can ensure provision is made for one party in retirement which will not cease if the other dies."

Specific proposals for legislation were published in the spring of 1997 just before the general election.

Legislation in the new form of a draft Family Law Bill is currently being drafted. The new government have convened a number of pensions specialists under a Department of Social Security Consultation Panel. (The author is again representing the actuarial profession).

One of the specific hurdles on the path to equality is the division of the State Earnings Related Pension benefit SERPs. With the logistics of changing UK wide Department of Social Security computer systems, further change will be slow.

Splitting pensions in payment have also been planned with pension providers, mainly life assurance companies and pension funds, acknowledging the principle of (value before) = (value after) on a CETV consistent test. Reserving the right to seek medical advice seems likely to avoid "death bed divorces"!

Several years of earmarking benefits will apply before any splitting legislation becomes effective. The new legislation will certainly not be effective before the end of the century and seem likely to only affect divorce petitions lodged after some future date.

SECTION 2 - DAMAGES: PERSONAL INJURY AWARDS

1. *Introduction*

The discussion paper brought together actuarial views on the determination of damages awards in UK personal injury cases. The Working Party was convened under the auspices of the Wider Fields Board of the Faculty and Institute of Actuaries following the judgment of the Court of Appeal in the landmark damages cases of Wells, Thomas, Page (October 1996). The paper did not represent the official view of the actuarial profession or the view of any particular organisation or individual.

The paper considered the historic and factual background to the subject, addressed the key debate of the discount rate and looked at the necessarily actuarial aspects of allowance for mortality and other contingencies. The paper also briefly considered structured settlements, implementation, different international approaches and provided a radical view on lump sum awards and the crucial issues surrounding the provision of care costs.

2. *Background*

The principle underlying compensation for personal injury in the UK is "*restitutio in integrum*", which means putting the injury victim back in the position that he or she would have been, were it not for the accident.

Damages for future (monetary) loss are normally calculated by reference to two key elements - a "multiplier" and a "multiplicand". In simple terms these elements represent:

- (1) the capital value of £1 pa compensation; and
- (2) the annual amount of the loss respectively.

The lump sum compensation is the product of these two elements.

The multiplier depends on financial and statistical assumptions, in particular the *discount rate* (rate of interest used in the calculation), increases in the amount expected to be paid out each year, the probability that a future payment will be required in compensation (i.e. allowance for mortality and for other contingencies such as unemployment and sickness). As a result of the 1970 case of *Mallet v McMonagle* the discount rate is usually set in the range 4 - 5%.

In 1982 a Joint Working Party of actuaries and lawyers, under the Chairmanship of Sir Michael Ogden QC, was set up to consider the production of a set of standard calculation tables to help in the calculation of damages awards. The "**Ogden Tables**" as they were called were duly published in 1984 together with explanatory notes recommending that the interest rate to be adopted in the calculation should be the rate of interest available on index linked government stock (index linked gilts).

The **Law Commission** (the body charged with considering law reform Report No. 224 strongly endorsed the actuarial approach to damages and recommended the use of the Ogden Tables together with the introduction of legislation requiring the Courts to have regard to the rates of return from index linked government stock (**gilts**). The Law Commission Report No. 225 reported the results of a large scale survey of damages victims who received awards. This demonstrated that damages were generally invested in a very conservative manner.

The second edition of the Ogden Tables was published in 1994. Allowance for other contingencies (e.g. unemployment and sickness) was included for the first time. The third edition incorporating more up to date (population) mortality is currently being prepared.

Section 10 of the Civil Evidence Act 1995 provides for the admissibility of the Ogden Tables. This has not yet been brought into effect. The Damages Act 1996 provides for the **Lord Chancellor** (the chief government law officer) to prescribe the rate of interest to be adopted by the Courts.

The appeals of Wells, Thomas and Page reaffirmed the use of 4 - 5% as the appropriate rate of interest for discounting. The basis of the successful appeal argument was that injury victims should be treated as "ordinary investors". In an appendix to the October 1996 judgment, Lord Justice Thorpe, a Family Division Judge, suggested that with suitable modifications the **Duxbury** Tables (annuity tables and projection software used in family law cases) might be used in the calculation for damages awards.

3. Actuarial Aspects of Personal Injury Claims

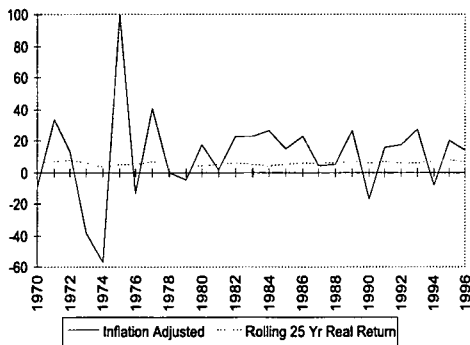
The key actuarial aspects which need to be considered are:

- discount rate
- real rates of return
- investment management expenses
- investor risk aversion/risk bearing ability
- inflation
- taxation
- market values and levels
- mortality
- other contingencies affecting the valuation

3.1 Discount Rate

The three Court of Appeal cases (Wells etc) hinged on the underlying discount rate. The fundamental point at issue was whether the discount rate was that available on "risk free" index linked gilts or whether an **equity** (ordinary shares) approach was appropriate. The equity view in turn reflected the position of an "ordinary investor".

Historical returns on investments are well documented. The historical data shows that by accepting the lower guarantees of equity investment, higher returns have been achieved via equities than gilts. Investment returns are termed "real" to reflect the return over and above price inflation (measured via the **Retail Prices Index - RPI**). UK equity investments have returned approximately 6% pa (real) over a long period. In contrast gilts returned approximately 2% pa (real) over the last 25 years after a long period of negative returns. Equity returns are volatile in the short term. The long term (25 years) returns are more steady.



The investment returns described above make no allowance for the expenses of management. The costs of investment management will be of the order of 0.75% p.a. of the fund value which should be taken as a direct reduction from the gross return.

3.2 Risk Aversion and Risk Bearing Ability

There is a good chance of providing a greater investment return in the long term by investing in equities, as long as the investor is able to bear the risks of market volatility. The key consideration is to establish whether the investor can afford and is willing to take the additional risk in pursuit of the higher return. A typical investment advisor would mix both equities and gilts, so that an optimal position would be developed for that investor.

Stock risk, the chance of one company failing, may be diversified by a suitable choice of pooled or managed funds. Risk aversion will be influenced by income from other assets or employment.

EU insurance companies transacting long term business are required to demonstrate that the assets which are held are appropriately "matched" by nature and term to the liabilities covered. UK pension funds have a similar constraint imposed by the Pensions Act 1995 to have regard to a minimum funding rate (MFR). The MFR is based on equity and gilt yields.

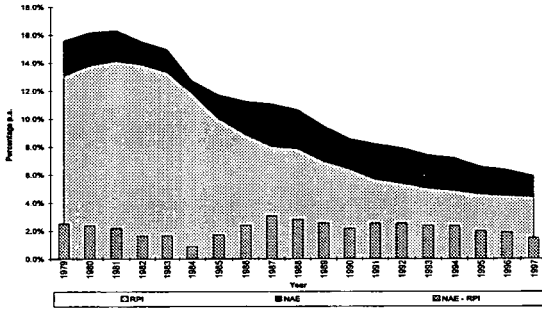
A financial adviser who recommended an assets distribution which did not reflect the reliance of the individual on the lump sum for future financial well being would fall foul of the investor protection legislation, the Financial Services Act. The group did not therefore believe that the appropriate asset distribution should reflect the "ordinary investor" without qualification.

It is inappropriate to base the calculation of lump sum damages on a discount rate which relies heavily on equity investment returns in all circumstances. The real rate of return used must reflect the lower ability to bear risk in the case of personal injury claimants and should be considered separately for each part of the claim e.g care cost, earnings loss etc. The appropriate overall mix is one which reduces the risk and volatility for the individual but balances it with an optimum return. For care costs this implies a greater reliance on returns on index linked gilts.

This necessary reliance will reduce for other elements of the award, for example the compensation for loss of earnings.

3.3 Inflation

The use of index linked gilts assumes implicitly that RPI inflation should be allowed for in valuing future losses. The use of a fixed 4 - 5% p.a. discount rate makes no explicit allowance for inflation.



Loss of earnings is a major element of any claim. It is a fact that earnings inflation has historically run at a level of 2% p.a. greater than RPI. This "2% gap" is an average from which it is important to recognise that some will experience above average earnings growth, the rest will experience below average earnings growth. Staff costs are the most significant element of expense in care costs and these are also likely to increase in line with National Average Earnings (NAE) inflation rather than RPI inflation. Overall a large part of the overall damages claim will be linked to earnings not prices.

Different rates of inflation in the calculation have an impact by reducing the effective discount rate, (e.g. use of NAE would reduce the effective discount rate by 2% p.a.)

3.4 Taxation

The traditional discount rate of 4-5% may be considered to make implicit allowance for tax. It should be noted that the current fixed rate of 4.25% used in the family court is gross, or before tax.

The Group believed the principle of "*restitutio in integrum*" should apply, comparing the position of the injury victim before and after the accident, after tax. In practice the calculation would start with an appropriate gross investment and recognise the impact of tax arising on the expected income and gains.

3.5 Market Values & Levels

Court awards using 4-5% interest rates do not involve adjustment to the main multipliers to take account of market conditions at the date of calculation or award. The consequence of this approach is that identical injury victims would be able to purchase different income streams on different dates depending on market conditions. This is a flaw in the general approach to compensation.

The use of current market yields would address the problem. Opinions however vary as to the extent to which low dividend yields reflect an "expensive market". The Group believed the prospective yields on index linked government stocks should provide the starting point or benchmark for any assessment of investment returns.

One investment view would consider that the fluctuations in the yield on index linked gilts provides the only acceptable benchmark. UK Pension scheme practitioners will however be familiar with market value adjustments set by reference to dividend yields. Appropriate allowance is a matter of considerable and sometimes acrimonious debate.

The consideration of market conditions only increase awareness of the importance of the timing of investments and the need for professional investment advice. This is not a new or unique actuarial problem.

3.6 Mortality

The mortality experience underlying the Ogden Tables is drawn from the English Life Tables (ELT) which record mortality rates experienced in England and Wales for a three year period around a census date (i.e. population mortality). This was thought to provide a fair reflection of the population group for damages awards. Other mortality tables are available, for example, those used by life assurance companies. Such tables are used in the Irish republic.

English Life Tables provide broadly based data, are smoothed to remove statistical variations but they are published some years after the census and only produced every 10 years. There is currently no allowance for projected changes in mortality. However these tables are generally accepted by "both sides".

The disadvantages of using these tables are not insurmountable. The Group believed allowance for future improvements in mortality was appropriate.

3.7 Contingencies

Contingencies need to be considered as the aim is to restore the injured party to the same position which would have applied had it not been for the accident. The main contingencies are ill-health, unemployment, geographic variations, and occupation. The Ogden Tables set out certain adjustments derived from research by Professor Steven Haberman of City University, London. The main factors cover loss of earnings and loss of pension. The theoretical deductions are small but in practice reductions of 20% are common.

The level of the allowances for contingencies represented by the adjustments to the tables has not generally been accepted, this reflects the general difficulties of communication and understanding. Further research and greater explanation and communication of the results is undoubtedly required.

Employment contingencies are obviously not appropriate for care costs, emphasising the need to consider separately each element of the damages of claim.

4. Implementation

Any change to the current 4 - 5% discount rate will inevitably involve inequities. If the change was made in one step there would be inequities between injured parties. Any retrospective award on claims "in the pipeline" would impact on general insurance companies and would not fall equally within companies in the general insurance industry. The final decision on the timing and balance of any change is clearly one for society/government.

5. Alternative Approach

The Group wondered whether "income settlements" were a preferable solution. In practice income settlements already exist in the UK in the restricted format of "structured settlements". This mutually agreed settlement is basically the purchase of an annuity for the victim. The courts do not, however, have the power to order such lump sum settlements, but they do offer the victim the opportunity to offload the mortality risks and the investment risks to a life insurance company. In practice they are considered primarily for their tax advantage.

The Group concluded that a lump sum settlement would broadly over compensate half the victims and under compensate the other half. The obvious problem stems from the lump sum anticipating a certain life expectancy, people unfortunately die before or after this "actuarial watershed"!

The Group therefore suggested returning to the principle of indemnity - by the provision of the necessary care requirements each year on an ongoing basis. This indemnity could either be defined in monetary terms, e.g. £20,000 p.a. increasing each year in line with NAE, or defined in terms of care needs, e.g. providing support for 10/10 "normal daily needs" (washing, dressing etc). Insurers already provide contracts for income settlements. A similar approach is possible for income replacement.

An income commitment will leave an important incentive for insurers to consider any medical developments which will help the injury victim and potentially reduce the defendant's long term liability. Such a regime already functions in the US for care costs.

This approach has the obvious advantage that the liability is exactly matched, the insurer does not overpay and the injury victim is largely in a risk free position.

Government will clearly wish to ensure any such continuing care commitments are properly provided or reserved for. Insurance companies could clearly be required to extend their reserves to fund for such care commitments. Funded "income settlements" would also provide an opportunity for the pooling of investment risk, professional investment management and greater efficiency in investment costs. The relatively few claims not falling on regulated insurers or Government would require security. An indemnity bond may suffice.

6. *The Group's Conclusions* (Presented at the time in question and answer format to assist journalists)

Q1. Should awards be assessed by reference to an "ordinary investor"?

No. Each investor has his/her own risk and return profile suited to his/her own circumstances. The circumstances of personal injury victims are unique and call for special consideration.

Q2. How should the discount rate be considered?

Consideration of the discount rate employed in awards should start with reference to the yield on index linked government stocks. For other elements, we believe that there is an argument for using a higher discount rate based on other investment types. Consideration should then focus on adjusting to reflect tax, expenses and earnings increases above RPI (around 2% p.a. on average).

Q3. Are current awards too low?

We do not seek to answer this question. Personal injury awards are set on the basis of the underlying assumptions. Currently, some of these assumptions are only implicit and are not necessarily well founded. Getting the correct approach is the important issue.

Q4. Should any change in damages awards be immediate?

Society/Government/the Courts should decide the extent of any retrospection in any change to current awards.

Q5. What is the way forward for calculations?

The framework of agreed Ogden Tables incorporating population mortality projections is appropriate together with separate consideration of the constituent elements of the underlying basis.

Q6. Is there an alternative to the current lump sum awards?

Yes. This could be achieved by legislation directing an "income settlement", in particular the payment of care costs on an annual basis by the defendant. This could benefit the injury victim and the defendant.

7. *Final Comments*

The Group's paper was warmly received at the Institute discussion. Representations by the profession have been made to the Lord Chancellor who is expected to consider the setting the discount rate for future cases after the appeal of the Wells case later this year.

A third edition of the Ogden Tables is currently being prepared to incorporate mortality from English Life Tables No. 15. Projected mortality is also being considered for inclusion.

Allan C Martin
March 1998