Assessment of Damages: The Current Situation in the UK
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"Lost Years and Lost Chances"

The aspect of damages for personal injury or death which has caused most discussion in the UK over the past two or three years has been compensation for the so-called "lost years". The decision in *Oliver v. Ashman* [1962] 2 QB 210 established that an injured plaintiff whose expectation of life had been reduced by the injury could only recover compensation for lost earnings by reference to the period of his reduced expectation. No recovery was possible for the lost years, and the comment was often made that it was cheaper to inflict injuries resulting in a very short life expectancy than to kill the victim, since in the latter case the family's claim for loss of dependency would relate to the lost earnings over a full working life.

This situation was changed dramatically by the decision of a majority in the House of Lords in *Pickett v. British Rail Engineering Limited* [1978] 3 WLR 955, which was that a living plaintiff could recover damages for the lost years, and that if he died after instituting his action for personal injury damages, his legal personal representatives could, by virtue of the Law Reform (Miscellaneous Provisions) Act 1934, maintain this claim. Although the decision left a number of uncertainties, it became clear that damages for the lost years should be calculated by reference to net earnings lost over this period, less the cost of the plaintiff's own maintenance and expenditure on personal enjoyment.

A change in the law had in fact been recommended by the Law Commission (1973) and by the Pearson Commission (1978). It had long been felt that there was a basic inequity in the *Oliver v. Ashman* decision in that not only did the plaintiff have no claim for his lost years, which is contrary to the basic principle of *restitutio in integrum*, but his dependants' possible claim under the Fatal Accident Act 1976 might well be statute-barred by the time his death occurred. There had always been a degree of controversy, however, since it could be argued that the inability to claim damages for the lost years was not unfair if the victim was an infant or an adult without dependants. It was also pointed out that if, as had been recommended by the Pearson Commission, compensation was normally by periodic payment rather than a lump sum, there would be no compensation payable during the lost years and no increase in the payments during the period of survival.

While the consequences of *Pickett* were still being digested, new controversy was aroused by the decision in *Gammell v. Wilson* [1981] 2 WLR 248. This extended the application of *Pickett* by establishing that the estate of a deceased victim could institute a claim for compensation for the lost years under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934, even if no proceedings had been instituted by the deceased prior to his death. This decision really "put the cat among the pigeons". It meant that not only did the estate have a claim under the 1934 Act, but that there remained the claim of dependants under the Fatal Accident Act 1976, and of course the beneficiaries of the estate need not be the same persons as the dependants. There can therefore be an element of double compensation. If a man had left his estate to his local barmaid, she would have a claim under the 1934 Act, while his widow and children would still be entitled to a fatal accident claim under the 1976 Act. It was, however, established that where the same persons were entitled under the alternative statutory bases of claim, the damages awarded by whichever method gave the higher figure to a particular dependant would extinguish that dependant's claim on the alternative basis. There has, however, been a storm of protest that the possibility of double compensation, and even of higher compensation to dependants than they would have had under the 1976 Act alone, has resulted in an unfair burden on the defendants in actions, i.e. effectively on motorists in general.

It was clear from the judgments that their Lordships were not happy with the decision they felt bound to reach. Lord Diplock stated that "I do not think that this outcome is either sensible or just". He went on to comment that the law on damages for death had reached a stage for which he could see no social, moral or logical justification, and that there was an urgent need for reforming legislation.

The recommendations of the Law Commission and the Pearson Commission, to which I have referred earlier, were that although *Oliver v. Ashmán* should be over-ruled to give living plaintiffs a claim for the lost years, such a claim should not be passed to the estate of the deceased plaintiff. They did however recommend that a claim under the Fatal Accident Act 1976 should not be barred by the fact that a plaintiff had instituted proceedings for personal injury damages before his death. I understand that strong representations on the need for legislation have been made to the Lord Chancellor's department by the British Insurance Association and by Lloyds. The Government has in fact indicated its willingness to introduce such legislation. In a House of Commons' answer in February 1981, the Solicitor General, replying to a question as to which of the recommendations of the Pearson Commission would be implemented, stated that the Government's first intention would be to maintain the recovery of damages for the lost years of a living plaintiff, but to abolish the survival of such a claim for lost years for the benefit of the claimant's estate. He indicated that the proposed legislation would follow the provisions of the Damages (Scotland) Act 1976. There was therefore a confident expectation that the Queen's Speech in November 1981 would include reference to an Administration of Justice Bill dealing with this matter *inter alia*. The expectation was not however fulfilled, presumably because the Government had too many other pressing problems.

There have been a number of interesting cases since *Gammell v. Wilson*. In a number of these the Courts have concluded that for young infants or even teenaged victims of accidents, there should be no compensation for the lost years because the attempt to assess it would be an exercise in pure speculation. Some judges have in fact argued for many years against any award at all for loss of earnings to an infant plaintiff, even by reference to his reduced expectation because of the imponderables involved. In the case of *C. v. Wiseman and Another* (The Times, 16th October 1981) all three members of the Court of Appeal took this view, but also expressed their opinion that the law of damages for personal injuries was in urgent need of reform.

Not all judges have adopted the escape route of declining to make an assessment because of its speculative nature. Some have expressed the view, with which I am sure actuaries would agree, that the obligation of the Court to make the best assessment it can is not avoidable when the uncertainties which are present in every case are increased because of the infancy of the plaintiff. Unfortunately, however, the Courts do not appear to have drawn the conclusion that the complexities of assessment resulting from the decisions in *Pickett* and *Gammell v. Wilson* strengthen the case for an acceptance of the assistance that could be provided by actuarial evidence. The reverse seems to be the case, with the general climate in the Courts hardening against the introduction of evidence by actuaries, economists, accountants or any other experts in this area.

One judgment in particular so totally rejected the evidence of the actuary who appeared for the plaintiff, and received so much publicity, that it caused considerable concern to the actuarial profession in the UK. This was the case of *Auty, Mills, Rogers & Popow v. National Coal Board* heard in June 1981 before Mr. Justice Tudor Evans. All of the four plaintiffs had suffered industrial injuries, their claims for loss of earnings had been heard separately, and this case was concerned solely with damages for loss of pension. In his 97 page judgment, Mr. Justice Tudor Evans described the essential questions which he had to decide as follows:

> "(i) to what extent is it open to me upon existing authority to take future inflation into account? If I must

disregard it, then clearly I cannot accept (the actuary's) method of calculation because it is based on future inflation;

(ii) is the evidence of (the actuary) on the issue of inflation admissible and, if so, is it acceptable evidence? If I reject it, then equally the actuarial method of assessing the losses must fail;

(iii) upon existing authority am I able to use actuarial evidence as a primary method of calculating future economic loss?;

(iv) if not, are these claims capable of being distinguished so as to permit the use of such methods?;

(v) generally, apart from his evidence on the issue of inflation, is (the actuary's) evidence admissible and, if so, what weight should I attach to it?"

Twenty pages later, the learned judge gave his decision on the first two questions as follows:

> "In my judgment, (the actuary's) evidence on these issues is inadmissible. It is based on hearsay and it is speculative in its nature. (The actuary) has given evidence in a field which more properly belongs to an economist. Even an economist would be speculating on the future of inflation. Such evidence was rejected by Hinchcliffe J. in *S. v. Distillers Co. (Biochemicasls) Ltd.* (1970) I WLR 114. It was also rejected by Nield J. in *Mitchell v. Mulholland* and his view was upheld in the Court of Appeal (see (1972) I QB 65, per Edmund-Davies LJ at pp. 77, 78). At p. 79 of the report, Edmund-Davies LJ said, referring to Australian authority to the same effect:
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> "With deference, these views as to the inadmissibility of such evidence in general commend themselves strongly to me. But Barwick CJ conceded that in a special case an exception might be made to such inadmissibility, continuing the passage just quoted by saying: 'where sound and precise evidence can be given as to the probable rate of increase in cost of some specific item becoming greater than the probable rate of benefit by the use of the capital sums to be awarded, the matter might possibly be different; though as at present advised I should consider such a possibility remote.'
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> "If I had been able to conclude that inflation could be taken into account, I would not have considered (the actuary's) evidence to be of a 'sound and precise' quality. I should say that if a different view were taken on the admissibility of (the actuary's) evidence on this issue, I would have placed no reliance on it."

With regard to questions (iii) and (iv), the learned judge referred only to *Mitchell v. Mulholland* and to the fact that in his judgment Edmund-Davies LJ referred to Lord Pearson's opinion in *Taylor v. O'Connor* that actuarial evidence should not be used as a primary method of assessment and quoted Lord Pearson as follows:

> "For these reasons, I am not persuaded that the actuarial method has any advantages over the conventional approach. On the contrary, I think that it may ensnare one into treating as virtual certainties what in truth are mere chances. For may part, while accepting that an actuary and accountant may to a limited degree provide the judge with a means of cross-checking his calculations and in arriving at the appropriate multiplier, I am not prepared to treat them as supplying, in the words of Lord Pearson, 'the primary basis of assessment'. That, I think, must still be the process of seeking out in the light of experience applied to the particular case the appropriate multiplicand and multiplier and that is the method which I (like the trial judge) propose to apply in this case."

The plaintiffs in the present case had submitted that he should not be bound by the decision in *Mitchell v. Mulholland* because a claim for future loss of pension benefit was different in its nature from a claim for future loss of wages. The learned judge decided, however, that there was no difference in principle and that he was therefore bound by the decision in *Mitchell v. Mulholland.*

As to question (v), the learned judge made a number of detailed criticisms of the actuary's evidence and finally concluded:

> "I do not find it necessary to consider further the criticisms which (the Defendant's Counsel) makes of the evidence and the methods because I am satisfied that neither is satisfactory. For the reasons I have given I shall value such claims as are proved by the conventional method of assessment."

There were passages in this judgment which appeared very unfair to the actuary and which could even be interpreted as casting doubt as to the competence of actuaries in fields other than the assessment of damages. It is this aspect which has caused so much concern within our profession.

Since the Report of the Law Commission in 1973 there have been a series of lost chances for reform in the law relating to the assessment of damages and for greater co-operation between the legal and actuarial professions. The Law Commission recommended that the climate of opinion might be improved by a legislative provision including the following clause:

> "For the purpose of establishing the capital value, as at the date of judgment, of any future pecuniary loss to which the claim relates, or the capital sum which at that date represents the reasonable value of any services to which the claim relates, any party to the action shall be entitled to adduce and rely on any admissible actuarial evidence; and where any such evidence is relied on for that purpose, the court shall have due regard to it in assessing the damages claimed."

The failure of the Government to act on the Law Commission's recommendations generally was partly the result of the setting up of the Pearson Commission to examine a much wider field of compensation in the light of the controversy over thalidomide children.

The recommendations of the Pearson Commission, which I will not discuss here, provided another opportunity for reform, and this seems to have become another lost chance. the Government has indicated that it intends to legislate only on a few minor recommendations and no other political party has responded any more positively.

The situation today may present the most favourable opportunity for extensive reform that has existed for many years. The decisions discussed at the beginning of this paper have introduced fresh complexities into the field of assessment, and judge after judge is advocating the need for reform in relation to both fatal accident and personal injury damages. The rebuff delivered to the actuarial profession in the case of *Auty & Others v. NCB* should stir us to seek to ensure that we play a full part in the consultative process preceding any legislation. There are a number of steps that could perhaps be taken and these are beginning to be aired publicly. Mr. Frank Guaschi, a member of the Council of the Institute, in a letter to the Post Magazine published on the 12th November 1981 makes the following suggestion:

> "Finally, I believe that actuaries should have many more contacts with the legal profession, preferably outside of the emotional atmosphere of the courts. A significant number of lawyers have more than a nodding acquaintance with mathematics and statistics and a meeting of both sides would have a high probability of success."

It is worth noting in this connection that in 1965 a Committee jointly representing the medical and legal professions published a report dealing with the way in which evidence from doctors should be presented to courts of law and tribunals and the problems associated with that theme. The report exercised considerable influence and has recently been up-dated by a new publication "Medical Evidence" published by the British Medical Association.

By the time we meet in Stratford it may be that initiatives will have been taken to open a fresh dialogue between the legal profession and the actuarial profession.