Damages and Compensation for Financial Loss

Thursday 17th June (afternoon)
Concurrent Session (1)

Chairman: Geoffrey Heywood (UK)
Opener: Peter Stratford (Australia)
Closer: Donald Fabian (South Africa)

Papers for discussion:

P. Milburn-Pyle (South Africa):
"Damages and compensations — an interesting development in the South African context."

J. H. Prevett (UK):
"Assessment of damages — the current situation in the UK."

Summary of Discussion

Mr. P. Milburn-Pyle (South Africa)

He pointed out that the present paper was a shortened version of a paper presented to the Actuarial Society of South Africa in November 1981, when it was thoroughly discussed. He did not wish anyone present to be under the impression that what was set out in the original paper and hence in this one was accepted whole-heartedly in South Africa. If anything, the opposite was the case.

However, having studied the transcript of the discussion later, he felt that a different picture emerged and that the majority of the opposition was misplaced. He then quoted from his formal written reply to that discussion, in which he said that he did not hear any valid argument in the discussion against his contention that the incidence of compensation should match the incidence of loss or expense. He therefore concluded that the moral and social advantages of the periodic payment system were generally accepted, subject only to one or two valid criticisms of relatively minor aspects of the matter. He also did not hear any arguments disproving the actuarial basis of the system proposed in the paper. Where a clear difference of opinion did exist however was the extent to which different people considered that the administrative difficulties of the system should be allowed to direct the degree of use of the system. Here the tune will clearly be called by the insurers and the legal profession and it would seem that for the foreseeable future the approach from these quarters was not likely to be conducive to any significant use of the system.

Mr. J. Prevett (United Kingdom)

He wished first to correct an error in his paper on page 30 where he referred to the case of C v Wiseman & Another. Mr. David Kemp, author of the-standard legal text book on damages, had pointed out in this particular case that although the view expressed here, that there should be no attempt to compensate for lost years in the case of an infant, was expressed by Lord Denning, the majority of the Court of Appeal, Griffiths and Shaw L. J., disagreed and Mr. Justice Shaw said in his judgement "The question that arises is whether any different principle applies in relation to loss of future earnings where the victim is a very young child, as in this case. For my part I fail to see why there should be any difference in the principles which determine what are the bases for the recovery of damages, whatever the age of the victim. The assessment of the measure of damages may be more or less difficult, but the right of the plaintiff to an assessment of damages for that element of damage cannot be brushed aside. The obligation of the Court to make the best assessment it can is not to be avoided by treating compensation for loss of future earnings in the case of a young child as being so speculative as not to deserve to be considered at all." That was very much the speaker's view.

Soon after the paper went to press there had been a more positive statement from Lord Hailsham on the recommendations of the Pearson Commission and there was now an Administration of Justice Bill going through Parliament which contained a clause that would cancel the duplication described in the paper in relation to the lost years in a fatal case. As things stood at the moment, following Pickett, Gammell and other cases, not only could the estate of an injured plaintiff take over his claim for the lost years, but the dependants had the claim that they always had under the Fatal Accident Acts, so that one could get two distinct claims both succeeding, where the beneficiaries of the estate were not the same persons as the dependants who claimed under the Fatal Accident Acts. That would be ended and the anomalies removed by the Administration of Justice Bill.

More important than that however, was that it had occurred to the President-elect of the Institute of Actuaries, Mr. Lyon, and himself that it might be an appropriate time to seek to put in the Administration of Justice Bill something to give recognition to actuaries and actuarial evidence in this field. There had been a meeting of an informal committee consisting of Mr. C. S. S. Lyon, Mr. E. A. Johnston (Government Actuary) and himself as a result of which they were seeking to get sponsorship in Parliament for the insertion of a clause that was, in fact, proposed by the Law Commission in 1973, to the effect that either party in an action would be entitled to adduce actuarial evidence in a personal injury or fatal accident case and that where such evidence was adduced the Court would have a duty to take account of it. This clause would give some statutory recognition to actuaries and would at least stop judges questioning whether actuarial evidence was even admissable. He had high hopes of this development and had, in fact, received a telephone call while at Stratford to arrange a meeting with some members of Parliament the following week. The Committee did not have any high hopes of success; there was no doubt that the Law Lords would be hostile. As a matter of courtesy the Presidents of the Institute and Faculty wrote to the Lord Chancellor outlining what they sought. The Lord Chancellor replied in a fairly negative vein, saying that he had always held the view that to allow the introduction of actuarial evidence would add to the cost and duration of trials and he was opposed to it and the speaker thought that would be the official view of the Government. Nevertheless the introduction of the clause would give an opportunity for Parliamentary discussion and further debate.

Lastly he wished to make a comment on Mr. Milburn-Pyle's paper where he discussed the possibility in South Africa for periodic payments rather than a lump sum. What puzzled him was that it appeared to be the practice at the moment to get agreement in advance to a schedule of payments (section 4.9 of the paper), which included an allowance for future inflation, also presumably agreed between the parties at the time of settlement. He would have thought that one of the basic arguments for periodic payments was that it did not give the Court the problem of dealing with those imponderables but, as far as future inflation was concerned, provided the possibility of payments that could be adjusted year by year in future, by reference either to a cost of living index or to a wages index. Similarly provision could be made for other uncertainties, rather than having to reach agreement on what the measure of those uncertainties was at the point of settling the action. He was a little surprised, therefore, to see that it was sought to reach agreement on inflation now, which must be just as difficult as trying to decide on a lump sum, particularly with a young plaintiff, rather than allowing inflation to emerge from year to year.

Mr. B. L. Burnell (Canada)

Mr. Burnell had expressed a wish to the Chairman to make some comments on the present position in Canada, although he had not been able to submit a paper and he was invited to do so at this point.

In Canada there was no statutory reference to actuaries giving evidence on these matters and perhaps part of the reason for that was the confederational nature of Canada with its ten provinces, each having its own Supreme Court and Appeal Court, with the Court of Final Appeal being the Federal Court, the Supreme Court of Canada. That had been the case since 1981 when the Statute of Westminster resulted in the House of Lords no longer being the Final Court of Appeal for Canada.

An important recent development had been what were known as the Supreme Court of Canada trilogy, three important cases where the decisions were given almost simultaneously, in which the Supreme Court accepted the reasonableness or desirability of actuarial evidence being given in damages cases. The Court indicated the general principles involved, which were very similar to the list set out in Mr. Milburn-Pyle's paper. One of the most contentious parts of their judgement was the use of the so called net rate of interest to value the financial loss, the net rate of interest being supposedly the difference between the rate of interest obtainable on long-term investments and the expected rate of inflation. The trouble was that about that time interest rates in Canada had reached the 10% level, but their lordships were looking at a prediction made seven years before by some eminent economist who felt sure that long-term inflation would not exceed 3%. Their lordships therefore decided that a net rate of interest of 7% should be used. For a while actuaries were stuck with that net rate of interest of 7%, but over a period of about 12 to 18 months other cases came before the various provincial courts and the trial judges accepted somewhat more realistic assumptions, thus accepting that so large a gap between interest and inflation was not perhaps realistic. More recently in Ontario the Supreme Court appointed a Committee to look into the whole matter of net interest rates and fortunately one or two members of the Canadian Institute of Actuaries, and of course many economists and others, were able to make their views known and the end result was that the Committee decided that 2.5% was the correct rate that should be used to represent the difference between interest and inflation. He could not recall the exact wording, but his impression was that they were talking about price inflation and it therefore perhaps left some flexibility to argue that, if salary inflation was running at a different rate from price inflation, one could depart from the 2.5%. Since then similar rules had been brought into effect in Nova Scotia and British Columbia. British Columbia distinguished between salary inflation and price inflation; for salary inflation the net rate was 2.5% and for price inflation the net rate was 3.5%.

In the other provinces the situation was such that one had either to bring in an economist or the actuary had to try to convince the Court that he knew something of the history of these matters and that a particular rate of interest was the right rate to use. Another new development, also coming from Ontario, was that a Committee of the Supreme Court had been established to look into the matter of so called "structured" settlements, which in a sense paralleled the development described in Mr. Milburn-Pyle's paper, but were a simpler approach. What happened was that the insurance company representing the defendant bought an annuity from a life insurance company. An interesting side issue was that under current tax legislation such payments of annuity were totally tax-free in the hands of the recipient, whereas if the claimant took a lump sum and then bought an annuity a portion of each annuity payment was taxable. That situation allowed a horse-trading position to develop, with the claiment under pressure to accept a lower amount because it was tax-free. He felt that legislation might be introduced to remove this anomaly. He added that structured settlements were still very much in their infancy in Canada and had to be a matter of mutual agreement between the parties. There was no mechanism by which the Court would make its award in the form of a structured settlement.

Mr. P. Stratford (Australia)

In opening the discussion Mr. Stratford said that in Australia it looked as though claims paid under third party, workmen's compensation, and other damages claims comprised 1.2% of the gross domestic product and there were other claims as well. In Australia there was no workmen's compensation for farmers and the full value of a damages loss was not paid in a case where the claimant had contributed towards the cause of the accident. His estimate was that probably 3% of the gross domestic product was taken up in this area and it was therefore a most important one. It was one that certain members of the actuarial profession had tended to look down on, and he found that unfortunate.

The two authors today had each written longer and more comprehensive papers on the general actuarial principles of damages. Today's papers dealt with more of an update, the one due to a change in the legislation in South Africa and the other due to a change in the interpretation of the law in England. Also discussed was the perennial problem of the acceptance of actuarial evidence in court. He intended to deal briefly with those three aspects and then to mention the present situation in Australia, which he found undesirable.

On reading Mr. Milburn-Pyle's paper he could not see why the Act had been changed in this way, apart from two reasons. The one was the problem of the longevity of a plaintiff and the other was the extraordinarily high cost of medical care that might be required in the case of a seriously injured plaintiff. Otherwise he could see no advantage to the insurance company, which is the only party that can take advantage of that section of the law. Mr. Milburn-Pyle suggested that a plaintiff may be able to initiate a settlement by instalments, but the speaker did not know whether that was so or not, nor did he know whether Mr. Milburn-Pyle knew whether a decision had been made on that point. He then referred to a decision in a case in England, to the effect that it was the right of any person to choose his own medical attention and the level of medical attention. In this view that decision, followed in Australia, had resulted in Australia in some extraordinarily large claims. There had been paraplegics who would not go into hospital at a cost of about the average earnings of a man in Australia, but would stay at home and have attention 24 hours a day seven days a week, which with Australia's labour laws meant that there must be the equivalent of five to six persons in attendance. Those who worked in the evenings up to a certain time were paid 1.5 times the normal rate, at night they received double rate and certain workers such as nurses at week-ends received three times the normal rate. The result was that the cost of the claim was the equivalent of ten persons' salaries.

The costs were not a deduction for tax purposes, so that they must be grossed up and the end result was that such a claim was settled for ten to fifteen times the salary lost. The highest lump sum award he knew was $1,700,000 in New South Wales. There was a similar case in South Australia where the plaintiff was older, but he was an ordinary worker and the amount was $950,000. This had naturally frightened everybody. The judges did not like giving these awards. The defendants, which in Australia were mostly Government insurance companies, did not like paying them. Politicians did not like passing on the cost in the form of premiums. The speaker thought the solution would be to restrict a person's right to that sort of medical attention, but he did not know how it could be done. A real problem was that once the award was made, say the $1,700,000 was paid out, there was no guarantee that the money would be spent on medical attention. In practice the paraplegic could then be put in a home at $300 a week and someone else made a profit.

The other problem concerned longevity and that raised a difficulty when there was any question of contribution, as it was called in Australia. One solution was to pay the full cost for a shorter period, instead of, say, 60% for life, but then one had to make some assessment of the mortality of the plaintiff. Certainly in Australia it would be very difficult to pay only 60%, because there would be trouble in paying for the medical expenses. In Australia there was no free medical attention, unless the person had very little money. If a claimant had an income from a claim for damages he would probably not come into the category of persons entitled to free medical attention. The speaker could not see what would happen. He could not see payment by instalments coming into use in Australia, mainly because he could not see the advantage for the insurer except in a few specific cases.

The third matter was the Pickett decision raised by Mr. Prevett, which was in fact made in 1935 in the Vinton Lyle case, which was very much on all fours with the Pickett decision. The decision was upset in 1962 in England, but in Australia the decision of 1935 was still followed, so that they had no problems with the Pickett decision. Following another decision, they will now have the problem that Mr. Prevett referred to, that is the duplication of claims. He was glad to hear that England was doing something to sort it out.

The other main problem was that of actuaries and the Courts. He had thought until comparatively recently that the situation for actuaries in Australia was about half-way between those in England and South Africa. It appeared to him that the position in South Africa was very good. The judges seemed to welcome actuarial advice and that seemed to come about because of an agreement between actuaries on the actuarial points. Obviously the plaintiff must claim that his loss is much greater than the defendant will concede, but if the actuarial assumptions used by both sides were reasonable there was a fair chance that the judge would accept them. That position used to apply in Australia, but the situation had deteriorated badly over the last few years. He would like to leave aside for the moment the other actuarial items and consider only the rate of interest and the rate of inflation. Australia had a federal system, like Canada, and in New South Wales the net rate of interest was 5% to 6%, in Queensland it had been 8%, then 6% by legislation, brought down to 5% and Victoria used between 6% and 10%. South Australia used 5%, Northern Territories used 5% or sometimes 6% and he did not know the position in Western Australia. Eventually certain cases went to the High Court and then the different advice given by actuaries was noted. In one case there was advice given that ranged between –3% and 5%. Eventually the High Court decided that there should be no choice in the matter and laid down a rate of 3%, which allowed for income tax and inflation. In Australia there was a graduated scale of income tax, so that the tax was greater when the loss was greater, but all that was now thrown out of the window.

In the speaker's view it might not have reached that position if those actuaries who worked in this field had talked to each other a little more. Two weeks ago he went to Court in a workmen's compensation matter. Those cases did not normally go to Court, because if one went to Court and the claimant was awarded a lump sum, the Income Tax Commissioner in Victoria charged it all to tax, although it might be several years' loss of income, so the award was usually under another section of the Act using the legislated amount as a guide. The claimant received the actual weekly loss until a specified amount was paid. No inflation was brought into it in any way whatsoever. If you lost $100 a week the limit was $18,000 so you got the present value of 180 weeks' loss. In this unusual case the speaker went to Court and gave his normal advice based on 15% interest, which could easily be obtained on Government bonds. Another actuary came to Court and said that the common law decision should be used and he used 3%. Obviously one of the actuaries was going to look stupid. In fact they probably both looked a bit stupid and it did not do the profession any good. 3% was completely thrown out, the speaker's 15% was not quite accepted for the probably good reason that the lawyers had been using 10% for some time for such cases. The judge settled on 12.5% as being reasonable, but it did not do very much for the profession.

What had to be done was to decide the reason for giving actuarial advice. It was certainly not to decide the amount of the damages claimed under English Law. It might be much closer to that in South Africa, but that was certainly not the case in England. In most cases a judge would be very very upset, even if all the facts had been agreed, if an actuary were to go into Court and say that this claim was worth, say $400,000. In Australia the judges had the complete and utter right to make up their own minds as to what they did, what they took off for contingencies and the like and they guarded that right very jealously. But, obviously, a very large number of cases did not go to Court, the majority of cases did not go to Court, and actuarial advice, if consistent, would help in the settlement of many cases. The real problem was that we could not tell the Court what inflation would be next week, next year or the year after. None of us was qualified to do so and he thought that all the objection there had been to actuarial advice in Australia had been on the grounds that actuaries specified what inflation would be in the years to come. They might not have directly done so; the Court had possibly misunderstood what they were saying. They had probably been saying that there would be inflation and there would be different interest rates. If there was high inflation there were probably high interest rates. But the Courts had not understood what the actuaries had been trying to say, so maybe the actuaries should talk among themselves first to try and achieve consensus on what they were saying and then talk with the legal profession, Talking with the legal profession was going to be very difficult indeed, because in the speaker's view lawyers were interested in today's facts and not in theoretical principles. If a lawyer could see some advantage for today's case he would listen, but he did not really want to listen to our principles and we were going to have to change that, although the speaker did not quite see how. There was in Australia, as in England, a tremendous collaboration between the medical profession and the legal profession. In Adelaide the doctors and the lawyers got together fairly often to discuss matters of common concern. Probably the standard of medical evidence given was better and the acceptance by the Court of medical evidence was better than actuaries could expect.

He did not think that we should ever reach that stage, because we were a smaller profession, with a narrower range of interests. After talking to some colleagues at the conference he thought that we should expand the present comparatively simple reports to give a statement that showed how the money would be spent, with the income from investments and the outgo over the years. The lawyers did not understand what an annuity was, they talked about the "multiplier" without realising that it was an annuity and all that mattered was how you worked it out. If there were better acceptance of actuarial evidence it would help those lawyers who wished to settle out of Court.

Mr. R. M. Walker (Canada)

Mr. Walker wished to comment on one or two points made by Mr. Burnell and, more importantly for the profession, two or three points raised by Mr. Stratford. In Canada, certainly in the Ontario courts, there had been a considerable degree of agreement between the actuaries who practised in this field on using a real rate of interest approach. He would say that most of the actuaries would probably feel that the real rate of interest lay in the narrow range of 2% to 4%. Also there had been quite a number of situations where actuaries had been invited to spend a fair amount of time with the continuing educaton section of the Canadian Bar Association in describing to the lawyers and in some cases to the students coming through the universities what the underlying principles were. The other subject that he wished to expand on was that of the trilogy in Canada that Mr. Burnell mentioned. He had been involved for 9 to 10 months immediately following those judgements trying to explain to various Courts in Canada why 2% to 3% was a better number than 7% when the Supreme Court of Canada said 7% and the explanation was very interesting.

The only one of those cases in which actuarial evidence was actually given on the interest rate specifically was the case of Andrews versus Grand and Toy in the Supreme Court of Alberta. The evidence was given by an actuary, Bob Grindley, who was persuaded by counsel for the plaintiff to give his evidence on the basis of the then commonly accepted interest rate of 5%. He did so and in cross-examination he was asked why he thought 5% was correct when 8.5% to 9% could be obtained on Government of Canada bonds.

Grindley addressed the question directly, explained the theory behind real interest rates and then stated that in a recent report Dr. Deutsch (then recently retired Chairman of the Economic Council of Canada) had stated that long term inflation in Canada was unlikely to be less than 3.5% in the foreseeable future. The available rate of 8.5% less 3.5% for inflation gave the rate of 5% used in evidence. This reasoning was accepted by the Supreme Court of Alberta.

The background to this 3.5% was in a report Dr. Deutsch prepared to mediate a dispute between the railway unions and railway companies in Canada over the cost of certain pension improvements. Dr. Deutsch was able to prove that the company estimates were reasonable using a future inflation rate of only 3.5%. In fact the estimates would have appeared even more reasonable using a higher rate but that might have lead to a dispute about the inflation assumption. The report, however, states quite specifically that he expected inflation to be *not less* than 3.5% in the foreseeable future.

When the case was appealed to the Supreme Court of Canada, the Justices were provided with all of the documentation and exhibits, the transcripts of the evidence at trial and copies of the judgement and legal arguments presented by council. They did not hear any additional evidence. In this case, council did not emphasize the "not less than 3.5%" estimate.

In making their decision, the Supreme Court accepted the real interest method, and accepted the Deutsch estimate of 3.5% for future inflation as an expectation rather than a minimum. They then took 3.5% from the current long Canada bond yield of 10.5% to give a real interest rate for the valuation of 7%.

For some months, thereafter, actuaries spent a great deal of time in trials explaining the principle and deriving a more reasonable real rate. In response to this evidence, Ontario appointed a commission under Mr. Justice Morden to examine the principles involved. This commission received a report from a panel of three experts, one economist and two actuaries, the speaker being one. The commission then recommended to the Ontario legislature an amendment to the rules of practce and rule 267(a) was adopted which states that the rate of interest to be used in determining the capitalization value of an award in respect of future pecuniary damages to the extent that it reflects the difference between estimated investment and price inflation rates is 2.5%.

That did leave actuaries with the opportunity of arguing for additional compensation to allow for the management fees of the investment fund and also for a lower interest rate where dealing with a wages loss if it could be shown, by evidence, that there was a real gap between the rate of wage increases and that of salaries. The speaker supported what Mr. Stratford said, namely that it was very important that the actuaries practising in this field should get some sensible agreement among themselves on what they were valuing and what assumptions were reasonable.

Mr. L. Mitchell (USA)

In most of the States the actuary was allowed to speak. Most of the States allowed an actuary to use his judgement. There were some states that had mandatory interest rates and mortality rates. In Southern California where he practised, most actuaries probably come up with a range of rates and not a single rate. He might use, say, 6% to 8% and say that anything within that range would be reasonable. Another actuary might come up with say, 7% to 9%. Actuaries were involved in such matters as damages and compensation cases, unlawful death and unlawful injury, malpractice, defamation of character if a person cannot get a job because he has been defamed, and divorce settlements. Divorce cases had become very popular among actuaries, because in many of the States now there was no fault involved, but you simply split the assets and one of the assets was the right to the pension plan benefit. The rights to the pension plan could be looked at in any number of ways. An accrued method would be logical, but the Courts had never shown much interest in logic. In many cases they would allow the non-employed spouse to share in a pro rata portion of the ultimate pension, which included benefits and increases that arose out of changes in the plan after the divorce was final. Following Mr. Burnell's comment, the actuaries in the States were also very much involved in continuing education. One of the nicest ways that was done was by means of a mock trial. That helped in two ways. First it allowed actuaries to work outside the pressures of the real court room, to work with lawyers and to teach them how to accept actuaries and then it expanded that teaching to a larger group.

It had been very successful in California.

Mr. R. P. Delany (Irish Republic)

He would like to pass comment on some of the things that had been said and also to give some insight into the practice in Ireland. First he was somewhat taken aback at the response of the Lord Chancellor to the letters from the Presidents of the Institute and the Faculty in which he said that if actuarial evidence were to be allowed it would increase the time and cost of trials. It was his understanding of the principles of damages that it was intended to place the aggrieved party so far as was possible in the situation that he would have been in, but for the accident. If one was going to allow cost and time to prevent one from awarding proper damages then there was something very wrong with the attitude of the Courts. He also referred to the comment by Peter Stratford that counsel in a particular case had said to him that it was not his job to see that justice was done but to do the best for his client. The speaker had difficulty in reconciling the two principles of seeing that justice is done to the extent that one was giving evidence under oath but at the same time trying to do the best that one could for one's client. As early as 1965 the Supreme Court in Ireland ruled that where there was future loss it was appropriate that actuarial evidence be adduced for the guidance of the judge and jury. Until inflation took off it was the practice of actuaries in this field to use a rate of interest of 1% below the ruling rate and to give one report on that basis. Then when inflation started to increase actuaries generally gave another set of figures based on a rate of inflation, but not necessarily one that was appropriate. When the speaker started in this field the rate of interest used was 6.5%; some years later it had increased to 8% and then a second figure was given calculated at 5% on the basis that inflation would be 3%. Referring to Mr. Prevett's paper he thought that there was an over-simplification in the case referred to when, because the judge did not like the word inflation and said that an actuary was not the person to comment on inflation, he then threw out the actuarial evidence. There was a similar experience in Ireland when one of the High Court judges did not like the word inflation. The speaker unfortunately had not had the opportunity of pointing out to the judge that, in disallowing inflation because he did not like it, he was assuming that it did not exist.

The reason that that approach never took place was the decision by Lord Justice Diplock in which he said that the calculation should be done at a rate of interest that might rule in times of non-inflation, such as 5% or 4%. The 5% fitted in with the 8% less 3% that had been used in Ireland and the practice ever since in the Irish Courts was to use a rate of 5%. This had led to the situation where the actuary might perhaps be recognised only as a calculator but, using the terms that are common in UK of multiplier and multiplicand, the actuary perhaps had very little room for manoeuvre on the multiplier but had an influence in the Irish situation on the multiplicand. That drew attention to another subject that would be debated the next day and that was the future of actuaries. On the one hand there was the actuarial approach and on the other hand the pragmatic approach. The speaker believed deeply that where actuaries were giving evidence on what to the lay man was a difficult subject, they must try to get across in an understandable way what exactly the actuary was trying to do. He suggested that not only were there difficulties if we did not agree on bases, there were also difficulties if it appeared that we simply charged large fees for looking up a table. It seemed to him that the judgement in the Pickett case had been built up out of all proportion in that it was really a judgement to right a wrong, because the basis had been that future loss was calculated on reduced life expectancy. There was an appeal, the plaintiff died and the House of Lords realised that an injustice had been done and, dare he say it, the decision was a compromise. He was delighted to hear that the effect of that decision in Gammell v Wilson type cases was likely to be ruled out, because the judgement was there in the background and affected every case of that nature in Ireland, some of which were being settled at higher figures that took the judgement partly into account.

He could see some justification for periodic payments from a pragmatic point of view and not an actuarial point of view.

In personal injury cases periodic payments appeared suitable for medical expenses and overcame the difficulties with

insurers that were met when the plaintiff died shortly afterwards. The question of contributory negligence was nevertheless a problem. However, he was faced with a difficulty in seeing how periodic payments could work in a fatal accident case. How were we going to explain to a widow that there was a reducing payment each year? It might be offset by inflation, but if the probability of survival was built in then it implied reducing payments. Finally, there was a problem with assets and accelerated values. He found it very difficult to justify an increasing income from assets or a change in the income of the widow because to him they did not appear to meet the principle of damages, which was to recreate the situation that would have existed but for the accident.

Chairman

He was particularly interested in the situation in Ireland because it did show the degree of involvement of the actuarial profession there. In the UK an actuary was usually involved only if the sums were likely to be very large. In Ireland, however, it appeared that an actuary was involved on each side in almost every case, with 90% being settled out of Court.

Mr. R. P. Delaney (Ireland)

In Ireland in a fatal accident case an actuary was normally involved on each side. Very seldom was there disagreement on the multipliers but there might quite often be disagreement on the multiplicand or on the periodic loss sustained by the dependants not necessarily resulting from a difference in actuarial judgement but from different evidence or different facts presented to the actuaries.

It could happen that an actuary was involved in a case for a plaintiff and then received instructions in the same case from the defendant without immediately recognising it because the facts stated were so different. In injury cases generally there was not an actuary on both sides unless one was dealing with a paraplegic where reduced life expectancy was involved. He would like to add a comment on the vexed question of taxation. If an individual had a loss of £5,000 a year and that was his only loss in the past year and he paid tax at 60%, was his loss £5,000 or £2,000? The principle of damages suggested that his loss was £2,000. In another example, if he were done a wrong and suffered a loss of £100 a year indefinitely, and if he could earn 10% on his money then it appeared that £1,000 would satisfy his claim. But if he were subject to 50% tax then, if the principle of damages were to be satisfied, he must get £2,000. It therefore seemed that one must look at the net loss of income suffered on the one hand and the tax paid on investment income on the other hand. So far so good, but what was to be done when working with an artificial rate of interest of 5%, which had not been arrived at as a real rate of return? Implicitly it might be, but explicitly it was not. He suggested that there was no option but to assume that the 5% was a rate of interest and, if tax was 50%, to do the calculations at 2.5%. There was also a point about the situation in South Africa. He was not sure whether by future taxation Mr. Milburn-Pyle's paper was referring to future changes in taxation or the likelihood of future taxation according to the circumstances ruling at the time. There was a principle in Irish law that one must take a plaintiff or a deceased as one found him. The practice therefore was to deal at the date of settlement or date of trial with the tax laws as they then applied.

Mr. R. M. Walker (Canada)

The implications of tax had been considered but in Canada they were stuck with the precedent of a decision in a disability case of Jennings v Regina in which the judgement clearly stated that for disability cases a gross income must be valued at a gross rate of interest.

However for a fatal accident case the situation was different, mainly because the loss to be rated was the plaintiff's share of the deceased's net income after tax. The practice in Ontario was to take the current rate of interest less 2.5% to give the inflation rate and do all the calculations grossed up for tax using the Tax Act as it stood at the present time. The Tax Act was progressive, so that the higher the loss the higher the grossed up loss became. An extension of that principle was that in a disability claim they now took the loss of income separately from the claim for medical expenses, because the latter could be grossed up for tax. In Canada they had also got round the problem of reduced life expectancy to some extent in an injury case, where the life expectancy was much reduced, because the normal practice was to value the loss of earnings using normal life expectancy but to allow for reduced life expectancy in the calculation of medical expenses.

Mr. B. L. Burnell (Canada)

He pointed out that because the tax scale was adjusted annually for inflation the result of using a net rate of income and a net rate of interest was not very different from that derived from gross income and a gross rate of interest.

Mr. J. Prevett (UK)

He just wanted to comment on two points already made. The one was the cost of actuarial evidence in trials. In his experience there had been cases where actuaries had been subjected to long periods of cross-examination in an attempt to discredit their evidence and to confuse the judge and the proceedings had been lengthened; but that should not be regarded as indicating that actuarial evidence was normally going to lengthen trials in that way.

On the contrary, if actuarial evidence were accepted then much of the present time spent in trying to discredit it would fall away. He also mentioned that actuarial fees had been disclosed to the Law Commission looking into the matter in 1973 and had been found to be quite reasonable and not in any way excessive. On the question of tax he confirmed that in the UK when following the Diplock judgement the rate was regarded as a gross rate and was subject to tax.

Chairman

It was indeed unfortunate that in 1973 when the Law Commission was concerned with actuarial evidence it should have come down so firmly on actuarial evidence being admissable in Court. Later, the Pearson Commission was set up, which was a Royal Commission and of a much higher status and they found differently. That overtook the Law Commission, but since then nothing had happened. We had lost a great opportunity and he hoped that with the new Committee we should be more successful.

Mr. P. Milburn-Pyle (South Africa)

He concluded from the trend of the discussion that the basis of salary increments was very different in other countries from that in South Africa. Any system where the capitalisation was based on a net real rate of interest was only workable where salary increments were effectively geared to inflation. That was not the case in South Africa.

Although his paper on periodic payments in November indicated that interest did not come into the matter, certain speakers on that paper introduced the idea of some sort of relationship between the long-term interest rate and the rate of inflation, which they considered facilitated the allowances that needed to be made for those influences, in other words the use of the net rate or so called real rate. This they saw as an argument in favour of the capitalisation approach, where the interest rate was a vital factor. They took the view that the removal of the net interest rate in the periodic payment system in turn placed an unacceptable burden on those preparing the claim.

The argument of a long-term relationship between interest and inflation was however one that he did not accept as having any relevance, even under the capitalisation approach. It implied that the recipient of a lump sum award would either invest the money successfully in inflation-geared assets, or would be able to rearrange fixed interest investments made with the lump sum in such a way as to take advantage of high interest rates coming about from time to time. As far as the first possibility is concerned he would however be surprised to find any Court taking the view that there was an obligation on a claimant to take the risk of

capital loss inherent in many of the forms of inflation-geared assets. In any case, he said, we were all aware of the significant disparity that could occur in timing between the rise of inflation and the corresponding increase in the values of equity-orientated investments. As far as the rearrangement of fixed interest investments was concerned, that would inevitably involve a realisation at reduced market values and the net result could only be a marginal improvement in income, if any.

He had always argued that the interest rate assumed in assessing the capitalised amount of compensation, and the future earnings career incorporated in the calculations, should be determined separately. The interest rate was determined by the investment facilities available when the lump sum award was made, whereas the future earnings career assumed was influenced by the view taken of the future trend of all the items that would have had a bearing, which could include currency depreciation, earnings prospects, demand for services, closing wage gaps etc. It seemed to him therefore that any attempt to follow a real interest rate method had no technical basis whatsoever.

Mr. P. Stratford (Australia)

He accepted that the real rate of interest approach posed various problems but in Australia there was no choice whatsoever. They were not able to take inflation explicitly into account.

Everything had been taken away from the actuary that might be in his discretion. He must use 3%, he must make no allowance for tax, on the investment income or earnings, and he must take no notice of inflation. Courts in Australia said that you must take the situation as it was today and that if you had lost $1 today you had lost $1 next year. You had not lost $1's earning power, you had lost $1.

Mr. L. Mitchell (United States)

In most of the large damages cases an actuary would be involved, but in every divorce case an actuary would be involved. The reason was that there was a case where a marriage was dissolved and it was six years later that the ex-wife realised that her husband had been a member of a pension plan and she tried to re-open the settlement and obtain her share of it. The Court held that it was too late. So she sued the attorney for malpractice, instead, and not only obtained the value of her share of the pension plan but also damages, so that since then an actuary had been involved in every divorce settlement to assess the value of any pension plan involved. He went on to say that there was a point that worried him in countries where actuaries had some sort of discretion and that was whether they were acting in an adversary situation or whether they were acting as an expert. He asked whether it made a difference to the actuary's evidence which side had hired him.

Mr. R. M. Walker (Canada)

There was a big difference of opinion whether actuaries should lend themselves to the adversary system. He saw two separate functions for the actuary involved in damages cases, the first in advising his counsel before the trial when he could point out advantageous or disadvantageous aspects of his client's case and the second when actually giving evidence in Court, when he must answer the questions asked as clearly, honestly and unambiguously as he could.

To deal with another point, the question of the net interest rate and the salary factor, there had been identified in Canada as many as five different salary factors, the productivity scale, scale increases for persons such as school teachers, promotional increases, an industry effect where an industry might be expanding, and inflation. They were able to argue on the first four, but for inflation they were able to take the easy way out and say that it was 2.5% less than the interest rate.

Mr. A. D. Woolf (Canada)

He mentioned an interesting experience that he had had in two cases where the same actuary was on the other side. In the one case where he was acting for the defendant the other actuary had used an interest rate of 14% and in the other case where he was acting for the plaintiff the other actuary had used an interest rate of 3%. Both reports had been done at the same time and the lawyers who had received them had happened to mention them to each other. The result was some very uncomfortable cross-examination for the actuary concerned.

Mr. R. E. Hayward (United Kingdom)

He mentioned that in the UK there was provision for compensation for unfair dismissal and there was a table of factors for valuing the lost pension rights. The table was prepared by the Government actuary and the speaker took it with him when discussing cases with counsel to show that there was some outside authority for what he was saying. He also mentioned that he saw a clear difference between the notion of justice and the practice of administration of the law. And he was quite sure that they were not running along the same lines.

Mr. J. Corp (Canada)

He mentioned that in Canada in Ontario and Nova Scotia there were still a few judges who did not know what actuaries did. One judge asked how you could put a value on a pension benefit and threw out all the evidence that had been given in a divorce case and that was the same judge who said that you did not need to wear a seat belt unless you thought that you were going to be involved in an accident. Finally he asked whether the index-linked bonds in the UK, which showed a lower real rate of return than the 4% to 5% used in damages cases, would result in a decrease in the rate used.

Mr. J. Prevett (United Kingdom)

The quick answer to that was that it was not really a real rate. What Lord Diplock said was that we had to assume that we were in an era of stable currency where there was a normal rate of interest, of 4% to 5%, and he was not talking in terms of real rates although he had been interpreted in that way.

Mr. D. T. Fabian (South Africa)

In closing the discussion he said that it had been a very interesting discussion that had not been restricted to the two papers, but had covered quite a lot of subjects raised by them. He would deal with the discussion under some main headings and would add some comments of his own. The most important point that had come out of the discussion to him was the need for better communication between actuaries, and between actuaries, judges and lawyers. He felt that that was an area which we should all try very much harder to improve. Most of us who had appeared in Court had had problems of communication. There was a reported case in South Africa in which the judge in his judgement said that because expectation of life had been agreed between the parties at 18 years and because the plaintiff was aged 30 and therefore would not have drawn his pension until after age 48 there was no need to take pension payments into account. That was the sort of confused thinking that we were up against.

That led to another big point that was made by Mr. Delaney and Mr. Mitchell and Mr. Walker. What was the position of the actuary in these cases? What was his professional responsibility and was he in an adversary situation or was he an expert? He could only comment on the situation in South Africa where the broad feeling among actuaries involved in this work was that they were experts. But there were actuaries in this field who tried to act like judges and in his view that was a pity. Lawyers had difficulty in settling damages claims and were very inclined to say to the actuaries involved "you actuaries get together and settle this". If it was the speaker involved he said "no sir, you tell me what the evidence is, (because in his experience the evidence that was actually presented in Court was very seldom the same as that which had been given beforehand), you tell me the other factors involved and then I will tell you what is a reasonable settlement and you go and settle it with the other counsel. Please do not ask me to settle with another actuary, because I do not consider that to

be my function." But that might just be the way these cases were handled by the speaker's firm, where they tried to make calculations on a consistent basis and particularly to produce the same report, whether acting for plaintiff or defendant. In fact, in many cases, the speaker did not notice which side he was acting for until, or unless, the matter came to Court. There had also been in South Africa situations similar to that mentioned by Mr. Corp, where the same actuary had used completely different assumptions about inflation and interest, depending on whether he was acting for an insurance company or a plaintiff. It was quite helpful to keep copies of another actuary's reports and to produce them at the right moment. But it did the profession no good, and that emphasised the point about communication between actuaries. He thought it important that actuaries should try to use sensible bases and not differ completely from each other, because that would either lead to the position that apparently obtains in the UK, where they are ignored, or would bring them into disrepute.

From the discussion it appeared that countries like South Africa, United States, Canada and Ireland were favourably disposed towards actuarial evidence; in Australia it appeared to be good at the moment, but might not stay that way; in the United Kingdom it was not very good but it was hoped that it may get better.

The comment that he would like to make about Mr. Milburn-Pyle's paper was that it did not get to grips with the practical problems involved in applying the method of periodic payments. In his opinion the particular section of the Act would not be used very much in South Africa except for medical expenses for seriously injured persons. One of the big problems with the new section was that it did not limit the legal process to the initial claim. What could happen was that a claim could be settled at the instigation of an insurance company by invoking this section of the Act, but that later on the insurance company could argue about what was a justifiable medical expense that it must pay in terms of the judgement. A plaintiff could find himself fighting the case over and over again. A lot of plaintiffs would therefore be only too happy to take a lump sum, even although they might feel that the periodic payments would be greater. The paper also did not deal adequately with the question of taxation. Although the question of tax had been mentioned quite a lot that afternoon, and it had been pointed out that where the tax scales were indexed to allow for inflation it made little difference whether one used a net rate or a gross rate, what had not been pointed out was that, under the periodic payments system, as it was in South Africa, the payment that the plaintiff received was subject to tax in full and therefore had to be grossed up.

Only the interest content of the instalments obtained by investing a lump sum award were subject to tax. Under the periodic payments system the defendant was therefore going to pay a very much greater sum. That, in itself, was not attractive to defendants. It was therefore only attractive where items like medical costs were concerned, where the gross position would apply any way.

On a general topic, he was interested that nobody had mentioned medical evidence and the actuary's role. In South Africa the medical profession gave evidence in these cases quite a lot and, unfortunately, from time to time, a doctor would give evidence in Court in the case of a paraplegic who already had urinary problems and bed sores and would say that he had a normal expectation of life. One or two insurance companies for whom he prepared reports had asked what he knew about this. Perhaps because the speaker had some long experience with substandard underwriting with a reinsurance company, he was prepared to include an estimate of expectation of life, based on medical evidence and tables such as those produced jointly by doctors and actuaries and published by the Society of Actuaries. Provided one put figures into the report and sources and quoted tables one could, in South Africa, get a judge to listen to some extent to the actuarial view on the expectation of life of a seriously injured person.

There was another interesting point in connection with the net rate of interest approach. Mr. Milburn-Pyle had said that in South Africa the actuary chose the inflation rate and chose the interest rate and then did his calculations. What he did not say was that until comparatively recently quite a number of actuaries who aapparently made the calculations that way according to their reports, in fact made the calculations at a net rate of interest or at a series of net rates of interest, because that was arithmetically easier. Now that did not work, if there was not a tax scale that was progressively changed for inflation. If one correctly increased earnings by the assumption about increases for promotion and inflation and then applied tax at the current rates on the increased earnings, one rapidly pushed the income into a higher and higher tax bracket.

The result was that one produced a lower answer than one would do if one used a net rate of interest. It was only recently that that point had been brought home to actuaries, who were using that method, and there was now either a clear statement in their reports that they were assuming that the tax scale was adjusted annually to allow for inflation, which of course it was not, or they made the calculations properly according to their report, or they made the calculations on an in-between method, which allowed for tax scales to be partially adjusted from time to time. The last approach required quite a lot of explaining to the judge or to lawyers and again taxed skills in communication.

The speaker was very interested to hear that there was a whole new field open to the actuarial profession in South Africa, and that was the subject of divorce. To his knowledge, actuaries were not involved in that field in South Africa at present.

Quite a lot of Mr. Milburn-Pyle's paper and the discussion had concerned the Pickett case, but he did not think that it had been brought out clearly that if the periodic payments method was adopted, and was so desirable, then it completely negated the judgement in the Pickett case, because one only got the payment while one was alive. It was true that Mr. Milburn-Pyle had suggested that the payments could go on to a dependant in some cases, but it seemed that that would raise a lot of problems and was a little far-fetched.

To return to the position of the actuary, there was a great difficulty in steering a middle course between saying to the judge "I am just an actuary, I just do calculations" and saying "I know what future inflation is going to be". He thought that actuaries had to try and steer the middle course because otherwise, what was going to happen was that they were going to be relegated to just doing sums and he did not think that was right, because he believed that actuaries knew a lot more about the financial effect of assumptions about the future than did economists, accountants and lawyers. He thought that actuaries had to try very hard to improve their communications and to have the courage of their convictions.

Actuaries must say "that is only an estimate but it is a jolly good estimate, it is the best estimate that I can make, but I do have a lot of professional expertise, which qualifies me to make that estimate." Somebody had mentioned that an actuary was involved in the majority of cases. That was most certainly not the case in South Africa. The majority of cases were small cases and were settled by lawyers without actuarial help. It was only when the damages look like being large that a lawyer asked for an actuarial report and it was then only perhaps one in a hundred that went to court. It was a very good point made by Mr. Delaney that actuarial evidence should not be disallowed simply because it was costing money and took up the time of the Court, as suggested by the Lord Chancellor.