

BODILY INJURY CLAIMS

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SUMMARY:

Bodily injury claims, which impact on a number of classes of insurance, have been subject to enormous change over the last few years and months. This paper summarises and considers those changes from an actuarial perspective.

1 *Introduction*

1.1.1 When we set out to write this paper our aim was to provide a background for any actuary or student new to the area of bodily injury claims, including:

- introductory education on UK injury law
- discussion of current and future issues and their possible significance
- practical approaches to reserving or rating classes with UK liability exposures
- sources of current legal information of relevance to actuaries dealing with classes impacted by injury claims
- summaries of some recent and significant court cases in this area.

1.1.2 As many practitioners will be well aware, this area has been subject to enormous change over the last few years and months. In this paper we will discuss the older and more familiar framework, then consider in turn the detail of the more recent and prospective changes.

1.1.3 Our paper is structured in the following order:

- 2 The background legal framework, as it affects bodily injury claims in England and Wales
- 3 Recent and prospective developments in the legal and social background
- 4 The general actuarial implications of bodily injury claims, especially for pricing and reserving
- 5 A summary of several legal cases of note, mostly chosen to illustrate themes and points drawn out in the body of the paper
- 6 An appendix giving sources of information.

Each of these chapters is self-contained and stands alone. Hence readers familiar with the legal framework could jump straight to chapter 3, for example.

- 1.1.4 Given access to market data we would have liked to undertake analyses and make observations about recent and prospective market trends in types, frequency and severity of bodily injury claims. In the established tradition of GIRO work parties, however, this hope was curtailed by the absence of “real data”. We refer particularly interested readers to the parallel IUA Study, in which two of the authors of this paper have been involved, which has had access to a significant volume of bodily injury claims data from the UK motor market. This document, which we expect to be called “The UK Bodily Injury Awards Study”, is due for release on 22 October 1999.
- 1.1.5 We note the existence of the paper “Damages: Personal Injury Awards”, which was presented to the Institute of Actuaries on 9 December 1997. That paper considers aspects of the actuarial basis used to calculate damages awards, and other possible approaches that could be used to compensate the plaintiff. It also gives, in an appendix, a summary of the development of case law as it now defines the current damages regime.
- 1.1.6 We have not duplicated any of that work in this paper, but refer interested readers to the original document.
- 1.1.7 In the interests of readability we have, throughout our paper, used exclusively the male gender. For simplicity we have also generally restricted our attention to the English and Welsh legal system, rather than explain the systems in Scotland or elsewhere. However, we have not intended to cause offence and wish to record that we do like women (indeed some of us are female), Scots, and any other groups that may feel similarly slighted.
- 1.1.8 Finally we wish to stress that this paper has been written by a group of actuaries in the UK primarily for the interest of others in our profession. Our understanding of the legal framework and the effects of recent developments may be flawed, for which we apologise. Our intent throughout has been to produce a general paper as a useful background for actuaries, rather than a precise and confirmed treatise on this area. If in doubt, ask a specialist. The working party expressly disavows any reliance on this paper in any specific situation!

2 *Legal Principles*

2.1 Introduction

2.1.1 Over recent years, much attention within the actuarial profession has been focused by those concerned with the cost of personal injury claims on the issue of “multipliers” and more specifically on the Ogden Tables.

2.1.2 The working party suspects that many actuaries, whilst having a good general understanding of the key issues around multipliers, i.e. around valuation of a given level of loss, have rather limited knowledge of the legal principles relevant to the determination of loss in the first instance. This chapter focuses more on multiplicands than on multipliers, in an attempt to redress the perceived actuarial knowledge (im)balance.

2.1.3 The chapter therefore aims to give a broad introduction to the legal principles and process commonly in play in England & Wales in relation to personal injury cases. As none of us is legally qualified, we must caution the reader that this chapter is offered on an “errors and omissions accepted” basis only ...

2.1.4 We describe here the situation before the Woolf reforms (see section 3.4) took effect. Those reforms have brought little change to legal principles but potentially large change to the processes. We decided to describe the prior situation in full. Given that the reforms are only just beginning to bite, and so we do not yet have hard experience of their impact on development speed etc, it is important that we have a clear understanding of how the old system worked. Only by having a sound knowledge of both pre- and post- reform systems can you really appreciate what the changes are and so begin to assess intelligently what their impact could be.

2.1.5 The chapter is set out under the following section headings:

2.2 The Legal System in England & Wales

2.3 Sources of Civil Liability: Negligence and the Duty of Care

2.4 General Defences

2.5 Assessment of Damages

2.2 The Legal System in England & Wales

Doctrine

- 2.2.1 The English legal system is to a large extent based on the doctrine of binding precedent or case law. This means that courts will usually be bound by previous decisions, or rather, by the legal basis for a previous decision (“ratio decidendi”). The judgement may also contain side statements (“obiter dicta”). These are not binding, but the reputation of the court sets their importance. In a court case each party may argue that a different precedent is binding. Although injury can of course arise from criminal acts, in general redress for personal injury is sought under civil law and the rest of this chapter discusses civil law and procedure.

Hierarchy of the Courts

- 2.2.2 The lowest level of civil court includes both the County Court and the High Court. The County Court is where personal injury cases with a value up to £50,000 are normally started. The High Court is the starting point for cases with a higher value.
- 2.2.3 The second level is the Court of Appeal. This court will not retry the case, i.e. it will not reconsider the facts of the case, but merely test whether the law has been applied correctly. As an example, see *Biesheuvel v Birrell*, section 5.2.
- 2.2.4 The third level is the House of Lords, represented by the Law Lords. Again the case is not retried, but merely tested as to whether the law has been applied correctly. Refer, for example, to *Wells v Wells*, section 5.3. An important distinction from the Court of Appeal is that the House of Lords is not bound by its own precedents, although it will not easily depart from these.
- 2.2.5 The legal system in England and Wales is ultimately subservient to European law. Consequently, although to date the Court of Justice of the European Community has had little influence on UK personal injury cases, it cannot simply be assumed that this will remain the case indefinitely.

The Legal Profession

- 2.2.6 A solicitor is an officer of the court and will advise clients and negotiate settlements with the opposing party to avoid litigation. He may represent his client in the County Court but, with a few exceptions, not in any of the other courts.
- 2.2.7 Barristers are lawyers who tend to specialise in a particular area of the law, and operate in courts as junior counsel. A barrister with many years experience can be made a Queen's Counsel by the Lord Chancellor. He will be more specialised and operate in courts as leading counsel. Furthermore there are various levels of judges for the various courts.

Legal Aid

- 2.2.8 The Legal Aid Act 1988 provides state help to those on low earnings seeking legal advice or wishing to bring a case to trial.
- 2.2.9 The Advice and Assistance Scheme provides that persons can obtain legal advice or assistance before actually going to court. It is fairly easy to obtain.
- 2.2.10 Legal Aid is more difficult to obtain. Apart from a low income the person must also establish a "prima facie" case. An area office will decide on this and will often only provide aid for some initial steps. Further aid will then be dependent on the outcome of these steps.
- 2.2.11 Major changes to Legal Aid are imminent and are discussed in section 3.7 of this paper.

Civil Procedure

- 2.2.12 The legal process is currently in the throes of major changes, following the Woolf reforms, which we consider in section 3.4 of this paper. The remainder of section 2.2 sets out the historical language, procedures and timescales that civil procedures have followed for many years, to allow the Woolf changes to be seen in context. Many things below have remained unchanged, but you should refer to section 3.4 for the up to date situation.

a) The Pleadings

- 2.2.13 To start a civil procedure, the plaintiff must obtain a writ of summons, issued by the court, and serve it on the defendant. The writ has an endorsement attached to it, which details the basis of the claim. More complex claims may be outlined in more detail in a statement of claim, which is due within 14 days after the writ has been served, unless parties agree otherwise. For personal injury claims this must include a medical report and details of special damages, i.e. losses already incurred, such as loss of earnings and cost of care.
- 2.2.14 The writ must be served on the defendant within four months of issue. This can be done by hand, post or fax. The defendant must acknowledge the service of the writ within 14 days and must indicate whether he intends to defend the proceedings. He must serve a defence within 28 days of the service of the writ or 14 days of the later service of the statement of claim. If he does not comply, then he may lose the case directly.
- 2.2.15 This is because, if either party believes the other side has no cause of action or no defence, it can ask the judge to decide against the other party without further ado. This is called a Summary Judgment under Order 14.
- 2.2.16 The defence will often simply consist of denials of each paragraph in the statement of claim. Anything not denied or declared “not admitted” will be considered to be agreed between parties without further evidence being needed. A defendant may bring a counter claim in the same proceedings, e.g. in the case of two drivers blaming each other for a car accident.
- 2.2.17 If anything in either the statement of claim or the defence is unclear, then the other party may make a request for further and better particulars. The first party is obliged to reply and give the information unless it is privileged (see below). This closes the pleadings.

b) Discovery

- 2.2.18 Discovery then starts within 14 days of the close of the pleadings. Each party must prepare a list of its relevant documents, split between those they are prepared to share, those they claim privilege for, and those no longer in their possession. Parties can then copy each other’s share-able information within 7 days. There are arrangements to inspect documents before this stage in order to

help a plaintiff decide whether he has a valid claim at all. The privileged documents will typically consist of correspondence between solicitor, client and insurer.

2.2.19 At any time during the discovery process a party may serve questions of any kind, known as Interrogatories, on the other party. The questions must be answered under oath within a certain time limit. The party served can alternatively ask the court to set aside the request as unfair.

2.2.20 The next step is the exchange of witnesses' statements. A witness who has made a statement cannot add other information at the trial.

2.2.21 Plaintiffs may apply to the court for interim payments if they have a "good case". Conversely a case may be "struck out" if there is no cause of action, or if it is frivolous and vexatious and an abuse of the process of the court, or if a party does not comply with time limits.

c) Pre-trial

2.2.22 After the discovery and within a month of the close of pleadings the plaintiff must take out a summons for directions. An automatic timetable often applies in personal injury cases. This will include requirements for exchange of lists of documents (within 14 days), serving of medical or other experts' reports (within 10 weeks), and other items such as police reports. The plaintiff must "set the case down" for trial within six months after close of pleadings.

2.2.23 The defendant can make a payment into court at any time between the issue of the writ and the trial. If the plaintiff turns the amount down, and then has a lower amount awarded, this makes him liable for all legal costs from the date of payment into court. These are both his own costs and the defence costs and would not be covered under the Legal Aid Scheme. This makes the payment into court a powerful weapon for the defence.

2.2.24 If the defendant feels that he can obtain a contribution or indemnity from a third party, then either the plaintiff can agree to include this party as co-defendant in the proceedings, or the defendant can issue a third party notice to the third party. The third party notice must be brought during the proceedings or within two years after the judgement or settlement.

- 2.2.25 In the preparation for trial, the parties are required to resolve all possible issues they can agree on and identify areas of disagreement. They should also consider alternative dispute resolution through arbitration or mediation.

d) The Trial

- 2.2.26 At the trial, the plaintiff's counsel opens the case with his speech. He then calls witnesses and examines them, called the examination-in-chief. Each witness can then be cross-examined by the counsel for the defence. Finally the first counsel may re-examine the witness. After that, the defence counsel may call witnesses who will in turn be examined-in-chief, cross-examined and re-examined.

- 2.2.27 When finished, counsel for the defence sums up, then counsel for the plaintiff has the last word. If counsel for the defence did not call any witnesses, he will have the last word. Then the judge sums up the case and gives his judgement. The judgement will include a summary of the facts, comments on the weight of the evidence, and the law that applies.

- 2.2.28 The losing party will usually pay costs, including those of the winner, although the judge may decide otherwise. There is the exception of a legally-aided plaintiff, where the defendant will not be able to recover his costs. If the submitted costs are unreasonable, then a court official will decide on the reasonable level.

- 2.2.29 Simple Interest on damages for personal injury cases is mandatory. Interest on the amount awarded or on costs is due from the date judgement was pronounced.

2.3 Sources of Civil Liability: Negligence and the Duty of Care

- 2.3.1 Civil law embraces both the law of tort and contract law, with liability normally attaching when someone commits a tort, i.e. a civil wrong, or after a breach of contract. Examples of case law relevant to some of these issues are provided in Chapter 5 and are referred to throughout this section.

- 2.3.2 Civil law has three sources:

- **Custom:** this is where the law follows the customs of a particular trade to solve disputes.
- **Common Law:** this is based on the doctrine of binding precedent.
- **Legislation:** this is the total of all the Acts passed in parliament together with any associated statutory instruments and regulations.

2.3.3 A contract is an agreement between parties and requires at least:

- An intention to create legal relations
- Offer and acceptance
- Consideration or form.

2.3.4 There are a few distinctions between contract and tort:

- Contracts are voluntary and torts are imposed by the law.
- For contracts the starting point for taking legal action is the date of the breach of contract, but for tort the date of loss or damage. (This is particularly important for certain time limits – see 2.4.12 and thereafter.)
- Damages are calculated differently.

2.3.5 Insurance policies will normally cover the liability of the insured for events of injury, loss or damage and nuisance. Liability as a result of a contract is normally excluded, unless liability would have attached without the contract anyway.

2.3.6 Under contract law there is a requirement for one party to be at fault before liability attaches. For tort there is normally a requirement of fault, but there are a few exceptions where liability is strict and there is no need to prove fault. Also there are a few areas where liability will not attach although fault exists.

2.3.7 For contracts, losses should arise according to the normal course of events from the breach of contract or as they have reasonably been considered by the parties when they made the contract. In tort, damages will only be awarded for losses that are reasonably foreseeable.

- 2.3.8 In the context of the law of tort, a party can only be at fault if it has not complied with a specific or general duty set up by the law. Therefore there is no liability for actions that may cause damage, such as setting up a business that causes losses to other businesses, because there is no duty not to do so.

Negligence

- 2.3.9 To prove negligence in tort, the plaintiff must prove that:
- the defendant owes him a duty of care
 - the defendant is in breach of that duty
 - the plaintiff has suffered loss or damage as a direct result of the breach (i.e. “causation”), and
 - the loss suffered is not too remote.
- 2.3.10 Each criterion represents a necessary but not sufficient test for establishing negligence, and consequently the standard of proof required to satisfy all four criteria is demanding.

Duty of Care

Standard of care

- 2.3.11 The law of negligence relates to situations where it has been established that the defendant owes a duty of care to the plaintiff. Bearing in mind that the standard of care achieved in a given set of circumstances can only be assessed in hindsight, what standard does the law expect?
- 2.3.12 The standard is that to be expected of a “reasonable man”, one who consciously or unconsciously takes into account
- the current standard of knowledge and practice
 - the likelihood of injury and its potential gravity
 - the cost of eliminating or reducing the risk.

2.3.13 This standard of care is subjective, in that it is what judges say it is, but is modified by precedent and gradually evolves with the general trend of public opinion. For a particular case, the standard of care is determined by reference to precedent and depends on the circumstances.

2.3.14 If a defendant shows that he complied with common practice for an activity then this is evidence that he has discharged his duty of care. Other evidence can also be brought however, for example relating to the Highway Code or Health and Safety at Work Act 1974, as to whether or not the defendant has or has not discharged his duty of care.

Special Cases

2.3.15 There are a few special cases worthy of note regarding the duty of care:

- A limited duty of care is owed to the unborn child
- A duty of care is owed to lawful visitors of land but a reduced duty of care is owed to trespassers (see also *Ratcliffe v McConnell*, section 5.4)
- If a person acts where there is no duty of care, he is not liable for damage that would have been caused if he had done nothing
- A person can usually only be liable for the acts of others in a master/servant or principal/agent relationship.

Economic Loss

2.3.16 Purely economic or financial loss is usually not recoverable under law because it is felt that this would “open the floodgates” for claims from many people with some remote interest. Further it is thought that such persons could protect themselves with contractual clauses anyway.

2.3.17 Attempts have been made to establish a duty to protect someone against the economic effects of injury by means of insurance. These attempts have so far failed.

Nervous Shock

- 2.3.18 A claim for nervous shock is actionable in the following situations:
- Fear of injury to yourself or your direct family
 - The sight of an accident or its aftermath (see *Frost and others v Chief Constable South Yorkshire Police* (“Hillsborough”), section 5.5)
 - Subsequent witnessing of injury of relatives.
- 2.3.19 Not actionable are:
- Hearing of an accident
 - The sight of injury to a non-human victim or to a corpse
 - Nervous shock following the reporting of an accident to a relative.

Causation

- 2.3.20 The onus is on the plaintiff to establish a causal relationship between a breach of duty of care and the damage for which compensation is sought.
- 2.3.21 A judge takes a common sense approach to deciding whether injury or damage was caused by the defendant’s lack of care. If breach of a duty of care and causation are established then liability will attach.
- 2.3.22 A simple test that may be applied in establishing causation is “but for”: if the result in question would not have occurred but for a certain event, it can reasonably be argued that the event caused the result. Conversely, if the result would have happened anyway, the event has not caused the result.
- 2.3.23 Often, however, injuries arise from a complex set of events and possible causes in which case establishing causation may be much more difficult.
- 2.3.24 We should note that the judge must come to a conclusion on causation. The judge is not permitted to rule that the defendant’s action was probably negligent, but because the judge is only 60% sure of this he will only award 60% of damages.

- 2.3.25 It is important to understand that court awards often reflect future uncertainties, but only once liability has been determined. Liability itself turns on evidence and proof of causation, not on valuing a chance.

Remoteness of damage and Foreseeability

- 2.3.26 In order for a duty of care to be owed, the damage or injury must have been “reasonably foreseeable”. Before 1961, all losses were recoverable if directly caused.
- 2.3.27 In 1961, the test of “reasonable foreseeability” was established (“*The Wagon Mound*”, see section 5.6). This test was designed to exclude much of a property claim where the defendant’s actions were such that it was reasonably foreseeable that damages would occur, but the extent of those damages could not reasonably have been foreseen.
- 2.3.28 For injury cases, however, the “eggshell skull” case (*Smith v Leech Brain & Co Ltd 1962*, see section 5.7) established that so long as the defendant could have reasonably foreseen that he would cause an injury, he is responsible for the entire injury even if the extent of the injury could not have been reasonably foreseeable.
- 2.3.29 Further there is a test of proximity: the plaintiff should be close enough to the defendant to be taken into contemplation by the defendant as being affected by the acts or omissions under consideration. The question as to what is reasonably foreseeable and what is reasonably proximate has been the topic of many court cases, and legal thinking on this continues to develop. (For example, refer to “*Hillsborough*”, section 5.5.)
- 2.3.30 “Inevitable accident” is merely the proposition that not all injuries are the result of a negligent act. In *Stanley v Powell 1891*, while hunting a pheasant the defendant’s shot ricocheted off a tree and injured the plaintiff. It was held that no liability existed as it was a pure accident.

Onus of proof

- 2.3.31 The burden is on the plaintiff throughout the trial to adduce sufficient evidence of fact to show, on the balance of probability, that the defendant was negligent

or otherwise in breach of a tortious duty. This contrasts with the stricter standard “beyond reasonable doubt” in criminal law.

2.3.32 The exception is “res ipsa loquitur”, i.e. the facts speak for themselves. In certain circumstances, this can shift the onus of proof from the plaintiff to the defendant. The defendant has to show, on the balance of probability, that the event was not caused by his negligence.

2.3.33 In order for this doctrine to apply, the plaintiff must show that the injury was more likely to have come from the negligence of the defendant than from any other cause. This might occur when the plaintiff lacks access to all the facts. In *Scott v London & St Katherine Docks Co 1865*, the plaintiff was passing in front of a warehouse when six bags of sugar fell on him. These events in themselves were sufficient to establish the likely negligence of the defendant and thus shift the burden of proof.

2.4 General Defences, Contributory Negligence and the Limitations of Actions.

2.4.1 In this section we will look at the General Defences to actions in tort, the concept of Contributory Negligence and the Limitations of Actions. General Defences are total defences to actions in tort, Contributory Negligence reduces the value of awards and Limitations of Actions set time limits on the ability to bring a claim.

General Defences

2.4.2 Various defences, contending that there was no duty of care, are routinely used in actions of negligence. There is no special power about these defences, and neither do they add to the body of law. However they are useful labels for examples where there is a denial that negligence exists, where the defence is that there did not exist a duty of care or that the defendant is not in breach of such duty. General defences include:

- **Vis Major (or “Act of God”):** this defence is more restrictive than commonly thought. It has been defined as “events due to natural causes directly and exclusively, without human intervention, and that could not have been prevented by any amount of foresight and pains and care

reasonably to be expected”. This is a very high standard. This defence is rarely used in practice, although the concept is often appealed to elsewhere.

- ***Emergency / Necessity:*** this defence holds that the duty of care that a person must be judged by takes into account what a reasonable man would do under the circumstances.
- ***Volenti Non Fit Injuria:*** this defence is that the plaintiff consented to the risk. Mere knowledge is not enough; consent, either explicit or implicit, must be granted. There is an exception to this defence for rescue cases. We note that this also does not apply to a plaintiff who accepts a ride from a drunk driver. In this instance, it may be held that the passenger is guilty of contributory negligence, but “volenti”, which would throw out the action, does not apply.
- ***Ex Turpi Causa Non Oritur Actio:*** this comes from a Latin phrase which translates as “no right of action arises from a base cause”. While there are few examples of this in case law, it is unlikely that a burglar would succeed in an action against an occupier for an injury caused by defective premises, even though a mere trespasser may have a remedy. We note here that the degree of baseness seems to be taken into account in the assessment of whether this defence should apply. (Refer to *Ratcliffe v McConnell*, section 5.4)
- ***Private Defence:*** one is permitted to take actions in order to protect oneself and one’s property. Again, as in criminal law, the means must be proportionate to the violence being perpetrated or threatened.
- ***Duress:*** while there are no modern cases on the subject, it is held that the threat of violence or even death does not exonerate the defendant from carrying out an activity which is tortious. It is widely accepted that the harshness of this rule would generally be tempered by the “reasonable man” standard of care.
- ***Statutory Authority:*** some statutes allow activities that would otherwise be tortious. Even so, the immunity will not extend to activity carried out

negligently and, unless specifically provided, the statute will not take away the right of compensation. It is for the defendant to prove this intention.

- ***Accord and Satisfaction:*** by releasing the defendant from future liability, accord and satisfaction allows a plaintiff to settle with a defendant without resorting to the courts.
- ***Res Judicia:*** this maxim is that the plaintiff cannot sue for a cause of action more than once, even if the damage becomes unexpectedly worse.

Contributory Negligence

2.4.3 This was a complete defence until The Law Reform (Contributory Negligence) Act reversed this in 1945. This enacted that, when a person suffers injury or damage that is partially a result of his own fault, his claim will not be defeated but his damages reduced to such an extent as the court feels equitable, in light of his share of the responsibility for the damages.

2.4.4 A few aspects are important:

- The court will always assess damages in full and then reduce the total award on the basis of contributory negligence.
- The law also applies to fatal claims with the estate or dependant obtaining a reduced award.
- The test is subjective and will depend whether the individual acted reasonably. For example, children's actions will be judged by their age and level of awareness.

a) Seat Belts

2.4.5 In *Froom v Butcher (1975)*, it was held that damages can be reduced if a driver or front seat passenger failed to wear a seat belt. If the injury would not have occurred if the plaintiff was wearing a seat belt at the time of the accident then a reduction of 25% should be made. If the injuries would have been reduced then a reduction of 15 – 25% would be appropriate. (See *Biesheuvel v Birrell*, section 5.2)

- 2.4.6 Knowledge of drunkenness will be considered grounds for reducing an award due to the contributory negligence of the plaintiff.

b) Employers Liability

- 2.4.7 Because there are few general defences available in employers liability cases (due to the statutory liability), contributory negligence plays a more significant role in this area. It has been held that a worker should be judged by the normal standard of care that he should bring to his work and that the management should take into account the effect of repetition and long hours in setting safety standards.

c) Contractual Liability

- 2.4.8 No apportionment of fault can be made if a claim is made in contract, even if the breach of contract is also a breach of a common law duty.

Subrogation

- 2.4.9 Under the doctrine of subrogation an insurer, having indemnified the insured for his loss, is entitled to recover the loss from a negligent third party. Subrogation arises commonly in property insurances, as these are contracts of indemnity only.
- 2.4.10 Interestingly, subrogation does not apply to accident insurance, meaning that the insurer has no right of recovery. A plaintiff with such insurance can be doubly compensated for his loss.
- 2.4.11 The respective interests and roles of insurer, reinsurer and retrocessionaire are also of interest. Although, where the amount claimed is very large, the reinsurers may have a much larger financial interest in the outcome of the case, it is the insurer who leads defence of the claim.

Limitations of Actions

- 2.4.12 The Limitation Act of 1938 set the basic rule that a writ must be issued within six years. For personal injury cases the limit was reduced in 1954 to three years. The Limitation Act 1980 is the one currently in force.
- 2.4.13 General principles that apply are:

- ***Accrual of Actions:*** actions in tort accrue from the date of injury or damage (whereas actions in contract accrue from the date of breach).
- ***Legal Disability:*** in the case of persons under a legal disability (minors and those of unsound mind), the time limit begins from their 18th birthday or when the legal disability ceases.
- ***Fraud and Concealment:*** if the cause of action has been deliberately concealed from the plaintiff by the defendant, the time does not run until the fraud has been discovered. (This point is at issue in litigation involving injuries allegedly attributable to tobacco.)

2.4.14 For personal injury cases, the limitation period is three years from the date on which the cause of action accrued or from the date of knowledge of the person injured. The court does have the discretion to override these limitations.

2.4.15 We note that property damage may also be included in the action but, for these limitations to apply, some personal injury must have occurred. It has been held that consideration should be given to a plaintiff's age, background, intelligence and disabilities in determining when knowledge occurred. Anxiety or suspicion is not sufficient to satisfy the test of knowledge of injury.

Death

2.4.16 Any claim brought under the Law Reform Act by the estate must be made within three years of the person's death or the personal representative's knowledge, whichever is later.

2.4.17 Any action for the benefit of dependants under the Fatal Accidents Act shall be time barred after three years from the date of knowledge of the person for whose benefit the action is brought.

Damage to Property only

2.4.18 As an aside, we note that property claims that have no element of personal injury have a six-year limitation period beginning from the date of damage. However there is also a provision in the Latent Damage Act of 1986 which will extend the period for up to three years from the date the damage was

discovered, with a “long stop” of 15 years from the negligent act. Legal disability can overrun the 15-year limit.

2.5 Assessment of Damages in Liability Claims

2.5.1 In this section we will look at the measurement of damages and possible remedies available to the plaintiff. These are designed to compensate the plaintiff rather than punish the tortfeasor, i.e. the one who commits a tort.

2.5.2 Damages can be classified in a number of ways and many categories will overlap. The main types of damages follow below.

Special Damages

2.5.3 Special damages are amounts in respect of losses and expenses incurred up to the date of the trial. These are capable of proof (i.e. receipts could be produced). The most important head of damage in this category will often be past loss of earnings or profits.

General Damages

2.5.4 General damages flow from the tortious act and it is not necessary for the plaintiff to prove his loss. They would consist of:

- Pain and suffering and loss of amenity
- Future loss of earnings/earnings capacity
- Additional future expenditure

2.5.5 This is in no sense an exhaustive list, particularly as attempts are being made continuously to develop new heads of damage. Indeed extending heads of damage is thought to be a prime contributor to recent inflation in injury awards (see section 3.9.14).

Exemplary or Punitive Damages

2.5.6 These are awarded in addition to compensatory damages to express the court’s view that the defendant’s conduct is deplorable or outrageous. Very large sums awarded for such damages in the USA often attract publicity here. This

week (July 1999), for example, an award was made against General Motors for almost \$6bn. This award, arising from a single incident where a vehicle caught fire, due in part to unsafe siting of the fuel tank, is more than GM's world-wide annual profit last year, and is apparently close to the total cost to GM of developing three different new models of car.

- 2.5.7 In England and Wales, punitive damages can only be awarded in a limited number of defined situations, and are very unlikely in a personal injury case.

Calculating claim amounts for Personal Injury claims

- 2.5.8 As outlined above, several heads of claim exist for personal injury claims. Most relate to costs incurred between accident date and settlement date, but some relate to costs to be incurred in the future, or lost earnings in the past or the future.
- 2.5.9 The typical approach to calculation of an award in respect of future cost of care or loss of earnings is to multiply a multiplicand, the annual amount necessary to provide care or the annual loss of income, by a multiplier.
- 2.5.10 The multiplier represents the expected future number of years the plaintiff will live and includes a discount for investment income and possibly other contingencies too, e.g. redundancy. Different multipliers will be applied under different heads of damage. Effectively these are annuities as recognised from life insurance, although they were often selected by judges using “rules of thumb” built up over the years rather than actuarial methods.
- 2.5.11 Until the Civil Evidence Act (1995) was enacted, mortality tables were not “admissible evidence” but needed to be supported by an expert witness (i.e. actuary) on each occasion. In the case of loss of income, there is also a further discount for the risk of becoming unemployed or disabled.
- 2.5.12 Where tables were used before *Wells v Wells* (see 5.3), the interest rate assumed in the multipliers was typically in the range 4 to 5% net of tax, based loosely upon a 6% per annum gross return. This was intended to include an allowance for future inflation of the multiplicand.

- 2.5.13 The calculation of future costs of care and future loss of earnings receives further attention in Section 3.2 of this paper.

Liabilities for Death

- 2.5.14 The only damages awarded to the deceased's estate are those arising between injury and death (and for funeral expenses) including:

- Loss of income
- Special Damages for loss of or damage to property
- Pain and suffering
- Awareness of reduced life expectancy.

- 2.5.15 No damages shall be awarded due to:

- Fear of impending death before the injury
- Loss of income after death
- Exemplary Damages.

- 2.5.16 Dependants may sue for the loss of dependency, and there is a fairly specific list of those that are eligible for dependency payments. They include

- Husband or wife (including common law and former spouses)
- Parents or grandparents (or those treated as parents or grandparents by the deceased)
- Children (or those treated as children by the deceased).

- 2.5.17 The list of those that are permitted to sue for bereavement is much shorter, and only includes the spouse and children. The bereavement award is £7,500 split between the plaintiffs.

- 2.5.18 In order to obtain an award, the deceased's death must have been caused by a wrongful act and the deceased must have been in a position to sue if he had been alive.

- 2.5.19 The court will normally split an award between the beneficiaries, and, of course, the number of dependants will not generally and materially alter the value of a claim, although it may result in a reduction of the assumed percentage of income that the deceased would have spent on himself.
- 2.5.20 The remarriage or remarriage prospects of a wife are not included in the calculation of the award, but the remarriage prospects of a husband theoretically could be as they are not barred from consideration under the law.

Calculation of Dependency Damages

- 2.5.21 The calculation of damages for dependency are calculated by taking a multiplicand (the net annual dependency of the widow) and a multiplier.
- 2.5.22 The multiplicand is less than the deceased's full income as the deceased would have spent money upon himself that would not have represented dependency. While the multiplicand normally represents the current net income, it can be adjusted to reflect the fact that the deceased's net income may not have remained stable.
- 2.5.23 The multiplicand is calculated from the date of death, not injury, as the estate has the claim for the loss of income between injury and death. In assessing the multiplier it should reflect the deceased's future health and job prospects.

3 *Legal Developments*

3.1 Introduction

3.1.1 There is a considerable amount of legislation relevant to personal injury claims. This field of law continues to evolve, as Chapter 2 has indicated, and this chapter provides information on a number of these areas.

3.1.2 The chapter is set out under the following section headings:

3.2 Ogden

3.3 Structured Settlements

3.4 Woolf Reforms

3.5 Compensation Recovery

3.6 Hospital Charges

3.7 Funding Legal Action

3.8 General Damages Reforms

3.9 Changes in Society

3.10 Future prospects

3.2 Ogden

Background

3.2.1 The previous chapter described the background to the English Legal System and its traditional compensation to claimants by means of a lump sum payment.

3.2.2 As stated there, the multipliers employed in the methodology were not scientifically based, but had evolved over time through many legal cases. In any individual case, an actuary might have been called to advise on a suitable multiplier, but this practice was by no means universal.

- 3.2.3 Indeed, in *Auty v National Coal Board, 1984* Lord Justice Oliver famously said that “as a method of providing a reliable guide ... the predictions of an actuary could be only a little more likely to be accurate (and would almost certainly be less entertaining) than those of an astrologer”.
- 3.2.4 In 1973 the Law Commission had proposed the introduction of legislation requiring the courts to have regard to actuarial evidence, but no legislation was then enacted.

The Ogden Tables

- 3.2.5 In 1984 Sir Michael Ogden and his working party, consisting of lawyers and actuaries, produced the first edition of their “Actuarial Tables with Explanatory Notes for use in Personal Injury and Fatal Accident Cases”. These are almost always referred to as the “Ogden Tables”. A second edition followed in 1994 and a third in 1998.
- 3.2.6 The Tables give values of multipliers, for each age and sex of claimant at various discount rates. These multipliers are based on the English Life Tables, i.e. the mortality of the UK population. The first edition used ELT13, the most recent set of ELT available at the time.
- 3.2.7 In the introduction to the first edition the working party argued that the most appropriate way to invest a compensatory lump sum would be in Index Linked Government Stocks (ILGS), which have been available since 1981. For much of the time since then, the price of ILGS has been such to provide a net of tax real rate of return, if held to redemption, in the region of 2½% to 3½% p.a. The Ogden working party recommended that this range of discount rates be used in the calculation of personal injury multipliers.
- 3.2.8 The Ogden working party was of the opinion that a plaintiff should not bear the investment risk inherent in stockmarket returns. If the stockmarket failed to perform, his lump sum may become seriously diminished. It considered this element of risk unacceptable and suggested that it could be eliminated by investment in ILGS.
- 3.2.9 Such an investment strategy would result in lower yields, and hence higher lump sum settlements, the cost of which would be borne by the insurance industry.

- 3.2.10 A second set of Ogden tables was issued in 1994. The principal reason for the newer edition was that the tables had been extended to allow directly for contingencies other than mortality, the main ones being unemployment and illness. The reduction in the multipliers reflected the individual's occupation and geographical region, as well as levels of economic activity and unemployment.
- 3.2.11 In addition, new tables were added so that figures for men and women whose retirement ages were 60 and 65 were available. The underlying mortality table was also revised to ELT14, to accommodate the improvements in life expectancy since the first edition.
- 3.2.12 The most recent set of Ogden Tables (April 1998) were issued following the production of ELT15. They also now show, in a parallel set of tables, the effect on multipliers of increasing life expectancies based upon projected improvements in population mortality. Adopting updated (lighter) mortality assumptions leads to higher multipliers, and when those multipliers incorporating an allowance for future improvements in population mortality are used, this further increases multipliers and hence claim costs.
- 3.2.13 The ABI and some others have argued reasonably strongly that it is inappropriate for courts to take account of projected improvements in population mortality. Recent case law suggests, however, that this variation of the tables is the more likely to be used in practice.
- 3.2.14 A summary of the history of the Ogden Tables is shown below.

Date	Version	Comments
1984	1	Initial set of multipliers, with explanatory notes. ELT13. Recommends that real interest rate be based on ILGS.
1994	2	Explanatory notes expanded, and allowances made for non-mortality contingencies. ELT14.
1998	3	ELT15, plus mortality assumptions showing projected increases in life expectancy.

- 3.2.15 In the third edition, Sir Michael Ogden notes that the Civil Evidence Act 1995 makes the provision of such tables a responsibility of the Government Actuary, allowing him to retire as chairman of the working party. Will the fourth and later editions be generally known as the Daykin (or whoever) Tables, we wonder?

Recent Case Law

- 3.2.16 Plaintiffs' solicitors were increasingly urging judges to take the Ogden Tables into account when setting damages in personal injury cases. Courts started to allow such evidence, but in most cases only as a check against the traditional approach. Finally, the Civil Evidence Act 1995 allowed the tables as admissible evidence in proceedings without proof.
- 3.2.17 In the following three cases judges heeded the Ogden working party's argument and used lower discount rates than had been used in the past:
- *Wells v Wells* (June 1995 – used a multiplier based on a 2½% yield)
 - *Thomas v Brighton Health Authority* (November 1995 – 3% yield)
 - *Page v Sheerness Steel Co.* (December 1995 – 3% yield).
- 3.2.18 Subsequently all three cases were appealed. Further details of these cases are contained in section 5.3.

Subsequent Developments & Current Position

- 3.2.19 In October 1996 the Court of Appeal (*Wells v Wells, etc.*, see section 5.3) concluded that a plaintiff who receives a large damage award is likely to seek investment advice. A 100% investment in ILGS was thought to be overly risk averse and, in each case, the Court of Appeal held that a more reasonable approach was a spread of investments with a substantial equity content, and specifically set multipliers with an underlying rate of return of 4½%.
- 3.2.20 The unsuccessful plaintiffs then appealed to the House of Lords, which in July 1998 overturned the Appeal Court's verdict and said that the injured person should not have to bear any investment risk. Hence the judgements reverted back to the concept of investment in ILGS, at a yield of 3%, and the

correspondingly higher lump sums, based on the 1998 Ogden Tables. They used multipliers drawn from Tables 11 – 20, those with an allowance for projected improvements in mortality.

- 3.2.21 The Damages Act 1996 gives the Lord Chancellor the power to prescribe the rate of interest to be used by courts when deciding multipliers. His initial failure to do so was assumed to be to allow the House of Lords to rule in the Wells cases. His continued failure to do so leaves the courts in “partial limbo”.
- 3.2.22 In making its recommendations which were enacted in the 1995 Civil Evidence Act, the Law Commission recommended that in determining an appropriate multiplier, the courts should use an interest rate which “takes account of the net real return upon an index-linked security”.
- 3.2.23 In the period since Wells was decided, the yield on ILGS has fallen from 3% to below 2%. Following this, a body of opinion has developed which argues that the rate should now be 2%. Sir Michael Ogden convened, in April 1999, a meeting of the Ogden working party. The working party endorsed the suggestion that the rate should now be 2%. Such a move would lead to a significant increase in Court Awards and consequently to a further large increase in the size of large personal injury claims.
- 3.2.24 At the other extreme, it is possible that the Lord Chancellor could effectively overrule the most recent House of Lords decision and prescribe a return to the traditional rate of 4 – 5% per annum. At the time of writing there is no clear indication that the Lord Chancellor intends to use his powers.
- 3.2.25 Should interest rates be set at 2% per annum, this would further significantly encourage the use of structured settlements (see the next section).

3.3 Structured Settlements

Background and History

- 3.3.1 A Structured Settlement is a means of paying part of a damages award for personal injury or fatal accident by a series of lifetime tax-free instalments, rather than a lump sum.

- 3.3.2 Often the defendant insurer buys an annuity from a life office to provide the income for the claimant. Such an annuity is written on the life of the claimant, and owned by him. The effect to the insurer, in this event, is basically similar to the payment of lump sum settlement. The claimant, however, is in a very different position, given that the mortality and investment risk are transferred to the life office that sold the annuity.
- 3.3.3 The defendant may also have the option of self-funding the annuity. This, for example, is routinely done by NHS Trusts and various government departments, where the income is, under the Damages Act 1996, guaranteed by the Secretary of State. (We believe that a 6% discount rate is used by the Treasury to value these settlements, making them appear much cheaper to the defendant than lump sums or commercially obtained structures.)
- 3.3.4 It is now ten years since the High Court approved the UK's first structured settlement in the case of *Kelly v Dawes* (see section 5.9). Since then, over 1,000 structures have been completed. For much of the time since *Kelly v Dawes*, several observers have been predicting that the rate at which settlements are used in the UK would rise, significantly and exponentially. Over the last few years, however, their use has not risen at the predicted rate, but continued at around 200 per year.
- 3.3.5 It was an ABI initiative, in conjunction with the Inland Revenue, which first introduced structured settlements into the UK. The ABI noted that structured settlements were already widely used in the US, and perceived to achieve cost-effective settlement awards. The Inland Revenue, from a public policy viewpoint, saw structures as more socially acceptable. A further issue for "the State" would have been the probable reduction in costs to the Welfare State from a guaranteed, lifetime income for the claimant. Claimants themselves are, in addition, relieved of the potential worry of managing a large lump sum.
- 3.3.6 Two Law Commission Reports, plus a spate of legislation later, we now have the present system of structured settlements, together with increased security, enshrined in Statute.

- 3.3.7 Experienced (cynical?) practitioners often suggest that one reason for the failure for structures to take off is the “Uncle Arthur effect”, outlined in the following point.
- 3.3.8 Although the claimant’s interests may well be best served by a structure, “close” relatives (or even the claimant themselves) sometimes view the prospect of a vast lump sum with some relish. This may be due in part to ignorance of the true cost of providing an income for life – something that members of the general public may only fully appreciate when buying an annuity on retirement from a defined contribution pension scheme. It is certainly also, in part, still the convention to anticipate such a lump sum, and the amounts involved can be very large to an individual used to dealing with “normal” levels of income and few capital purchases in their lifetimes.
- 3.3.9 Some suggest that the adversarial approach to claims settlement in the UK has also, to date, encouraged plaintiff lawyers to seek prestige for themselves and their firms by pressing to obtain large “visible” lump sum settlements for their clients.

Actuarial Issues

- 3.3.10 Structures have implications for both non-life and life assurance actuaries.
- 3.3.11 One clear issue that actuaries are in a position to understand and explain to their clients and the wider public is the transfer of mortality and investment risks from the claimant. This could be perceived by some as of such intrinsic value to the claimant as to make structures appealing, independent of cost considerations. Clearly in practice some cost/benefit trade-off applies.
- 3.3.12 Non-life actuaries will be all too aware of the discount rate issues, which we have considered in the previous section on the Ogden Tables. There is a “notional multiplier” inherent in the yield available under any structured settlement. For example, if one agrees a multiplicand of £10,000, and this requires a purchase price of £250,000 to fund a structure, the yield of 4% equates to a notional multiplier of 25.
- 3.3.13 The level of multiplier implied by the structures market at present is often higher than the corresponding entry in the Ogden Tables using a 3% discount rate. If

the discount rate were lowered, to 2%, say, then the yields under the structure might begin to look very attractive. Again, if the size of the market expands following the predicted increase in the use of structures, then margins in the basis used to price structures may fall.

- 3.3.14 A secondary issue is the effect of taxation on the different means of providing compensation. The income from an annuity providing a structured settlement is tax-free to the recipient. The workings of life office taxation are not completely clear to the authors of this paper, but it may well be that the price of the structure can be based on a yield somewhat above the fully net yield. If so, competition in the structures market should mean that there can be a saving passed on to the general insurer because of the tax efficiency of structures.
- 3.3.15 For life office actuaries there are other problems related to structures. Factoring in increased mortality within the general population may be a problem in any event, but one which is accentuated when considering a restricted population of substandard lives. Although structured settlement annuitants have, by definition, been affected by a serious personal injury, the monies received under the structure often fund an optimum care regime, thereby reducing risks of infection, etc. The effect on life expectancy can be very difficult to gauge, even with expert medical assessment. (see *Kelly v Dawes*, for example, in section 5.9)
- 3.3.16 The relatively small scale of the market at present also makes any errors harder for life-office actuaries to hide, possibly encouraging the use of pricing bases with larger margins. (We note that some non-life actuaries may be surprised to read that this level of uncertainty in this large a market could cause life office actuaries genuine concerns!)

The future

- 3.3.17 There is now a reasonable groundswell of opinion that structured settlements ought to be used more frequently than at present, as bodies such as the ABI, the Lord Chancellor's Department and the Law Commission currently ponder yet further fundamental changes to the personal injury system. The lump sum system is perceived as fallible, with periodic payments, i.e. structures or even

indemnity payments (i.e. income paid direct from the general insurer), actively under consideration.

- 3.3.18 Several others within the insurance industry are also seeking to promote industry-wide responses to this issue. This is perceived as a good public relations exercise in itself, and also potentially money-saving given the alarming prospect of further reduced yields in the calculation of the Ogden multipliers.
- 3.3.19 Further, the Woolf reforms, which we deal with in the following section, are intended to provide a legal framework less adversarial and hence more conducive to the use of structures.
- 3.3.20 For the reasons outlined above, we believe that the use of structured settlements will increase significantly, offering both challenges and opportunities for the insurance industry and the actuarial profession into the new Millennium.
- 3.3.21 A further possibility is to move away from fixing the size of an award at trial and towards an indemnity award. Under such an award the insurer would meet need as it arose, within certain limits. Hence if the claimant's medical situation dramatically improved or worsened, the revised level of needs would be met, and the costs to the insurer would fall or rise in turn.
- 3.3.22 This type of settlement would most fully implement the principle of indemnity (of course), and avoid the out-turn being an over- or under-settlement. It would, however, be somewhat at odds with the present regime of one-off settlement at trial, and leave insurers with an uncertain future liability (... similar to the sort that life offices routinely deal with!).
- 3.3.23 There may also be some advantages for the insurer in taking this development one step further and investing time and effort in helping to manage and mitigate the impact of the injury over the life of the claim.
- 3.3.24 There could, however, be disadvantages in this approach, e.g. in recent years the US insurance industry has been severely criticised for over-actively managing claims and restricting access to medical professionals in an attempt to minimise costs.

3.4 Woolf Reforms

Introduction

- 3.4.1 In his final Access to Justice report in July 1996, Lord Woolf recommended the development of pre-action protocols:

“To build on and increase the benefits of early but well informed settlement which genuinely satisfy both parties to a dispute.”

- 3.4.2 The result of this paper was the Criminal Justice Act, which came into force on 26 April 1999, involving the most fundamental change to the English and Welsh legal system in around 100 years.

- 3.4.3 The overriding objective of the new rules (Woolf reforms) is “to enable the court to deal with cases justly”. This means trying to ensure that:

- expenses are reduced
- delays in obtaining a claim settlement are minimised
- both parties are on an equal footing
- the process is fair and is proportionate to the complexity and importance of the claim and the amounts involved
- the courts’ limited resources are allocated appropriately.

- 3.4.4 Translated into a post-Woolf world, this means litigation should be

- avoided wherever possible
- less adversarial and more co-operative
- less complex
- of more certain timescale and in any case shorter
- cheaper, more predictable and more proportionate to the value and the complexity of individual cases

- conducted on a more equal footing for those parties of limited financial means.

3.4.5 In general, the process should have:

- clear lines of judicial and administrative responsibility for the civil justice system
- effective deployment of judges so that they can manage litigation in accordance with the new rules
- a civil justice system responsive to the needs of the litigants.

Outline of the Changes

3.4.6 The Woolf reforms have resulted in the development of pre-action protocols for personal injury claims, the aims of which are:

- more pre-action contact between the two parties
- better pre-action investigation by the two parties
- earlier and better exchange of all information.

3.4.7 The protocols apply to the entirety of every claim which includes a claim for personal injury. They were primarily designed for cases worth less than £15,000. Judges are, however, expected to examine how closely the parties have complied with the spirit of the protocols for larger cases. Defendant lawyers are, therefore, routinely suggesting that insurers seek to comply with the protocol at all levels of claim.

3.4.8 These protocols hopefully should put the parties in a position where they are more likely to be able to settle claims satisfactorily and early without litigation. However, if litigation does become necessary, the Woolf reforms put the framework in place to enable proceedings to run to the court's timetable and more efficiently.

3.4.9 The courts now also have significantly more power to be pro-active and to control various aspects of individual cases. For example summary judgement

can be ordered if it appears that one side's case has "no real prospect of succeeding".

3.4.10 Fraudulent or disingenuous claims may also be reduced. For example, litigants will now have to sign a statement verifying the factual accuracy of their pleadings.

3.4.11 In section 2.2.23 above we mentioned the possibility of defendant solicitors making payments into court. A significant change under the Woolf reforms is to allow claimant solicitors to also make Part 36 offers (effectively the same thing). If following the rejection by the defendant of such an offer, the final settlement is for that amount or higher, then the paying party can be penalised by an extra 10% mark-up on costs and the claim payment.

3.4.12 This opens up a whole new raft of "tactical manoeuvres", and may well in itself be a further prompt towards settlements being made out of court, rather than risk additional penalties.

3.4.13 In an attempt to move towards the use of plainer English, new terminology is also being adopted, including the following:

Old term	New term
Discovery	Disclosure
Plaintiff	Claimant
Pleading	Statement of case
Statement of claim	Particulars of claim
Taxation	Assessment
Writ	Claim form

Comment

- 3.4.14 Historically, insurers have found it difficult to manage tightening timescales and have consequently found themselves in county court more often than is healthy. Until recently, for a book of non-comprehensive Personal Motor Insurance, typically around 15 – 20% of premium may have gone to solicitors, primarily the claimant's. This would often be over half of the cost to the insurer of these bodily injury claims.
- 3.4.15 The Woolf reforms are an opportunity to significantly reduce these problems, as they will change the way insurers interact with solicitors. Although the legislation affects the whole of the insurance industry, it is on the high frequency, low severity lines such as personal lines motor, that the effects will most widely be felt.
- 3.4.16 As at December 1998 about half of all bodily injury claims were still not settled after 3 years, and solicitors' fees covering these prolonged periods have been high. The reforms' intention to speed up the settlement process should decrease these costs, assuming that the guidelines are followed.
- 3.4.17 The main challenges for insurers presented by the changes are in respect of:
- tighter timescales throughout the claim process
 - different enforced procedures depending on the size of the claim
 - projection/estimation of ultimate claim costs.

a) New Timescales and Defined Procedures

- 3.4.18 The new personal injury protocols mean that insurers' claims departments need to respond quickly in specific, well-defined ways. Failure to do so could result in a variety of different consequences from additional costs due to increased solicitors and/or specialists fees, to excluded evidence, including experts' reports.

- 3.4.19 The new timescales are shown in the following table and then described in more detail below:

Procedure	Post-Woolf Timescale
Response to initial letter	7 days
More detailed reply to notice letter of claim	21 days
Investigate and reply regarding liability	3 months (excluding 21 days above)
Decision on acceptance or rejection of expert	14 days

- 3.4.20 The defendant (insurer) should reply to the letter of claim within 21 calendar days of the posting date of the letter. This letter must identify the insurer (if applicable). If there is no reply by the defendant or insurer within this time, the plaintiff is entitled to issue proceedings. Historically no time limit existed.
- 3.4.21 The defendant then has a maximum of three months from the date of acknowledgement of the claim to investigate.
- 3.4.22 By the end of that period, the defendant should reply stating whether liability is accepted or denied. If liability is being denied, the letter must detail the reasons for the denial, and include all documents in their possession which are material to the issues surrounding the claim; the documents likely to be material are therefore very extensive.
- 3.4.23 If liability is admitted, the presumption is that this will bind the defendant for all claims up to a total value of £15,000, unless something is later revealed which it could not be reasonable to discover in the initial three-month period.
- 3.4.24 Historically, no time limits existed, and if the defendant denied liability, no reason(s) for the denial needed to be given.

- 3.4.25 Note that for accidents which occur outside England and Wales and/or where the defendant is outside this jurisdiction, the time periods of 21 days and 3 months may be extended up to 42 days and 6 months.
- 3.4.26 Before either party can instruct an expert, they need to supply the other party with a list of name(s) of experts in the relevant speciality whom they feel are suitable. The other party then only has fourteen days to object to one or more of the suggested experts.
- 3.4.27 If there is a mutually acceptable expert, the first party can then instruct him. The second party will then not be entitled to rely on the evidence of their own expert within that speciality unless:
- the court allows it
 - the first party agrees
 - the first party's report has been amended and they are not prepared to disclose the original version.
- 3.4.28 However, if the second party rejects all of the proposed experts, both parties may instruct an expert of their choice, with the court having the right to decide whether either party had acted unreasonably if proceedings are subsequently issued.
- 3.4.29 Historically, there were no rules governing the acceptance or rejection of a single expert for both sides, or any time limits for the process. It was conventional for both parties to appoint experts, whose views may have conflicted.
- 3.4.30 Overall, the new rules impose much tighter timescales on the initial process of dealing with claims involving personal injury elements. Obviously, insurers' claims departments need to meet these or face the consequences.

b) Claim Size Issues

- 3.4.31 The Reforms contain a three track system based on financial thresholds:
- the small claims track, (where bodily injury costs are less than £1,000 and total costs are below £5,000)

- the fast track, (total cost of no more than £15,000 and the trial is likely to last less than 1 day with expert evidence being limited)
- and the multi track.

3.4.32 All three tracks have separate procedures, which involve various fixed and enforced timescales for the procedural steps leading to trial and for the trial itself. Indeed, for the first two categories there are limits imposed on the trial costs and on the fees recoverable by solicitors.

3.4.33 Given this, there may be a tendency in some cases for the value of the claim to be inflated in order to get it over the next threshold. Indeed, this has happened before. In 1996 rules were introduced in County Courts which stipulated reduced costs for claims with bodily injury amounts below £1,000. The result was a dramatic increase in the percentage of personal injury claims over this limit.

3.4.34 Obviously, this has a definite cost implication for insurers, making effective claim management and monitoring imperative.

c) Estimating Ultimate Losses

3.4.35 It is not clear how wholeheartedly the Woolf reforms will be followed. It is likely that there will be a transitional stage in which the adoption of the guidelines gradually takes effect. The final situation is currently difficult to gauge.

3.4.36 Assuming that the guidelines are indeed followed, the reforms, with their tighter timescales and rigid guidelines, will result in the claims payment pattern speeding up.

3.4.37 The new precedent letter under the protocol should give defendants better information with which to place a broadly reasonable estimate on the claim at an earlier date than under the pre-Woolf regime.

3.4.38 The changing environment is making actuarial estimation of the ultimate claims cost more difficult, with the corresponding knock-on effects on pricing and other factors. Insurers' actuaries need to follow the changes made to the claims

processing system as carefully as possible, so that effective monitoring processes can be put in place to identify the distortions arising.

3.5 Compensation Recovery

3.5.1 The Compensation Recovery Scheme (CRS) was originally introduced in 1990 and was then subject to reform in 1997 as a result of the Social Security (Recovery of Benefits) Bill which came into force in October 1997. This scheme is enforced centrally by a department of the DSS called the Compensation Recovery Unit (CRU).

3.5.2 The Beveridge Report (1948) prescribed that accident victims should not be compensated twice for the same need. Under this principle, the CRS addresses the repayment of Social Security Benefits to the state from the compensation a victim subsequently receives.

Original Regime

3.5.3 Before the introduction of the CRS in 1990, the rules governing the deduction of State Benefits from a plaintiff's claim for special damages were complicated. Some benefits were deducted in full, some were only partially deductible and the remainder were not deductible at all. This situation was made worse by the frequency by which the names of benefits changed.

3.5.4 However, the main advantage to the insurance industry of the regime before the CRS was introduced was that it was the compensators who benefited from the deduction; the plaintiff's damages were reduced but the defendant did not have to pay the monies deducted to anyone. Insurers simply retained the money.

Operation of CRS 1990 – 1997

3.5.5 The Social Security Act 1989 (Section 22) had two main aims, namely to:

- rationalise the system of benefit deductions, and
- create a system under which the State could recover the benefits paid to accident victims who later received compensation.

Although this made the deduction rules easier to understand and apply, insurers just faced increased costs.

- 3.5.6 The introduction of the CRS did not affect cases in respect of pre January 1989 accidents.

Current Regime (post October 1997)

- 3.5.7 Due to a number of problems with the original scheme, with instances of clear injustice arising as a result of the rules, the Social Security Select Committee reviewed the scheme and published a report in July 1995 calling for its reform. The two main conclusions of the report were that:

- the State (tax payer) should not compensate victims of injury or disease where someone else is responsible in the eyes of the law, and
- the Government should shift the advantages of benefit recovery to the State, especially as the insurance industry had greatly benefited from the original (pre-1990) situation.

- 3.5.8 Following consultation and carrying out a Compliance Cost Assessment, the Government announced that alterations to the scheme were required. The Social Security (Recovery of Benefits) Act 1997 and associated Regulations resulted.

Fundamental Changes

- 3.5.9 Overall the Act and Regulations brought in under it substantially reshaped the system of compensation recovery in personal injury cases. However, of all the changes, there were four which fundamentally affected insurers. These are described in more detail below:

a) All Recoupable Benefit Paid

- 3.5.10 Under the old system, the maximum amount recoverable by the CRU was the total damages received by the plaintiff. Under the new regime, that limit was removed.

- 3.5.11 Now, therefore, the compensator must repay the total benefits paid as shown on the CRU Certificate, regardless as to whether this can be set against the damages paid or not.

b) Ring-fencing of General Damages

- 3.5.12 As a result of the 1997 Act, damages for pain, injury and loss of amenity are “ring-fenced”, in that they are protected from reduction due to benefit repayment.

- 3.5.13 Since this “ring-fencing” did not exist under the previous regime, increased costs for insurers were inevitable.

- 3.5.14 The aim of this section of the Act was to protect plaintiffs from receiving reduced compensation for their actual injury as a result of the benefit recovery being offset against the general damages. However, due to the fact that the rules also restrict the offsetting of benefits against the special damages (see below), this meant that insurers’ costs increased as a result.

c) “Like for Like” Deduction Only

- 3.5.15 In addition, the Act introduced the concept of “like for like” deduction in that restrictions were imposed on which benefits could be offset against which types of special damage, as defined in section 2.5, above. It stated that where damages are paid in respect of:

- loss of earnings
- cost of care
- loss of / increased costs of mobility

and the injured party has received benefits for the same kind of loss, then the insurer is able to deduct the recoupable benefits from the relevant part of the compensation.

3.5.16 The various types of benefit which can be deducted from each relevant head of special damages are given below:

Heads of Compensation	Benefit
Loss of Earnings	<ul style="list-style-type: none"> • Disability Working Allowance • Disablement Pension payable under Section 103 of the 1992 Act • Incapacity Benefit • Income Support • Invalidity Pension • Invalidity Allowance • Jobseeker's Allowance • Reduced Earnings Allowance • Severe Disablement Allowance • Sickness Benefit • Statutory Sick Pay • Unemployability Supplement • Unemployment Benefit
Cost of Care	<ul style="list-style-type: none"> • Attendance Allowance • Care Component of Disability Living Allowance • Disablement Pension increase under Section 104 or 105 of the Act • Constant Attendance Allowance • Exceptionally Severe Disablement Allowance
Loss of Mobility	<ul style="list-style-type: none"> • Mobility Allowance • Mobility Component of Disability Living Allowance

3.5.17 However, if under a particular head of damage the recoupable benefits exceed the amount awarded or, indeed, if there is no claim made, then no reduction can be made against any other head. Also, no deduction can be made from the damages payable in respect of future losses (i.e. general damages), which form the largest part of awards for care and loss of earnings in a high proportion of cases.

- 3.5.18 It should be noted, however, that a cut-off point still applies. This is the earlier of the date of compensation payment or five years after the date of accident/injury, or first claim in a disease case.

d) *Small Payments Limit*

- 3.5.19 Under the old regime, a Small Payments Limit (SPL) existed whereby if £2,500 or less was paid in compensation, then no benefits were recoupable. Although the power to set an SPL was retained in the Act, it was effectively abolished as a result of the reforms.
- 3.5.20 This closed a loophole which had enabled defendants to settle some cases very cheaply in the past.
- 3.5.21 Indeed, this had been a particularly strong negotiation tool, giving a financial advantage to both claimant and compensator to settle, so that effectively both these parties were selecting against the state (taxpayer).

Example

- 3.5.22 Mr A is unemployed and in receipt of State Benefits. He suffers a broken arm in a car accident. He pursues a successful claim and is awarded a total of £8,000, split £6,000 general damages for pain and suffering, and £2,000 for special damages. Between the date of the accident and the date of settlement, Mr A has received £6,000 in State Benefits and this is the amount stated on the CRU Certificate.
- 3.5.23 The table below illustrates possible outcomes for the claim under the old and new regimes (in addition the receipt by the plaintiff of £6,000 in State Benefits):

Party	Scenario 1	Scenario 2	Scenario 3
To Plaintiff (injured party)	£2,000	£2,500	£6,000
To CRU (the State)	£6,000	£ 0	£6,000
From Insurer	£8,000	£2,500	£12,000

- 3.5.24 Scenario 1 indicates a possible outcome of events under the old regime. Here the State recovers its costs in full from the injured party, as the amount required by the CRU can be fully offset against the general damages.
- 3.5.25 Scenario 2 indicates a more likely outcome of events under the old regime. Under this scenario the injured party and the insurer agree to settle at the SPL (as described in *d*) as both of these parties are better off than in Scenario 1. In effect the State is being selected against.
- 3.5.26 Scenario 3 shows the likely outcome under the new regime. As the injured party's pain and injury benefits are now ring-fenced (as described in *b*), these must go to this party. The CRU is still entitled recoup its costs in full (as described in *a*).
- 3.5.27 Ring-fencing, together with the abolition of the SPL, now means that the full burden passes to the insurer for the first time, as illustrated in Scenario 3 above.

Effects

- 3.5.28 Compensators must now inform the CRU of every claim, with benefits being recoupable in all cases.
- 3.5.29 There were various other minor changes contained in the 1997 Act, covering items such as requiring, since 6 October 1997, awards made by the Court to split the special damages award between the various separate heads of damage. Before that only a split between general damages and special damages was required. The need to split the special damages by head of damage, although making the process clearer for plaintiffs, was viewed by critics as likely to lead to increased costs for compensators from prolonged negotiations and increased incidence of trials, due to additional problems agreeing the splits by head of damage.
- 3.5.30 Overall, as illustrated in the example above, the impact of the Act was to increase compensators' costs. Further, the Act was retrospective in that it applied to all claims outstanding at the point of introduction, in October 1997.

Assessed Costs and Benefits

3.5.31 The Compliance Cost Assessment (CCA) published by the Government prior to the Act's introduction estimated that the total annual cost to insurers would be between £54m and £79m per annum. The CCA estimated that, if insurers passed these costs on to their customers, in order to meet the increased costs, premiums would need to increase by:

- 3.7% to 5.6% for Employers Liability,
- less than 0.5% for Motor insurance and
- 1.9% to 3.9% for Public Liability insurance, when sold as a separate entity.

The differential in percentage increases between the classes is due to the different proportions of total cost relating to bodily injury.

3.5.32 Critics of the reforms, however, estimated that the total cost to the industry would exceed the estimates contained in the CCA. To date, we are not aware of any further publicly available analysis that has been carried out on the ultimate cost effects of the reforms on the insurance industry.

3.5.33 Our experience suggests that, whatever the true figures may be, the additional costs are certainly significant. We are also aware that the numbers of reviews and appeals requested of the CRU by compensators has risen dramatically from the typical levels before the Act.

3.6 Hospital Charges

3.6.1 The Government recently implemented changes to the legislation with respect to NHS Trusts' rights to recover hospital treatment costs from insurance companies arising out of Road Traffic Accidents (RTAs) where compensation is paid to a motor accident victim. The new rules came into force on 4 April 1999.

Previous System

- 3.6.2 Under the Road Traffic Act 1988 NHS authorities could collect certain monies in respect of treatment administered to RTA victims to whom compensation was subsequently paid. The tariff structure was as follows:

Emergency Treatment Fee	£21.30; payment towards ambulance call out costs, applying to every RTA patient, irrespective of whether there is a successful PI claim or not
In patient Charge	maximum of £2,949 (under Section 157)
Out patient Charge	maximum of £295

- 3.6.3 The emergency treatment fee was often routinely collected. However, due to the perceived administrative complexities of the system, little was collected by many hospital trusts in respect of actual treatment administered.
- 3.6.4 Recovery was very uneven. Over a third of NHS Trusts collected little or no funds, whereas some trusts were regularly collecting hundreds of thousands of pounds each year.

New System

- 3.6.5 The low amounts actually collected under the old regime prompted the Government to review the legal position. The Road Traffic (NHS Charges) Act has formalised the collection arrangements and imposed higher recovery limits.
- 3.6.6 The impact of the changes to the system depends on the date of the RTA, with different rules applying for accidents pre or post 2 July 1997, the date on which the Government made its intentions with respect to hospital charges known.

Accidents Occurring Before 2 July 1997

- 3.6.7 The new tariff system applying to accidents occurring before 2 July 1997 is as follows:

Emergency Treatment Fee	Abolished for hospital treatment
In patient Charge	£435 per day subject to a ceiling of £3,000
Out patient Charge	£354 flat rate

- 3.6.8 The increase in the maximum under the Act for in-patient treatment (from £2,949 to £3,000), was argued as justifiable by the Department of Health as it was in line with increases historically made by Regulations under Section 157. The Department argued that this change should not be viewed as retrospective.

Accidents Occurring After 2 July 1997

- 3.6.9 For accidents from 2 July 1997, the new tariff system is identical to that above except that the maximum amount that can be recovered in respect of in-patient charges has been increased to £10,000.
- 3.6.10 It should be noted that it is not possible to incur both in and out-patient costs under the new regime.

Overall Implications of the Changes

- 3.6.11 Recoveries by hospitals under the Act will increase, partly due to the change in the tariff structure, but also due to a more streamlined recovery system involving the CRU, who now process the NHS Recovery Certificate and the CRU Benefit Recovery together, although certificates remain separate.
- 3.6.12 Several argue that the changes in the tariff structure for accidents prior to 2 July 1997 have resulted in a retrospective increase in costs.
- 3.6.13 Under the new legislation the NHS Trust is entitled to recover a charge of £354 for any out-patient treatment, including a minor examination, if the victim

subsequently receives compensation for personal injury. Previously, this charge could only be levied in respect of “reasonable expenses actually incurred”.

- 3.6.14 The exact financial impact of this change on insurers depends on the number of outstanding claims on 4 April 1999 which eventually result in a personal injury claim.
- 3.6.15 Prospectively, the abolition of the Emergency Treatment fee will balance to some extent the potential increase in in-patient charges. However, this was certainly not true retrospectively, where the Emergency Treatment fee may have already been levied on the patient.
- 3.6.16 Further, although no additional charges can be levied on insurers in respect of cases where the claimant has received full and final settlement of the personal injury claim, the Act allows for the possibility of costs being recovered on treatment received after 2 July 1997 where the claim was not settled by April 1999.
- 3.6.17 Where liability for the personal injury claim is split, the hospital charges will be settled in a similar way to the CRU benefit recovery.
- 3.6.18 The ABI estimated that the resultant direct increase in motor insurance premium costs would be about £10 per individual policyholder per year.
- 3.6.19 The Act also requires the motor insurers bureau (MIB) to pay the NHS costs for victims of RTAs caused by uninsured drivers when it makes a compensation payment. (Note: NHS recoveries will be paid by the MIB only for accidents occurring on or after 5 April 1999, not for claims open at that date.)

Expected Recoveries

- 3.6.20 The anticipated recoveries under the Act are significant. The ABI state that the Government’s aim was to raise £160m annually from the new collection arrangements, although some estimate that the final recoveries could materially exceed this. No precise industry estimates are possible due to the lack of industry-wide data.

The Future

3.6.21 Depending on the revenue-raising success of the Act, various future changes might be envisaged:

- The cap on in-patient treatment could be increased and possibly even removed eventually. This would adversely impact both the primary and the reinsurance market.
- The charging structure for out-patient treatment could be made more sophisticated so that, for example, recoveries could be made in respect of each trip to the physiotherapist, etc.
- The concepts could be extended to other types of insurance. An obvious target would be Employers Liability insurance. (Indeed it may be that only the lack of an EL equivalent to the MIB prevented EL claims being included in the original Act.) Recovery under Public Liability insurance is also possible.

3.7 Funding Legal Action

3.7.1 Radical reforms to mechanisms for funding legal action have been proposed in the “Modernising Justice” White Paper and the Access to Justice Bill, which is expected to receive Royal assent later this year.

3.7.2 The driving force for change has been the increasing costs of Legal Aid. Civil Legal Aid currently costs around £1.6bn per annum, with payments rising at a rate well above inflation over the last several years.

3.7.3 The proposals make considerable changes to the provision of public legal services in both the civil and criminal sectors.

3.7.4 On the civil side, a Legal Services Commission will be established, replacing the Legal Aid Board. Civil Legal Aid will be replaced by the new scheme, the Community Legal Service, which is charged with securing value for the taxpayer by ensuring that money is spent on cases that most need help and providing the widest possible access to basic legal information and advice.

3.7.5 If a “prudent person” would be unlikely to spend money on the case then it will not be publicly funded. We believe that to be funded by the Community Legal Service a case will have to have at least a 60% chance of success, and be likely to recoup damages of at least three times its cost. Cases that do not qualify for public funding may still be taken on by solicitors if they are privately funded or if the solicitor is prepared to operate with a conditional fee arrangement (see below).

3.7.6 Note: another proposal affecting insurers is the reform of the Magistrates’ Courts, proposing that responsibility for the enforcement of fines and non financial penalties should be transferred from the police to the Magistrates’ Courts.

Conditional Fees (“No Win, No Fee”)

3.7.7 Conditional fees were first introduced in 1995 for personal injury, insolvency and human rights cases.

3.7.8 In a Conditional Fee arrangement (CFA)

- The solicitor agrees to be paid only if he succeeds in recovering damages for the plaintiff
- If the solicitor is successful he becomes entitled to a success fee, in addition to the normal fee, which is payable out of the plaintiff’s damages
- The success fee is agreed with the plaintiff at outset as a percentage of the normal fee. This can be up to 100%, but at present is usually 25% – 50%, with an average of around 43%.
- The plaintiff takes out an insurance policy to cover the defendant’s costs if he loses (typical premium is £100 – £200).

3.7.9 The Lord Chancellor also currently proposes:

- making the success fee recoverable from the losing party (normally the defendant’s liability insurers), and

- making the insurance premium recoverable from the losing party (normally the defendant's liability insurers).

- 3.7.10 Insurers will probably have to meet these costs from the end of 1999. They will be made aware when a CFA is operating, will know the percentage success fee and the insurance premium paid. They will be able to challenge the percentage, and the court will have discretion to decide whether the success fee should be recoverable. It is interesting to speculate whether awards will be inflated to cover the possible deduction of the success fee.
- 3.7.11 The cost to insurers is difficult to predict until such time as the level of success fees becomes established. The success fee can be regarded as a percentage uplift to normal costs to reflect the risk of failure. Based on the current 95% success rate for personal injury cases, the average success fees should logically be around 5%, which is in line with the figure quoted by the Lord Chancellor's Department. However some solicitors are stating that they will set all success fees at 100%, since the client has nothing to lose. With success fees currently averaging 43%, it would appear that the legal profession may be doing well from the introduction of CFAs!
- 3.7.12 It is difficult to predict the effect that conditional fees may have on the cost of claims and the speed of settlement. Combined with the Woolf reforms, this leads to considerable uncertainty. Since a solicitor receives a bonus calculated as a percentage of his normal fees, there may be some incentive to drag out the case to increase the number of chargeable hours. However, other solicitors may be keen to promote early settlement to guarantee a fee, rather than run the risk of a long court case with the possibility of failure and no fee at all. Solicitors are likely to turn down speculative claims that have little or no chance of success.
- 3.7.13 A large firm of solicitors has recently made a huge loss on a Conditional Fee case when litigation between smokers and the Tobacco Industry collapsed. It is estimated that the firm's costs ran to £2.5m, which it is not now able to recover from the plaintiffs.

3.7.14 In USA a system of Contingent Fees operates whereby the attorney to a successful plaintiff is entitled to an agreed proportion of the settlement (up to 1/3rd). Clearly the UK move to Conditional Fees is a step in this direction.

3.7.15 The table below summarises some of the Pros and Cons of Conditional Fees:-

PARTY	PROS	CONS
Claimant	<ul style="list-style-type: none"> no legal fees if he loses the case solicitor is incentivised to secure victory 	<ul style="list-style-type: none"> must buy Legal Expenses insurance to cover the defendant's costs if he loses may not be able to find a solicitor prepared to take his case if the outcome is uncertain or if costs of the case are likely to be very high solicitor may pull out of a case if costs escalate unexpectedly
Solicitor	<ul style="list-style-type: none"> if he wins the case, he will get both his normal fee and the success fee extra work may become available following changes to Legal Aid 	<ul style="list-style-type: none"> he will not be paid for his work if he loses the case
Defendant's Insurer	<ul style="list-style-type: none"> may get fewer cases as solicitors will not be prepared to take on speculative cases 	<ul style="list-style-type: none"> solicitors may be inclined to set high success fees as it is felt that their client "has nothing to lose" will incur additional costs if they lose as they will have to pay the claimant's Legal Expenses Insurance premium and the Success Fee

3.7.16 In our judgement, the introduction of CFAs has merit for areas of “unsettled” law. Here the defendant’s solicitor is encouraged to consider the prospects for the case quite carefully. If he takes on such a case and wins then in some sense he has “earned” his success fee.

3.7.17 For settled areas of law, however, we see few advantages in CFAs, especially with high success fees. Many potential cases are reasonably clear-cut, and here in our judgement CFAs are likely simply to mean extra costs to insurers.

“Ambulance Chasing”

3.7.18 For a number of years now, solicitors have been allowed to advertise their services. Posters advertising the services of solicitors who will help accident victims pursue claims are visible in hospital accident and emergency departments. Open any local newspaper and you are likely to find advertisements for the services of the legal profession.

3.7.19 In 1994, the Law Society opened a Freephone Accident Line to give advice on compensation for accidental injury. Individuals contacting the Accident Line will be put in touch with a solicitor in their area and obtain 30 minutes of free legal advice.

3.7.20 Many solicitors will even go round hospital wards to see if any of the patients has a potential claim he could pursue. Indeed the working party has discovered that one firm of personal injury specialists, Donns solicitors, opened an office inside Hope Hospital in Salford, Manchester in September 1996. We expect that other firms may have taken similar steps. Unlike their competitors ... they just wait for the ambulances to arrive.

3.7.21 “Ambulance chasing” is just one example of recent changes in society, which are examined in Section 3.9.

3.8 General Damages Reforms

Background

3.8.1 After a consultation process, the Law Commission published, in April 1999, certain recommendations in the paper “Damages for Personal Injury: Non-

Pecuniary Loss – Item 2 of the Sixth Programme of Law Reform: Damages”
(Law Com No 257).

3.8.2 There were several areas where the Law Commission recommended no change to the current stance:

- Damages for non-pecuniary loss should be retained.
- The traditional “diminution of value” approach to the assessment of damages for non-pecuniary loss should remain (i.e. indemnification)
- Damages for non-pecuniary loss in respect of permanently unconscious claimants should not be altered.
- Damages for non-pecuniary loss in respect of claimants who are conscious but severely brain-damaged should not be altered.
- A threshold for the recovery of damages for non-pecuniary loss should not be introduced.
- The Commission recommended no changes to the way in which interest on awards for non-pecuniary loss is calculated, or, indeed, to the amount of such interest.
 - Interest should continue to be awarded on damages for non-pecuniary loss in personal injury cases, and on the whole sum of damages for non-pecuniary loss, as opposed to only on the value of pre-trial losses.
 - Interest on non-pecuniary damages should continue to run from the date of service of the writ.
 - No legislative change should be made to the rate of interest on non-pecuniary damages in personal injury cases so that it remains at 2%.
- No change to the law should be made with respect to the recoverability after the claimant’s death of pre-death damages for non-pecuniary loss.
- No legislative change should be made with respect to overlap between damages for loss of earnings and loss of amenity.

Where change is required

3.8.3 The Law Commission recommended that damages for non-pecuniary losses in cases of serious personal injury (those where the damages for pain and suffering and loss of amenity for the injury alone would be more than £2,000) should be increased.

3.8.4 There were various reasons given for this recommendation, including:

- Some 75% of Consultees who responded on this issue felt that such damages for very serious injuries are too low.
- A rough comparative exercise carried out by the Commission led it to the conclusion that, since the late 1960s / early 70s non-pecuniary awards in respect of very serious injuries have failed to keep pace with inflation.
- Findings by Professor Hazel Genn's 1994 study, "Personal Injury Compensation: How Much is Enough?". This highlighted both that the size of damages are generally not perceived to be commensurate with the losses and that, often, the ongoing non-pecuniary effects of many injuries are greater than initially anticipated by victims (and hence also by the judiciary).
- The life expectancy of seriously injured claimants is now somewhat longer than it used to be. (Arguably, although mainly applying to the most serious injuries, this can be seen as having implications for the whole scale.)

3.8.5 Therefore, overall, the Commission recommended that in respect of:

- injuries where the current award for non-pecuniary loss for the injury alone would be more than £3,000, the awards for this head of damage should be increased by a factor of at least 1.5, but not by more than a factor of 2;
- injuries where the current award for non-pecuniary loss for the injury alone would be in the range £2,000 and £3,000, the awards for this head of damage should be increased by a series of tapered increases of less than a factor of 1.5.

- 3.8.6 The Commission reached this view by bearing in mind the following factors:
- The views of society in general, obtained from a specially commissioned survey carried out by the Office for National Statistics.
 - How tort damages are paid for (i.e. increased insurance premiums).
 - The level of damages in other UK compensation schemes, e.g. Social Security benefits.
 - The level of general damages awards for personal injury in other jurisdictions, mainly Scotland and Northern Ireland – the divergence between the EU jurisdictions being viewed as too great, making comparisons difficult.
- 3.8.7 The Commission further noted that if these recommended increases had not been implemented until over a year after the publication of their report, they should be adjusted to allow for inflation since the date of publication.
- 3.8.8 The main findings of the Law Commission in respect of the mechanism required to increase the damages for non-pecuniary loss were to reject:
- juries playing a greater role in assessing damages for personal injury than under the present law or, indeed, of using trial by jury as a means of providing an assessment of what judicial awards in this respect should be;
 - creating a Compensation Advisory Board;
 - creating a legislative tariff.
- 3.8.9 Further the Commission was also not in favour of legislation imposing an increase in the level of damages for non-pecuniary loss in personal injury cases. Instead, bearing in mind the recurrent view amongst consultees that the current system has many advantages, they hope that judges, via the Court of Appeal and House of Lords, will use their existing power to lay down guidelines in a series of cases which would result in the overall increase recommended by the Law Commission as detailed above.

Comment

- 3.8.10 We have not found any assessment of the cost of these changes to the insurance industry, or data with which we could make any estimation.
- 3.8.11 We note that public support for these proposals (3.8.6) is consistent with the social change we comment on in the next section. We suspect that the corollary of higher insurance premiums is not so widely understood.

3.9 Changes To Society

- 3.9.1 In addition to the many legal developments that we have so far covered in this chapter, it is clear that changes to our society and our values are also having a significant impact on bodily injury claims, as illustrated below.

Blame Culture / Claim Culture

- 3.9.2 UK society is increasingly developing a “Blame Culture” where individuals are no longer willing to take responsibility for the results of their actions, but look to blame others. People are less willing to accept that sometimes injury can be caused by a genuine accident with no prospect of financial recovery.
- 3.9.3 The public is increasingly aware of the possibility of litigation to secure damages. The continuing growth in consumerism is another aspect leading to a growth in the claim culture. Some examples of recent cases help to illustrate this point:

Frost & Others v Chief Constable of South Yorkshire Police

- 3.9.4 Police officers on duty at the time of the Hillsborough tragedy tried to claim for psychiatric harm. The case was overturned as it was ruled that rescuers needed to be, or believe they were, exposed to danger themselves in order to claim for psychiatric harm. (See section 5.6)

Stress: Lancaster v Birmingham City Council

- 3.9.5 This recent case is the first UK court award made against an employer for a stress claim. (See section 5.10) Assessments vary as to how important a precedent this case may prove to be.

Smokers v Tobacco Companies

- 3.9.6 In these cases smokers attempted to avoid the 3-year time-bar on bringing bodily injury cases.

Armed Bank Robber sues Police

- 3.9.7 An armed bank robber was rugby-tackled by a passing police officer and suffered a broken arm. He brought a case against the Police Force and received a payment of £30,000.

Rugby Player sues Referee

- 3.9.8 A rugby player who sustained a broken leg during a game subsequently sued the referee for failing to control the game. He was awarded £50,000.

Other examples

- 3.9.9 Apparently, Status Quo sued the BBC for £250,000 for failing to play their records. Also:
- A school paid £30,000 to a victim of bullies, despite denying that it took no action over the persistent bullying.
 - A cancer victim who was told by a hospital that her cancer was terminal sued the hospital when she made a recovery.
 - A mother with a healthy baby sued the hospital where the baby was born because she was told that the baby had died.

A telling comparison from thirty years ago

- 3.9.10 The aftermath of the Aberfan Disaster in 1966 is a telling contrast. 116 children and 28 adults were killed when coal slurry slid down a hill and engulfed the village primary school, part of the secondary school and some nearby houses. The tip had been built over a natural spring. Despite the understandably very strong bitterness and resentment from the local community (which still remains to a significant degree), the National Coal Board never accepted responsibility for the accident or paid out any formal compensation. A disaster fund of some £2.5 million was, instead, raised by donations from round the world.

- 3.9.11 This calamitous incident produced no claims despite the nature and scale of the tragedy. The first claim resulting from this event was submitted in 1990, when it was well outside the allowed timeframes.

New Types of Claim

- 3.9.12 In recent years the courts are seeing increasing numbers of cases involving new types of claim such as :

- Stress Related Illness
- Post Traumatic Stress Disorder (e.g. “*Hillsborough*”, see 5.6)
- Pollution claims
- Repetitive Strain Injury
- Sick Building Syndrome
- Police Authorities, Fire Brigade and Air Sea Rescue are starting to charge for their work in securing and clearing up incidents

- 3.9.13 This last point is an example of a trend in government of moving more reliance onto the individual or private sector. Other examples are, the State recovering greater amounts of social security payments (section 3.5), National Health Trusts being able to claim more from insurance companies (section 3.6), and legal aid being reduced (section 3.7).

- 3.9.14 In addition a significant trend over recent years has been for plaintiff’s solicitors to include more heads of damages than they had in the past. This has contributed to a significant increase in existing claims costs. (See the legal section of the LIRMA 1997 report for more detail.)

Enhanced Plaintiff Expectation

- 3.9.15 Increasingly claimants are submitting claims for amounts which exceed previous legal settlements. Sometimes the unpredictability of court settlements means that an insurer may be prepared to offer a settlement prior to going to court rather than risk an uncertain claim amount.

- 3.9.16 Occasionally there are high-profile cases that achieve high settlements and help to increase the expectations of other plaintiffs. A good example of this is the following case:

Biesheuvel v Birrell (see also section 5.2)

- 3.9.17 Mr Biesheuvel, a UK road accident victim, was awarded record damages of £9.2m (including £3.7m for loss of earnings). He was a student in the back seat of a car which collided with a parked vehicle and he is now paralysed from the neck down. The defendant disputed the size of the damages and claimed that the plaintiff contributed to his injuries by not wearing a safety belt, but the appeal was dismissed.

- 3.9.18 The Judicial Study Board monitors the levels of settlements for various types of damages and issues reports to aid solicitors in determining appropriate amounts. It is interesting to note that there have been 4 editions published in the last 6 years, reflecting the rapid increase in settlements. The latest edition has costs running at an average of 6% more than the previous edition.

UK rehabilitation

- 3.9.19 The UK has a very poor record in rehabilitating seriously disabled accident victims. For example, in the UK a paraplegic has a 15% chance of returning to work, a 30% chance in the US and a 50% chance in Scandinavia (Source: 1997 LIRMA study). In other Western countries, disabled people are significantly more likely to have an increased level of independence.

- 3.9.20 This anomaly is something that it would be worthwhile for the insurance industry to address, even if only out of narrow self interest! A disabled person who achieves a level of independence, and is able to stay in work will cost insurers considerably less money, as well as having a far better quality of life.

Mechanisms for Reporting

- 3.9.21 Has it become easier to make a bodily injury claim? The increasing availability of Legal Expenses insurance, sometimes associated with Conditional Fee arrangements, means that individuals may be more tempted to “have a go”. The expansion in Legal Expenses insurance could be regarded either as a great

opportunity for insurers or, alternatively, as ensuring the continued growth of bodily injury claims.

- 3.9.22 The legal infrastructure is now highly developed and, with advertising of solicitors services and conditional fee arrangements, may encourage individuals to make more claims.
- 3.9.23 UK industry is being increasingly regulated, with employers having to comply with more Health and Safety regulations all the time.
- 3.9.24 The latest Working Time Regulations are an example of where legislation may help to increase claims. Employers are required to record the hours of any staff who are close to the limit of 48 hours per week. The recording of such data provides potential evidence for any employee who wishes to bring a stress-related claim.

Rolling back State Provision

- 3.9.25 The costs of providing for an ageing population are forcing successive Governments to re-examine the extent of State Provision. Governments are tending to privatise the provision of services which were previously provided by the state and they are reducing state support for individuals who have suffered bodily injury. This has two effects:
- a trend towards individuals providing for themselves by way of extra insurance and savings
 - larger claims to cover additional costs (e.g. costs of long term care as State funding is reduced).

This will ultimately lead to more claims, and also to larger claims.

Medical Advances

- 3.9.26 Society is continuing to benefit from medical advances. However many of these advances are extremely expensive, leading to a high rate of inflation for medical costs. In addition improvement in medicine leads to greater survivability and a corresponding increase in costs to insurers.

Safety Advances

3.9.27 Continual improvements are being made in safety for all aspects of human activity. Car manufacturing quality is a good example of this. The effects of safety improvements on the insurance industry are difficult to quantify due to a number of contrasting effects :

- Reduction in the number of accidents
- Greater survivability of accidents may lead to higher claim payments for long term care
- Reduction in the severity of injuries leading to reduced payouts
- A concentration on safety for passengers of a vehicle can lead to greater risks for pedestrians in the event of an accident, e.g. a strong, heavy vehicle chassis will provide protection for passengers, but greater injury to pedestrians
- Increasing complexity of Health & Safety legislation makes it difficult for many employers to ensure full compliance, leaving them open to Employers Liability claims

3.10 Future prospects

3.10.1 In this section we summarise and draw together the future prospects identified in the previous sections. First, however, it is interesting to note that despite all the “doom and gloom” above, the number of High Court Writs issued has been declining over many years, as illustrated below:

Year	Number of High Court Writs
1994	156,696
1995	153,624
1996	139,662
1997	121,446

- 3.10.2 County Court statistics show a similar pattern. Possibly claimants are being more selective about which cases lead to litigation. Insurers may also be attempting to settle claims without resort to the courts, due for example to the expenses of legal action. Other possible reasons could be the perceived risk of a capriciously large award being made against them, or of a new head of damage becoming established, if the case goes to trial and they lose.
- 3.10.3 Against this background the working party will consider each development from Chapter 3 of this paper in turn. For more detail on any particular topic, we refer you back to the relevant previous sections.
- 3.10.4 The Ogden Tables are clearly here to stay, whatever they may be called in future. We imagine that even those actuaries working for insurers and reinsurers who find their employers to be paying larger awards as a result of the more scientific approach will welcome this development.
- 3.10.5 The issue of the appropriate discount rate is with the Lord Chancellor, and hard to predict with any certainty. We have met strong believers that he will soon prescribe each of 2%, 3% and 4½%(!) Others think that he will continue to sit on the fence for some time yet. The working party ... chooses to duck this one!
- 3.10.6 The use of structured settlements is, we believe, likely to increase, possibly quite rapidly. It could well be that after several “false dawns”, conditions are now right for the much more widespread use of structures. The current initiatives by the ABI and others are symptomatic of this.
- 3.10.7 Whether society, the courts and the insurance industry are ready for insurer-funded income-replacement schemes, or even indemnity awards, is not so clear to us. However, these also seem to us to have some fairly clear advantages, and may well come, over time, to be an accepted part of the damages landscape.
- 3.10.8 The Woolf reforms will continue to have repercussions for several months yet, with the final situation hard to forecast from here. The concept of a leaner and

less adversarial judicial framework, with more proactive judges, seems to us a basically good idea.

- 3.10.9 The effects of the changes on the data actuaries use to reserve for and price the relevant insurance products will keep practitioners occupied for some time to come.
- 3.10.10 In addition to timing effects, any tendency, following the Woolf reforms, for claims to be inflated to take them into multi-track (thereby raising the levels of solicitors fees) would create a step-change in the distribution of claim sizes. Defendant lawyers are presumably alert to this issue, but the effects on claim costs and actuarial projections could also be material.
- 3.10.11 The operation of the CRU in processing the recovery from insurers to the State of Social Security and NHS costs is already having a significant effect on motor insurers' costs. The ABI and others argue reasonably forcibly that "the poor motorist" will end up paying yet again, as increased costs are passed on in higher premiums. This social change, which has various other manifestations (including rises in road fund tax and fuel duty), is not one that we can comment on in this paper. Vested interests apart, however, changes like the ring-fencing of benefits do appear to resolve an inequity that was a feature of the previous system.
- 3.10.12 Perhaps the more alarming possibilities for the insurance industry lie ahead. Having now begun on the "slippery slope", many believe that governments will in future increasingly look to raise higher and higher revenues from "soft targets" like insurers. The extent to which limits are increased in future more rapidly than inflation may be influenced by how effective the ABI and others are at putting their arguments across.
- 3.10.13 The proposed changes to legal funding are likely to have a significant impact on the numbers of "have a go" claims. On the one hand, the scaling back of legal aid will make it harder for the general public to press their claims, especially where there is no legal expenses insurance (though note that such insurance is already in place for a significant portion of the motor insurance market). On the other, we are already seeing that the moves to conditional fees and "ambulance chasing" generate claims where there previously were none.

- 3.10.14 We believe that the net effect of the changes, especially when taken in concert with the Woolf reforms, is likely to be as follows:
- To increase numbers of “potentially winning claims”, as the social change towards a blame culture identified in section 3.9 takes increasing effect. Could we really imagine anything less than a flood of claims if the Aberfan disaster were to be repeated now?
 - But to reduce the numbers of spurious and speculative claims given that, as a rule, solicitors are not famed for working for little prospect of payment.
- 3.10.15 The proposed changes to the levels of general damage awards look set to have a relatively significant impact on primary insurers, though for once the reinsurers look set to have the slightly better end of this problem.
- 3.10.16 The changes, as proposed, genuinely seem to be a “catch up” exercise. The consequent step-change in award sizes as they are introduced may be quite significant. If mechanisms are introduced whereby changes are more regular in the future, then this would cause a more uniform inflationary effect going forwards.
- 3.10.17 Finally we make the general comment that we have, in this chapter, considered in detail only the currently foreseeable changes and their potential effects.
- 3.10.18 History shows clearly that there has for many years been a regular flow of *unforeseen* changes. (A couple of years ago the unforeseen changes would obviously have included many of those we have now been able to include here.)
- 3.10.19 Some argue that bodily injury claims inflation cannot possibly continue at the high rates seen over the last several years. Considering the combined effect of the foreseen changes at any time might suggest that this would be true, at least after a couple of potentially traumatic years of one-off high increases.
- 3.10.20 We counsel extreme caution over this argument, however. We believe that any who had held it over the last ten or fifteen years should by now have been shaken from it. It is appropriate for us, as actuaries, to learn the lessons of the

past well. Ideally this should include those new to an area learning from any over-optimism their predecessors may have been subject to!

- 3.10.21 In the next section we consider the actuarial issues of pricing and reserving for bodily injury claims. Note that the methods we consider can and should make allowance for “IBNR-type” unforeseeable changes.

4 *Insurer and Reinsurer Pricing and Reserving for Bodily Injury Claims*

4.1 Introduction

4.1.1 It is assumed that the reader is familiar with the basics of pricing and reserving methodology. This section will highlight the particular issues to consider when dealing with classes exposed to bodily injury (BI) claims, and in particular the trends over recent history.

4.1.2 For further information on the basics of reinsurance pricing, the reader is referred to the papers produced by the Reinsurance Pricing working party e.g. GISG Volume 2 1998.

4.1.3 We have used Motor business in our examples, but the issues are similar if not the same when applied to other classes of business showing similar claims.

4.1.4 For the purposes of this paper we have ignored possible effects resulting from exposure to the “Millennium Bug”, but an awareness of the issues should be borne in mind for all classes of business.

4.1.5 The reader is referred to the forthcoming IUA study on bodily injury claims for further information and in particular quantification of many of the ideas addressed in this paper.

4.1.6 The rest of this chapter is set out under the following section headings:

4.2 Insurers – Pricing

4.3 Insurers – Reserving

4.4 Reinsurers – Pricing

4.5 Reinsurers – Reserving

4.6 Example of the Impact of Ogden

4.2 Insurers – Pricing

Analysing historical experience

- 4.2.1 Consideration should be given to capping very large claims, which should be dealt with separately (e.g. re-spread over other claims).

Differential Rating

- 4.2.2 The cost of BI claims can heavily affect the overall claims cost of any one insurer. However, it is very difficult practically to segment the risks and apply rate differentials that depend on the profile of the insured to allow purely for their tendency to claim for BI. That is, it is hard to develop a rating structure which allows properly for the tendency to produce BI claims. More often, rating factors such as the age of policyholder and insurance group of car are used as a guide to the likely overall levels of claims, which includes bodily injury claims.

Projecting trends

- 4.2.3 Each BI claim can be considered to have been derived from a number of constituents called “heads of claim” (explained in chapter 2), for example
- loss of future earnings
 - cost of care
 - special damages
 - pain and suffering and loss of amenity
- 4.2.4 A large proportion of claims are dealt with “out of court”, in which case one figure may encompass all of these elements without breakdown.
- 4.2.5 In an ideal world, the contribution that each of these constituents makes should be measured separately by the insurer – although there may be overlaps in reasoning as they are not necessarily independent of each other.

- 4.2.6 In particular, the loss of earnings and cost of care settlements can relate to many future years of payments, whereas the latter two heads of claim are often paid soon after the claim date.
- 4.2.7 Each head of claim will be affected by inflation, the causes of which will be different for each head. Therefore the overall inflationary effect is dependent on the size of claim (e.g. large claims usually indicate high percentage cost of care).
- 4.2.8 For further information on the effects of inflation on BI claims, the reader is referred to the IUA study.

4.3 Insurers – Reserving

Triangulation Methods

- 4.3.1 In an ideal world the actuary will have bodily injury data triangles of amounts, numbers and average cost per claim (ACPC), split between fees and settlement amounts by injury type. The actuary would project claims amounts, numbers and average costs to ultimate, by payment and injury type.
- 4.3.2 In the real world this data is often not available. If it is not possible to split data by injury type then the size of the claim might be used as a proxy. For example, small claims, say less than £5,000, might be split out and examined separately. This could act as a proxy for the smaller “whiplash” type claims, as opposed to the more serious injuries, which may on average take longer to settle and have a greater propensity to increase in case-reserved severity up to settlement. So splitting the data, even crudely, may reduce heterogeneity.
- 4.3.3 The need to reduce heterogeneity is particularly important when the mix of injury claims is changing, perhaps in response to secular trends. In the UK there has recently been a trend for increasing frequencies of small “whiplash” type claims. This could be linked to the social trend of increasing litigiousness. The impact on the bodily injury data overall is to increase total claims amounts, broken down to increasing frequencies and perhaps falling ACPCs. Failing to spot this trend properly could result in an unreliable platform for reserving and pricing going forward.

- 4.3.4 As well as the advantages gained by taking out small bodily injury claims for separate analysis, so there is an advantage to removing, or perhaps capping, the larger claims. Capping claims at, say £50,000 – £100,000 removes much of the “random” claims development of the larger claims, which will also be much more prone to subjectivity in case reserve setting, particularly when the claim amount exceeds the reinsurance retention. This approach fits with feeding back the results into pricing, as the larger claims arguably have a more random spread through the rating cells than the smaller claims.
- 4.3.5 The larger claims, or excess amounts over the cap, will need to be projected to ultimate separately. Depending on the numbers involved some may require individual attention, especially where a reinsurance recovery is anticipated.

Case Reserves

- 4.3.6 Factor reserving is an approach to setting case reserves in a semi-automated manner. Certain injuries, such as “minor whiplash” may be automatically assigned a predetermined case reserve amount. If factor reserving is used it is important for the actuary to be aware of it, and of the injuries covered, amounts involved, and the timings of when these amounts are updated. Even if factor reserving is not used, as such, there may be informal standard case reserve levels, with periodic review, which have a similar impact, of which the actuary should likewise be aware.
- 4.3.7 As mentioned above there may be distortions in the case reserving practice when claims exceed the reinsurance retention. There may also, in some insurers, be a tendency for claims to cluster around, or just below, the notification point for their reinsurance programme. These anomalies need to be allowed for and may be subject to step changes.
- 4.3.8 A view should be taken on the impact of the recent Woolf reforms, which are discussed in greater detail in section 3.4. The anticipated change in the speed of settlement and legal costs should be considered when both pricing and reserving, and any adjustments made accordingly.

Pricing Base

- 4.3.9 The Bornhuetter-Ferguson method requires the use of an initial estimate of the ultimate loss ratio. For bodily injury claims care must be taken to project past loss ratios forwards accurately allowing for overall rate and mix changes, as for physical damage claims, but special care must be taken with inflation assumptions. If the actuary looks at frequency and severity separately, there is still the risk that a change in mix, say towards smaller claims, may make the severity inflation look odd.

4.4 Reinsurers – Pricing

Analysing historical experience

- 4.4.1 Experience can be analysed in homogenous groups e.g. by cedant, by market, by territory or by layer. It is important to distinguish between frequency and severity when considering claims inflation (the IUA study explains this in greater detail).
- 4.4.2 A suitable benchmark may be derived from pooling of cedant data across as many cedants as possible, within the same territory. This may already be available through pooling schemes (e.g. ISO) or bespoke research.
- 4.4.3 The use of benchmarks is vital when handling lines of business where there is exposure to BI claims. This is because for this type of claims numbers of events will be relatively low for any one cedant.
- 4.4.4 For the purposes of obtaining more accurate development patterns, it is important to record claims that have ever been above the observation limit, rather than just those that are currently above the limit. Sometimes this is misunderstood by cedants, who may only provide claims whose latest value is over the limit, resulting in a conflict between rate quoted and development patterns.

Differential rating

- 4.4.5 Claims control and expenses can differ between cedants, and a subjective assessment will help when rating different cedants. When pricing a reinsurance contract for any one cedant, it would be unfair to penalise a purely “unlucky”

insurer. But it is necessary to take a view as to whether poor experience is systematic or random. The reader is referred to chapter 5 for further examples of specific cases.

- 4.4.6 For lower layers of risk XL reinsurance, burning cost methods can be used as a guide to rating differentials for different cedants, although the credibility of data for higher layers needs to be remembered. This can be supplemented by subjective views from the underwriter, as an approximation to exposure methods, in particular for higher layers.

Projecting trends

- 4.4.7 It is important to consider the inflationary influences described earlier, when deciding suitable trend rates for use within the pricing process.
- 4.4.8 Factors affecting the trends in claims frequency and/or severity might include medical improvements, car manufacturing quality, presence of airbags, speed cameras, etc. Note that an improvement in medical care usually increases the severity as it leads to a greater longevity of the claimant and raises the associated claims expenses. Note also that even if accident frequency generally is decreasing, it may be that the frequency of claims at higher layers is increasing even when excluding inflationary effects.
- 4.4.9 UK reinsurers often face a number of BI claims from territories other than the UK. The geographical source of the claims will affect all aspects of the awards. This is because the particular aspects of that area can affect the origin of the claim e.g.
- claim procedures
 - court awards (e.g. judges versus juries)
 - attitudes towards litigation (social environment)
 - the existence of state benefits
 - social environment
 - remuneration methods

- punitive damages

- 4.4.10 When comparing the effects of the different territories, medical malpractice may be a suitable benchmark product to compare the level of litigiousness. The effects of any European Union action should also be considered, for example, new co-ordinated legislation.
- 4.4.11 The development of structured settlements will feature here too – for example in the UK, structured settlements are rarely seen, preferring instead a more settlement-orientated approach. Where structured settlements are more prevalent, the speed and values of future settlements will differ.
- 4.4.12 Any guaranteed commutation terms need to be priced where necessary.
- 4.4.13 Various types of indexation clause are common with treaties covering motor risk XL classes.
- 4.4.14 A view should be taken on the impact of the recent Woolf reforms, which are discussed in section 3.4. The anticipated changes in legal costs and in the speed of settlement should be considered both when pricing and reserving, and any adjustments made accordingly.

4.5 Reinsurers – Reserving

Triangulation Methods

- 4.5.1 Development patterns will vary depending on territory. Some countries favour early settlement of lump sum payments, whereas others tend to pay out as and when the claimant's expenses are incurred.
- 4.5.2 The tail of the development pattern may be hard to predict. It may be necessary, especially for relatively new reinsurers, to consult market data.
- 4.5.3 Any mix change over the years between working layers and higher layers will certainly affect the pattern of development and different layers or groups of years may need to be treated separately.
- 4.5.4 Some very large losses, especially where the reinsurer has a large share, may distort the development. It may be necessary to look at very large claims or

layers separately. Care should also be taken to bear in mind how close any large losses are to being total losses to the layer. An early reported large loss which is just burning a layer is much more likely to develop adversely than a large loss which is already close to a total loss. This can have a significant impact on reserving for a smaller reinsurer.

Case Reserves

- 4.5.5 All of the points mentioned under case reserving for the insurer could potentially impact the reinsurer. The main concern is that the case reserving practice varies so much by cedant. Some cedants are pessimistic, some optimistic; some respond early to legislative changes, some late or never. The degree of change in case reserve magnitude for known or anticipated trends will vary greatly between cedants. All of these factors bring great and often immeasurable heterogeneity to bodily injury reserving for the reinsurer.
- 4.5.6 It is particularly important to bear in mind the fact that once the claim goes over the retention there is less incentive for the insurer to monitor the case reserve closely as its accuracy will have no bearing on their net position. It is also a possibility that case reserves may cluster at or just below the notification point. This could be due to this level coinciding with internal authority limits, but could also, in some cases, be related to minimising apparent burning cost to working layer excess of loss ahead of renewal.
- 4.5.7 When considering the tail of the development pattern, allowance needs to be made for any indexation clause in the reinsurance contract, as this will directly affect the rules on claims payments for non-proportional reinsurance.
- 4.5.8 Some cedants will set their case reserves at the level the claim is likely to be settled at “today”. Others will attempt to predict when the claim is likely to be settled and allow for future inflation to that point. This mix of approaches leads to some of the “IBNER” (Incurred But Not Enough Reported) being strongly related to the claims settlement value inflation over the development period. This needs to be monitored as it could drift over time and could be subject to various step changes.

Pricing Base

- 4.5.9 The Bornhuetter-Ferguson method requires the use of an initial estimate of the ultimate loss ratio. It is necessary to project a typical loss ratio forward for reinsurance pricing changes. It is important to note that if reinsurance price is expressed as a rate on the cedant's premium, then the reinsurance pricing strength change is the product of the reinsurance rate on premium change and the cedant's premium strength change. It is also important to note that the relevant value is the rating strength with respect to large bodily injury claims inflation. For example, if a cedant's premiums are keeping pace with overall ground-up motor claims inflation, but large bodily injury claims are inflating at a faster level, then from a reinsurance perspective the cedant's rating strength is falling.

4.6 Impact Of The Ogden Ruling On A Reinsurer's Pricing And Reserving

- 4.6.1 We have given, in chapter 3, a list of factors which will each have an impact on the finances of insurers and reinsurers. In the earlier sections of chapter 4 we have given a general overview of how actuaries can price and reserve for classes affected by bodily injuries. In this section we give an example of how the effects of one of the changes may be analysed.
- 4.6.2 We understand that Stephen Jones and Grant Mitchell are planning to run a workshop at the GIRO conference which will attempt to run through and quantify various, or all, of the other effects we have outlined in chapter 3. Interested readers may find this workshop valuable.

The Implications of the Ogden Recommendations / House of Lords judgement

- 4.6.3 All other things being equal, the effect of using the lower discount rate recommended by Ogden would be to increase the size of the lump sum award necessary to produce the same level of perceived monetary benefit to the plaintiff over the period.
- 4.6.4 The resulting higher awards would impact on those motor and liability cases with an incidence of serious injury claims. The more serious the injury, the

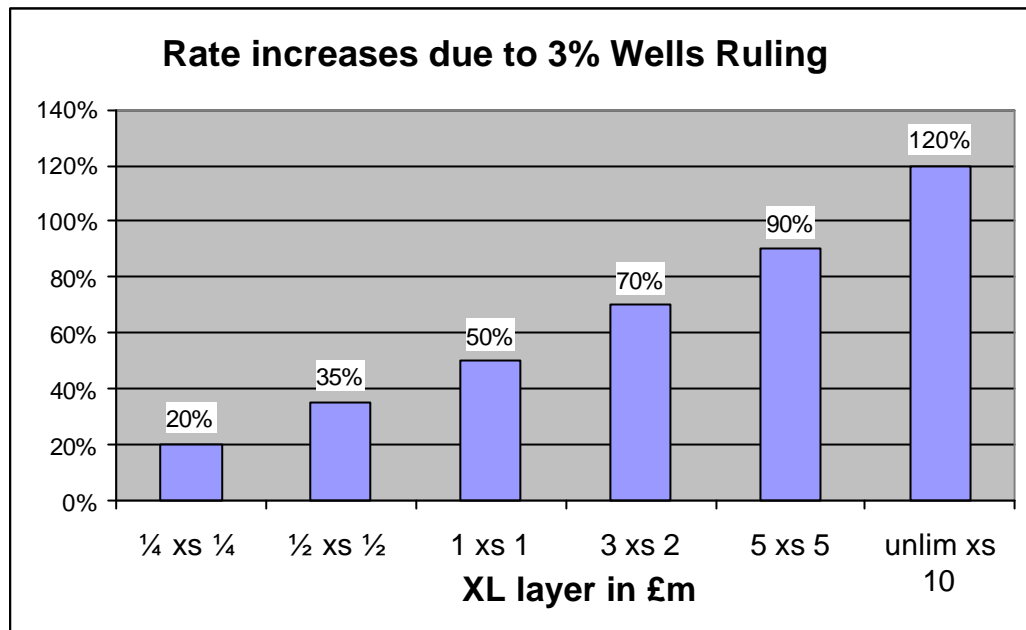
longer the period of disability, and the greater impact. The impact will also be greater for younger persons, as they have a longer life expectancy.

- 4.6.5 It has been suggested that the House of Lords judgement is equivalent to an increase in overall claims costs of primary insurers of 1.5% for comprehensive business and 3% for non-comprehensive business.
- 4.6.6 The impact will be greater for excess of loss reinsurers than insurers due to the effect of gearing.
- 4.6.7 The following example describes how a reinsurance actuary might deal with the changes brought about by Ogden.

Example: Impact on Reinsurer's Pricing and Reserving

Pricing

- 4.6.8 Start by deciding what the pre-Ogden ruling pricing base is for the various layers of cover. This is actually quite difficult, due to the inability to remove Ogden effects completely from historical case reserves. The loadings will vary by cedant, and over time, and it is very difficult to determine what the likely ultimate claims cost would be pre-Ogden. However, sense checks can be applied by looking at how settled claims have developed.
- 4.6.9 Decide what the ground-up Ogden impact is as a function of claims severity. This could be a simple percentage for each of a set of rounded claim values, or a distribution. In any case it should allow for the fact that ground-up increases are greater for larger claims. It is helpful to examine real examples and actually calculate the pre- and post- ruling settlement values.
- 4.6.10 Apply the ground up settlement increases to the pre-Ogden ground-up loss distribution and calculate the new rates for layers. Compare these rates for reasonableness with the pre-Ogden rates for layers.
- 4.6.11 The analysis described above was carried out by one of the authors on a sample of 5,000 UK motor bodily injury claims in excess of £100,000, over 14 underwriting years. The resulting increases to rates for various motor excess of loss layers from this Ogden adjustment exercise are shown below:



Reserving

- 4.6.12 Estimate the ultimate claims pre-Ogden. Again this is difficult due to the inability to obtain accurate information regarding whether and to what extent Ogden has been included in the cedant's case reserves.
- 4.6.13 For each underwriting year allocate the total IBNR between "true IBNR", that is, in respect of claims not yet reported (to the reinsurer), and "IBNER". Allocate the IBNER between the actual claims, taking care not to breach the cover on any contract.
- 4.6.14 Re-express all of the individual ultimate claims as losses from the ground up, backing out the reinsurer's share and taking care to tie together claim fragments from different layers of the same contract. Identify all higher layers which could potentially be breached.
- 4.6.15 Apply your assumption regarding the ground-up settlement increase from the Ogden ruling to each reported claim amount, from the ground up. Your assumption should reflect that the larger claims are likely to be affected to a greater extent. It may be necessary to examine claims files to ensure sensible assumptions here.

- 4.6.16 Re-apply the reinsurer's layers and shares to calculate the revised post-Ogden ultimate claims, and hence the revised IBNER. This can then be compared with the pre-Ogden IBNER as a sense check.
- 4.6.17 The easiest way to deal with the "true IBNR" would be to apply the same percentage increase, for each underwriting year, as calculated for the IBNER. However it could be argued that the unreported claims are likely to be higher than the reported claims, on average, for a given underwriting year, and therefore subject to a greater Ogden impact. The actuary will have to decide on the materiality of this point in each case on its merits.
- 4.6.18 Combining the effect of the ruling on the IBNER and IBNR, as notionally divided, gives the estimated impact of the ruling on the portfolio overall. This can then be compared with a separate reserving exercise on the whole book attempting to project to ultimate allowing for the Ogden ruling "implicitly" in the choice of development factors.
- 4.6.19 There is no easy solution to this and all methods are unusually plagued with uncertainty, so it is important to emphasise this to the recipient of the work. It may be helpful to rework the calculations with a range of assumptions to test for sensitivity and give a range of estimates.
- 4.6.20 One of the authors carried out this exercise to assess the impact of the Ogden ruling on UK motor excess of loss business. The ultimate claims estimates increased by 15% – 35%, across the various underwriting years, with an all year average increase of around 25%. Clearly the impact will differ significantly between reinsurers, whereas the pricing impact is the same for the whole market, the former being the impact of the change on a sample, and the latter being the impact on the distribution.

5 *Sample cases*

5.1 Introduction

5.1.1 In this section we provide a pencil sketch of several relevant legal cases. Some of these have been chosen because of their historical significance, others because they illustrate certain points. They are presented here in the order that they are first referred to in this paper.

5.1.2 Obtaining quality, succinct information has not been as easy as we had hoped. We comment on this difficulty further, and provide references for some sample sources, in the Appendix, chapter 6.

5.2 Biesheuvel v Birrell

5.2.1 The plaintiff (aged 22 years at date of accident) was travelling as a rear seat passenger in a car being driven by the defendant in May 1994. The defendant lost control of the vehicle and crashed into a row of parked cars. Neither the defendant nor the other three passengers were badly hurt, but Mr Biesheuvel broke his neck and was left paralysed in his legs and with only limited use of his arms. He was confined to a wheelchair and required extensive care and assistance in day-to-day living and could not be left alone for long periods of time. It was considered that his condition was permanent and that he would never be able to work full time in the field of financial or business consultancy, as he had originally intended.

5.2.2 The plaintiff had just completed a business administration degree at Bath University and was expecting a successful career. He had been offered a job with Touche Ross and was currently undergoing the interview process with Arthur Anderson with a view to a consultancy role, where he could have expected high earnings.

5.2.3 It was accepted that the defendant's negligence had caused the accident.

5.2.4 The plaintiff was awarded £9,281,693 broken down as follows:

- Past loss of earnings (£80,700) + interest (£14,930)

- Other Special Damages (£360,113) + interest (£54,516) + tax on interest (£41,215)
- Pain, suffering and loss of amenity (£137,000) + interest (£6,617)
- Future loss of earnings (£3,700,000)
- Loss of pension rights (£67,491)
- Initial capital expenditure (£551,804)
- Annual recurring costs (£4,267,307)

5.2.5 This award is a record for a UK road accident victim. The Court seemed to accept all the plaintiff's evidence that he would have had a high earning career, leading to a £3.7m award for future loss of earnings.

5.2.6 The judge made no finding of contributory negligence against the plaintiff, although he had not been wearing a seatbelt at the time of the accident.

5.2.7 The defendant subsequently appealed and asked the court to consider the extent to which the plaintiff's injuries had been caused by his failure to wear the seatbelt in the back seat and what, if any, reduction should be made if there was contributory negligence by the plaintiff in failing to wear that seatbelt.

5.2.8 Two issues were considered by the court :

- whether the failure to wear a seatbelt constituted negligence, and
- to what extent, if any, the failure to wear a seatbelt affected the injuries sustained.

5.2.9 On the first issue, the court concluded that a person of ordinary prudence would and should wear a seatbelt if travelling as a rear seat passenger. Therefore there is negligence in this case.

5.2.10 However, on the second issue the court accepted the plaintiff's evidence that the injury had been caused by impact with the car's roof. There was no evidence that wearing the seatbelt would have made any difference to the outcome as the plaintiff was 6'4" tall (so his head was close to the roof) and the

seatbelts fitted to the car did allow several inches of vertical movement. Therefore there was no finding of contributory negligence.

- 5.2.11 The Court concluded that damages should be assessed as between £8m and £9.25m.

5.3 Wells v Wells

Thomas v Brighton Health Authority

Page v Sheerness Steel Co Ltd

- 5.3.1 In the case of Wells, the plaintiff was a part-time nurse aged 57 who suffered serious brain damage as a result of a car accident. In the case of Thomas, the plaintiff was injured before birth, suffering cerebral palsy as a result of the maladministration of a drug intended to induce labour. In the case of Page, the plaintiff was a 24 year old steelworker who was struck on the head by a white hot steel bar which penetrated his brain and was pulled out by his own hands. In each case the defendant admitted negligence.
- 5.3.2 The cases revolved around the correct method of calculating lump sum damages for the loss of future earnings and the cost of future care. In determining the multiplier to be applied to the annual amount, it was suggested that the lower yield obtainable on Index Linked Government Securities (ILGS) should be used instead of the traditional 4 – 5%. This meant that the multiplier and the damages were both significantly higher than under the well-established methods.
- 5.3.3 A 3% discount rate was used for Thomas and Page, and Wells was awarded a settlement based on a discount rate of 2½%.
- 5.3.4 All three defendants appealed. The respondents (i.e. the plaintiffs in the original cases) contended that (1) this was the correct approach to take as the plaintiff was entitled to invest taking the minimum risk, and (2) that the test was not whether it would be prudent to invest in equities but whether to invest in ILGS would achieve the necessary objective with the greatest precision.
- 5.3.5 The Court of Appeal rejected the respondents' first proposition because it assumed that a plaintiff was to be placed in a privileged position, different from that in which an ordinary investor would be placed. The respondents' second

proposition was also rejected. It was felt that the defendant had as much right to take advantage of the presumption that the plaintiff will adopt a prudent investment policy as the plaintiff had to receive an award which achieves as near as possible full compensation for his injuries. It would be artificial for the court not to take account of the high probability that the plaintiff will invest more conventionally.

5.3.6 The appeals were allowed. The Court ruled that the conventional discount rate of 4 – 5% should still apply and the awards were reduced as follows :

- Wells: reduced from £1,619,332 to £1,086,959
- Thomas: reduced from £1,307,963 to £994,592
- Page: reduced from £997,345 to £702,773

5.3.7 The original plaintiffs took their cases to the House of Lords. The Law Lords ruled that it was in the nature of lump sum payments in respect of future pecuniary loss that they may prove to be either too little or too much. They concluded that the original judges had been right to assume for the purpose of their calculations that the plaintiffs would invest their damages in ILGS. The correct rate of discount was 3% and the awards were revised upwards.

5.3.8 This set of cases, very important in themselves, also illustrate the progress of a case through the structure of the courts.

5.4 Hunt v Severs

5.4.1 This case concerned a road traffic accident in September 1985. The plaintiff, Miss Hunt, was a pillion passenger on a motorcycle driven by the defendant, Mr Severs, who was her boyfriend. An accident occurred which resulted in the plaintiff suffering paraplegia along with additional complications. The defendant admitted liability.

5.4.2 Whilst in hospital the plaintiff was regularly visited by the defendant, who also provided care following her return home. They later got married.

5.4.3 In the first trial (April 1992), the plaintiff was awarded £617,004, of which £77,000 was for the cost of (past and future) care provided by the defendant

and £4,429 was in respect of the defendant's travelling expenses incurred when visiting the plaintiff in hospital.

5.4.4 This decision was appealed on the grounds that the defendant was rendering these services to the plaintiff of his own free will and was, therefore, not obliged to further compensate the plaintiff by paying damages as well. The appeal held that there was no double recovery – the plaintiff's requirement for help and services represented a loss for which she was entitled to compensation from the defendant. The multiplier used was also increased from 14 to 15, thus increasing the total damages award by £20,013.

5.4.5 The case was then heard by the House of Lords in April 1994 which upheld the defendant's appeal. The purpose of damages in respect of voluntary care was to compensate the voluntary carer. However, in this case, the tortfeasor (Mr Severs) had voluntarily given these services to the plaintiff and there were no grounds for requiring him to pay the injured party damages in respect of these services, which the plaintiff then had to repay him. The award was, therefore, reduced by the amount of damages for the services rendered by the defendant.

5.4.6 The Law Lords also reduced the multiplier of 15 back to 14. Indeed, in their judgement they stated that the assessment of damages is not and can never be an exact science as there are too many imponderables and it is for this reason that courts had been traditionally mistrustful of reliance on actuarial tables as the primary basis of calculation. Further, the use of a discount rate of 4½% in the assessment was not disputed. At the time, this generated press coverage detailing the "significant relief" that this caused for both insurers and reinsurers alike.

5.4.7 This case illustrates the process of appeal and the issue of the purpose of damages. Also note that Mr Severs was here the tortfeasor, the defendant in the original trial, and the appellant, as well as the boyfriend, voluntary carer, then husband to the defendant.

5.5 Ratcliff v McConnell

5.5.1 In the early hours of 8 December 1994, Luke Ratcliff (a student at an agricultural college) and two friends decided to go for a swim in the college pool after a night out. They had been drinking, but Mr Ratcliff was not drunk.

They obtained entry to the pool by climbing a gate, undressed, lined up at the side of the pool and did a running dive. The place where the plaintiff dived must have been shallow. He hit his head on the bottom of the pool resulting in tetraplegia.

5.5.2 He claimed damages from the defendants (the governors of the college) who are the owners and occupiers of the pool for negligence or a breach of their duty under the Occupiers Liability Act 1984 (the 1984 Act), which deals with the duty of an occupier of land to trespassers. The defendants denied liability.

5.5.3 The Judge held that the defendants were in breach of their duty under the 1984 Act. He held that the plaintiff was guilty of contributory negligence. He apportioned liability 60% against the defendants and 40% against the plaintiff. The defendants appealed.

5.5.4 The pool is surrounded by substantial walls and fences about seven feet high. Access to the pool is via the changing rooms, or through a wooden gate. During the Autumn and Winter terms, and in particular on the night in question, the changing rooms and the wooden gate were locked. Notices about safety and opening times were displayed. An expert witness stated the pool was unsafe for diving and criticised the inadequacy of the depth signs and the absence of signs prohibiting diving.

5.5.5 The original judge made a number of findings which the defendants disputed on Appeal :

- There had been persistent misuse of the pool outside permitted hours
- The college was aware of the misuse
- Disciplinary measures had not been taken against offenders
- New students and visitors were not specifically warned about the opening times.

5.5.6 However the Appeal judges found that

- Since 1989/90 the gate had been generally locked and misuse had reduced massively.

- There were only two incidents since 1989/90 of which the college was aware, and both involved visitors. (One incident involved a visiting rugby team who used the pool in the early hours of the morning. The gate was not locked as it should have been, and one individual was seriously injured after diving in at the shallow end and hitting his head on the bottom.)
- The college could not impose disciplinary measures against non-students.
- The plaintiff was aware of the opening hours, and these were displayed at the pool entrance.

5.5.7 The 1984 Act determines that an occupier of premises owes a duty to trespassers if:

- he is aware of the danger or has reasonable grounds to believe that it exists
- he knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger or that he may come into the vicinity of the danger; and
- the risk is one against which he may reasonably be expected to offer the other some protection.

5.5.8 Where the occupier owes a duty, the duty is to take such care as is reasonable in all the circumstances of the case to see that others do not suffer injury on the premises. The duty may be discharged by taking reasonable steps to warn of the danger concerned or to discourage persons from incurring the risk. No duty is owed to any person in respect of risks willingly accepted as his by that person.

5.5.9 The danger in this case was that of diving into the pool and hitting one's head on the bottom. This danger is common to all swimming pools, and is obvious to any adult. Even in the case of a lawful visitor there is no duty to warn of a danger that is apparent. Where reasonable care has been taken, the fact that even greater precautions could have been adopted without difficulty does not, in general, constitute a ground for finding negligence.

- 5.5.10 The plaintiff had been told expressly by the defendants that the pool was closed. He was not drunk, and he knew what he was doing. He deliberately climbed the wall. He knew the dangers, but did not check the depth of the pool. He knew that alcohol might affect his judgement. He was aware that access to the pool was prohibited. He was aware of the risk and willingly accepted it.
- 5.5.11 The Appeal judges held that the defendants were under no duty towards the plaintiff.
- 5.5.12 The plaintiff had to prove causation (i.e. that if the defendants made it clear that diving was forbidden, the plaintiff would not have dived into the pool). The plaintiff was judged not to have proved this. He ignored the prohibition on swimming and ignored the notices. One of the friends had continued to dive in 1996, despite the ban that existed and his knowledge of this accident.
- 5.5.13 The appeal was allowed unanimously.

5.6 Frost & Others v Chief Constable South Yorkshire Police (“Hillsborough”)

- 5.6.1 Six police officers claimed damages for post-traumatic stress resulting from witnessing the corpses of victims of the Hillsborough football disaster.
- 5.6.2 It was agreed that events on 15 April 1989 at the Hillsborough Football Stadium resulted in the death of 96 spectators, physical injuries to more than 700 and scarred many others for life by emotional harm. The Chief Constable admitted that the disaster was caused by police failure to control the crowd, allowing the overcrowding of two spectator pens.
- 5.6.3 The defendant had settled the claims of 14 police officers deployed inside the pens, but denied liability in 23 other cases. The court considered that bystanders had no case for damages, and drew a narrow definition of which rescuers were eligible for damages.
- 5.6.4 Inspector Henry White was the only plaintiff involved in the rescue, but he had not been any closer to the disaster and its consequences than some bystanders,

and so his claim was dismissed. In four of the other cases the court was not satisfied that shock had induced their injuries.

- 5.6.5 Five of the police officers took this decision to the Court of Appeal.
- 5.6.6 The Court of Appeal was ruling on the circumstances in which an employee can recover damages for psychiatric injury sustained as a result of tending a victim of his employer's negligence. Had the employer breached his duty of care?
- 5.6.7 The Appeals were upheld by a majority for four of the police officers. One officer who was on duty at the ground, but not closely involved in the incident or its immediate aftermath, was owed a duty of care as he was in the area of risk of physical or psychiatric injury and was thus exposed by the respondent's negligence to exceptionally horrific events. Another three officers (including an Inspector who was present throughout and another officer who did not arrive at the ground until after the incident and who was not therefore within the area of risk) were categorised as rescuers participating in the immediate aftermath of the incident. There were breaches of duty to all four.
- 5.6.8 The fifth officer did not succeed in her appeal. She was not present at the ground, but acted as a liaison officer at the hospital, and therefore could not be classified as either a rescuer, or within the area of risk.
- 5.6.9 The Chief Constable of South Yorkshire took the case to the House of Lords which overturned the ruling of the Court of Appeal by a majority.
- 5.6.10 The Law Lords concluded that in an ideal world, all those who had suffered as a result of negligence ought to be compensated, but in a practical world the tort system imposed limits.
- 5.6.11 It was settled law that bystanders at tragic events were not entitled to recover damages. There is great difficulty in drawing the line between acute grief and psychiatric harm. If the police officers' claims were recognised then it would substantially expand the existing categories in which compensation could be recovered.
- 5.6.12 Compensation is routinely awarded for psychiatric harm where the plaintiff is exposed to danger, or believes he is exposed to danger. But if awards were

expanded to include pure psychiatric harm there was a potentially wide class of claimants involved. To uphold the claims of the police officers, whether as rescuers or individuals, would have been to give them a wider right to compensation than the others present. In addition, any award of damages to the police officers sat uneasily with the denial of the claims of bereaved relatives.

5.7 Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co. Ltd, 1961 (The “Wagon Mound”)

5.7.1 This case established the test of “reasonable foreseeability”.

5.7.2 The defendants were the charterers of “The Wagon Mound”, which contained a cargo of bunkering oil. Due to the negligence of the defendant, some of the oil escaped into Sydney Harbour. The plaintiffs owned a wharf and, at the time of the escape of the oil, were undertaking the repair of a ship using blow-torches. These produced an extremely hot flame which, on coming into contact with some debris covered in the oil, caused it to ignite and generate extensive damage to the wharf. The debris had arrived at the wharf by an unfavourable combination of wind and tide.

5.7.3 The defendants were not found liable for the damage. The court ruled that, although some of the damage could have been foreseen by the defendants, the circumstances were so peculiar that the extent of the damage could not reasonably have been foreseen. In particular, the flash point of the oil was 170 degrees, a temperature which water would reach in only the most unusual circumstances. The rule applied here was that a man should only be held liable for the probable consequences of his act.

5.8 Smith v Leech Brain & Co. Ltd (1962) (The “eggshell skull” case)

5.8.1 In *Smith v Leech Brain & Co. Ltd (1962)*, a workman suffered a burn to his lip as a result of the negligence of his employers, the defendants. Due to his predisposition to cancer, a carcinoma developed from which he subsequently died. The court held that the defendants were liable for the man’s death even

though the death of the man was not reasonably foreseeable from such a minor injury.

- 5.8.2 This rule, the “eggshell skull” rule, operates only after the defendant has been found to be in breach of his duty of care. The defendant’s duty of care is dependent on the gravity of the injury and the cost (to the defendant) of avoiding the injury. In this case it was first established that the cost to the defendant of avoiding the lip injury was sufficiently minor as to make the defendant’s failure to avert the injury a breach of his duty of care. These considerations were made before considering the later, consequential death of the man. Once the breach of the duty of care had been established, the defendant became liable for its full consequences. This departure from the general rule established in “Wagon Mound”, a material damage case, is applicable only to personal injury cases.

5.9 Kelly v Dawes

- 5.9.1 This case was the first ever structured settlement in the UK.
- 5.9.2 In July 1986 Catherine Kelly, a recently married nurse aged 22, suffered serious injuries in a road accident. Her husband was killed in the accident. The driver of the other vehicle was wholly to blame. His insurers settled her claim arising out of her husband’s death with a lump sum payment.
- 5.9.3 As a result of her injury the plaintiff was transformed into a bedridden invalid with grossly impaired neurological functions, almost wholly unaware of her surroundings. She became totally dependant on skilled nursing care and the care of her parents and family. Her condition was not expected to improve for the rest of her life.
- 5.9.4 Her life expectancy was difficult to assess. Plaintiff lawyers suggested a period of ten to twenty years, defendant lawyers five to ten. This large divergence, plus the willingness of her father and the various others involved, made the use of a structured settlement particularly appealing.
- 5.9.5 In November 1988 it was provisionally agreed that £427,500 would be the lump sum payable on a conventional basis, but that under a structured settlement £410,000 would be paid out, £110,000 as a lump sum and

£300,000 to provide a tax-free index-linked annuity for the rest of the plaintiff's life. This was used to purchase an annuity of £25,652 index linked and guaranteed for 10 years.

5.9.6 When it was actually approved in July 1989 allowance for the intervening inflation in medical care costs was made, but the pioneering nature of the settlement was unchanged.

5.9.7 At the time of writing (July 1999), Catherine Kelly is still alive. The tax-free annuity has risen from an initial £25,760 to £36,618. Her family are, apparently, still delighted that the existence of the structured settlement has allowed them to ensure continued care for her, involving no mortality or investment risk to them. The current view is that her life expectancy may be a further 20 to 30 years.

5.10 Lancaster v Birmingham City Council

5.10.1 This case, decided in July 1999, concerned a 43 year old woman who had been employed by the Council since 1971 in various clerical and technical posts. In 1993 her part-time position as an estate improvement assistant was abolished and she was given alternative employment as a housing officer dealing directly with the public.

5.10.2 Although the claimant possessed neither appropriate qualifications nor experience in this field she was promised training and support. Such assistance was not forthcoming, and despite the claimant's demands she never received it.

5.10.3 The claimant was found to have suffered psychological injury as a result of the pressures of her work which, she maintained, consisted of an excessively high workload with no continuity and little clerical support. She suffered bouts of clinical depression accompanied by lethargy and mood swings. As a result of the psychological problems she suffered, the claimant had difficulty coping with every-day life and was subject to various problems, including irritability, insomnia and panic attacks.

5.10.4 She was absent from work for a number of lengthy periods before finally retiring from her £7,000 a year part-time job on the grounds of ill-health, as being unfit for any work, in February 1997.

5.10.5 Liability was admitted by the defendant before the trial. The court made an award of £67,000 total damages plus costs:

- £12,000 for pain suffering and loss of amenity
- £40,000 for future wage loss, labour market vulnerability, pension loss
- the balance for special damages items plus interest on the award

5.10.6 In fixing this award the court noted that she had since been able to take up a part-time job, but felt that she would be unlikely to hold down a job paying more than £4.50 per hour.

5.10.7 Unison, the public service union, heralded this as a “historic precedent”. They claim that this was the first case in the UK in which a court award was made against an employer for a stress claim. (The previous stress award had been made out of court with no admission of liability.) The union is, apparently, currently investigating another 7000 stress-related complaints.

6 ***Appendix: Sources of Information***

- 6.1.1 We decided, early on in our discussions, that it would be useful for us to “throw our net widely” and investigate as many different sources of data on bodily injury claims as possible. We also decided that it would be useful for us to include in our paper the key sources of information that we found useful, as an ongoing aid to actuaries researching this area for themselves.
- 6.1.2 We managed to find a number of different sources, but did not find the hoped-for “*unified quality source*” that we had initially postulated. It may exist, but if so, we didn’t find it! If any readers are aware of such a source, the working party would be very happy to be told about it.
- 6.1.3 We include in this appendix references and some commentary for the sources that we thought were the most useful.

Published Papers and Reports

- 6.1.4 “The UK Bodily Awards Study”, published by LIRMA in June 1997, analyses in some detail the experience of bodily injury awards, particularly arising from motor incidents, from 1985 to 1995 inclusive. LIRMA commissioned separate studies by legal, medical and actuarial experts, which are presented together in the report. The actuarial team analysed data from a variety of insurers totalling 82.2 million vehicle years of exposure, from which there was data for 219,000 claims in all, including 4,800 claims over £100,000.
- 6.1.5 This year the IUA have commissioned a follow-on study. This report is due for publication and launch at a seminar in London in October 1999, a week or so after GIRO. Once again the study has included an actuarial team analysing a large amount of pooled data, including this time a significant volume of claim data coded by type of injury and other claimant data.
- 6.1.6 The other paper referred to in the Introduction to this paper is “Damages: Personal Injury Awards” by AC Martin and others. This paper, prepared under the auspices of the “Wider Fields” board, was presented to the Institute of Actuaries on 9 December 1997.

Organisations who can supply data

- 6.1.7 Lawtel (tel: 0171 580 2544, web: www.lawtel.co.uk) are providers of information on the quantum of bodily injury claims, amongst other things. Their database is strong for relatively recent claims, but not exhaustive historically. For example, they had no information at all on two very significant claims that we were interested in from around 10 years ago.
- 6.1.8 Lawtel recognise that the nature of the database, being substantially text orientated, is currently not conducive to actuarial manipulation and analysis, but seem happy to consider suggestions aimed at making the database more useful.
- 6.1.9 New claims data is available on this subscriber-available internet-based database very quickly. For example details of *Lancaster v Birmingham City Council* (see 5.10) were available the day after the judgement.
- 6.1.10 One issue of possible concern to actuaries (and to defendant lawyers) with claims databases from the various suppliers and publishers is the potential for bias. Depending on the volume of cases cited and the means that are used to amass case histories, the well known actuarial issue of selection may operate. For example, we have heard lawyers criticise the widely-quoted and analysed set of cases in the book “Kemp and Kemp” on these grounds. If plaintiff lawyers submit and/or editors present cases that are biased towards the successful or “novel” (often a proxy for “with larger awards”, for example because of a new head of damage), then care must be taken when using such a database.
- 6.1.11 Lots of newsletters service a similar market, aimed mainly at lawyers practising in this area. Monitor Press (01787 378607) is the provider of one such monthly summary. Again, although the data on individual claims is often extensive and indicative of current developments, the sample is generally small, and it is hard for actuaries to analyse any body of data from this type of source.
- 6.1.12 Frenkel Topping (0161 886 8000) have established themselves as the leading UK agency for structured settlements, having been involved in the earliest cases and continuing to take part in the majority of cases. When researching this particular area we found them to be extremely helpful and amenable. They publish various information in a variety of formats.

Websites

- 6.1.13 A search for sites relevant to personal or bodily injury claims in most of the internet engines generates a large number of hits. Most of these seem to us to be US based legal firms, even if attempts are made to restrict the search to sites in the UK. We list below specific sites we found useful, with comment.
- 6.1.14 The Law Commission site (www.open.gov.uk/lawcom) contains the full text of various reports and consultation papers, although appendices are sometimes omitted. Other pages in the open government site, e.g. www.open.gov.uk/court, are also useful.
- 6.1.15 The ABI site (www.abi.org.uk) contains ABI circulars and comment.
- 6.1.16 Increasing numbers of lawyers and barristers have websites. In our searches we have generally found the level of relevant content reasonably disappointing. Amongst those we made some use of were:
- www.exchangechambers.co.uk
 - www.lawrights.co.uk
 - www.foil.org.uk

Publications

- 6.1.17 We haven't made use of the "standard publications" quoted in various other papers on bodily injury claims. The one standard text referred to above, in 6.1.10, is "Kemp and Kemp, Damages for Personal Injury and Death".
- 6.1.18 Other publications read or referred to for this paper include:
- "Judicial Studies Board: Guidelines for the Assessment of General Damages in Personal Injury Cases: 4th Edition", published by Blackstone Press.
 - "Courting Mistrust: The hidden growth of a culture of litigation in Britain", by Dr. F Furedi, published by the Centre for Policy Studies.