The Law Commission

(LAW COM. 56)

REPORT ON PERSONAL INJURY LITIGATION— ASSESSMENT OF DAMAGES

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) *of the Law Commissions Act* 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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THE LAW COMMISSION

Item VI(b) of the First Programme

PERSONAL INJURY LITIGATION—ASSESSMENT OF DAMAGES

To the Right Honourable the Lord Hailsham of Saint Marylebone,
Lord High Chancellor of Great Britain

PART I. THE HISTORICAL BACKGROUND OF ITEM VI(*b*)

Terms of reference

1. Under Item VI of the Commission's *First Programme* we recommended the examination of two aspects of Personal Injury Litigation: as Item VI(*a*), Jurisdiction and Procedure to be examined by an *ad hoc* committee and, as Item VI(*b*), the Assessment of Damages to be examined by the Commission. Item VI(*a*) has been examined by the Winn Committee[1].

2. Item VI(*b*) (The Assessment of Damages) was formulated as follows:—
"This is a problem which has attracted much attention. Questions for examination include: the usefulness of the jury as an instrument of assessment; limitations upon the revising function of the Court of Appeal; the impact of tax; the use of an actuarial approach and actuarial evidence; the proper principles which should govern the award of damages for pain and suffering and for loss of the amenities of life; and the adequacy and consistency of current awards of damages."

We would stress that it is not within our terms of reference to suggest any method by which in relation to personal injuries the present principle of liability based on fault should be replaced or supplemented by a principle of strict liability or some system of first party insurance. On 19 December 1972 the Prime Minister announced in the House of Commons[2] that a Royal Commission was to be established with wide terms of reference to enquire into the basis on which compensation should be recoverable. There is no doubt that some of the matters dealt with in this Report will be reconsidered by this Commission, particularly perhaps those upon which our recommendations have been negative ones because they have been made in the context of our present fault based rules[3].

3. In dealing with Item VI(*b*) we have also been concerned with one aspect of Item XV in the Commission's *First Programme.* In Item XV we recommended that the Commission itself should examine under five separate headings certain actions which, because they were based on archaisms, seemed unsuitable for retention in a modern legal system. It is Item XV(*a*) with which we have been concerned in the context of Item VI(*b*) and this topic was formulated in the *First Programme* as follows:—

"Much of English law is heavily overlaid with history. This does not mean that the principles involved may not still be applicable in modern conditions, subject to necessary adjustments from time to time. There are, however,

[1] (1968) Cmnd. 3691.
[2] See Official Report, 848 H.C. Deb. ser. 5, col. 1119.
[3] See Part III, paras. 23–52 below.

certain parts of the law which seem to rest on social assumptions which are no longer valid or to involve archaic procedures. The topics mentioned below constitute only a first list of such matters which would appear to call for attention.

(*a*) Actions for loss of services, loss of consortium, seduction, enticement and harbouring, and the extent to which employers, spouses or parents should be entitled to recover wages or payments made to or on behalf of an employee, spouse or child, as the case may be, who is the victim of a tort. These matters have been the subject of a detailed survey, with proposals for reform, in the Eleventh Report of the Law Reform Committee (1963 Cmnd. 2107)."

Item XV(*a*): Published Working Paper No. 19

4. It was hoped that each of the topics referred to in Item XV(*a*) might be disposed of rapidly. Accordingly after some outside consultation, provisional proposals were prepared and given limited circulation. These provisional proposals can be summarised as follows:—

(*a*) the abolition of the action for loss of services whether by an employer, a husband or a parent;

(*b*) the abolition of the action for loss of consortium;

(*c*) the abolition of the action for seduction;

(*d*) the abolition of the actions for enticement and harbouring;

(*e*) provision enabling an injured person to recover the reasonable expenses incurred by a spouse, parent or member of the household to which he belongs.

This last proposal was based on the concept of a family pool to be replenished by action taken on behalf of the "pool" by the injured person.

5. As a result of the comments received in response to these proposals the Law Commission concluded that it was not possible to dispose of the question involved as rapidly or as summarily as had originally been hoped, and that further and wider consultation was essential before any firm proposals could be formulated. We said in our *Second Annual Report*[4], that there were, in particular, two difficult questions which required further study:—

"(i) whether an employer should have a remedy against the tortfeasor in respect of wages paid to the victim of the tort, his employee, during the period of incapacity, and the scope of any such remedy;

(ii) what provision the law should make to give a remedy against the tortfeasor to members of the victim's family or others who incur expense or suffer loss in aiding or comforting him while incapacitated."

And we added:—

"Our provisional opinion is that the ancient common law remedies, though they are inadequate and in some respects clearly do reflect social assumptions which are no longer acceptable, cannot safely be swept away until these two questions are satisfactorily answered."

6. Accordingly, in June 1968 we issued Published Working Paper No. 19 which discussed all the matters set out in Item XV(*a*). Following consultation

[4] Law Com. No. 12, para. 93.

on this Working Paper we were able to recommend[5] the abolition of the actions for seduction, enticement and harbouring of a spouse or child and this recommendation was implemented by the Law Reform (Miscellaneous Provisions) Act 1970, section 5. This Act did not, however, deal with the analogous actions for seduction, enticement and harbouring of a servant.

7. It subsequently became apparent that the other remaining topics, actions for loss of services and for loss of consortium, were closely connected with the subject-matter of Item VI(*b*)[6]. We therefore decided to defer making any recommendations on these matters until we had concluded our full round of consultation on Item VI(*b*).

Item VI(*b*): All Souls Seminar, February 1966

8. The Commission's consideration of the subject-matter of Item VI(*b*) began with a wide ranging enquiry into the systems of compensation for injury in other countries combined with an attempt to identify the "proper principles" which should govern the award of damages for pain and suffering and for loss of the amenities of life. Unfortunately these time consuming exercises proved to be largely abortive. Systems in other common law jurisdictions are basically the same as ours and study of them yields help only on detail. In civil law countries, the systems tend to be so different that, short of a radical upheaval of our basic principles, they prove unhelpful.

9. Our attempt to identify general principles to be applied in the assessment of damages for pain and suffering and loss of amenity (non-pecuniary loss) began with a Seminar at All Souls College, Oxford, in February 1966[7]. The hope then was that legislative guide-lines could be enacted. The Seminar led to the issue of a lengthy Working Paper which, in 1967, was given a limited distribution to those who attended the Seminar for preliminary consultation. The part of that Paper which dealt with non-pecuniary loss formed the basis of Section (C) of Published Working Paper No. 41[8]. The long search for principle in assessing damages for pain and suffering has led us, in the end, to accept the dictum of Sellers, L. J. in *Warren* v. *King*:—

> "No true value can be reached for there is nothing to establish it, as in the case of the value of goods, of the cost of production or a price reached by the process of supply and demand and the haggling of a market."[9]

A Social Survey

10. Efforts were made to conduct a Social Survey aimed at discovering "whether the damages at present awarded by the courts for pecuniary and non-pecuniary loss are adequate". These efforts failed because it was found to be quite impossible within the financial resources available to sample a sufficiently large number of people who had been awarded damages for personal injury. In addition, as we point out later in this Report[10], within a fault based

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[5] Law Com. No. 25, (1969) H.C. 448, *Report on Financial Provision in Matrimonial Proceedings*, at paras. 101 and 102.

[6] Those who submitted comments on these two actions when consulted on Published Working Paper No. 19 are shown at List "A" in Appendix 1.

[7] Those who participated in the All Souls Seminar are shown at List "B" in Appendix I.

[8] Published Working Paper No. 41, paras. 68–116.

[9] [1964] 1 W.L.R. 1 at p. 8.

[10] See paras. 17 and 20 below.

system, the fact that the large majority of cases are settled upon a compromise basis and that those fought frequently result in a finding of contributory negligence being made against the plantiff renders "adequacy" a somewhat meaningless criterion.

Request for an Interim Report

11. In June 1968, the Lord Chancellor, Lord Gardiner, asked us to produce an Interim Report dealing in particular with the "Itemisation" of the various heads of damage. At that time we were also co-operating closely with the Institute and Faculty of Actuaries upon the question of the use of actuarial evidence in the assessment of the pecuniary loss suffered by victims of personal injury. Lord Gardiner's request led to the issue of a preliminary Working Paper on Itemisation and Actuarial Evidence in 1969 with a limited circulation. This in turn led to the issue of Published Working Paper No. 27 in March 1970, which dealt with Itemisation and Actuarial Evidence and was given a wide circulation[11].

Published Working Paper No. 27

12. Published Working Paper No. 27 was, to some extent, overtaken by events. Fortuitously, the partial implementation[12] of the recommendation of the Winn Committee as to interest on damages and the subsequent decision of the Court of Appeal in *Jefford* v. *Gee*[13] (requiring limited itemisation of damages) rendered legislation on this subject less urgent. Further, in January 1970, the House of Lords ruled in *Taylor* v. *O'Connor*[14] that the "multiplier" and not the actuarial method was to be regarded as the normal and primary method for the assessment of pecuniary loss.

13. In Published Working Paper No. 27 we had not thought it necessary to argue the question of principle between the "multiplier" and the actuarial method. Assuming that the most accurate method of computation was the best, we merely canvassed a way of making actuarial evidence more readily available in the shape of standard tables.

Published Working Paper No. 41

14. The impact of these two cases on our work made us decide to defer submitting a report upon the limited subject-matter of Working Paper No. 27 and to concentrate upon the production of a comprehensive Working Paper covering the whole field including the questions of "family loss" raised in Working Paper No. 19[15], but excluding the subject of an employer's action for damages for the loss of his servant's services[16] upon which we felt able to make recommendations based upon the consultation on the original Working Paper No. 19. Accordingly, on 18 October 1971, we issued Published Working

[11] Those who submitted comments on Published Working Paper No. 27 are shown at List "C" in Appendix 1.
[12] By the Administration of Justice Act 1969, s.22.
[13] [1970] 2 Q.B. 130.
[14] [1971] A.C. 115.
[15] Published Working Paper No. 19, paras. 46–87.
[16] *ibid.*, paras. 9–45.

Paper No. 41[17], which was given a wide circulation to 241 different potential commentators of whom 176 were individuals and 65 were organisations. Consultation on this Paper ended in July 1972 and those who sent us comments upon it are listed in Appendix 2. We now submit our Report on Item VI(*b*) and also on the actions for loss of services and consortium and the remaining actions for seduction, enticement and harbouring of a servant under Item XV(*a*) of our *First Programme*.

PART II. GENERAL CONSIDERATIONS

Personal injury claims and other claims in tort

15. The damages with which we are concerned in this Report are most frequently awarded in claims arising out of breaches of common law or statutory duty by road users, employers and occupiers of land. Those claims are indistinguishable in principle from other claims in tort nor is there any fundamental difference between the general principles to be applied in assessing damages for personal injury and those to be applied in assessing other forms of damage, for example to property or reputation. As in other parts of the law of tort, these claims are based either in fault or in strict statutory duty and the amount of damages can be reduced or extinguished by the fault of the plaintiff. Nor is the fundamental principle of the English law of damages, that the plaintiff should, so far as possible, be placed in the same position as he would have been had the tort not been committed, any less applicable here than elsewhere. But there are practical differences between claims for damages for personal injury and other claims which tend to obscure principle and which have always to be borne in mind when considering legislation. We have attempted to pay due regard to these considerations in making this Report.

The number of claims

16. The sheer number of the claims made is itself a factor of major significance. In Appendix 3 we set out an up-to-date version of the statistics of personal injuries quoted by the Winn Committee[18]. This great number of claims means that the total amount of damages paid to all claimants is a significant factor in the general economy of the country. It is a factor which, on consultation, some have urged us to take into account. So long, however, as compensation for personal injury remains fault based, we do not think that the national economy is something which ought to affect individual claims of this kind any more than it should be allowed to affect the assessment of damages for other wrongs for example libel, damage to property or breach of contract.

Compromised claims

17. Most employers, occupiers and road users are insured against liability. Most plaintiffs who have been injured at work or have a claim arising out of the death of a relative at work, have their claims handled for them at first by their trade union and many plaintiffs injured in motor-car accidents will have their claims handled by solicitors specialising in this type of work. This means that claims for damages for personal injury lead to an early confrontation between different institutional interests and this, in turn, leads to the settlement without

[17] In the course of preparing Published Working Paper No. 41 we received much help and advice from those shown at List "D" in Appendix 1.
[18] (1968) Cmnd. 3691, at para. 38 and Appendix 5.

recourse to litigation of a large majority of claims. In considering legislation, it is therefore necessary always to bear in mind the impact which the implementation of any recommendation will have upon claims which are settled as well as upon claims which are contested to judgment.

Insurance

18. The fact that most tortfeasors are insured against liability for causing personal injury means that the heavy financial burden of compensating the injured falls in the end upon the class of premium payers, be they employers, occupiers or car owners. Any increase in the scale of damages awarded means inevitably increased premiums. This fact leads some to the conclusion that the impact of any increase upon premiums is something which ought to be taken into account in deciding what principles ought to govern the assessment of damages in this class of litigation. Those who hold this view are, in fact, advocating that the amount of such damages should be artificially restricted to relieve the burden upon premium payers. We reject this view. Whatever factors might properly be taken into account in an enquiry into the whole basis of compensation for injury, we do not think that the lot of the premium payer is something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault based system. Newspapers are insured against liability for libel, but the size of the premiums they have to pay is not commonly advanced as a reason for limiting the amount of damages which ought to be awarded for injury to reputation. We do not think that merely because of the great number of claims and the total amount of compensation payable in personal injury litigation, different principles should therefore apply to the assessment of damages in individual claims.

Social Security

19. When a man is injured he suffers a number of "pecuniary losses": he is off work, so he loses his wages; he needs healing, so he incurs medical expenses; he can no longer look after himself, so he has to be nursed and have extra assistance in the home. Some of these losses are made good by the State through social security benefits, for example industrial injury benefit, industrial disablement benefit and unemployment benefit. The burden here is widely distributed through society. When these losses are made good by someone other than the tortfeasor, problems of loss distribution arise with which we deal, in detail, later[19], but, in addition, the fact that some of the losses are made good by the State leads easily to a comparison between premium payers and tax payers. This, in turn, leads many of our critics to propound the view that our enquiry has been too narrow and that we ought to have made a wide ranging enquiry into the whole basis of compensation. There is, they say, only a certain amount of money available to make good losses suffered by people through injury and sickness and this ought to be distributed more fairly and without, or with less, regard to the fortuitous circumstance that some such injuries are caused by torts and some are not. The subject-matter of such an enquiry undoubtedly comes within the terms of reference of the Royal Commission to which we have referred in paragraph 2 above, but we wish to make it clear that such an enquiry is not within our terms of reference and that it is, indeed, one which we are specificially precluded from making. The question whether compensation for

[19] See paras. 123–159 below.

loss caused by injury should be the concern of the State and be covered by some form of compulsory insurance is not our present concern, nor is the question whether the fault basis of compensation ought to be modified or abandoned.

The "adequacy" of damages

20. We have already pointed out[20] that the question of adequacy is not one which we think can, in this context, usefully be asked. So far as pecuniary loss is concerned, we believe that every effort should be made to see that such loss is fully compensated as accurately as possible. So far as non-pecuniary loss is concerned, we are unable to suggest any principles, short of a tariff, which could sensibly be made part of a legislative code. Such a tariff we reject for the reasons stated hereafter in this Report[21]. But on one aspect of "adequacy" some people have misunderstood us. Because some of the provisional conclusions at which we arrived in Published Working Paper No. 41 would, if implemented, lead to an increase of damages, it has been assumed that our object has been to increase damages. This assumption has been accentuated by a misunderstanding of one passage from the Working Paper. In paragraph 104, we said that "there is a considerable body of opinion which feels that the judges have drawn the scale [of damages for non-pecuniary loss] too low and are too reluctant to increase it to take account of the fall in the real value of money". That there is such a body of opinion has been amply demonstrated once again in consultation upon the Working Paper, but that did not and does not mean that this is or was our opinion. We, in fact, think that, at any rate in recent years, the judges have been much more ready to increase the level of non-pecuniary damages to keep pace with inflation. Whether the figure of £4,000 for the loss of an eye which the judges in England have established or £6,000 which is the figure at which juries in Northern Ireland have arrived is the "right" figure is, as we have pointed out in our Working Paper and as we reiterate here, a largely meaningless one. With these matters we deal in detail later; what we are constrained to emphasise here is that we have no preconceived bias towards increasing or decreasing the level of damages. To take an example, our recommendations as to interest, applying as they do to all claims, will affect an overall reduction in the amount of damages paid to victims of accidents although in some individual cases, where compensation is now unjustly low, our proposals will mean substantial increases. Our aim is to see that compensation in each individual case is, so far as the law can achieve, full for pecuniary loss and socially acceptable for non-pecuniary loss, and that losses which ought to be made good are made good. So far as non-pecuniary loss is concerned, the only helpful question that we think can be asked is not whether the damages awarded are "right" but who ought to decide what these arbitrary amounts should be. And, on this aspect of our Report, this is the only question which we do consider.

General scope and arrangement of the recommendations in this Report

21. In Published Working Paper No. 41 we attempted, in eleven separate sections, to examine the whole field of assessment of damages in personal injury cases and we recorded a number of provisional conclusions. Many of these provisional conclusions were upon matters of detail and, in general, they have been approved by those whom we have consulted.

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[20] See para. 10 above.
[21] See paras. 32–35 below.

22. Now that we have reached firm conclusions in the light of consultation, it is appropriate to depart somewhat from the order in which we examined the various topics in the Working Paper and to arrange the material in this Report under headings corresponding to the broad nature of our recommendations, namely:—

(*a*) In Part III, we dispose of those matters in which we recommend no change in the present law. In Part III, therefore, we deal with certain major innovations which we suggested in the Working Paper, but which we have finally decided not to recommend. We also deal with certain other matters on which we adhere to our provisional conclusion in the Working Paper that the existing law is satisfactory.

(*b*) Part IV covers the areas of the law in which we consider there is need for reform; it contains our positive recommendations. Most of the important changes which we recommend can only be brought about by legislation and we annex a draft Bill at Appendix 5 designed to give them effect. In Part IV, we also deal with a few residual matters on which we recommend changes which we think would be improvements but do not involve legislation[22]. Finally, in Part IV, we recommend the abolition of the causes of action for seduction, enticement and harbouring of a servant, matters which are largely unrelated to the main subject of this Report.

(*c*) A summary of all our recommendations in Parts III and IV is given in Appendix 4.

PART III. MATTERS ON WHICH NO CHANGE IN THE PRESENT LAW IS PROPOSED

Introduction: the arrangement of Part III

23. In this Part we deal, firstly, with two aspects of damages for personal injury regarding which in the Working Paper we canvassed the possibility of radical innovations but did not, at that stage, indicate even a provisional view on whether they ought to be implemented or not. After consultation we have decided that we ought not to propose either of these two radical changes, namely:—

(*a*) In examining the defects in a system of damages awarded as lump sums, we considered, in some detail, the possibility that this method of awarding damages might be replaced or supplemented by a system of periodic payments[23]. In the result we reject periodic payments as a method of awarding damages within a fault based system and we deal with this subject in Section (A) below.

(*b*) Our consideration of the principles of the assessment of damages for non-pecuniary loss[24] led us to make the tentative suggestion that, instead of the judges fixing the scale of damages, there might be substituted a legislative tariff consisting of average figures for non-pecuniary

[22] On one matter we recommend in Part IV of this Report that changes be brought about by amendment of the Rules of Court, namely, in regard to particularisation of pleadings (paras. 211–233 below). In Section J of Part IV, we suggest there is a need for a reconsideration of the rules with regard to payments into court generally and in Section K of Part IV, we suggest the setting up of a Judges' Consference on the Assessment of Damages.

[23] Published Working Paper No. 41, paras. 226–252.

[24] *ibid.*, paras. 68–104.

loss in respect of specified injuries or the loss of a specified faculty. We have concluded that no change is desirable in the general principles for the assessment of non-pecuniary damages and we specifically reject the introduction of a legislative tariff. Our reasons for these conclusions will be found in Section (B) below.

24. Also in the context of awards for non-pecuniary loss we examined in the Working Paper whether the present usual method of trial by judge alone should be modified by an increased use of jury trial or the introduction of a special damages tribunal[25]. On this topic, we are still of our provisional view that neither of these alternatives to trial by judge alone is desirable and consultation confirmed that we are right to reject both these developments. We deal with this topic in Section (C) below.

25. In considering the assessment of pecuniary loss for a living plaintiff, we provisionally concluded in the Working Paper that in two particular respects the present law is satisfactory, namely, the rule with regard to deductions for expenses saved and the rule in *Gourley's Case*[26] for taking tax into account[27]. We adhere to our provisional conclusion and as these two matters are self-contained it is convenient to give our reasons for leaving these two rules unchanged in Section (D) below. This will leave for later consideration[28] the other related questions which arise on the assessment of pecuniary loss for a living plaintiff, namely:—

(*a*) the principles of assessment of pecuniary loss for a living plaintiff;

(*b*) the general question of losses incurred by others by reason of the victim's injury including, in particular, the question of losses suffered by members of the victim's family and the loss suffered by the victim's employer for which, at present, the actions for loss of services and for loss of consortium provide a partial remedy;

(*c*) collateral benefits and their impact on the assessment of pecuniary loss;

(*d*) loss distribution.

(A) PERIODIC PAYMENTS

A periodic payments system rejected

26. In Section (J) of the Working Paper[29] we examined the possibility of introducing a system of periodic payments to supplement or replace the present lump sum method of awarding damages. We arrived at no provisional conclusion as to whether such a system ought to be introduced but we did express a firm opinion that, unless on consultation we found a very wide demand for an obligatory system, we would favour a system which provided the courts with an optional alternative to lump sum awards[30]. We also said it was our view that, if a system of periodic payments was introduced, it should be a sophisticated one devised to apply as widely and comprehensively as possible. Such a system

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[25] *ibid.*, paras. 208–217.
[26] [1956] A.C. 185.
[27] The rule as to tax is in fact also an aspect of loss adjustment, between defendant and tax payer.
[28] See paras 108–159 below.
[29] Published Working Paper No. 41, paras. 226–252.
[30] *ibid.*, para. 240.

would entail complicated administrative machinery and would lead to a significant increase in the work load of the courts. We further voiced the opinion that it would only be worth introducing such a system if one were satisfied that it would be used by a significant number of litigants, bearing always in mind the fact that the large majority of claims are compromised without recourse to litigation.

27. Consultation has left us in no doubt that the introduction of a system of periodic payments would meet with vehement opposition from almost every person or organisation actually concerned with personal injury litigation. The introduction of such a system would affect the "short term" nature of liability insurance and the suggestion met with strong opposition from the insurance interests whom we consulted. There was equally strong opposition from those organisations who can be regarded as representing plaintiffs' interests. In addition, the Bar Council and The Law Society opposed the suggestion.

28. It became equally clear to us that, unless periodic payments were introduced as a replacement of lump sum awards and not as an optional alternative, they would be very little used and that settlements would continue nearly always to be cast in the form of lump sum payments.

29. Whatever merits periodic payments would have within a different system of compensation for injury, we are satisfied that, in a fault based system, it would not be worth while introducing periodic payments.

30. Though we reject the introduction of periodic payments, we nevertheless consider that the difficulties inherent in the lump sum system can and should be mitigated by a legislative provision enabling the court in suitable cases to make an award of "provisional damages" and leave over for a period of time the final assessment of the plaintiff's damages. To this matter we return in paragraphs 231–244 below.

(B) THE PRINCIPLES OF ASSESSMENT FOR NON-PECUNIARY LOSS—A LEGISLATIVE TARIFF

No change proposed in the principles of assessment for non-pecuniary loss

31. In paragraphs 68–94 of Published Working Paper No. 41 we examined, in some detail, the many ways in which the courts have attempted to evolve guide lines which would assist in the assessment of damages for non-pecuniary loss. In particular, we came to the provisional conclusions that the courts have been right to reject any test based on an assessment of loss of happiness and that the law should not, as it does not, take account of the fact that a plaintiff cannot use the damages awarded to him. After consultation, we adhere to these conclusions. As we have said earlier[31], we have been unable to devise any legislative guide lines which would assist the courts in their task of assessing this peculiarly arbitrary type of compensation. We accordingly make no legislative proposals on this part of the law.

A legislative tariff rejected

32. Our consideration of the basis of compensation of non-pecuniary loss led us, in paragraphs 95–104 of Published Working Paper No. 41, to ask whether

[31] See para. 9 above.

the judges were the right people to fix the "scale" of damages for non-pecuniary loss and to suggest, as a possible alternative, the introduction of a legislative tariff directed to the general level of assessment of awards for non-pecuniary loss in respect of specified injuries or the loss of a specified faculty. Although convinced that trial by judge alone was the best method of assessing damages in personal injury claims, we suggested that it was, arguably, for society, through the legislature to fix what, in a fault based system, the compensation to be paid by a tortfeasor should be for an identifiable injury. In subsequent paragraphs of the Working Paper[32], we examined the possibility of the introduction of such a tariff and the form it might take.

33. In suggesting the possibility of a legislative tariff we were also motivated by the fact that many people have, in the past, expressed the opinion that damages awarded for pain and suffering and loss of amenity are too low. Consultation has confirmed that many still hold this view. Of necessity, however, a wholly rational basis for this view cannot be formulated although a strong argument by analogy to the damages awarded for defamation was mounted by some we consulted. We felt that, if this opinion was widely held, it could most satisfactorily be met by taking away from the judiciary the decision as to what, for any given injury, was an "average" figure to award, and giving it the legislature. There is another body of opinion which takes the view that damages for non-pecuniary loss are not too low but too high. These critics of the present position base their argument, as we have said earlier[33], largely upon consideration of the effect of damages upon the general economy. We do not believe that, in this sphere of the law, any more than elsewhere, the judges ought to be swayed in their judgment by such a consideration; if it be right to adjust the scale of damages for non-pecuniary loss for such reasons, then we think that this is something which should be done by the legislature by means of a tariff and not by the exercise of judicial discretion.

34. However, the suggestion that a legislative tariff might be introduced met with strong opposition from the majority of those whom we consulted and even those who were most dissatisfied with the present level of damages were lukewarm in support of such a tariff. It was the view of the Bar Council that the courts could not readily be persuaded to make use of a legislative tariff which was likely to detract from the principle that the judge evaluates the individual case.

35. It was always clear to us that the difficulties which the construction of such a tariff would entail were formidable. Whilst it would no doubt be helpful, as some judges have thought[34], if they could be told by the legislature what was the current average figure for, say, the loss of an eye, it would be very much more difficult to devise a helpful norm for back or head injuries and even more difficult for diseases such as cancer or asbestosis. We do not believe that these difficulties would prove insuperable[35] but, in the absence of any real enthusiasm for this innovation, we do not think that we ought to recommend it.

36. On the assessment of non-pecuniary loss there remains the problem of the so-called "overlap" between awards for loss of earnings and awards for loss of

[32] Published Working Paper No. 41, paras. 98–104.
[33] See paras. 16 and 18 above.
[34] Devlin, L. J. on loss of expectation of life and Donaldson, J. on an eye.
[35] Published Working Paper No. 41, para. 100.

amenity. This is a matter on which we do consider there is a need for reform and we return to it in paragraphs 193–201 below where we recommend a legislative provision for the itemisation of the separate heads of damage.

(C) MODE OF TRIAL: JURY TRIAL AND A DAMAGES TRIBUNAL

Introductory

37. In Section (H) of Published Working Paper No. 41 under the heading "The mode of trial for the determination of claims", the main point which concerned us was whether an improved method could be devised for assessing damages. One such method in regard to non-pecuniary loss, a legislative tariff, we have rejected as explained in paragraphs 32–36 above. We must now deal with two alternatives which involve the interposition of the lay element in the machinery of trial.

Jury trial—no extension of the use of juries proposed

38. In paragraph 211 of the Working Paper we pointed out that in two cases in 1965[36] the Court of Appeal laid it down that, save in exceptional circumstances, the court should not exercise its discretion to allow a jury in actions for personal injuries and that these two decisions have led to the virtual disappearance of juries from this type of litigation.

39. In paragraphs 213–216 of the Working Paper we summarised the pros and cons of jury trial in the following terms:—

(*a*) It is the interposition of the lay element into the assessment of awards, brought about by jury trials, which furnishes the major arguments propounded by those in favour of a return to jury trial in at least some personal injury claims. It is contended that juries would be likely, at least on average, to award more than judges; and that, juries being more in touch with the ordinary man's view of the appropriate level of current awards, they would be a fairer tribunal than a judge alone.

(*b*) On the other hand, the arguments against the use of juries in this type of litigation are formidable. The principles of uniformity and also of predictability would necessarily be much weakened. It would be wholly impracticable to have jury trials in every case and the choice of case in which to allow this method of trial would present difficulties. Jury trial is more expensive, prolongs the length of the hearing and causes much inconvenience to those who have to serve as jurymen. Another reason which militates against any increased use of juries is that they are not the most suitable tribunal for assessing pecuniary loss, particularly if, as we hope, the method of this type of assessment becomes more sophisticated.

40. At the Working Paper stage our provisional conclusion was that the disadvantages of jury trial far outweighed any advantage they might have over trial by judge alone and that any increase in their use was undesirable. In coming to this conclusion we noted that the Winn Committee had formed a similar view[37].

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[36] *Hodges* v. *Harland and Wolff* [1965] 1 W.L.R. 523 and *Ward* v. *James* [1966] 1 Q.B. 273.
[37] (1968) Cmnd. 3691, para. 478.

41. As a result of consultation we are confirmed in our provisional view that jury trial should not be extended. Of those who commented on Published Working Paper No. 41 nearly everyone expressed a view on this topic and there was strong and almost unanimous agreement with our provisional conclusion.

42. Only two commentators spoke in favour of extending jury trial. First, a set of comments particularly representative of the view of plaintiffs strongly argued for jury trial in a limited number of cases on the general basis that the judges have fixed the general level of damages too low and have taken too little account of inflation. We recognise the need to deal with the problem of inflation and later in this Report we make a specific recommendation upon it[38]. Secondly, it was brought to our attention that jury trial is normal practice in Northern Ireland where it works satisfactorily and has not prevented either a pattern of conventional awards being arrived at or the settlement of claims by agreement.

43. In reviewing our provisional view we have given special consideration to the dissident opinions we have just quoted, but, despite them, our final conclusion is that we do not recommend the use of juries in the trial of personal injury actions.

A damages tribunal—no such tribunal is proposed

44. As we have mentioned in paragraph 37 above, our interest in the possibility of setting up some kind of damages tribunal has stemmed from the fact that this might be an appropriate way of interposing the lay element in the assessment of damages, in particular of non-pecuniary damages. The Winn Committee have considered the slightly different question of whether personal injury litigation "could be conducted more efficiently or economically before any tribunal or body other than one of the existing courts of law"[39]. The Committee rejected entrusting such litigation to Industrial Injuries Tribunals[40] or to some type of Traffic or Motoring Court[41]. Of a court comprising assessors or experts the Winn Committee found themselves "unanimously of the opinion that none of the proposed changes as to the constitution of court of trial is to be recommended"[42].

45. Consultation on Published Working Paper No. 41 produced only two comments in favour of some special tribunal and they were tentative. All other commentators were opposed to the introduction of any new type of tribunal. Opposition to this type of tribunal is further strengthened by recent experience in Western Australia. The Western Australian Third Party Claims Tribunal (comprising a legal chairman and two lay members), which was established as recently as December 1967 under the Motor Vehicle (Third Party Insurance) Act 1967, has already been disbanded. We have been informed that the working of this Claims Tribunal (particularly in its assessment of damages) proved unsatisfactory. This recent experience from Western Australia finally convinces

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[38] See paras. 227 and 229 below.
[39] (1968) Cmnd. 3691, para. 401.
[40] *ibid.*, paras. 402–403.
[41] *ibid.*, para. 404.
[42] *ibid.*, para. 406.

us that we are right to conclude that no advantage would accrue to the trial of personal injury cases in this country were some kind of special damages tribunal to be created.

Assessors

46. Another suggestion made to us on consultation was that a judge should sit with assessors as experts. To this there are two objections. First, we do not think it is satisfactory that decisions should be taken upon or influenced by opinions or advice given elsewhere than in open court. We note that it was the view of the Winn Committee that "litigants themselves prefer that a judge should decide all the issues in their cases and that strong repugnance would be felt for any system which permitted decisions"[43] to be so influenced. Second, an assessment at first instance arrived at by reason of advice given to the judge by his assessors or experts could not readily be checked and thus the desirable controlling jurisdiction of the Court of Appeal would be undermined.

(D) PECUNIARY LOSS BY A LIVING PLAINTIFF—DEDUCTIONS FOR EXPENSES SAVED AND FOR TAXATION

Deductions for expenses saved—no change in the present rule proposed

47. As we stated in paragraphs 26 and 130 of Published Working Paper No. 41, a plaintiff's damages may be subject to a deduction in respect of expenses which he has been saved, so long as they are *in pari materia* with his future expenses which are being compensated[44]. We went on to comment that the deductions which in practice are made in respect of "expenses saved" usually do not represent a very significant factor in the final assessment and we concluded that we saw no reason for changing the present rule.

48. For the purpose of this Report we can say quite shortly that, in the light of consultation, we remain of the same view. We received no comment of any substance on our Working Paper to suggest that the present rule should be changed.

The rule in Gourley's Case as to taking tax into account—no change proposed

49. Damages for personal injuries, even if they include an element of past or future loss of income, are not subject to income tax or capital gains tax. The question therefore arises as to whether a plaintiff, in a personal injuries case, should be entitled to recover damages in respect of the gross amount of his loss of earnings or only in respect of so much of his lost income as would have remained to him after deduction of tax and, where appropriate, surtax. In *British Transport Commission* v. *Gourley*[45], the House of Lords answered this question, holding that the plaintiff was entitled to recover compensation only for so much of his lost income as would have remained to him after deduction of tax.

50. The Law Reform Committee in their *Seventh Report*[46] considered the general question whether the liability to tax of a person entitled to damages should be required to be taken into account in assessing the damages, but

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[43] *ibid.*, para. 406.
[44] *Shearman* v. *Folland* [1950] 2 K.B. 43.
[45] [1956] A.C. 185.
[46] (1968) Cmnd. 501.

found themselves almost equally divided as to whether the law was satisfactory; those members who thought the law was unsatisfactory were themselves divided between those who thought that the damages should be taxable[47] and those who thought that tax should be disregarded altogether. The Committee, however, agreed in thinking that it might well become desirable to review the practical implications of the decision in *Gourley's Case* after a further lapse of time.

51. In our Working Paper we discussed the rule in *Gourley's Case* and came to the provisional conclusion that the rule should not be altered. There was little dissent, on consultation, from this conclusion. We have always been aware that the effect of the rule is to shift a loss from tortfeasors (usually in the shape of premium payers) to the Inland Revenue (in the shape of tax payers) and it was represented to us that this was a reason for altering the rule. Such a change would entail our advising that damages for personal injuries should be subject to tax in the hands of the plaintiff, although such damages have been expressly exempted from taxation[48]. Whether the tortfeasor or the State should bear this loss is a question of policy upon which we do not feel called upon to express an opinion but, so long as the tax laws remain as they are, we think the rule should stay. We see no reason why someone who has lost a net sum should receive a gross sum. It seems to us that in general a plaintiff should only be compensated for what he has lost and that this principle, enunciated in *Gourley's Case* against the background of present tax laws, is a correct one.

52. We would only add that in paragraph 137 of the Working Paper we also invited comment on whether any change is desirable in the present rule by reason of the anomaly which may be thought to arise when the victim of an accident is a person with a large unearned income. In such a case, we tentatively suggested, the overall rate of tax assessable on the plaintiff's earned income (and hence on the award for his loss of earnings) will be abnormally high and the defendant will reap the benefit. Such comments as we received on the Working Paper were in line with our own provisional view that this particular situation does not constitute any strong case for altering the present rule.

PART IV. RECOMMENDATIONS FOR REFORM: LEGISLATION REQUIRED

Introduction: the arrangement of Part IV

53. We now turn to those areas of the law in which we consider there is a real need for reform. On most of the subjects concerned we have concluded, as we mentioned in paragraph 22(*b*) above, that the changes which we recommend can only be brought about by legislation. The terms of the legislation to cover all such matters are set out in the draft Bill annexed as Appendix 5, and, at the end of each recommendation for legislation, we refer to the relevant provision in the Bill. We also deal hereunder with the matters referred to in the footnote to paragraph 22(*b*) above, on which we believe that improvements would be made by changes in the present system which do not require legislation[49].

[47] Under the Finance Act 1960, ss. 37 and 38, damages in excess of £5,000 for wrongful dismissal became taxable.

[48] Such damages are expressly exempted from capital gains tax and ss. 37 and 38 of the Finance Act 1960, now ss. 187 and 188 of the Income and Corporation Taxes Act 1970, exclude payments for injury or disability.

[49] See footnote 22 above.

54. In this Part of our Report, we revert to discussing the topics concerned mainly in the order in which they were examined in Published Working Paper No. 41[50]. We thus deal first with the rule in *Oliver* v. *Ashman*[51] because the reversal of this rule, as we now recommend, will have an effect on various other matters. Accordingly the matters to which our recommendations relate are dealt with in the ensuing Sections of Part IV arranged as follows:—

Section (A) deals with the rule in *Oliver* v. *Ashman* itself.

Section (B) covers two topics which are interrelated with our recommendations on *Oliver* v. *Ashman*, namely, loss of expectation of life considered as non-pecuniary loss and the claims which survive to the estate of a deceased person under the Law Reform (Miscellaneous Provisions) Act 1934.

Section (C) deals with aspects of pecuniary loss suffered by a living plaintiff other than those already dealt with in the proposals in paragraphs 47–52 above[52], namely, the principle of assessment for a living plaintiff, the actions for loss of services and loss of consortium, the allowance to be made for collateral benefits and the question of loss distribution.

Section (D) covers non-pecuniary loss suffered by persons other than the victim of tortious injury—"*solatium*".

Section (E) covers the itemisation of the heads of damage and the problem of "overlap".

Section (F), in discussing the methods by which pecuniary loss is assessed, contains our recommendations with regard to actuarial evidence and the allied problem of allowing for inflation in the process of assessment.

Section (G) deals with the difficulties, under a lump sum award system, of compensating for uncertain future losses and recommends, in order to alleviate them, a procedure for the making of awards of provisional damages in cases where any estimate is inevitably wrong.

Section (H) deals with the special problems which arise in claims under the Fatal Accidents Acts 1846–1959 and contains our recommendations for certain limited changes.

Section (I) contains recommendations with regard to the award of interest on damages.

Section (J) discusses the difficulties experienced when payments into court are made and suggests an improvement in the present system.

Section (K) contains a proposal for a practical change by the institution of periodic Judges' Conferences on the Assessment of Personal Injury Damages on the lines of the existing Sentencing Conferences.

Section (L) contains our proposal for the abolition of the causes of action for seduction, enticement and harbouring of servants.

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[50] Published Working Paper No. 41, paras. 50–51.
[51] [1962] 2 Q.B. 210.
[52] *i.e.* to leave unchanged the rules with regard to deductions for expenses saved and for taxation.

(A) THE RULE IN *OLIVER* v. *ASHMAN*

The provisional proposals for reform

55. In Section (A) of Published Working Paper No. 41 we discussed[53] the rule in *Oliver* v. *Ashman*[54] in which the Court of Appeal decided that where a plaintiff's expectation of life is reduced he can only recover damages in respect of his future loss of earnings during the period he is likely to remain alive and that nothing may be awarded in respect of the further period he would probably have lived had it not been for his injury. We went on to express our sympathy with the strong criticisms that have been made of this rule, the main one being that it results in manifest injustice to the dependants of a plaintiff who has a seriously reduced expectation of life.

56. The need to reform the rule in *Oliver* v. *Ashman* arises, and arises urgently, in order to produce a just award in the sort of case exemplified by two typical situations. The first is the case of a young husband in a coma, having a wife and two children dependent upon him. His expectation of life is short and he will probably survive the date of trial by only a short time. *Murray* v. *Shuter*[55] is a very clear illustration. The second concerns a slow death, the life expectation being five to ten years, the victim being conscious. *Smith* v. *Central Asbestos Co.*[56] provides the typical variations of this tragic situation. We think that such cases involve a clear injustice which should be remedied.

57. A recent decision of the Court of Appeal demonstrates the injustice which can be caused by the rule in *Oliver* v. *Ashman*. In *McCann* v. *Sheppard*[57], the plaintiff, a man aged 26, was very seriously injured in a road accident in August 1968. In January 1970 the plaintiff issued a writ against the driver of the car in which he had been a passenger at the time of the accident. Some six months later, while the action was still pending, he married and a child of the marriage was born in September 1971. In June 1972 his action came on for trial and he was awarded damages (including interest) of £41,252: this total included a sum of £15,000 for loss of future earnings. In July the defendant gave notice of appeal. On 22 October 1972, the plaintiff died as a result of his injuries (he took an overdose of drugs prescribed to kill his pain). The case then came before the Court of Appeal which gave judgment in March 1973. Evidence of the plaintiff's death was admitted and the original award was varied by, *inter alia*, reducing the £15,000 for loss of future earnings to £400 (representing the loss of earnings between judgment and death). This meant that the plaintiff's widow and child were deprived of any compensation for their lost dependency. The Court re-assessed the damages as at the date of trial as if it had then been known that, within a few months, the plaintiff would die and, because of the rule in *Oliver* v. *Ashman*, the Court was unable to award anything for the "lost period" in substitution for the £15,000 extinguished by the death. Stamp and James, L.JJ. both expressed the opinion that, in any event, nothing could have been awarded for the "lost period" even had the rule in *Oliver* v. *Ashman* not been binding on the Court because, at the date of trial, the plaintiff could not have established that there was any prospect of his "making any savings out

[53] Published Working Paper No. 41, paras. 52–58.
[54] [1962] 2 Q.B. 210.
[55] [1972] 1 Lloyds Rep. 6.
[56] [1971] 2 W.L.R. 206.
[57] [1973] 1 W.L.R. 540.

of earnings". Had the law been what we think it ought to be[58] the result of this case would have been different; loss during the "lost period" would have been assessed on the basis of what the plaintiff would have earned less his probable expenditure on his own maintenance over that period. This test would have resulted in the substitution for his loss of future earnings (out of which he would have had to maintain both himself and his family) of an amount calculated by reference to that part of his earnings which he would have spent on maintaining his family. This would, in effect, have meant the substitution for the £15,000 of a sum equivalent to that which his widow would have recovered under the Fatal Accidents Acts had he died before his case came to trial. We think that this would generally be considered a just decision.

58. We expressed the provisional conclusion that the present rule in *Oliver* v. *Ashman* should be reversed and suggested three possible alternative solutions for changing the law:—

(*a*) the reversal by legislation of the rule in *Oliver* v. *Ashman* and the adoption of the formula accepted in the Australian case of *Skelton* v. *Collins*[59], *i.e.* compensation for loss of earnings in the so-called "lost years"[60] should be based upon the amount of such earnings less what the plaintiff would have spent on his own maintenance;

(*b*) assuming the retention of the present rule that a plaintiff gets nothing for the "lost period", the dependants should be permitted to bring an action under the Fatal Accidents Acts notwithstanding that the deceased had, during his lifetime, himself received damages;

(*c*) a plaintiff should be enabled to join his dependants in his own action and provision should be made that the sum awarded to compensate the dependants for what they would probably lose during the lost period should be paid into court.

59. We further said that we thought the choice must be between the first and third solutions though we were not committed to either. However, we expressed an adverse view on the second proposal.

Analysis of the three proposed solutions in the light of consultation

60. With but one exception all the commentators on Published Working Paper No. 41 supported the reversal of the rule in *Oliver* v. *Ashman* by legislation. There was, however, a very wide difference of opinion as to what should be put in its place. Numerically the first alternative solution, outlined in paragraph 58(*a*) above, had the most support. A variation of this solution which would provide no deduction at all for living expenses had slight support. The second solution, outlined in paragraph 58(*b*) above, found little favour but that which it did find was very persuasive. The third solution, outlined in paragraph 58(*c*) above, found some support but we have concluded that it is too complex a solution to be satisfactory.

61. The problems presented by a reversal of the rule in *Oliver* v. *Ashman* are difficult ones and we feel that we should set out in some detail, as we do in paragraphs 62–85 which follow, the matters we have considered in making our final choice in favour of the first solution propounded in the Working Paper.

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[58] See paragraph 87 below.
[59] (1966) 39 A.L.J.R. 480.
[60] In this Report we refer to this time as the "lost period".

Solution (a) analysed

62. A reform of the law on the basis of Solution (*a*) would, we recognise, not be in accordance with the principles generally applied in the assessment of compensation for future loss of earnings, which take no account of how the plaintiff will spend the money awarded—whether on himself, on his dependants or otherwise. Nevertheless, we consider that the principle of earnings less what he would have spent on his own maintenance ought to be accepted.

63. In the case of mature plaintiffs with no dependants, we envisage that compensation would depend on whether the plaintiff could establish as a probability that he would have saved some part of his earnings during the lost period or spent them otherwise than upon himself. In the case of very young plaintiffs we would expect the awards to be small because of the impossibility of such plaintiffs establishing as a probability that they would, in fact, have made any savings from future earnings. In both these cases it is true that the award, unless spent by the plaintiff himself, might result in a bonus for his estate and ultimate beneficiaries not dependant upon him at the time of the accident, nor perhaps at death. However, we do not see the foregoing result as unjust, particularly in the case of a mature plaintiff without dependants at the time of the accident; by reducing the plaintiff's expectation of life, the dependant has taken from him his ability to offer to anyone who might become dependant upon him in the future any security during the lost period.

64. In the case of plaintiffs with dependants at the time of the accident, the amounts would be substantial, but there would be no certainty that the plaintiffs, having obtained their awards, would, in fact, put aside that part of the total award as provision for their dependants; and, to this extent, the object of compensating the dependants might be nullified. However, the fact that this solution is the one nearest in principle to the way in which damages are at present awarded (*i.e.* that they should be paid to the victim himself) is a persuasive factor in its favour. In any event we feel it would be taking an over cynical view of the attitude of accident victims to assume that any large number of them will not devote that part of their damages to making provision for their dependants. We attach importance to the fact that this solution is undoubtedly the simplest to operate.

Solution (b)—the prima facie case against

65. In the Working Paper we suggested that this solution (allowing the dependants to bring a Fatal Accidents Acts claim notwithstanding that the plaintiff had himself in his lifetime recovered damages) would present a number of practical difficulties. Those we mentioned were that the limitation period would certainly have to be extended; that, after perhaps a considerable lapse of time, the dependants might have difficulty in proving that the deceased had died as a result of the original accident; that in accordance with the rules governing deductions in Fatal Accidents Acts claims, it would be necessary to determine the extent to which the claiming dependants had benefited from the death; and that the defendant would have a potential claim hanging over him perhaps for years.

Solution (b)—the arguments in favour

66. As we have already mentioned[61] the arguments put on consultation in favour of this solution were very persuasive and accordingly, before stating our

[61] See para. 60 above.

final recommendation in favour of the first solution, we feel we should set them out in some detail.

67. If the revised law is to revolve, as it should, around the question of dependency, the relevant dependants might be:—

(i) dependants at the time of trial, *or*

(ii) assumed dependants at the date of assumed death, where the trial occurs before death, *or*

(iii) actual dependants at the date of death.

It is put forward as self-evident that the actual dependants at the date of death is the logical class, consistent with existing principles and with justice. Only by the adoption of Solution (*b*) can the compensation be placed in the hands of those dependants to produce a result which is free from anomaly and injustice and is a consistent working out of existing principles.

68. The argument in favour of Solution (*b*) then goes on to pose three problems and to suggest the answer to them. First, it is asked to what extent must the dependants give credit for benefits received from the estate in so far as they are benefits derived from the victim's award. It is argued that they must do so. Second, it is pointed out that there is a possibility of abuse by a well advised victim himself under Solution (*b*). He would, of course, only receive the present *Oliver* v. *Ashman* award but, if he was frugal, much of his award might remain at his death, to diminish his wife's award. By a proper will, however, he could direct his estate to his adult children or some other beneficiary, so that his widow's award would be undiminished. But, it is argued, this is not a disturbing possibility. It must be recognised that wealthy and well advised men do just this before their deaths, so that their widows benefit in Fatal Accidents Acts claims. Moreover, judicious delay on the part of alert lawyers can achieve the same result under the present law. Third, it is argued that while Solution (*b*) necessitates consideration of the limitation periods, the answer may not be difficult to find.

Difficulties as to limitation periods in Solution (b) answered

69. The present law as to limitation under the Fatal Accidents Acts is that:—

(*a*) if a victim's claim is tried in his lifetime, and he is awarded compensation, his dependants have no further claim on his death;

(*b*) if a victim settles his claim in his lifetime, the same result follows;

(*c*) if a victim allows the limitation period for his claim to pass in his lifetime, neither he nor his dependants on his death have any claim;

(*d*) if a victim issues a writ within three years of his accident and then spins out proceedings in the knowledge that he is dying, on his death his dependants' claims are in effect added to his (which survive to his estate) and there is a full claim for his suffering and past loss of earnings and a full Fatal Accidents Acts claim for the dependant family loss.

70. It is argued that the adoption of Solution (*b*) will not inhibit the living plaintiff from bringing his case to trial expeditiously because, under it, no-one will henceforward suffer. It is, therefore, further argued that there is no reason why any dependants should have a claim more than three years after the

accident unless the victim has commenced proceedings within the period prescribed for his own claim. This principle, it is accepted, should be subject to the obvious qualifications:—

(i) that disability on the victim's part or the provisions of the Limitation Act 1963, or other proper reasons may extend the period beyond three years;

(ii) that a payment by way of settlement to the victim should not extinguish the claim of the dependants.

71. It is argued finally that there is no necessity for the dependants to be subject to any separate limitation period. If the victim must bring or settle his own proceedings in good time, it is not anticipated that, in practice, any great difficulty will confront widows in proving their claims. If they cannot do so in the rare instance, they must fail.

72. As to the danger in Solution (*b*) that this will leave a defendant with a potential claim hanging over him for years; it is pointed out that for practical purposes the defendant will be an insurance company. While it is certainly embarrassing to any defendant to have an unresolved issue of liability hanging over him, because he may lose vital witnesses, under Solution (*b*) liability has to be tried under the usual time limitations in the victim's action. The fact that an insurance company may have to retain money over a period of years because the issue of quantum is not immediately resolved would, it is thought, have but a marginal effect on insurance premiums and Solution (*b*), involving deferred payments which may never arise, appears more favourable to insurers than the larger immediate payments which would arise under Solution (*a*).

73. For all the foregoing reasons it is argued that of the three alternatives suggested, the best is Solution (*b*) which is symmetrical and logical and the only solution which is practical and just.

74. We would now turn to the reasons which have led the Commission to reject the foregoing arguments, persuasive though they are.

Solution (b)—the arguments against

75. On grounds of principle we accept that the arguments summarised in paragraphs 66–73 above go a long way to neutralising the *prima facie* case against Solution (*b*) as rehearsed in paragraph 65 above; but we attach greater importance than do our critics to the desirability of preventing a defendant from having an action hanging over him. Nor are we entirely convinced by the argument quoted in paragraph 67 above that it is axiomatic that the qualified dependants should be those at the date of death. The view is held by some that during his lifetime a plaintiff ought to have some discretion as to the provision he makes for his dependants.

76. Our objections to Solution (*b*) are on grounds of practicability. We are specially concerned about the practicability of this solution in those cases which are settled; in such cases major difficulties would arise under three heads:—

(i) the problem of recording settlements;

(ii) the conflict of interests involved in agreeing settlements;

(iii) the necessity of court approval for settlements.

77. In the first place the practicability of arriving at settlements under Solution (*b*) would be seriously inhibited by the necessity of having a system of recording such settlements and the fact that the record of every settlement would have to state three matters:—

(i) The loss of expectation of life upon which it was based. This would be necessary because, in the case of premature death, the defendant would, unless this basis of settlement were recorded, be paying double compensation; to the plaintiff for the period he was not going to live, to the dependants for the period which had already been the subject of compensation to the plaintiff[62].

(ii) The amount of the damages attributable to future loss.

(iii) The extent to which questions of liability had been taken into account in arriving at the settlement. This might be either in respect of contributory negligence or in respect of the chance of total failure or both. This proportion would govern the dependants' subsequent claim.

78. There is, perhaps, no reason why a system for such a detailed recording of settlements should not be devised, although there would be difficulties in doing this. More serious, however, are the difficulties which arise because of the fundamental conflicts of interest between the parties involved in the settlement.

79. A plaintiff will nearly always want as big a capital sum as he can get; an insurer, under a Solution (*b*) regime would want to have recorded as big a reduction for liability risk as possible; but it would be in the interest of dependants, present or future, that the liability risk should be as low as possible, even at the expense of a smaller capital sum being paid to the plaintiff. In the negotiations leading to compromise the dependants would not be represented; they might not even exist and, in any event, their future claim would be only indirectly in issue. The insurer defendant would take very seriously into account the claim which he would know he had some day to meet and, to the detriment of the dependants, would attempt to cast settlements so that as much weight as possible was placed upon the liability risk. This would make it very difficult for the plaintiff and his legal advisers.

80. The mechanics of negotiation contain a fair amount of bluff and counter-bluff and a plaintiff's legal adviser, faced with what seemed to him to be a generous offer, but one linked with a higher liability risk than he thought justifiable, would be in grave difficulties.

81. In the result, we believe that if Solution (*b*) were adopted every settlement of a claim which contained an element of compensation for the lost period would have to be approved by the court and here further difficulties would arise.

82. The object of approving such settlements would be to safeguard the interest of dependants or future dependants. But a simple requirement that all settlements containing a lost period element should be approved by the court could quite easily be circumvented by the parties agreeing, in negotiation, that the plaintiff had suffered no loss of expectation of life. It would, therefore, be necessary that every settlement of a claim for personal injuries should go before

[62] If one rejects a system which would compensate the plaintiff for the lost period without any deduction for his own maintenance, only one based on periodic payments can protect a plaintiff who exceeds his expected life span.

the court to ensure that it did not contain a lost period element. In view of the great number of personal injury claims this would seem to be a substantial and most undesirable addition to the cost of litigation and the work of the courts.

83. It has been suggested that, because most claims with a lost period element are substantial, a solution might be to make all claims for personal injury above a certain figure subject to the approval of the court. Such a solution might, however, fail to catch the very cases where the dependants' interests are most important, namely, those in which the plaintiff has suffered a very big reduction in his life expectancy.

Solution (c) analysed

84. The relatively few comments we received in favour of this solution have not convinced us that our own objections to it in Published Working Paper No. 41 were ill-founded. If a plaintiff with dependants was able to join them in his action, we envisaged that a sum of money would be awarded to compensate the dependants for what they would probably lose during the lost period. This money would be paid into court where it would earn interest during the remaining years of the plaintiff's life, such interest being taken into account in the computation of the capital sum. On the plaintiff's death the sum in court would go to his dependants in proportions decided by the judge at the trial of the action. If the plaintiff lived longer than his prognosed expectation of life, he would be allowed to apply to the court for a variation of the way in which the disposal of the money had been ordered; he would also be able to apply for a variation on account of changes in his family situation, such as the desertion of a wife, the marriage of a daughter whose expected dependency was thereby ended, or perhaps the addition of more dependants, for example by adoption.

85. Our main objection to this solution is that it would, in practice, greatly complicate the settlement of claims. A plaintiff with a reduced expectation of life and dependent children would have to obtain the approval of the court and the position of his wife would require protection also.

Recommendations

86. On balance we have come to the conclusion that the difficulties in Solutions (*b*) and (*c*) are such that it is Solution (*a*) which we should recommend.

87. We, therefore, recommend that the rule in *Oliver* v. *Ashman* be reversed by legislation and that, in any case where it is established that the plaintiff's expectation of life has been reduced by his injuries, he should himself be compensated for the loss during the period he would otherwise have lived on the basis of his anticipated income from earnings (and from other sources for the reasons given in paragraph 90 below) during that period, less what he would have spent on his own maintenance (Clause 2(2)(*b*)).

88. We reject the suggestion, made to us on consultation, that there should be an age limit below which such damages should not be awarded. Awards to young plaintiffs will inevitably be small because it will be impossible for such plaintiffs to establish that they would probably have made any savings or supported any dependants out of their earnings, and an arbitrary age limit seems undesirable.

89. We do not, however, think that the court should be restricted to considering only dependants actually in existence at the time of the accident. It ought to be open to a plaintiff without dependants at the time of his accident to establish

as a probability that he would have used his earnings during the lost period otherwise than on himself.

90. We are also of the opinion that, in line with the reasoning of the Australian High Court in *Skelton* v. *Collins*, the plaintiff should be entitled to compensation for other kinds of economic loss referable to the lost period. A person entitled by will to receive an annuity for his life would, if his life were shortened by the defendant's fault, lose the capacity to receive the annuity during the lost period, no less than he would lose his earning capacity. There seems to be no justification in principle for discrimination between deprivation of earning capacity and deprivation of the capacity otherwise to receive economic benefits. The loss must be regarded as a loss of the plaintiff; and it is a loss caused by the tort even though it relates to moneys which the injured person will not receive because of his premature death. No question of the remoteness of damage arises other than the application of the ordinary foreseeability test.

91. A plaintiff's income may, however, come from dividends paid on capital assets and, as these assets will themselves, subject to death duties, be able to pass, on his death, to his dependants, we consider the court must have a discretion to ignore such lost income in the lost period in its assessment of damages (see the proviso to Clause 2(2)(*b*)).

(B) (i) EXPECTATION OF LIFE CONSIDERED AS NON-PECUNIARY LOSS

(ii) CLAIMS UNDER THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934

Introductory

92. As we pointed out in the Working Paper[63], these two subjects are distinct but inter-connected and, for this reason, we dealt with them together. Loss of expectation of life as an independent concept made its appearance in *Flint* v. *Lovell*[64]. In that case Acton, J., in awarding damages to a 70-year-old plaintiff, treated the shortening of his life as a head of damage separate from the mental suffering arising from knowledge of lost expectancy, and the Court of Appeal upheld his judgment. Shortly before *Flint* v. *Lovell* was decided, the Law Reform (Miscellaneous Provisions) Act 1934 had been passed whereby, in certain circumstances, causes of action vested in the deceased survived for the benefit of his estate.

93. In *Rose* v. *Ford*[65] the House of Lords was required to decide both wether *Flint* v. *Lovell* was rightly decided and whether, if so, this head of damage was recoverable for the benefit of the estate. They answered both questions in the affirmative and, dealing with the first question, Lord Wright said:—

> [A man has] "a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life shall not be shortened by the tortious act of another. His normal expectancy of life is a thing of

63 Published Working Paper No. 41, para. 59.
64 [1935] 1 K.B. 354.
65 [1937] A.C. 826.

temporal value, so that its impairment is something for which damages should be given."[66]

94. As Professor Kahn-Freund has pointed out, "*Flint* v. *Lovell* might have remained a decision of little consequence had it not been for the survival of the cause of action under the 1934 Law Reform Act"[67]. In *Rose* v. *Ford*, the plaintiff died without recovering consciousness and, in later cases, damages were awarded where death was instantaneous. It is clear that, in such cases, nothing is given for the subjective element of knowledge of the loss. Equally clearly the victim does not himself benefit from the award. As was inevitable, the awards of damages varied widely until, in *Benham* v. *Gambling*[68], the House of Lords laid down, in effect, a standard conventional sum of £200 which was later increased to £500 because of the decline in the value of money between 1941 and 1964[69].

95. As a result of these decisions the same conventional award is made for loss of expectation of life whether the award is made to a living plaintiff or to the personal representatives of a victim who has died before prosecuting his claim to judgment, although, in the case of a living plaintiff, something may also be awarded for the suffering caused by the victim's knowledge that his length of days is curtailed.

The provisional conclusions for reform

96. On these matters our provisional conclusions in the Working Paper were that:—

(*a*) damages for loss of expectation of life assessed as an arbitrary sum should be abolished;

(*b*) we invited comment as to whether there should be put in its place any other head of damage for loss of expectation of life and, if so, on what basis it should be assessed;

(*c*) if there were to be a separate head of damage for loss of expectation of life it was our view that it should not survive to the estate of the deceased victim under the Law Reform (Miscellaneous Provisions) Act 1934;

(*d*) on the other hand, we suggested that claims for other items of non-pecuniary loss should survive to the victim's estate under the 1934 Act.

97. As was inevitable, consultation on this part of the Working Paper was complicated by the treatment of the two different subjects under one heading. A further complication arose from the fact that consideration of the desirability of the survival to the estate of a deceased victim of his claim for damages for loss of expectation of life leads to a consideration of the question whether there ought to be introduced into English law a wholly new cause of action for the non-pecuniary loss suffered by the near relatives of a deceased victim. This question was examined in paragraphs 197–203 of the Working Paper and is considered later in this Report[70]. For example, the Bar Council came to a hesitant conclusion that the law should remain as it is largely because they

[66] *ibid.*, at p. 848.
[67] (1941) 5 M.L.R. 81 at p. 84.
[68] [1941] A.C. 157.
[69] *Naylor* v. *Yorkshire Electricity Board* [1968] A.C. 529. The judge's award of £500 was increased to £1,000 by the Court of Appeal but was restored by the House of Lords. It is of interest that an economist gave evidence at the trial of the decline in the purchasing power of the pound between 1941 and 1964. His evidence was unchallenged.
[70] See paras. 160–180 below.

thought that, for social reasons, the parents of a dead child should get something; they also expressed themselves opposed to any award in the form of a *solatium*. Yet they were clearly thinking of the conventional sum of £500 awarded as damages for loss of expectation of life to the estate of a dead child as a masked *solatium* to the parents.

98. On consultation opinion was evenly divided as to whether there should be any separate head of damage for loss of expectation of life. But many of those who favoured its retention considered that the damages awarded for the suffering caused by the knowledge of that loss were the most important part of such damages. The balance of opinion was against survival to the estate of the deceased of a claim for damages for loss of expectation of life, but some who so commented thought that in place of such survival close relatives of the deceased should be given a cause of action for *solatium*. Opinion was evenly divided as to whether other forms of non-pecuniary loss (pain and suffering endured between accident and death) should survive to the estate of the deceased.

Damages for loss of expectation of life as non-pecuniary loss

99. We remain of the opinion that there should be no separate head of damage for loss of expectation of life assessed as a small conventional figure of £500. In almost every case of a living plaintiff this head of damage is largely irrelevant; where accident shortens an expectation of life the injury will be a serious one for which heavy damages are awarded and such damages undoubtedly mask and swallow up the conventional figure. We do not think that there should be substituted for a conventional award some other basis of assessment depending upon a subjective appraisal of the likeliness, or otherwise, of the victim having enjoyed a happy life. Such a test is one which we reject in the assessment of damages for non-pecuniary loss generally[71]. We think that what ought to be compensated is the suffering caused to a tort victim by the knowledge that his days are prematurely numbered. We accordingly recommend that claims for damages for loss of expectation of life as a separate head of non-pecuniary loss be abolished, but that the court should be required to take into account, in assessing damages for pain and suffering, any suffering caused or likely to be caused by awareness of lost expectancy. Clause 3(*b*) of the Annexed Bill implements this recommendation.

The survival of non-pecuniary claims for loss of life expectancy

100. The abolition of the claim for damages for loss of expectation of life will make it unnecessary to amend the Law Reform (Miscellaneous Provisions) Act 1934 (which provides for the survival of causes of action to a deceased's estate) in this respect. But even if such a claim were retained, the argument against its survival to the estate of a deceased is very strong, mainly because persons who have not suffered any loss may get the benefit of the award. The exceptional case where the award is of some importance is where a child is killed and the parents, on behalf of his estate, claim the conventional sum. There is evidence that the recovery of this small sum genuinely operates as some solace for bereavement. We think, however, that the question whether parents so circumstanced should receive compensation is something which ought properly to be considered in the context of the possibility of creating a new cause of action,

[71] See para. 31 above.

rather than as a fortuitous result of the survival of causes of action. We consider this aspect of damages later in this Report[72].

The survival of other claims for non-pecuniary loss

101. The question whether other claims for non-pecuniary loss vested in a victim at his death should continue, as they now do, to survive for the benefit of his estate raises different issues. Apart from the survival of the claim for damages for loss of expectation of life, to which we have referred in the preceding paragraphs, where an injured person dies at once there cannot be vested in him at death any claim for non-pecuniary loss. However, where he has survived his accident for some time before dying, a claim for damages for pain and suffering and loss of amenity will be vested in him at his death. The provisional conclusion which we reached on this question in our Working Paper was that such claims should continue to survive for the benefit of his estate. We then put the argument thus:—

> "The deceased may have suffered severe pain over a considerable period before death and may even, during that time, have spent some of the damages he was advised he would recover; and, during this period, relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them. We can see no reason why, in justice, a victim's death, perhaps wholly unconnected with the injury, should lead to this compensation being taken away."[73]

Criticism of our provisional conclusion

102. Those who criticised our provisional conclusion on this question did so mainly on the ground that compensation paid after death could not benefit the person who had suffered the loss and that it would, therefore, benefit, at the expense of the tortfeasor, some relative or even creditor, who had suffered no loss. Criticism was also levelled at the hypothetical nature of the argument put forward and it was pointed out accurately that, if there was no survival of such claims no solicitor could safely countenance the expenditure of money, recovery of which by the victim would be contingent upon his survival. These criticisms were advanced on the assumption that between injury and death compensation for pain and suffering accumulating during that period could not be paid to the victim. (By definition, in the circumstances here being considered, death precedes the trial of the victim's claim for damages.)

Interim payments

103. The impact of the criticism referred to in the preceding paragraph has, in our opinion, been substantially lessened by an important change in procedure which has taken place since the publication of our Working Paper. Order 29, Part II of the Rules of the Supreme Court now provides that a plaintiff may, in certain circumstances, apply to the court for an interim payment prior to the trial of the action. This interim award must not exceed a "reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff"[74]. It is also provided[75] that "on giving or making a final judgment or order" the court may make an order "for the repayment

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[72] See paras. 160–180 below.
[73] Published Working Paper No. 41, para. 67.
[74] R.S.C., O.29, r.12(1). We refer again to this procedural change in another context later, see para. 238 below.
[75] R.S.C., O.29, r.16.

by the plaintiff of any sum by which the interim payment exceeds the amount which that defendant is liable to pay the plaintiff".

Effect of the provisions for interim payments

104. Because we have concluded that there should be no change in the principles which the courts have laid down for the assessment of non-pecuniary loss for a living plaintiff[76], we have not burdened this Report with the detailed examination which we gave to this question in our Working Paper[77]. However, we endorse the approval which we there gave[78] to the dictum of Harman, L. J. in *Warren* v. *King*, namely:—

> "It seems to me that the first element in assessing such compensation is not to add up items as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances?"[79]

We expressed the opinion that as a "first element" this criterion was right. An interim payment immediately to "alleviate the disaster to the victim" is one which, as the law now stands, can be made. We think it most desirable that where, perhaps because of difficulties of prognosis, trial of an action is properly delayed, such an interim award should be able to be made and, if made, we do not think that that part of it referable to the period between accident and death ought to be repayable out of his estate, if the victim dies before trial. If, however, the survival of claims for non-pecuniary loss was abolished any interim payment of this sort would clearly not form part of any award of damages to the estate and might, where the pecuniary loss was small, lead to a repayment to the tortfeasor. We think that the abolition of the rule that these claims survive would inevitably lead to a situation where the courts could not safely make any interim payments of damages referable to non-pecuniary loss. These considerations lend substantial further weight to the provisional conclusion at which we arrived in our Working Paper and we, accordingly, recommend that claims for damages for non-pecuniary loss vested in a deceased victim at his death should continue to survive for the benefit of his estate.

The impact of the reversal of the rule in Oliver v. Ashman on the Law Reform (Miscellaneous Provisions) Act 1934

105. There is, however, one technical difficulty which would arise under the Law Reform (Miscellaneous Provisions) Act 1934 if our proposal[80] for the reversal of the rule in *Oliver* v. *Ashman*[81] is adopted. If a man is injured and his expectation of life is thereby shortened, a cause of action will thereupon be vested in him for future pecuniary loss both during his anticipated life-span and for anticipated loss during the "lost years". If he then dies before prosecuting his vested claim to judgment, the fact of death will (as it does now) conclude his vested claim for pecuniary loss during his expected lifetime[82]. But death would not conclude the claim for the lost years which would, therefore, survey to

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[76] See para. 31 above.
[77] Published Working Paper No. 41, paras. 68–94.
[78] *ibid.*, para. 93(*f*).
[79] [1964] 1 W.L.R. 1 at p. 10.
[80] See paras. 86–91 above.
[81] [1962] 2 Q.B. 210.
[82] See *McGregor on Damages*, 13th ed., para. 1171.

his estate under section 1 of the Act of 1934. The defendant would then find himself paying damages twice over, to the dependants under the Fatal Accidents Acts and to the beneficiaries under the will (probably the same people)[83] or intestacy by reason of the survival legislation. We accordingly recommend that legislation should provide that claims for damages for the lost period should not survive to the estate of a deceased person (Clause 16(3)).

The impact of our proposal for the award of damages for bereavement on the Law Reform (Miscellaneous Provisions) Act 1934

106. In paragraphs 177–180 below we recommend that parents who have lost an unmarried child or a spouse who has lost the other spouse, should be awarded a sum as damages for the bereavement caused by reason of a fatal accident. These damages being entirely personal should clearly not survive to the estate of the person to whom it is awarded, and our legislative proposal, which includes this claim in Fatal Accidents Acts claims, so provides (Clause 10(4)).

Recommendations

107. In the result, on the matters covered by this section of our Report, we recommend that:—

(*a*) claims for loss of expectation of life as a separate head of non-pecuniary loss should be abolished, but the court should take into account, in awarding damages for pain and suffering, an appropriate additional amount to cover any suffering caused or likely to be caused by awareness of lost expectancy (Clause 3);

(*b*) in claims under the Law Reform (Miscellaneous Provisions) Act 1934, claims for damages for non-pecuniary loss (other than for loss of expectation of life) should continue to survive;

(*c*) for the reasons given in paragraph 105 above when a tort victim dies before judgment, legislation should provide against a defendant having to pay twice over to the dependants under the Fatal Accidents Acts and to the estate of the deceased (Clause 16(3)).

(C) THE ASSESSMENT OF DAMAGES FOR PECUNIARY LOSS

The matters considered in this section and their inter-connection

108. Under the above general heading we examine four identifiable topics, namely:—

(i) the principles of assessment for a living plaintiff;

(ii) the actions for loss of services and loss of consortium;

(iii) collateral benefits and their impact on the assessment of pecuniary loss;

(iv) loss distribution.

109. Different aspects of these subjects have heretofore been given separate consideration in the consultative documents which we have published, namely:—

(*a*) in Part III—Section (D) of Published Working Paper No. 41, we considered the principles of the assessment of pecuniary loss and the

[83] Under our proposals the amount by which the dependants benefit from the estate will no longer be taken into account (see paras. 255–256 below).

particular question to what extent a plaintiff should give credit to a tortfeasor for benefits received from sources other than the tortfeasor;

(*b*) in Part III—Section (G) of that Paper, we considered to what extent losses incurred by others on behalf of a victim (with particular reference to losses incurred by members of the victim's family) should be recoverable from the tortfeasor and what should be the method for such recovery;

(*c*) in Published Working Paper No. 19, we considered the archaic actions for loss of services and loss of consortium which give partial and, to some extent, anomalous remedies to persons who have suffered damage as a result of personal injury caused to others by tort.

In this Report we consider all those matters together because they are closely interconnected and, in some ways, different aspects of the same problem.

(i) The principles of assessment for a living plaintiff

The basic principle governing the assessment of pecuniary loss

110. We have, in this Report[84], already stated our aim to be that compensation in each individual case should be full for pecuniary loss. This indeed is the law, a succinct statement of which is found in *McGregor on Damages* as follows:—

> "The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law."[85]

This broad principle has indeed been established for a long time and was propounded by Lord Blackburn in *Livingstone* v. *Rawyards Coal Company* in the following terms:—

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."[86]

The passage cited was quoted with approval by Earl Jowitt in a modern leading case on personal injuries:—

> "The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries."[87]

The different types of pecuniary loss

111. When a man is injured he suffers a number of losses: he is off work, so he loses his wages; he needs healing, so he incurs medical expenses; he can no longer look after himself, so he has to be nursed and have extra assistance in the home. Some of these losses consist of not getting what he would otherwise have got, some of expense which he would not otherwise have incurred, but

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[84] See para. 20 above.
[85] 13th ed. at p. 738.
[86] (1880) 5 App. Cas. 25 at p. 39.
[87] *British Transport Commission* v. *Gourley* [1956] A.C. 185 at p. 197.

they do not differ in principle. To the extent that a plaintiff can show that he is actually out of pocket they are, under the law as it now is, recoverable and they should plainly remain so.

112. In respect of some losses, however, the plaintiff will be unable to show that he has actually incurred expense or suffered loss. Extra help in the home may be provided voluntarily by members of the family or by friends without any agreement that they should be remunerated for their services, and relatives and friends may ameliorate a plaintiff's loss of social intercourse by visits to him in hospital or whilst he is confined at his home: he could employ a nurse, in which case he would recover the cost from the tortfeasor, but, instead, the necessary attention is given to him by his wife who may have had to give up work to attend to him. This does not mean that the relevant item of damage has not been suffered, but only that the item cannot be reduced to a specific sum which the defendant is under a legal duty to pay. If the victim is astute and well advised enough to enter into a contractual arrangement with whoever is providing him with the services he needs, then he is able to recover the cost of those services from the tortfeasor, but, if he fails to take this precaution, he may not be. In these cases we do not think that the payment of compensation should depend on whether a largely fictitious contractual relationship has been engineered by the victim's legal advisers.

113. In *Schneider* v. *Eisovitch*[88] the plaintiff was injured in a road accident in France, her husband being killed in the same accident. Her brother-in-law and his wife flew to France in order to accompany her home to England. Paull, J. held that she was entitled to recover the £110 expenses incurred in this way and said:—

> "In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable, bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted; and thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends."[89]

114. In *Gage* v. *King*[90], however, Diplock, J. dissented from this decision of Paull J. because he regarded it as an essential condition that a plaintiff should be under a legal liability to pay the expenses of a benefactor before he can

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[88] [1960] 2 Q.B. 430.
[89] *ibid.*, at p. 440.
[90] [1961] 1 Q.B. 188.

himself recover those expenses from a tortfeasor. Whatever the law may be, we consider that the decision in *Schneider* v. *Eisovitch* produced a fair result[91].

(ii) The actions for loss of services and loss of consortium (per quod servitium et consortium amisit)

The situation giving rise to these actions

115. Another situation which arises in this branch of the law is where the victim rendered gratuitous services before the injury of which the recipent is, by the injury, deprived. A wife, for example, is so injured that she is unable any longer to do any housework or to care for her family and extra help has to be employed.

116. Consideration of the situation outlined in the last paragraph leads to the questions raised in Published Working Paper No. 19, as to the rights of action which a husband has for the loss of his wife's services and *consortium* and a father for the loss of his child's services. It is convenient, at this stage, to introduce also the other *per quod* action, namely, that of an employer for the loss of his servant's services.

The scope of these actions

117. The actions *per quod servitium et consortium amisit* are outstanding examples of the way in which modern law is still tied to its historical past. They are based upon the principle that a master is entitled to sue anyone who causes him to suffer loss by wrongfully depriving him of the services of his servant. This includes the loss of the real or notional services of persons who would not today be regarded as a man's servants, such as his wife and children; the action stems from a time when wife, child and servant were considered rather as the property of the plaintiff than as individuals. Outside the range of these family relationships, however, the scope of the action is very narrow because recent decisions have confined the master's remedy to cases where the injured person could be described as a menial servant forming part of the master's household[92].

118. A further limitation on the scope of the action arises from the decision of the House of Lords in *Best* v. *Samuel Fox & Co. Ltd.*[93] that a wife did not have an action for the loss of services and consortium of her husband caused by tortious injury inflicted on him by the defendant. There is no right to damages if the wife, child or servant is killed instead of merely injured[94], save for claims under the Fatal Accidents Acts.

119. At present, therefore, a remedy is available in the following circumstances:—

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91 The Court of Appeal has recently followed *Schneider* v. *Eisovitch* in *Cunningham* v. *Harrison & Another* (*The Times*, 18 May 1973) in holding that where the injured plaintiff's wife rendered services to him in place of a nurse, the plaintiff was entitled to recover compensation for the value of these gratuitous services and it was not necessary that the husband should have made a legal agreement for the payment of them. The Court likewise held in *Donnelly* v. *Joyce* (*The Times*, 19 May 1973) that where a mother gratuitously nursed her injured child, compensation for the value of such services could also be recovered.

92 *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641.

93 [1952] A.C. 716.

94 *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C. 38. However, if the death is caused by a breach of contract entered into by the master, he can recover damages. *Jackson* v. *Watson & Sons* [1909] 2. K.B. 193.

(*a*) Where a menial servant has been injured and the master has thereby been deprived of his services, the master may sue for the financial loss he has suffered.

(*b*) A husband who is deprived of his wife's services because she is wrongfully injured can similarly recover for loss of her services. A parent may recover for the loss of services of a child if the child is actually rendering services at the time of injury or is a child to whose services the law regards the parent as entitled (*i.e.* a minor living at home and not in other full-time employment).

(*c*) Where a wife has been injured her husband can sue for the loss which he has incurred by being deprived of his wife's society (*consortium*).

120. A comparatively recent example of a husband's claim is provided by *Cutts* v. *Chumley*[95] where a husband recovered £5,000 for loss of services and £200 for loss of *consortium*. Damages awarded for loss of *consortium* are small; in *Hare* v. *British Transport Commission*[96] the wife had been in hospital for 12 weeks and an award of £20 was made for loss of *consortium*. Lord Goddard said:—

> "Loss of consortium still survives as a cause of action, but it is not one, I think, for which the courts should give generous compensation in addition to such legitimate expenses as he has had to incur on account of his wife's absence."[97]

121. The actions for loss of consortium and loss of services of a servant or child can, therefore, fairly be said to have little importance or relevance today; they are archaic and anomalous and their abolition would leave no important loss uncompensated. The husband's action for loss of his wife's services does, however, mean that damages can be recovered from a tortfeasor in the situation to which we have referred in paragraph 115 above. However, we think that, in such a situation, it is out of keeping with modern views as to a housewife's status that the remedy should be in the hands of the husband. It is our view that, in this situation, the housewife should be able, in her own action, to recover damages in respect of this aspect of her disabilities. Nor do we think that this right to compensation should be limited to the housewife. We think that anyone within what can loosely be described as "the family group" should be able to recover, in his own action, the reasonable value of any gratuitious services which he rendered to anyone else within that group before his accident. We consider hereafter how the "family group" should be delimited[98]. This would be in line with our other proposals in all of which we have tried to confine to the injured person himself the right to recover all losses resulting from his injury. The damages ought, we think, to be assessed by reference to the reasonable value of such services and any assessment should have regard to the amount of any expenses actually incurred before judgement in replacing the lost services.

122. The last remaining question asked in Item XV of our First Programme was to what extent employers should be entitled to recover wages or payments

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[95] [1967] 1 W.L.R. 742.
[96] [1956] 1 W.L.R. 250.
[97] *ibid.*, p. 252.
[98] See Paras. 156–157 below.

made to or on behalf of an employee. This question falls for consideration and answer under the headings "Collateral benefits" and "Loss distribution".

(iii) Collateral benefits—(iv) Loss Distribution

The questions of principle which arise

123. Pecuniary losses which a victim incurs may be made good otherwise than by the tortfeasor. If they are, two questions arise:—

(*a*) To what extent, if at all, does the victim have to give credit to the tortfeasor for the alleviation of his loss by others?

(*b*) How shall the loss, now involving three parties, victim, benefactor and tortfeasor be distributed between them?

124. There is a number of different sources apart from the tortfeasor from which such losses may be made good and the law is not consistent in the way in which these sources are treated. This inconsistency has been the subject of criticism from some of those whom we have consulted but different considerations do, to some extent at least, apply to different sources of collateral benefit and we shall consider them separately. The main sources are:—

(*a*) the State through a wide variety of social security benefits;

(*b*) the victim's employer who may continue to pay the victim's wages or, at least, to supplement social security benefits by means of sick pay;

(*c*) insurance as a result of policies taken out by the victim himself, *i.e.* first party insurance;

(*d*) pensions, either contributory or not;

(*e*) charitable gifts;

(*f*) the victim's family and friends.

General considerations

125. In the consideration of these two aspects of damages, collateral benefits and loss distribution, commentators are swayed by a number of different objectives, some giving more weight to one than to another. They are:—

(*a*) avoidance of double recovery by the victim;

(*b*) a fair loss distribution;

(*c*) ensuring that benefits earned by the victim's thrift and foresight (for example first party insurance, and contributory pensions) shall not redound to the tortfeasor's credit; and

(*d*) reducing the tortfeasor's liability so that insurance premiums for third party liability cover may be lessened and the financial burden on society reduced.

The general principle which has guided the conclusions in this Report

126. To the first three of the objectives referred to in the last paragraph we have, in our recommendations, attempted to give weight, although we have sacrificed the legal enforcement of a fair loss distribution for the sake of procedural simplicity and the avoidance of a multiplicity of actions. The general principle which has guided us has been to concentrate in the hands of the victim himself the recovery of the various sorts of losses suffered and, because

of the difficulties that arise on the settlement of claims, to stop short of giving any legal rights against the money in the plaintiff's hands. Our basic principle has been to trust the victim to compensate those who have suffered, bearing in mind that, in cases contested to judgment, our proposal as to itemisation[99] will identify that part of the total damages awarded which is referable to a loss suffered by another.

127. So far as the victim's anticipated future loss is concerned, no problem, of course, arises; he should be put in sufficient funds by the award of damages (subject, of course, to any shortfall due to contributory negligence) to pay for any necessary services so that the benevolence of others will be no longer necessary. For the reasons which we mentioned earlier[100], the fourth objective has not affected our consideration of the subject matter of this Report.

128. The difficulties which arise on the settlement of claims if one introduces a legal right to enforce loss distribution against a victim relate, of course, to the requirement, if such a right is given, of devising a method of protecting the interests of those entitled to enforce such rights. In a different context it is these difficulties which have led us to reject one of the alternatives to the rule in *Oliver* v. *Ashman*[101].

The present rules regarding giving credit for collateral benefits

129. Insofar as there is at present a general principle as to the extent to which a plaintiff has to give credit for collateral benefits in his claim against the tort-feasor, it can be found most clearly stated in the speech of Lord Reid in *Parry* v. *Cleaver*[102]. It is clear that payments made to a victim from charitable motives are not to be taken into account[103]. This decision also confirmed the long established rule[104] that payments under insurance policies should not be taken into account[105]. In *Parry* v. *Cleaver* it was further held that a pension, whether or not discretionary and whether or not contributory, should not be taken into account in assessing compensation for a plaintiff's lost earnings. The justification for this decision is found in the fact that a contributory pension has in fact been paid for, in part, by the plaintiff himself and a non-contributory pension has likewise in effect been paid for by the plaintiff since his receipt of such a pension will have been reflected in a wage lower than he might otherwise have earned.

130. At the other end of the scale it is clear that the plaintiff must give credit against lost wages for payments such as sick pay, unless he is under a legal obligation to repay them to his employer. It was conceded in *Parry* v. *Cleaver* that if a plaintiff has lost a pension he must give credit for such pension as he is going to receive.

131. We now turn to consider separately and in more detail the different sources of collateral benefits.

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[99] See para. 214 below.
[100] See para. 18 above.
[101] [1962] 2 Q.B. 210 and see paras. 75–83 above.
[102] [1970] A.C. 1.
[103] *ibid.*, per Lord Reid at p. 13.
[104] *Bradburn* v. *Great Western Railway* (1874) L.R. 10 Ex. 1.
[105] [1970] A.C. 1 per Lord Reid at p. 16.

(a) Social security benefits

132. The position of social security benefits is partially regulated by statute. Section 2(1) of the Law Reform (Personal Injuries) Act 1948 provides that:—

> "in an action for damages for personal injuries ..... there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from his injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued."[106]

133. So far as other benefits are concerned, however, more or less doubt exists. In no personal injury case is there a decision of the Court of Appeal on unemployment or supplementary benefits. In *Parsons* v. *B. N. M. Laboratories*[107] (a wrongful dismissal case) it was held that an unemployment benefit should be deducted in full, even though part of it might be regarded as the result of the plaintiff's thrift. This decision was followed at first instance in *Foxley* v. *Olton*[108], a personal injury case. However, in the same case it was held, following *Eldridge* v. *Videtta*[109], that supplementary benefit was not to be taken into account on the ground that it was discretionary. In the light of the speeches in *Parry* v. *Cleaver* it seems that whether or not there is a discretion as to payment is irrelevant. In *Hewson* v. *Downes*[110] the court, following *Parry* v. *Cleaver*, held that a State retirement benefit was not deductible. There are other benefits which are earnings related or take the form of means tested subsidies about which there are no court decisions.

134. As we have pointed out in paragraph 132 in respect of industrial injury benefit, industrial disablement benefit, sickness benefit and invalidity benefit, statute provides for a certain proportion of these benefits to go to the credit of the tortfeasor. Historically these provisions represent a compromise, the effect of which is that the State divides the benefits it pays between victim and tortfeasor. The Beveridge Report on Social Insurance and Allied Services[111] recognised the problem of double compensation where tort damages are recovered but decided that the problems were so complicated that they required the attention of a special committee. In 1946 a Departmental Committee on Alternative Remedies reported[112]. The majority proposed that insurance benefits should be deducted in full from awards of damages[113]. The trade union members dissented from this proposal[114]. The compromise contained in section 2(1) of the Act of 1948 was introduced in the Bill and both Houses of Parliament accepted it with little comment. There has been strong academic criticism of this compromise[115], but when "invalidity benefit" was introduced by the National Insurance Act 1971, the same provision was applied to it[116].

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106 To these benefits was added "invalidity benefit" by the National Insurance Act 1971 s.3 and Sch. 5, para. 1.
107 [1964] 1 Q.B. 95.
108 [1965] 2 Q.B. 306.
109 (1964) 108 Sol. J. 137.
110 [1970] 1 Q.B. 73.
111 (1943) Cmd. 6404.
112 (1946) Cmd. 6860.
113 *ibid.*, para. 38.
114 *ibid.*, Annex A.
115 Atiyah, *Accidents, Compensation and the Law*, pp. 438–443.
116 S. 3 and Sch. 5, para. 1.

135. In Published Working Paper No. 41[117], we provisionally proposed that, by analogy with the treatment afforded to the benefits mentioned above, a plaintiff should give credit for half of the unemployment and supplementary benefits he receives over a five-year period but that state retirement benefit should be treated in the same way as a private pension[118]. However, we came to no provisional conclusion as to any other benefit.

136. In the light of our consultation on Published Working Paper No. 41, we have reconsidered these provisional conclusions. Although section 2(1) of the Law Reform (Personal Injuries) Act 1948 is a pure compromise which lacks any basis in principle it continues to be applied, as we have seen, when Parliament wants to avoid complete double compensation to a tort victim. We do not wish to erode a compromise which has commended itself to Parliament; on the other hand, any general application of the compromise and any more drastic avoidance of double compensation, would be out of line with legislative policy in claims under the Fatal Accidents Acts. Section 2 of the Fatal Accidents Act 1959 provides that:—

> "In assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1846, there shall not be taken into account any..... benefit..... which has been or will be paid as a result of the death".

It is further provided that:—

> "benefit means benefit under the National Insurance Act, 1946 (as amended by any subsequent enactment, whether passed before or after the commencement of this Act)....."[119]

137. We think that there is a real analogy between social security benefits and pensions and that, in the absence of specific legislation, such benefits should not be taken into account in the assessment of damages for personal injury. We accordingly recommend that legislation should provide that, with the exception of the benefits specifically covered by section 2 of the Law Reform (Personal Injuries) Act 1948[120], as amended, social security benefit shall not be taken into account in the assessment of damages for personal injuries.

(b) The victim's employer

138. One of the most important losses which an injured man suffers is his loss of wages or salary and, of course, for this loss, he is entitled to full compensation. The amount of loss sustained between accident and trial is easily computed; for future losses the court has to arrive at a lump sum which is adequate fully to compensate the loss which the plaintiff will suffer; we deal with the method by which this computation ought to be made in a later section of this Report[121].

139. It frequently happens, however, that the victim's employer continues to pay the victim's wages or salary even though he is, because of his injury, no longer able to work. If he does not pay the full salary he may continue to pay

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117 See para. 136 below.

118 As it was in *Hewson* v. *Downes* [1970] 1 Q.B. 73.

119 See National Insurance Act 1965 and National Insurance (II) Act 1965.

120 One commentator suggested the repeal of section 2(4) of this Act which provides that the court must ignore the possibility of taking advantage of National Health Service facilities in considering whether medical expenses claimed are reasonable. We did not refer to this subsection in our Working Paper; we have not, therefore, consulted upon it. Accordingly we do not make any recommendation on it.

121 See paras. 215–230 below.

the victim sick pay sufficient to make up the difference between his pre-accident wage and the social security benefits paid to him by the State. These wages or sick pay may be paid because the employer has a duty to pay them under the victim's contract of service, which may or may not contain a clause requiring the victim to repay to the employer moneys so advanced out of any damages he may recover from the torfeasor.

140. On occasions the employer, although under no legal duty to do so, may pay wages or sick pay for a time whilst the victim is off work; this payment can either be made in the form of a loan or of a payment repayable only if tort damages are recovered, or it can be made purely gratuitously with no obligation upon the victim to repay. A further variation on this situation arises because in some cases it will be the employer himself who is the tortfeasor.

The present legal position where the employer is the source of collateral benefit

141. The present legal position would seem to be as follows:—

(*a*) Where wages or sick pay are paid to a plaintiff under his contract of service and the plaintiff is under no legal duty to repay them to his employer, he is not entitled to recover damages for loss of the wages he has been paid (but has not earned) from the tortfeasor. If he were so entitled both employer and tortfeasor would be making good the same loss and the plaintiff would be doubly compensated.

(*b*) However, where the contract of service provides that the employee must repay any wages or sick pay out of his tort damages, then he will be able to recover them from the tortfeasor.

(*c*) Similarly, if the payments are made as a loan the plaintiff is entitled to recover them from the tortfeasor.

(*d*) If the employer chooses to pay wages to an employee purely gratuitously and without exacting any undertaking to repay at all, then the employee will be able to recover damages for the loss of his wages from the tortfeasor. In these circumstances the payment by the employer would be no different from any other gift and purely gratuitous payments need not be taken into account against a plaintiff[122].

(*e*) An unsatisfactory situation arose in *Dennis* v. *London Passenger Transport Board*[123]. The plaintiff received sick pay from his employer and a pension from the Ministry of Pensions. In a letter to him, the Ministry of Pensions, whilst not asserting that he was under any legal obligation to refund the moneys paid to him, said that they would expect him to refund the amount if he recovered compensation from a third party; as to the sick pay, his employers, the London County Council, told him that if he got compensation, he would be expected to repay it. Denning, J. held that there should be no deduction from the damages awarded to the plaintiff on account of lost wages because of these payments but directed the plaintiff to repay the sums advanced to him to the Ministry and local authority. So long as the payments made in this case can be properly looked at as gratuitous, then the decision would seem to be in line with authority, but it is doubtful

[122] See para. 129 above.
[123] [1948] 1 All E.R. 779.

whether a court has any power to give directions as to the disposal of a lump sum award to a plaintiff. In Published Working Paper No. 41[124] we suggested that the court should by legislation be given power to give the necessary directions as to the disposal of damages where collateral benefits have been conferred on the plaintiff. In our consideration of the whole field we have, however, as we have said[125], been persuaded that the basic principle to adopt is to avoid the legal enforcement of loss distribution and we do not, therefore, recommend the adoption of this provisional conclusion in our Working Paper.

(*f*) If the tortfeasor is also the employer then, of course, the plaintiff will not be entitled to recover damages in respect of wages or sick pay he has received, whether they were paid under his contract of employment or not. (Strictly, in the situation where the wages or sick pay are repayable, the plaintiff would be entitled to recover from the tortfeasor employer and obliged immediately to repay to the tortfeasor employer).

The employer's action per quod servitium amisit

142. As we said earlier[126] it is in this part of our Report that the question to what extent employers should be entitled to recover wages or payments made to or on behalf of the employee is considered. Whilst the limitation of the employer's *per quod* action to the loss of the services of menial servants had effectively deprived it of any usefulness, it might have had as a method of loss distribution, it has, for some time, been thought desirable to consider the whole question of an employer's position in relation to payments made by him to or on account of any servant of his injured by reason of another's tort, before recommending the abolition of the archaic action.

143. Before the Law Commission was set up, the employer's action *per quod* had been examined by the Law Reform Committee and the Law Reform Committee for Scotland, and it has since been examined in our Published Working Paper No. 19. In paragraphs 145–150 which follow we summarise the results of our examination.

144. In 1961 the Law Reform Committee was invited—

"To consider the desirability of:—

1. abolishing the right of action by a master for the loss of his servant's services; and

2. enabling an employer to recover damages for loss suffered by him in consequence of a wrong done to his employee by a third person."

The second question only was also referred to the Law Reform Committee of Scotland. Both Committees reported in 1963[127]. The Law Reform Committee unanimously recommended the abolition of the right of action in all its aspects, subject to a right to either spouse to recover expenses incurred as a result of tortious injury to the other or to a dependent child, but, by a majority, took the view than an employer should be given a limited right of recovery[128]. On the

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124 Published Working Paper No. 41, para. 206.
125 See para. 126 above.
126 See para. 122 above.
127 (1963) Cmnd. 2017 (England) and (1963) Cmnd. 1997 (Scotland).
128 (1963) Cmnd. 2017, paras. 5–16.

other hand, the Law Reform Committee for Scotland, agreeing with the English minority, recommended that legislation should not be introduced to enable an employer to recover[129].

145. In June 1968 we published Working Paper No. 19 in which, as we pointed out in the introduction to this Report[130], we discussed, among other things, the question of what, if any, right of recoupment should be given to an employer. Working Paper No. 19 was based upon the assumption that it is wrong that "a good employer who continues to pay his employee during the period when the latter is away injured..... may thereby reduce the damages payable by the person who has wrongfully injured the employee"[131]. The Paper considered three possible ways in which the loss could be shifted on to the tortfeasor:—

(*a*) independent right of action by employer;

(*b*) subrogation;

(*c*) recovery from tortfeasor by the employee.

It is clear that (*c*) can result in double recovery unless some way is found of making the plaintiff accountable to his employer.

146. Published Working Paper No. 19[132] also drew attention to the fact that an employer can, if he wishes, quite easily prevent the tortfeasor from benefiting either by incorporating in the contract of service a right of recovery by the employer in the event of the employee recovering damages, or by making the payments in the form of a loan. It also conceded[133] that "the case for further reforming the law is, to some extent, dependent on whether any change in the legal position would be likely to lead in practice to greater readiness on the part of employers to continue to pay wages to their injured workers".

147. The provisional conclusion at which we arrived in Working Paper No. 19 was that the employer's action for loss of services should be abolished, but that where an employee has been off work because of the injury he should be entitled to recover damages in respect of the wages for the period of absence prior to the trial, irrespective of whether he had been paid wages or sick pay by his employer and even though they had been paid under the terms of his contract of service and he was under no legal obligation to repay them. It was our provisional view that there should be no provision for any definite right of recoupment from the victim which should be "left to be worked out between the victim and the benefactor, either prospectively (for example under conditions of employment) or retrospectively after the victim has recovered from the tortfeasor"[134]. This solution accepts the possibility of double recovery in the hope that, without any statutory provision requiring it, employers will themselves ensure that they have a legal right of recovery against the victim. This solution would be in line with our recommendations as to the way in which other benefits which the plaintiff has received from others should be treated, but there is a big, and, many may think, significant difference between a plaintiff's relationship with his employer and his relationship with those members of his

[129] (1963) Cmnd. 1997, paras. 15–16.
[130] See para. 6 above.
[131] Published Working Paper No. 19, para. 10.
[132] *ibid.*, para. 12.
[133] *ibid.*, para. 21.
[134] *ibid.*, para. 42(*e*).

family or close friends who render him services when injury makes such services necessary. We think that in the context of the relationship of master and servant the principle of avoiding the risk of double compensation should prevail.

148. It became clear from our consultation on Published Working Paper No. 19 that employers do not want to have to bring actions themselves. Many big employers already have loan provisions in their contracts of service, which permit them to recover from their employee and thus enable the injured employee to recover from the tortfeasor. There was, however, some concern elicited for smaller less well advised employers who fail to make prior arrangements for equitable loss distribution. There was little support for allowing recovery by the plaintiff without any safeguard for the employer's rights, but the difficulties which would arise in the event of settlements and because of contributory negligence remained formidable and incapable of solution without the establishment of fairly complicated procedures. We did not get the impression from consultation that any alteration in the present rules would lead to any significant increase in the payment of wages to injured employees. After all, if the obligation to pay wages or sick pay is contractual, the employer's mind, in drafting the terms of the contract, has presumably been adverted to the position which will arise if one of his employees is off work because of tort injury, and if the payment is made either gratuitiously or by way of a loan there will be full recovery from the tortfeasor.

149. In the result we have decided to recommend the abolition of the employer's cause of action for damage caused by the loss of his servant's services—the action *per quod servitium amisit*. We do not propose the institution of any system based on direct action by the employer or upon the doctrine of subrogation. We think that the complications, which would occur in any system which made a servant accountable to his employer (particularly in cases which are settled) make such a solution undesirable.

150. We have given very careful reconsideration to the proposal provisionally recommended by us in Published Working Paper No. 19, namely, full recovery by the plaintiff in all circumstances. Whilst we realise that this proposal would be in line with our other recommendations and whilst we recognise that it may be difficult logically to distinguish between a non-contributory pension and payment of sick pay[135], we have decided to make no recommendation for any change of the law. For the reason which we gave above[136] we think that, in the relationship of master, servant and tortfeasor, the principle of avoiding any chance of double recovery should prevail. Gratuitous payments, whether in the nature of wages, sick pay or for other services to the victim, will still, under our recommendations, not be taken into account against a plaintiff's claim.

(*c*) *First party insurance*

151. In Published Working Paper No. 41 we expressed the opinion that there was a deep-seated feeling that it would be unfair to take into account, in assessing pecuniary loss, payments made to a plaintiff as a result of his own thrift and foresight. On consultation there has been a wide measure of agreement with our provisional view that moneys paid to a plaintiff under an insurance

[135] But see *Parry* v. *Cleaver* [1970] A.C. 1 at p. 12.
[136] See para. 147 above.

policy should not be taken into account in assessing his pecuniary loss. We adhere to this view and recommend no alteration in the rule in *Bradburn* v. *Great Western Railway*[137], that such payments should not be taken into account. This rule is in line with the legislative policy in respect of claims under the Fatal Accidents Acts[138].

(d) Pensions, whether contributory or not

152. We adhere also to our provisional view which we expressed in Published Working Paper No. 41 that there should be no alteration in the tule as to pensions laid down in *Parry* v. *Cleaver*. We agree with the reasoning of that case and the analogy drawn between pensions and insurance moneys. This rule is also in line with legislative policy under the Fatal Accidents Acts.

(e) Charitable gifts

153. On this matter we have no hesitation in saying that, as at present, charitable gifts to the victim should not be deductible from the damages payable by a tortfeasor.

(f) Gratuitous services received or rendered by the victim

154. In paragraphs 112–114 above we referred to losses suffered by a victim which are made good by the voluntary help of his family and friends without any agreement being made between victim and helper for payment in respect of the help given. We considered this sort of loss in Published Working Paper No. 41 under the heading "Losses incurred by others on the victim's account"[139]. In paragraph 115 above we referred to another situation which (although not a "collateral benefit") was, in the Working Paper, dealt with under the same heading. This is the situation which arises where a person is so injured that he is unable, because of his injury, to continue gratuitous services which he rendered prior to his injury; the most obvious example of this situation is where a housewife is injured and her family is thus deprived of the services which she gave. Although dealt with under the same heading in the Working Paper, these two situations are different in that in the first it is the injured person who, after the accident, receives the services; in the second, it is the injured person who is prevented by the accident from rendering the services which heretofore he gave. It is the second situation for which at present the law provides a partial remedy in the right of the husband to claim damages for the loss of services of his wife or children, but this remedy is limited in that only a husband or father can sue. We deal with these two situations separately.

Losses incurred by others on the victim's account

155. In Published Working Paper No. 41[140] we expressed the provisional view that in the circumstances outlined in the previous paragraph a victim should be entitled, in his own action, to recover damages in respect of the expenses incurred by others, subject to an overriding requirement of reasonableness. This conclusion met with a wide measure of approval on consultation. Accordingly we recommend that legislation should provide in general terms that the victim of a tortious injury should be entitled to recover, in his own

137 (1874) L.R. 10 Ex. 1.
138 The Fatal Accidents Act 1959, s. 2 provides that insurance moneys and pensions shall not be taken into account in the assessment of damages.
139 Published Working Paper No. 41, para. 195.
140 *ibid.*, paras. 206–207.

action, damages on account of expenditure incurred and services rendered on his behalf so long as they were reasonably necessary. In accordance with our general policy, we do not advocate any system of linked claims nor do we think that there should be any statutory right of recovery against the victim. This was also found widely acceptable by those whom we consulted.

Where others are deprived of the victim's services

156. Where someone dies as a result of tort caused injury the law gives a remedy to those who were dependent upon him so long as they are members of the class[141] to whom the Fatal Accidents Acts give a remedy and so long as the dependancy can be quantified in money terms. If the wage earner is killed then the quantification is primarily concerned with identifying that part of his earnings which he devoted to the maintenance of his family as opposed to himself. If, however, the person killed was one who rendered gratuitous services then the court has to put a value on those services and award damages based upon that value. Where a wife and mother is killed, the husband and children recover substantial damages so that they can replace the housekeeping services which she provided before her death. Where a tort victim is injured however, the law at present is less consistent in its treatment of those who were dependent upon him. The victim is himself compensated for his loss of earnings: out of those earnings, prior to his accident, he maintained his dependants; by the compensation he receives he is enabled to continue to maintain them. Because the law does not compensate him for his loss of earnings during the period that he would have lived, had not his expectation of life been reduced by his injury, his dependants are, during that period, deprived of the maintenance he would have continued to provide. It is for this reason that we have recommended the reversal of the rule in *Oliver* v. *Ashman*[142]. In line with our general policy we have suggested that these lost period damages should be recoverable in the victim's own action[143].

157. Where, however, the services upon which someone was dependent were rendered gratuitously, the law, as we have seen, is not consistent. For purely historical reasons the husband deprived of his wife's services and the father of his daughter's are given a right to recover damages by the so-called *per quod* action[144] but no other dependant has any right to recover compensation for lost dependency. We do not think that this sort of compensation should be so narrowly circumscribed nor, for the reasons already given[145], do we think that the right of recovery should belong to someone other than the victim himself. We think that where, within the family group, gratuitous services were, prior to his injury, rendered by a tort victim, he should be paid such compensation as will enable him to replace those services which he is no longer able to give. It is arguable that where a person rendered services gratuitously before his injury he should be compensated without regard to the identity of the person or even cause to whom the services were given: this is essentially the same argument which favours an extension of the class given a remedy under the Fatal Accidents Acts to include anyone, whether related or not, who was, in fact,

[141] Spouse, parent or child of the deceased and any person who is or is the issue of a brother, sister, uncle or aunt of the deceased.
[142] See para. 87 above.
[143] See generally paras. 55–91 above.
[144] See paras. 117–121 above.
[145] See para. 121 above.

dependent upon the deceased. We have, however, recommended only minimal extensions to this class and, in the present context, the argument for extension beyond that class is even less strong: this compensation is to be paid direct to the victim who must be trusted to use it to replace those services he can no longer give whereas fatal accident damages go, of course, direct to the dependant. These arguments persuade us that we should recommend that the victim's right to compensation should be limited to compensation for his inability to render any longer gratuitous services which, before his accident, he gave to someone within the class of dependants under the Fatal Accidents Acts. It is our view that the "family group"—to which we have referred in paragraph 121 and this paragraph should consist of the class of dependants under the Fatal Accidents Acts. In this situation a technical difficulty arises under section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 similar to that created, as mentioned in paragraph 105 above, by the reversal of the rule in *Oliver* v. *Ashman*: it might result in the defendant having to pay damages twice over. Where the plaintiff has died it is clearly right that any damages for services which would have been rendered to his dependants during the period between the date of his injury and the date of his death should survive to his estate under the 1934 Act. However, it would be wrong to permit the survival of a claim for such damages in respect of any period after the deceaseds' death: such a claim would duplicate the claim which could be brought by his dependants under the Fatal Accidents Acts for loss of dependency. To avoid this duplication, legislation should provide that no claim for damages for services which would have been in respect of any period after the deceased's death should survive to his estate under the 1934 Act. (Clause 16(2)).

Abolition of the action per quod servitium amisit

158. If our proposals, particularly those in paragraphs 156–157 above are implemented we are able to recommend the abolition, in all its forms, of the action, *per quod servitium amisit*. The action for loss of *consortium* is not concerned with pecuniary loss and we, therefore, postpone our recommendation in respect of it until a later part of the Report.[146]

Recommendations

159. In paragraphs 110–157 above we have covered a number of interrelated subjects and have made some legislative proposals. We now summarise them:—

(*a*) where others have incurred expense or suffered pecuniary loss on behalf of the victim such expense or loss so long as they are reasonable, should be recoverable by the plaintiff from the tortfeasor (Clause 4);

(*b*) where a victim gratuitiously rendered personal services to anyone within the Fatal Accidents Acts class of dependants prior to his injury, he should be able to recover their reasonable past and future value from the tortfeasor (Clause 5 and see Clause 16(2));

(*c*) all actions for loss of services should be abolished (Clause 12);

(*d*) with the exception of the benefits specially provided for by section 2 of the Law Reform (Personal Injuries) Act 1948 social security benefits should not be taken into account in the assessment of damages for personal injury (Clause 1 codifies the present law as to "collateral

[146] See para. 161 below.

benefits" and, by exclusion, implements this particular recommendation in subsection 1(*a*)).

(D) NON-PECUNIARY LOSS SUFFERED BY PERSONS OTHER THAN THE VICTIM OF TORTIOUS INJURY—*SOLATIUM*

The general rule in English law

160. The courts in England have, since the middle of the nineteenth century[147], awarded damages for non-pecuniary loss in personal injury claims, but, as such, they have never awarded damages for the suffering caused to anyone other than the victim. The common law rule is that injury negligently caused to A (or the property of A) whereby damage is caused to B is not actionable by B. To this rule the Fatal Accidents Acts 1846–1959 provide a statutory exception, but this exception was early limited to the recovery of pecuniary loss in the form of lost economic dependency. In *Blake* v. *Midland Railway*[148] the court rejected a claim for compensation for a widow's grief as falling outside the purview of the Fatal Accidents Acts.

The action per quod servitium et consortium amisit

161. The only other exceptions to this general rule in English law are the actions for loss of services and for loss of *consortium*. We have considered and made recommendations as to the actions for loss of services in the preceding section of this Report[149]. The action for loss of *consortium* is, as we have seen[150], anomalous. It is limited to a husband's claim for the loss of his wife's society through injury but not through death. The courts have set their face against any extension of the action for loss of *consortium*[151], and our description of the action in Published Working Paper No. 19[152] as anachronistic met with no disapproval on consultation. Damages awarded under this head are small[153]. We have no doubt that it should be abolished.

The effect of the survival of causes of action for loss of expectation of life

162. Where someone is killed by a tortious act, English law does, as we have seen in Part IV, Section (B) of this Report, achieve indirectly a form of award to persons other than the victim. There is vested in the victim at death a cause of action for loss of expectation of life which survives to his estate and thus to the beneficiaries under his will or intestacy. Where the beneficiaries were dependent upon the deceased and within the category of persons entitled to recover under the Fatal Accidents Acts, they do not benefit from this survival for the small conventional sum of about £500 is as the law now stands fully deducted from their damages under the Acts; but where the beneficiary was not dependent upon the deceased the money comes to him as a result of the victim's death. The most common examples of this indirect form of *solatium* occur when a child or spouse is killed, though usually, in the case of a spouse, the survivor will be able to prove a dependency in excess of the amount of damages for loss of expectation of life[154].

147 *Blake* v. *Midland Railway* (1852) 18 Q.B. 93.
148 *ibid.*
149 See para. 159 above.
150 See para. 121 above.
151 *Best* v. *Samuel Fox & Co. Ltd.* [1952] A.C. 716.
152 Published Working Paper No. 19, para. 46.
153 *Cutts* v. *Chumley* [1967] 1 W.L.R. 742.
154 See paras. 99–100 above.

The effect of the proposals elsewhere in this Report

163. If the recommendation we have made in this Report[155] is implemented, it will mean that the rule of the common law will be restored with the single statutory exception provided by the Fatal Accidents Acts. No one other than the victim will be entitled to recover damages for personal injury; in the case of death, the dependants will be able to claim under the Fatal Accidents Acts, and the deceased's estate will benefit only to the extent of loss (both pecuniary and non-pecuniary) actually sustained between accident and death by the victim himself. The husband's right to damages for the loss of his wife's society and, more importantly, the small sum (£500) which the parents of a dead child now recover by the indirect effect of the survival of the cause of action for loss of expectation of life will no longer be available. It falls, therefore, for consideration whether there should be any place in English law for the recovery of damages for non-pecuniary loss suffered by others than the victim.

Previous consideration of the problem of non-pecuniary loss suffered by others than the victim

164. This question was given elaborate consideration in Published Working Paper No. 19[156]. Consultation on this Paper did not, in this respect, prove very helpful and the question was once again posed in Published Working Paper No. 41[157]. The provisional conclusion at which we arrived in Published Working Paper No. 41 was that non-pecuniary loss of this kind ought not to be recoverable at all but that, if it was finally decided that compensation should be payable by way of this sort of damages, then the amount of such compensation should be fixed by legislative tariff.

165. On consultation there was a fairly even division of opinion as to whether *solatium* ought to be recoverable by the relatives of a deceased victim of tort injury. Of those who favoured such an award the majority agreed with our provisional view that such compensation should be fixed by legislative tariff. To those who favoured a limited form of *solatium*, should perhaps be added those who favoured retention of the cause of action for loss of expectation of life and its survival to the estate of the deceased because, in this way, a *solatium* is, in effect paid to the parents of a dead child. There was very little support for any award of damages for non-pecuniary loss to the relatives of an injured victim. The abolition of the action *per quod consortium amisit* was contemplated with universal complacence.

The position under other systems of law

166. The rejection in England of the claim by a widow for damages for grief[158] set the trend of interpretation of fatal accidents legislation in other common law jurisdictions[159]. Indeed, later statutes began to make specific provision for the damages to be limited to compensation for material loss[160]. Recently, however, there has been a movement in the opposite direction. South Australia, in 1940,

155 That claims for loss of expectation of life as a separate head of non-pecuniary loss should be abolished entirely.

156 Published Working Paper No. 19, paras. 46–88.

157 Published Working Paper No. 41, paras. 197–203.

158 *Blake* v. *Midland Railway* (1852) 18 Q.B. 93.

159 See *International Encyclopedia of Comparative Law*, Vol. XI, Torts, Chap. 9, Personal Injury and Death, by Harvey McGregor, for a very full treatment of the comparative law on the whole subject of damages for personal injury and death.

160 As in New Brunswick, New York and New Zealand.

and Ireland, in 1961, introduced a limited entitlement to damages for non-pecuniary loss in wrongful death cases, and in the United States of America today there is also express statutory allowance of such damages in a number of States.

(a) South Australia

167. In South Australia[161] the right of recovery is limited to parents in respect of the death of an infant and to the surviving husband or wife of the deceased. The damages are not to exceed, in effect, £500 in respect of an infant or £700 in respect of a spouse.

(b) Republic of Ireland

168. The legislation in Ireland is more widely drawn. The remedy is given to any member of the family and this class is widely defined. It is given to any member of the family "who suffers injury or mental distress". The total amount awarded for "mental distress" is limited to £1,000.

(c) Scotland

169. Scottish law has long recognised the right of relatives of a deceased person to recover as damages an award of *solatium* as "pecuniary acknowledgment of their grief and suffering"[162]. On the whole sums awarded (by juries) are small; in recent cases sums of £1,250 to £1,500 have been awarded to widows. In Memorandum No. 17[163] the Scottish Law Commission reach the provisional conclusion that "the relatives" right to *solatium* should be replaced by an additional element of damages acknowledging the non-pecuniary loss suffered by a person who was either the husband, wife, parent or child of the deceased". In this connection, by "non-pecuniary loss" is meant the sort of loss which a man's wife and children suffer through the loss of his help as a member of the household and of his counsel and guidance as a husband and father[164].

170. Paragraphs 102 and 103 of the Scottish Law Commission Memorandum No. 17 read:—

> "102. We consider that the award should be described in terms such as "an acknowledgement of the non-pecuniary loss suffered by the claimant in consequence of the death of the deceased". This would leave it, in effect, to the courts to identify in particular cases the nature of the loss suffered. This must be so, because it will differ from case to case; although one fairly common example would be the loss suffered by a child when deprived of advantages which the court considers would probably have resulted from upbringing and early education by the parent of whose society the child has been deprived.
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> 103. We also think on similar grounds that it should be left to the courts to work out the appropriate compensation. A tariff of compensation could be devised, but it would soon become out of date, and if it attempted to deal with the many complex situations which might arise, it would be

[161] Wrongs Acts 1936–1959.
[162] See Scottish Law Commission Memorandum No. 17, dated 10 April 1972, p. 68 *et seq.* for a full discussion of this Scottish form of action.
[163] *ibid.*, p. 81, para. 16.
[164] *ibid.*, para. 99.

unwieldy. We would imagine, however, that since what is being compensated is not grief and sorrow, the awards would in practice be more varied in their amounts than are *solatium* awards at present."

171. In two major respects the provisional conclusion at which the Scottish Law Commission has arrived differ from our conclusions. In Published Working Paper No. 41[165] we expressed the view to which we adhere that it would be undesirable to leave the amount of compensation at large because this would produce undesirable litigation and the same kind of enquiry into family life and affairs which led to the Law Reform (Miscellaneous Provisions) Act 1971 (which provides that a widow's remarriage or prospects of remarriage shall not be taken into account in assessing her damages under the Fatal Accidents Acts). Any such award we thought should be regulated by tariff. Second, the Scottish proposal would exclude from the right to recover damages the one class of person whom the majority of those we consulted, and we ourselves, think has the best claim to an award, namely, the parents of an infant killed by another's tort.

Proposals for changes in the law

172. We have come to a final conclusion on this difficult topic. In two cases, but two only, we think that there is a strong case for allowing recovery of damages for the bereavement caused by the death of a close relative. We have used the word "bereavement" rather than "grief" or "mental suffering" because we think that the purpose of the award should comprehend not only these forms of psychic damage but also those other deprivations on which the Scottish Law Commission's proposal lays particular emphasis.

173. We follow the South Australian example in believing that an award of damages, albeit small, can have some slight consoling effect where parents lose an infant child or where a spouse loses husband or wife. If money can, even minimally, compensate for such bereavement we think that it should be recoverable.

174. From the comments which we have received from those experienced in this sort of litigation, we are persuaded that the small conventional sums at present reaching, by an indirect route, the parents of a dead child do have some beneficial effect. We do not want our proposals to abolish this source of solace and we think the case of husband and wife should be treated in the same way as parent and child. We do not, however, feel justified in recommending any further extension, particularly as we depart from the South Australian and Irish examples in recommending a fixed tariff figure rather than an upper limit to an award otherwise at large.

175. We make this recommendation for a fixed tariff figure because we are anxious that there should be no judicial enquiry at all into the consequences of bereavement. Nor do we follow the South Australian example in distinguishing between the amounts recoverable in differing relationships; it is, we think, fruitless to try to distinguish between the loss suffered by a parent and that suffered by a spouse; we accept that the award is no more than an arbitrary figure, but, despite its arbitrariness, we think it is something that ought to be, in these two limited contexts, recoverable. We recognise that the effects of bereavement will be greater in some cases than others but to avoid any judicial enquiry into degrees of grief we are prepared to accept this disparity.

[165] Published Working Paper No. 41, paras. 200–202.

176. This new cause of action will form a significant departure from common law principle. It will be an extension of the Fatal Accidents Acts to comprehend, in the case of a greatly restricted class of persons, an additional award in the form of a tariff figure. It should, therefore, we think, be subject to the same limitations as claims under those Acts, depending upon whether there would have been liability to the deceased had he survived and be reduced in proportion to any contributory negligence by the deceased.

Recommendations

177. To implement in detail the proposals we have made in paragraphs 172–176 above, we recommend that the parents of an unmarried minor child who is killed by another's wrong should be entitled to recover the sum of £1,000 from the wrongdoer in an action under the Fatal Accidents Acts. If both parents are included in the claim, each should be awarded £500. For the purpose of this provision "child" should not be defined as meaning "child of the family". If the concept of "child of the family" is removed from the context of matrimonial proceedings, where only one marriage is in issue, a child can be a "child of the family" in relation to two or more marriages simultaneously. It would, therefore, be necessary, if, for the purpose of damages for bereavement, "child" were defined to include "child of the family", to give the court a discretion as to the way in which the £1,000 should be distributed between various claimants and this would inevitably lead to the sort of litigation which we are most anxious to prevent. Since the extension of the class of dependants under the Fatal Accidents Acts which we recommend[166] is governed by dependency these considerations do not in that context present difficulty. In the case of an illegitimate child, parent should be defined as meaning mother (Clause 10(2) and (3)).

178. We further recommend that where a person is killed by the wrongful act of another the surviving spouse should be entitled to recover £1,000 from the wrongdoer (Clause 10(1)).

179. There should be included in any legislation a provision permitting the variation of the figure of £1,000 by statutory instrument (Clause 10(5)). Any such variation should only apply to deaths occurring after it has come into force and awards for bereavement ought, despite our later recommendation as to interest in respect of other non-pecuniary loss[167], to bear interest from the date of death. (Clause 14 and Schedule 2).

180. We recommend that these claims should be made in proceedings under the Fatal Accidents Acts. We think that it is unlikely that a court would hold that any subsisting claim under the Fatal Accidents Acts would survive to the estate of a dependant who died before judgment but we know of no authority on this point and circumstances can be envisaged where such a survival would be just. But the award with which we are here concerned is a very personal award to the person who has suffered the bereavement and we therefore recommend that it should be made clear in the legislation that claims for damages for bereavement should not survive to the estate of a deceased parent or child (Clause 10(4)).

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[166] See paras. 257–259 below.
[167] See paras. 277 and 286 (*c*) below.

(E) ITEMISATION OF THE HEADS OF DAMAGE—THE PROBLEM OF "OVERLAP"

Introductory

181. The itemisation of the heads of damages has been examined by us on two occasions. Early in 1970 the Lord Chancellor, Lord Gardiner, asked us to make an interim report limited to this question and we discussed it in Published Working Paper No. 27 which was issued for comment on 13 April 1970.

182. Shortly before the publication of Published Working Paper No. 27, the Court of Appeal gave its decision in the case of *Jefford* v *Gee*[168] (which we discuss in different contexts elsewhere in this Report)[169]. The result of this decision is that a judge is now obliged, to a limited extent, to itemise his award. In the result it was agreed that we should make no report following the earlier Published Working Paper No. 27 and in Published Working Paper No. 41 we briefly re-examined[170], in the light of *Jefford* v *Gee*, the provisional conclusions we had reached in the earlier Working Paper.

183. In our second Working Paper we concluded that the arguments in favour of itemisation, as expressed in the first Working Paper, still remained valid despite the limited effect of *Jefford* v. *Gee* and we said that we continued to believe that legislation would be desirable. In this Report we feel it is necessary to deploy the whole of the argument for legislation requiring itemisation as previously discussed in the two Working Papers. We would add that we believe the case for legislation is further reinforced by certain changes in the law advocated in this Report itself and to which we will refer again in paragraphs 198–201 below.

The present practice of the courts

184. Prior to the partial implementation of a recommendation as to interest on damages in the Winn Committee Report, by section 22 of the Administration of Justice Act 1969, and the decision of the Court of Appeal in *Jefford* v. *Gee*, it was the usual[171] practice of judges in awarding damages for personal injury not to itemise the amounts awarded under the separate heads of damage canvassed before them, but to award a lump sum which took them into account.

185. Because interest has to be awarded, at different rates, upon the sums given for special damage and non-pecuniary loss but is not to be awarded upon the amount given for future loss of earnings and for future expenses, the total sum has now, as ruled in *Jefford* v. *Gee*, to be divided into these three components. However, no itemisation of the component parts of the special damage or of the non-pecuniary loss is required; the judge is not required to make a division

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168 [1970] 2 Q.B. 130.

169 See paras. 268–272 and 284 below.

170 Published Working Paper No. 41, paras. 218–221.

171 Though not invariable; see *Povey* v. *Governors of Rydal School* [1970] 1 All E.R. 841 referred to in Kemp & Kemp *The Quantum of Damages*, 3rd ed., Vol. 1, 7th Supp., where the note does not make clear that the settlement at a reduced figure which was approved by the Court of Appeal was made on an appeal as to liability as well as to damages. *Wagman* v. *Vare Motors* [1959] 1 W.L.R. 853: *Wise* v. *Kaye* [1962] 1 Q.B. 638: *Oliver* v. *Ashman* [1962]. 2 Q.B. 210: *Elstob* v. *Robinson* [1964] 1 W.L.R. 726: *Harvey* v. *Sharman* [1964] C.L.Y. No. 1003/85: *Janney* v. *Gentry* [1966] C.L.Y. No. 3296: *Garber* v. *Rhodes* [1966] C.L.Y. No. 3284: *Fletcher* v. *Autocar Transporters Ltd.* [1968] 2 Q.B. 322: *Kitcat* v. *Murphy* (1969) 113 Sol. J. 385.

between future loss of earnings and future expenses and need not itemise such future expenses. There is as yet no decision as to which category includes an award for the loss of earning capacity (as opposed to quantifiable loss of future earnings).

The general arguments for itemisation

186. In the assessment of damages for personal injuries a distinction is made between pecuniary and non-pecuniary loss. Pecuniary loss is the term used to describe the loss of money or money's worth in the past or in the future. Pre-trial expenses, pre-trial loss of earnings, post-trial expenses and loss of future earnings are all included within the term. Their common feature is that the loss, whether actual or estimated, is capable of being fully compensated by payment of a sum of money. In contrast, non-pecuniary loss includes such heads of damages as loss of amenity, pain and suffering and, at present, loss of expectation of life. Their common feature is that, though perforce the law can offer only money in compensation, the loss is not really measurable in money terms.

187. A court's award of damages has to cover both types of loss. The duty of the court if liability is proved or admitted is to award a sum as compensation for the whole of the injured person's loss, after making due allowance for contributory negligence, limitation by contract and the like. The damages so awarded are given in the form of a once-and-for-all lump sum.

188. It appears to us that it is bound to help towards the accurate computation of damages if, in assessing the elements of pecuniary loss (as we have explained that term), the court is required to consider and assess separately each item of such loss and is also required to award the sum total of the amounts so assessed. It would also be wrong to overlook the fact that the public and press display a lively interest in all aspects of personal injury litigation, not least in the way in which judges assess damages and the amount of their awards.

189. The more specific arguments in favour of establishing itemisation as a practice to be adopted by the courts are that:—

(*a*) Itemisation would ensure that all the elements of pecuniary loss are properly evaluated in the assessment of damages[172].

(*b*) So far as pecuniary loss is concerned it is generally accepted that full compensation should be awarded[173]. In our view this result cannot be achieved unless all the component elements of pecuniary loss are ascertained and the sum total of them is awarded.

(*c*) It is plainly desirable that there should be available to the parties as much information as is reasonably possible regarding the component elements of the damages assessed in cases which appear to be comparable with the particular case on which they seek advice. This is likely to have the desirable consequence that fair settlements will be promoted.

190. In the course of our preliminary consultations experienced practitioners have expressed the view, with which we agree, that the non-itemisation of awards can have consequences bearing unjustly on the plaintiff. It is said in particular that, where there is no itemisation, too little is sometimes awarded

[172] See Kemp & Kemp, *The Quantum of Damages* 3rd ed., Vol. 1, p. xv.
[173] See para. 110 above.

for loss of future earnings; this occurs particularly in those cases where there is a large award for non-pecuniary loss. On the other hand, there may well be cases where the absence of itemisation favours the plaintiff. It is desirable to eliminate the possibility of such divergences and we have more to say on this aspect in paragraphs 193–201 below where we discuss the so-called problem of "overlap". As Lord Denning, M.R. said when discussing itemisation in *Kirby* v. *Vauxhall Motors Ltd.*:—

> "... in the ordinary way it is both proper and helpful for a judge to itemise the damages: and he should be encouraged to do so for two reasons. First, it shows that the judge has himself applied his mind to all proper considerations and has worked out the damages in the way it should be done. Second, it is a great help to this Court on an appeal, so that this Court in turn can themselves review the items in computing the overall figure."[174]

191. Despite the development in practice since *Jefford* v. *Gee* we remain of the view, as stated in Published Working Paper No. 41 that the process of itemisation is still inadequate. The court is still not required to make any division of special damage and future pecuniary loss between loss of earnings and loss of expenses. There is further uncertainty remaining after *Jefford* v. *Gee* which arises from the distinction between loss of earning (where these are more or less capable of present computation) and loss of earnings capacity (where there is no actual present loss but a possible future loss). We think that loss of earning capacity should be treated as evidence of a future pecuniary loss and not as part of the non-pecuniary loss[175].

192. The final argument in favour of itemisation—and one to which we attach the greatest importance—arises from the present way in which the courts treat the so-called problem of "overlap" as typified by the decision of the Court of Appeal in *Smith* v. *Central Asbestos Co*[176]. As we stated in paragraph 221 of Published Working Paper No. 41 the necessity, in our view, for rectifying the results of this decision has strengthened our opinion that itemisation should be prescribed by legislation (in addition to the reasons for legislation which we give in paragraph 198 below).

The problem of "overlap"

193. In the consideration of non-pecuniary loss there arises the "overlap" between the damages awarded for loss of amenity and pecuniary loss in the form of future earnings. In *Fletcher* v. *Autocar and Transporters Ltd.*,[177] Diplock, L. J. pointed out in regard to the amenities the plaintiff had lost that, to the extent that the value he placed upon them was in part reflected in the money that he spent on them, this was already provided for in compensation for his loss of earnings and to this extent he had been awarded money in place of the amenities he would have spent it on[178]; and he used this consideration to justify the damages awarded for pain, suffering and loss of amenity which, in his dissenting judgment, Salmon, L. J. considered to be too low. In his judgment

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174 Unreported, No. 256A (C.A.) of 7 July 1968—and see (1969) 113 Sol. J. 736.

175 If our recommendation that interest shall no longer be payable on non-pecuniary loss is accepted (see paras. 273–277 and 286(*c*) below), it will not matter so far as interest is concerned in which way it is treated. See generally paragraph 204 below.

176 [1971] 3 W.L.R. 206.

177 [1968] 2 Q.B. 322.

178 *ibid.*, at p. 351.

Salmon, L. J. expressed the opinion that an "overlap" of this nature would only be taken into account if the court were proposing to add something to the normal compensation for a particular injury in respect of a particular loss of amenity.

194. This aspect of the inter-relation of heads of damage presents difficulties from the theoretical and analytical points of view but, in practice, we do not think that it has any substantial effect upon the conventional sums awarded for non-pecuniary loss, nor do we think that it ought to have. If the loss of a special amenity has the effect of increasing an award of damages for non-pecuniary loss above the conventional sum (as we think it can and should) we do not think it ought to be relevant to enquire what that amenity cost. The fell-walker and the fisherman should be equally compensated for their lost recreation although the fisherman may have spent large sums for fishing rights.

The problem of "overlap" as treated in Smith v. Central Asbestos Co.

195. However, in a recent case, the Court of Appeal has applied the "overlap" principle in a rather different way. In *Smith* v. *Central Asbestos Co.*[179] there were seven plaintiffs who had all contracted asbestosis in varying degrees over long years of working for the defendants. Each was awarded damages which were itemised under the two heads of "Loss of future earnings" and "Loss of amenities of life". The amounts awarded for loss of future earnings were calculated upon an arithmetical basis but the amounts awarded for loss of amenities were, in some cases, less than they would otherwise have been, because the amounts awarded for future loss of earnings were high.

196. The reason for this discrepancy appears plainly from a passage in the judgment of Lord Denning, M. R., in which he discussed the question of itemisation:—

> "No question arises in any of the cases as to the special damages or the loss of expectation of life. The contest is only as to loss of future earnings during the "years of survival" and for the pain and suffering etc. (such as loss of amenities of life) during those years.
>
> Before I discuss these, I would say a few words about the severance of items of damage. In *Watson* v. *Powles*[180] and *Fletcher* v. *Autocar and Transporters*[181] we discouraged judges from taking the items separately and just adding them up at the end. But since *Jefford* v. *Gee*[182] the judges have to itemise the damages in order to calculate the interest. This does not mean that the total award is necessarily to go up higher on that account. The total award is still to be one which gives him a fair compensation in money for his injury. Care must be taken to avoid the risk of overlapping. Thesiger, J. in this very case had this point in mind. He intimated that a high figure for loss of future earnings might go in reduction of the award for pain and suffering and loss of amenities of life: and he found support for this in the only other asbestosis case which has come before the court: *Sales* v. *Dicks Asbestos & Insulating Co., Ltd.*[183]

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179 [1971] 3 W.L.R. 206.
180 [1968] 1 Q.B. 596.
181 [1968] 2 Q.B. 322 at p. 336.
182 [1970] 2 Q.B. 30.
183 Unreported. Roskill, J., 19 October 1967.

I think there is a good deal in this. When a man is stricken with a disease like asbestosis, it must be a comfort to him to know that he is getting full compensation for loss of his future earnings. It will do something to relieve his distress on being put on light work or put out of action altogether. To that extent the award for loss of amenities may be reduced. The judge also pointed out that high wages often represent "danger money", so that compensation at those rates includes compensation for risks which he no longer incurs when he is on light work."[184]

Criticism of Smith v. Central Asbestos Co.

197. It seems to us that the judgment of the Court of Appeal in *Smith* v. *Central Asbestos Co.* exposes a contrast between two possible views of the relationship between damages for pecuniary loss and for non-pecuniary loss. The first is that, although for the purposes of the calculation of interest the amounts for different heads of damage should be separately assessed, the total sum awarded should be based upon an overall estimate of the plaintiff's loss. One of the advantages claimed for this method of approach is that similar injuries may receive a similar overall compensation, so that cases where there is a substantial pecuniary loss do not diverge too much from those where there is not. The other view is that it is more fair to treat compensation for pecuniary loss and non-pecuniary loss quite separately, and that the purpose of the law of damages should be that of making full compensation for the one and reasonable compensation for the other.

A solution to the problem of "overlap" by the process of itemisation

198. For our part we feel that examination of the judgments in *Smith* v. *Central Asbestos Co.* shows the subtlety and over-complexity which is required on the approach adopted by the Court of Appeal in that case. We think that in the attempt to do perfect justice there may be seeds of injustice. In Published Working Paper No. 41 our provisional conclusion on how to resolve the problem of overlap as posed by the decision in *Smith* v. *Central Asbestos Co.* was that a fairer result is achieved by treating the assessment of pecuniary and non-pecuniary loss as independent of each other. On this approach we suggested that the damages should be assessed on the basis that the plaintiff is entitled to receive:—

(*a*) compensation for his full pecuniary loss (subject, of course, to the recognised deductions and allowances), plus

(*b*) compensation for his non-pecuniary loss in accordance with the recognised scale depending upon the nature of the injury.

Thus the global award should comprise the total sum arrived at by adding together the independent assessments of pecuniary and non-pecuniary loss. The balance of those who commented on our Working Paper supported this suggestion.

199. Consultation on the Working Paper has confirmed our provisional conclusion that, in any particular case, there is no justification for reducing the award for non-pecuniary loss because the victim will also receive full compensation for his loss of earnings. The loss of a leg in terms of suffering and lost amenity is the same for a man with a high salary as for a low-wage earner

[184] [1971] 3 W.L.R. 206 at p. 218.

(or for the victim such as a housewife who earned nothing) and both should, in justice, receive the same amount for their non-pecuniary loss. If the plaintiff, such as a housewife, is unable to prove a loss of earnings[185], we see no injustice in the award being limited to non-pecuniary loss.

200. We are also confirmed in our provisional conclusion that there is no justification for reducing the amount assessed as the full pecuniary loss by the argument that the plaintiff, because he has received the full scale award for his suffering and loss of amenity, is saved the necessity of devoting part at least of his award for loss of earnings to providing himself with new amenities in place of those which he has lost. We can see no justification for reducing the award for loss of earnings by this process of reasoning. The victim who was earning good money before his accident could spend his earnings as he thought fit and he should be placed, by his award for pecuniary loss, in the same financial position with the same field of choice as to how he spends his money, as he was before the accident. It seems wrong that the award for loss of earnings should be assessed at less than full compensation because the plaintiff can be expected to limit his pre-accident spending habits in order to make good some part of the non-pecuniary loss of amenity inflicted on him by the tortfeasor.

201. There is one final point which is implicit in what we have said in paragraphs 199 and 200 above. We cannot help feeling that the present disposition of the courts to reduce the damages in order to obviate the so-called problem of "overlap" is motivated to some extent by the feeling that there is, or should be, a scale of figures for the overall sums awarded in particular types of claim. We see no justification for the existence of any pattern of overall awards as such. The amount comprising the overall award should not, in itself, be capable of arbitrary adjustment. It should only be such sum as represents the addition of the awards for pecuniary loss and non-pecuniary loss assessed independently of each other.

Proposals for changes with regard to itemisation

202. The detailed proposals regarding itemisation which we consider should be embodied in legislation are set out in detail in paragraph 214 below. In addition to implementing the decision we have reached on "overlap", our aim has been that legislation should also ensure that the court will state separately any amounts awarded under any of the new heads of damage which would result from the acceptance of our recommendations elsewhere in this Report, namely:—

(*a*) If there is acceptance of our recommendations in paragraph 159 above, it will be necessary, where relevant, specifically to itemise under the general heading of pre-trial pecuniary loss the amounts awarded to the plaintiff for any additional claims made by him in respect of:—

(i) expenses incurred on his behalf by others, and

(ii) expenses which, but for the accident, the plaintiff himself would would have incurred in performing services to others.

(*b*) If there is acceptance of our recommendations in paragraphs 86–91 above regarding the reversal of the rule in *Oliver* v. *Ashman*, it will be

[185] Although under our proposal in paras. 156–157 above she will be able to recover the value of her services to the family.

necessary (where the injury has shortened the plaintiff's life expectancy) to itemise under the general heading of post-trial loss of earnings the amounts awarded for the future wages lost during respectively:—

(i) the period of years the plaintiff will now probably live, and

(ii) the additional years he would normally have lived but which are now probably "lost" because of the injury.

(*c*) In claims under the Fatal Accidents Acts, if there is acceptance of our recommendations in paragraph 286 (*d*) and (*f*) below, it will be necessary separately to itemise the amount awarded in respect of dependency up to trial and the future loss of dependency after trial.

203. Our proposals are in no way intended to alter the principle that the plaintiff has only one cause of action for his injury and that in respect thereof he is entitled to only one award. Nor are they intended to change, save as expressly provided in the annexed draft Bill, the principles of the present law governing the assessment of the plaintiff's expenses and loss of earnings, e.g. making allowances for the incidence of taxation, collateral benefits received and expenses saved and the like.

Loss of earning capacity

204. In some cases it may be impossible to establish any mathematically assessable future loss of earnings although the plaintiff may have suffered a loss of earning capacity which will probably result in loss of earnings in the future. The courts[186] sometimes draw a distinction between "loss of future earnings" and "loss of earning capacity" but this distinction seems to be based on nothing more concrete that the precision with which, from the available evidence, it is possible to quantify the loss. There is, we think, no real distinction between these two heads of damage; where the evidence precludes mathematical assessment the court has perforce to make the best estimate it can, but that estimate is still an estimate of probable future pecuniary loss. Clause 1(2) of the draft Bill, therefore, provides that any loss of earning capacity shall be taken into account in determining the amount of any damages to be awarded in respect of future loss of earnings or profits (Clause 1(2) and Schedule 1 paragraph 8).

Multiple injuries

205. It is not intended that where multiple injuries were suffered, the court should be required to itemise the award separately for each injury: in the majority of cases this would be impracticable.

Itemisation with greater particularity or, by consent, with less particularity

206. There is no reason why the court should ever feel inhibited from itemising its award with even greater particularity than that which is proposed. For example, there may be cases where it might be helpful to sub-divide post-trial expenses into medical and other expenses: but in such cases the question of sub-division should be left to the court's discretion. There may also be a few cases where, if the parties consent, it would be proper to allow the court to itemise

186 *Fairly* v. *John Thompson* (*Design and Contracting Division*) *Ltd.*, *The Times*, 10 February 1973.

with less particularity than that proposed[187]. Clause 7(8) provides for both these situations.

Jury trials

207. Our proposals are framed in the knowledge that the vast majority of personal injury cases are tried by a judge alone. In the very rare cases where there is a jury, we consider that it should be required to itemise the relevant sub-heads of pecuniary loss in the same way as a judge and we do not envisage any difficulties in their receiving from the judge the necessary direction to enable them to do so.

The need for legislation

208. We have carefully considered whether there are any possible methods other than legislation by which the proposed change could be brought about. As we have acknowledged above, an improvement in the practice of itemisation has resulted from the decision in *Jefford* v. *Gee*, but we have concluded that legislation is the only practicable method of implementing all the changes which are desirable for the following reasons:—

(*a*) as it is an essential element of our proposal that the award for pecuniary loss should be the sum total of the itemised amounts, we are to this extent proposing a change in the law of damages and such a change could only be introduced by legislation;

(*b*) the most recent decision of the Court of Appeal in *Jefford* v. *Gee* does not amount to a general requirement of itemisation but only to a limited requirement.

The possible effect of itemisation on appeals

209. In our Working Paper No. 27 (which was issued before the decision in *Jefford* v *Gee*) we said that during the initial period of bringing any legislation into force it might well be that appeals would increase while insurance companies and trade unions "tested the market"; but once this period was over we saw no reason why the number of appeals should not again decline. In the event, we think that the decision in *Jefford* v *Gee* has itself provided a fair test as to whether itemisation encourages the unnecessary bringing of appeals. So far as we know there is no evidence that there has been an increase in the number of appeals since limited itemisation became the rule under *Jefford* v *Gee*. We have no reason to believe that this will not continue to be the position if the proposals in this Report become law.

210. In any event, however, if itemisation were to reveal that on occasion, a trial judge, as a result of some mistake in the assessment of the various heads of damage, had made a serious error in the final award, justice demands that such an error should be corrected. The possible increase in the number of appeals cannot be a valid argument against reform, if otherwise the case for reform is

[187] An example of such a case would be that of an injured housewife. Her claim will relate to services rendered both to herself and to her family: the assessment of the damages will fall to be considered both under paragraph 7 in Schedule 1 and under paragraph 10 in Schedule 1. No doubt, both these items will, by agreement, always be awarded as one sum. It would be in the interest of neither party to have an arbitary division of the total cost of replacing the housewife's services. Clause 7(8) enables the court to itemise with greater particularity if it so wishes or, if the parties agree, with less particularity.

made out. Moreover, we do not anticipate that a generalised practice of itemisation would increase the number of appeals which are unjustifiable in the sense that, while the judge may have erred in the assessment of one particular head of damage, his final award was corrected or nearly so: in our view competent legal advisers are unlikely to encourage a litigant to appeal if they consider that the appeal would, at best, produce a marginal change in the final award. In a field of litigation which is dominated by trade unions, insurance companies and the Legal Aid Fund, the risk of unnecessary appeals is small.

A change in the rules of pleading

211. We realise that to insist on greater particularity in pleadings can lead to undesirable delay. Nevertheless, we take the view that, as a corollary to itemisation, it is desirable to amend the rules of pleading so as to require plaintiffs in personal injury cases (as plaintiffs under the Fatal Accidents Acts are already required to do) to give in the Statement of Claim particulars of the quantum of damage under the relevant itemised heads. Even at present such particularisation seems to be essential both to assist the judge in the itemisation of the award and to enable the defendant before the trial of the action to have a clear picture of the claim made against him. We have reason to believe that such a change in the rules of pleading would receive strong support from the Queen's Bench Masters, and we accept the suggestion made to us that, by an amendment to Rules of Court, a certificate of readiness for trial should not be given until the pleadings have been put in order in this respect.

212. The desired change so far as the High Court is concerned, could, we suggest, possibly be made by an amendment to the Rules of the Supreme Court Order 18, Rule 12 (requiring a plaintiff in a personal injury action to give particulars of the pecuniary loss suffered). So far as the County Court is concerned, we suggest that a similar change should and could be brought about by so amending Order 7 of the County Court Rules 1936, that in personal injury actions the plaintiff should be required to specify in his Particulars of Claim the relevant itemised heads of the claim.

213. Subject to the views of the competent Rule Committees we further recommend amendment of the Rules of the Supreme Court and of the County Court Rules respectively in order to make the changes in the rules of pleading which we have proposed above.

Recommendations

214. We make the following recommendations:—

(*a*) in actions for damages for personal injuries the damages should be itemised under the separate heads numbered 1–12 in Schedule 1 of the annexed Bill. These heads fall into three main divisions namely pecuniary loss before judgment, future pecuniary loss and non-pecuniary loss (Clause 7 and Schedule 1);

(*b*) damages itemised as non-pecuniary loss should not be reduced by reason only of any amount which the court proposes to award in respect of pecuniary loss (Clause 7(5));

(*c*) the total amount of the damages awarded should be the sum of the separate itemised amounts (Clause 7(6));

(*d*) in actions under the Fatal Accidents Acts damages should be itemised under three heads, damages in respect of pecuniary loss before judgment,

damages in respect of future pecuniary loss and damages in respect of personal bereavement (Clause 11(1));

(*e*) "loss of earning capacity" should be compensated as a future pecuniary loss under the head, "loss of future earnings" (Clause 1(2)).

(F) THE METHOD OF ASSESSMENT OF PECUNIARY LOSS—ACTUARIAL EVIDENCE: ALLOWANCE FOR INFLATION

The provisional proposals for reform

215. Our Working Paper was critical[188] of the ruling of the House of Lords in *Taylor* v. *O'Connor*[189] under which the "multiplier", in contrast to the actuarial method has to be regarded as the normal and primary method of assessment of pecuniary loss; we provisionally concluded that a new approach was desirable to the use of actuarial evidence so as to create a different climate for its acceptance free from the inhibiting influence of the decision in *Taylor* v. *O'Connor* and of the further ruling of the Court of Appeal in *Mitchell* v. *Mulholland* (*No.* 2)[190].

216. As a practical means of achieving this aim and of promoting the greater use of acturial evidence, the Working Paper suggested—

(*a*) a legislative provision to the effect that the parties in a personal injury action should be entitled to rely upon the evidence of actuaries and upon approved actuarial tables to an extent which the court considered appropriate in the particular case[191] and that the court should pay due regard to such evidence and to such tables and

(*b*) the publication of actuarial tables (for use in cases where the cost of calling an actuary to give evidence could not be justified) on some official basis so that their accuracy could not be challenged.

217. On the question of awards making allowance for inflation, the Working Paper accepted[192] that probably the most practical way of doing this was to apply the rules for assessing damages on the basis that the plaintiff will be able to invest his damages in good growth equities as enunciated by Lord Diplock in *Mallett* v. *McMonagle* where he said:—

> "During the last twenty years, however, sterling has been subject to continuous inflation. Its purchasing power has fallen at an average rate of 3 per cent. to 3½ per cent. per annum and the increase in wage rates has more than kept pace with the fall in the value of money. It has been strongly contended on behalf of the appellant that inflation and increased wage rates are irreversible phenomena in the modern world and that in assessing damages under the Fatal Accidents Acts the "dependency" should be calculated as a continuously increasing amount to allow for the increasing cost in a depreciating currency of equivalent material benefits which the deceased would have provided for his dependants out of his rising wages. But this is to isolate but one of many interrelated factors. The damages will be paid in

188 Published Working Paper No. 41, paras. 157–162.
189 [1971] A.C. 115.
190 [1971] 2 W.L.R. 1271.
191 It was suggested that the discretion as to actuarial evidence would no doubt be exercised upon the Summons for Directions.
192 Published Working Paper No. 41, para. 190.

currency which has the value of sterling at the date of the judgment. Experience of the twenty years of inflation has shown that its effects can be offset to some extent at any rate by prudent investment in buying a home, in growth stocks, or in the short term high-interest bearing securities.

. . .

Fiscal policy, too, may have a considerable effect upon the annual amounts which can be produced by a given capital sum. The changes in income tax and the introduction of capital gains tax during the last twenty years would themselves have been sufficient to falsify actuarial calculations of the capital value of an annuity made before those changes were introduced; and it would be unwise to assume that fiscal policy will not alter further in the coming years.

In my view, the only practicable course for courts to adopt in assessing damages awarded under the Fatal Accidents Acts is to leave out of account the risk of further inflation, on the one hand, and the high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it, on the other hand. In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4 per cent. to 5 per cent. should be adopted."[193]

We also pointed out that the adoption of Lord Diplock's solution to the problem of inflation itself reinforces the necessity of assessing damages by applying a discount rate in accordance with actuarial methods rather than by using the "multiplier".

218. There was opposition to the Working Paper proposals on the grounds that actuarial methods would add to the cost of litigation, would give a wholly misleading appearance of accuracy and would unjustifiably increase the level of awards. One commentator suggested that we had made too little of the extra cost of actuarial evidence: another said that one should be prepared to sacrifice a certain amount of accuracy in awards in order to reduce the cost of litigation[194].

219. There was also, however, enthusiastic support for the suggestions in the Working Paper. The Bar Council expressed their whole hearted support. The Institute and Faculty of Actuaries and the Government Actuary, in lending their support to our proposals, also expressed the important opinion that the

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[193] [1970] A.C. 166 at pp. 175–176.

[194] We think that these fears as to the cost of actuarial evidence are exaggerated. We have been told the fees actually paid in respect of actuarial evidence in 21 cases decided or settled out of court between 1967 and 1973; they varied between £30 and £865, averaging just under £300. The damages awarded or paid on settlement in at least 10 of these cases exceeded £40,000. Typical examples of fees paid in cases actually contested in court where oral actuarial evidence was given are provided by *Fletcher* v. *Autocar and Transporters Ltd.* [1968] 2 Q.B. 322 C.A. and *Povey* v. *Governors of Rydal School* [1970] 1 All E R. 841. In *Fletcher* the issue was as to quantum of damages only, and the damages awarded by the trial judge were £66,447 (reduced on appeal to £51,447): the fee paid in respect of the actuarial evidence was £184. In *Povey*, the issue as to quantum of damages was tried after the issue as to liability had been decided and this part of the trial lasted 2 days. The judge awarded £78,398 damages (later settled at £62,500 on an appeal as to liability and quantum): the fee paid in respect of actuarial evidence was £630.

implementation of our provisional proposals would present no practical difficulties for the actuarial profession.

The case in favour of actuarial evidence restated

220. Our present proposals are by no means as novel as their critics aver. They merely seek to re-establish the accepted position which obtained before the decision in *Taylor* v. *O'Connor*. It has never been suggested that actuarial evidence is inadmissible and, prior to *Taylor* v. *O'Connor*, there had been a clearly observable tendency for the courts increasingly to receive actuarial evidence in substantial personal injury claims. Practitioners and judges were becoming accustomed to actuarial techniques of valuation and were beginning to appreciate the assistance that could be obtained from their use. This impression is borne out by the comments we have received from the Bar Council.

221. In this connection it is not without interest to recall the words of Lord Blackburn when in 1880 and in another context the House of Lords was required to evaluate an expectancy:—

> "But I think the Legislature knew that the value of an expectancy must, in a great degree at least, depend on the probabilities of the duration of life, the chances of marriage, and the chances of such marriages proving fruitful. They must, I think, have known that actuaries had tables, founded on extensive experience, on which they acted, which enabled them to value with considerable accuracy the probabilities of life: and that though the experience on which calculations as to the probabilities of marriage and issue were based was much narrower, and the results more subject to uncertainty, yet that some calculation could be made in that way and none could be made in any other. I think therefore that the Legislature must have contemplated that the Court would call in the assistance of an actuary to report to them on all those matters which properly come within the province of an actuary. Such was the course taken in *De Virte* v. *Wilson*[195] the only other case in which as yet the Court has had to act: and such was the course taken in the present case. No objection was made on either side, but I do not think they could have been taken on either side."[196]

Even earlier than this, actuarial evidence had been received in a claim under the Fatal Accidents Act. In *Rowley* v. *The London and Western Railway Company*[197] actuarial evidence was admitted in a claim by the dependants of a solicitor. At the trial the judge, Kelly, C. B., asked counsel for the plaintiff "Are you going to call an actuary?" which suggests that, even by 1873, actuaries were being called in this type of case.

222. The tendency, referred to in paragraph 220 above, for the courts to use actuarial methods of valuation has, however, been halted by the decisions in *Taylor* v. *O'Connor* and *Mitchell* v. *Mulholland* (*No.* 2). The prevailing judicial view must be taken to be that—

(*a*) the use of the multiplier has been, remains and should continue to remain, the ordinary, the best and the most satisfactory method of assessing the value of a number of future annual sums both in regard

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195 Court of Sess. Cas. 4th Series, vol. v. p. 328.
196 *M'Donald* v. *M'Donald* (1880) 5 App. Cas. 519 at pp. 539–540.
197 (1873) 42 L.J. Exch. 153 also reported in (1873) L.R. 8 Exch. 221 which includes a report of the remark by Kelly, C.B.

to claims for lost dependency under the Fatal Accidents Acts and claims for future loss of earnings or future expenses;

(*b*) the actuarial method of calculation, whether from expert evidence or from tables, continues to be technically admissible and technically relevant but its usefulness is confined, except perhaps in very unusual cases, to an ancillary means of checking a computation already made by the multiplier method.

223. In the light of what has now been said by the House of Lords and the Court of Appeal, there seems to be a strong possibility, to put the matter at its lowest, that parties will be actively discouraged from calling actuaries as expert witnesses. We cannot help feeling—and this feeling is reinforced by the consultation on our Working Paper—that the entrenchment, as we see it, of the "multiplier" by *Taylor* v. *O'Connor* is unsatisfactory. In the present situation created by *Taylor* v. *O'Connor* it seems unlikely that there will be any spontaneous change in the practice of the courts.

224. As we have pointed out already, in paragraph 220 above, there has never been any suggestion that actuarial evidence is inadmissible but, in order to undo the inhibiting influence of *Taylor* v. *O'Connor*, there will have to be legislation providing that the parties to an action for damages for personal injury shall be entitled to lead and rely upon evidence and that the court shall pay due regard to it. It is, therefore, these aims which are embodied in Clause 13 of the draft Bill at Appendix 5. Whether a court should attach any cogency to particular evidence is not, of course, a matter which can or should be subject to legislative control.

The aim of the legislative provision

225. We believe that such a clause will promote the greater use of actuarial evidence and that the virtual prohibition on its use imposed by *Taylor* v. *O'Connor* and *Mitchell* v. *Mulholland* (*No.* 2) will be removed. In the new climate which will thereby be created we believe that judges and practitioners will gain experience of dealing with actuarial evidence and that, as was already beginning to happen before the embargo fell, such evidence will gradually be acted upon and adopted more and more. The extent of the change will depend to some extent on the availability of an official set of actuarial tables. The preparation and publication of such tables (as to which see paragraph 228 below) is, therefore, an important part of this reform of the law. The proposal for a legislative clause of this sort received enthusiastic support from the Bar Council.

Control of expert evidence

226. Clearly the use of actuarial evidence will, in many cases, be inappropriate. Rules of Court already provide for control over and limitation of expert evidence[198] and we think that the legislation which we propose should make it clear that this control will apply to actuarial evidence. For the same reason it must be made clear that the court's discretion as to costs is not intended to be fettered.

[198] See R.S.C. 0.38 r. 4. See also the provisions of the Civil Evidence Act 1970.

Inflation

227. We must stress one point. We are quite clear that the draft clause should make no attempt to deal with the problem of allowing for inflation and should deal only with the principle of having regard to actuarial evidence. It would be extremely difficult, if not impossible, to draft a clause to deal with inflation. Accepting that the primary guidance on how to deal with inflation will still be Lord Diplock's dictum in *Mallet* v. *McMonagle*[199], the making of adequate allowance for inflation can, in any event, only be a by-product of using actuarial techniques. The compilation of the official actuarial tables can offer some assistance on the problem of inflation and to this we refer in paragraph 229 below.

The compilation and publication of official actuarial tables

228. In order to bring such a set of tables into being we recommend that a special committee be set up by the Lord Chancellor to advise on their compilation, the tables to be accompanied, as has been suggested by the Bar Council, by detailed notes as guides to their use, so that, as lawyers become accustomed to actuarial thinking and techniques, the informed use of tables may supersede the use of individual expert evidence in most cases. While the precise composition of this committee can be left for later discussion, we consider it appropriate to suggest here that a possible membership might include representatives of the Judiciary, the Institute & Faculty of Actuaries, the Bar Council, The Law Society and the Law Commission. Assuming that the Lord Chancellor is willing to sponsor the tables, we suggest that their publication could appropriately be undertaken by Her Majesty's Stationery Office.

The problem of allowing for inflation

229. We believe, however, that something concrete can be done to improve the handling of the problem of inflation beyond merely leaving the courts to apply *Mallett* v. *McMonagle*. The Bar Council, in the detailed points made in their memorandum to us, have indicated a possible practical improvement by suggesting that the set of official actuarial tables can itself be compiled so as to include a factor which will enable allowance to be made for inflation, though the feasibility of doing this will require careful examination by experts. To this end the committee responsible for compiling the tables should, we believe, include in its membership economists who could advise on the possibility of establishing a factor which would cover inflation. Having established what that factor was, it would be for the actuary members of the committee to advise how the inflation factor could be incorporated in the tables. Any such factor would, we think, be a variable and not a constant.

Recommendations

230. Our recommendations with regard to actuarial evidence and the problem of allowing for inflation may be summarised as being:—

(*a*) legislation to promote the use of actuarial evidence (Clause 13);

(*b*) the setting up of a technical committee comprising actuaries, lawyers and economists to compile a set of official actuarial tables (Clause 13(3)); such tables could include, if this proves feasible, a factor which would allow for inflation;

(*c*) that any tables approved by the Lord Chancellor should be admissible in evidence (Clause 13(3)).

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[199] See para. 217 above.

(G) PROVISIONAL DAMAGES

The difficulty, under a lump sum award, of compensating for uncertain future losses

231. In Section (J) of Published Working Paper No. 41[200] we considered in some detail the question whether there should be introduced into the law some other method of awarding damages than the present method of making a lump sum award. In our analysis of the defects inherent in a lump sum payment system, we tried to distinguish between two types of case in which future events must or may render a lump sum award unjust. The defects are inherent because in making a lump sum payment a court is attempting to compensate for loss in an uncertain future. We called one sort of case a "chance" case, the other a "forecast" case.

"Chance" cases

232. There are cases where the injury apparent at the trial may in the future be exacerbated by some catastrophe such as epilepsy, cancer or total blindness (for example caused by the sympathetic damage to one eye resulting from injury to the other). In this sort of case medical prognosis cannot say whether the catastrophe will or will not occur; all it can do is try to make an estimate, in terms of percentages, as to the probability that it will occur. The most common case is where the chance of traumatic epilepsy is estimated as being, for example, 2 per cent., 10 per cent. or 60 per cent. In this sort of case all the court can do is to make an award based upon a calculation of what would have been the damages if the catastrophe had already happened reduced by the percentage chance that it will not happen. If it does happen the plaintiff has been undercompensated; if it does not, the defendant has paid more than he ought to have paid.

233. The important feature of this sort of case is that it is, by making a lump sum award, in practice impossible for the court to do justice between the parties. We say "in practice" because it would, theoretically at least, be possible to ensure justice to the plaintiff if the award under this head of damage took the form of a sum of money sufficient to permit the plaintiff to take out a single premium insurance policy providing for the payment of the appropriate lump sum to him in the event of the catastrophe happening in the future.

234. The insurance policy for such a situation would have to be an indemnity policy to take account of the differing degrees of severity with which the catastrophe might strike (for example grand mal rendering the victim unemployable, or petit mal easily controlled by drugs). We do not know whether, in every conceivable circumstances, such a policy would be available on the insurance market, but, if it were, each such policy would have to be tailored to the individual circumstances of each case, and we think that this solution to the problem can properly be called more theoretical than real. Nevertheless, by analogy, we believe it points the way to the solution which we recommend later.

"Forecast" cases

235. The more common sort of case is where a lump sum award may, in the event, prove to have been the just amount. In this sort of case the medical

[200] Published Working Paper No. 41, paras. 222–256.

prognosis upon which the award was made may prove to have been precisely correct. An example of this sort of case would be where the medical evidence is that arthritis will occur in a damaged joint probably in ten years, probably of a certain severity, probably causing a certain degree of disability. If the future shows that the prognosis was correct then an award made on that prognosis would have been just. Of course, no doctor would claim that his prognosis could achieve anything like this precision in more than a very small percentage of the cases upon which he advises, but the difference in principle in cases of this sort and what we have called "chance" cases lies in the possibility of a just award in the former which is absent in the latter. The practical distinction is that the difference between what should have been awarded and what was awarded is likely in cases of this sort to be less extreme than in "chance" cases.

Periodic payments

236. There is one way in which the injustice inherent in any award in cases of this sort can be overcome and that is by the institution of a totally different form of compensation based upon variable periodic payments. We gave this subject detailed consideration in our Working Paper and upon consultation and for the reasons adumbrated in paragraphs 26–30 above we have concluded that we ought not to recommend a system based upon periodic payments.

Provisional awards

237. However, in Published Working Paper No. 41[201] we expressed a provisional view that the courts should be empowered, within the framework of a lump sum award system, to make provisional awards. We then thought that this power should be limited to "chance" cases and, perhaps, to some exceptional instances of "forecast" cases. On consultation opinion was divided as to whether a system permitting provisional awards should be introduced but, on balance, there was approval for the proposal in our Working Paper. There was, however, doubt expressed even by those who approved in principle, as to the practicability of the proposal.

Interim payments

238. New Rules of Court encourage us to believe that it is practicable to introduce a limited power to make provisional awards. These Rules of Court have come into force since Working Paper No. 41 was published and deal with the comparable subject of interim payments. Order 29, Part II, of the Rules of the Supreme Court provides that a plaintiff may, in certain circumstances, apply to the court for an interim payment. Before such an award can be made the court must be satisfied that the defendant is liable to the plaintiff and the interim award must not exceed a "reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff." No order can be made against a person unless he is insured, a public authority or "a person whose means and resources are such as to enable him to make the interim payment". The provisions of these Rules are, of course, intended to regulate a different situation from that which we are here considering and to provide a means whereby a plaintiff can recover a part of the compensation to which he is entitled without having to wait until the trial of the action. Our concern is with the period after the trial of the action, but we think that Order 29 of the Rules of the Supreme Court may provide a model of sorts for our proposal.

[201] Published Working Paper No. 41, paras. 254–256.

Recommendations

239. We have, as a result of consultation and reconsideration of the practical difficulties, come to the conclusion that we should recommend legislation aimed principally at the sort of case we have called "chance" cases. The distinguishing feature of these cases is that the plaintiff can prove there is a possibility, but no more than a possibility, that some event will occur. It must be an event for which, without injustice, the plaintiff can be awarded nothing unless it occurs. We think that, to deal with this class of case, the court should be given power to make such an award, if the plaintiff specifically claims relief.

240. A restriction which we think essential arises from the fact that the effect of such an award is that the defendant's liability will be uncertain perhaps for many years. We accordingly recommend that such an award should not be made against a defendant unless:—

(*a*) the defendant is a public authority; or

(*b*) the defendant is insured in respect of the plaintiff's claim; or

(*c*) in road accident cases the defendant is a person exempt from the requirements as to insurance of section 143 of the Road Traffic Act 1972 by reason of his making a deposit with the Accountant General of the Supreme Court or otherwise.

241. We further recommend that the court shall be entitled to order that an application for a final award shall be made, if at all, within a given time, or that the entitlement to make such an application should only end with the plaintiff's death.

242. We think that, if this proposal is implemented, it will, in effect, empower the court to insure the plaintiff against the occurrence of a catastrophe the possibility of which is foreseen. In view of our proposal that no such order shall be made against a defendant unless he is insured (or treated by the law as if insured) we see no injustice in this; the real defendant (the insurance company) will, no doubt, by re-insurance or otherwise, be able to provide for these rare risks in the same way as it provides for more common ones.

243. We have been advised that, since our recommendation for a provisional award to be made in even a limited class of cases constitutes a departure from the principles on which damages are awarded at present, the implementation of our recommendation will require legislation (Clause 6).

244. Once statutory authority has been given to the making of a provisional award as recommended it will be necessary to provide by Rules of Court for the detailed procedures to be adopted where such an award is made and we suggest that this matter be brought to the attention of the Supreme Court Rule Committee. The form of judgment will probably be most conveniently prescribed by a practice direction.

(H) CLAIMS UNDER THE FATAL ACCIDENTS ACTS 1846–1959

Introductory

245. Published Working Paper No. 41 was published soon after the Law Reform (Miscellaneous Provisions) Act 1971, section 4(1) of which provides that:—

"In assessing damages payable to a widow in respect of the death of her husband in any action under the Fatal Accidents Acts 1846 to 1959 there shall not be taken into account the remarriage of the widow or her prospects of remarriage."

246. Although we had grave misgivings about this provision, we assumed, in writing the Working Paper, that we would not be justified in doing more than advise the repair of the two minor anomalies referred to in the Working Paper[202] and to which we revert in paragraphs 251–252 below. However, on consultation, so great has been the criticism of the main principle of section 4(1) of the 1971 Act that we feel we cannot omit consideration of that section in this Report.

The Law Reform (Miscellaneous Provisions) Act 1971—section 4(1)

247. Despite the fact that no consideration was given to section 4(1) of the 1971 Act in the Working Paper, there was a great deal of criticism of the way in which this section operates and the unfair way in which it has, in practice, affected the damages paid to different classes of widows. The young widow who, at the time of trial has already remarried a wealthier man, gets far higher damages than does the middle-aged widow with four children and but slight prospects of remarriage. Surprise was expressed by our commentators that in the Working Paper we had expressed no reservation about the principle of the 1971 Act. Unfortunately, however, there was an almost complete dearth of constructive suggestions as to what might be put in place of the section 4(1) provision.

248. The weight of criticism against section 4(1) of the Act has caused us to reconsider at length and as fully as possible whether there is any suggestion we can now make which would remedy its anomalies without re-introducing as a relevant consideration a widow's prospects of remarriage. The factors which guided our thought were:—

(*a*) We are convinced, as already stated in paragraphs 26–30 above, that no general system of periodic payments is desired or desirable in a fault based system.

(*b*) Short of the radical provision in section 4(1) there is no way of making a widow's prospects of remarriage irrelevant other than by the introduction of some form of periodic payment.

(*c*) Any periodic payment would have to be terminable only on actual remarriage—or death. No system which made a periodic payment variable or terminable with *de facto* dependancy would be acceptable. This is amply evidenced by the protests made against any form of "snooping" into the private lives of persons receiving social security benefits.

(*d*) The anomalies which are now so widely deplored were recognised explicitly in the debate on the Bill in the House of Lords[203] and canvassed at length. The decision to make the widow's prospects of remarriage totally irrelevant was made in the full realisation that it would lead to over-compensation in many cases.

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[202] Published Working Paper No. 41, paras. 148–150.

[203] See Official Report. 317 H.L. Deb. ser. 5, cols. 527–561 : 318 H.L. Deb. ser. 5, cols. 521–549 and 1525–1593 and 319 H.L. Deb. ser. 5, cols. 767–782.

249. We have ourselves considered the following ways in which the anomalies might be remedied:—

(*a*) *Statistical evidence*:

Apart from the fact that this was suggested in the House of Lords debate[204] and did not commend itself to the House, it does not seem to be workable. There are some statistics available but they relate to very general categories of widows. It would not be difficult to argue that in any particular case they were inappropriate and in some cases they would be obviously misleading. It seems most undesirable to tell the judge to deduct as much from the award to a bed-ridden cripple as from the award to an already engaged ex-beauty queen of the same age. In jurisdictions where statistics are used—for example the Republic of South Africa—they are used merely as a guide to the court, which also takes into account the relevant surrounding circumstances, including actual prospects of remarriage.

(*b*) *Periodic payments, variable upon all relevant changes of circumstance, namely Lord Diplock's scheme with "nuts and bolts"*:

As was pointed out by Lord Diplock in the House of Lords debate[205], the award of a periodic payment which could be increased or reduced upon the happening of a relevant event would resolve all the difficulties in regard to overcompensation. But as was also pointed out in the House of Lords debate, it would have to be a fully worked out system of variable periodic payments[206]. We have always been of the opinion that if a scheme of variable periodic payments was not introduced in case of injury to a living plaintiff, it would not be practical to introduce one merely for Fatal Accidents Acts claims. As a result of consultation it is clear that there is no real demand for such a scheme. We are not in favour of creating the "nuts and bolts" merely for the purpose of replacing the 1971 Act.

(*c*) *A simplified form of periodic payments:*

This would merely involve assessing the dependency and awarding it for a period corresponding to the deceased's expectation of working life, reduced as appropriate by reference to contingencies and by reference to the joint expectation of life. The type of order would be, therefore, £1,000 per year for fifteen years, to terminate at the widow's remarriage; but otherwise it would not be variable. It would be possible to make provision for an adjustment from time to time in the light of inflation. But such a scheme would have one major objection; it would leave the widow stranded on the expiration of the order. The payments might terminate when the widow was 40 or 50. We do not think that such a scheme would commend itself. Whilst logically perfectly fair it seems to us to be socially unacceptable.

(*d*) *The conversion of a lump sum into an annuity terminable upon remarriage:*

The court would make an ordinary lump sum assessment ignoring the contingency of remarriage and would then award the widow such annuity as the lump sum would purchase, with the proviso that the

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[204] 318 H.L. Deb. ser. 5, col. 1579.
[205] 318 H.L. Deb. ser. 5, cols. 539–542.
[206] 318 H.L. Deb. ser. 5, cols. 522–531 and col. 1581.

annuity would cease upon remarriage, or perhaps some stated time after remarriage[207]. One objection to such a scheme is that quite a number of the annuities awarded would necessarily be very small annual amounts. However, there is another much more important objection, that the widow would have no way whatsoever to protect herself against inflation. In spite of lengthy consideration, we can think of no way of meeting this objection.

250. We have also considered various other solutions such as deferred payment of part of the lump sum, some combination of a lump sum and a periodic payment, or periodic payments without any "nuts and bolts", but merely left to the courts. We have, however, concluded that each of such solutions would have immediate and obvious major objections. We are, therefore, unable to make any recommendations for resolving the anomalies which undoubtedly disturb many of those whom we have consulted.

The 1971 Act: two minor anomalies to be corrected

251. Accepting the main principle behind section 4(1) of the 1971 Act, we provisionally concluded in paragraphs 147–150 of Published Working Paper No. 41 that two relatively minor anomalies in the Act should be corrected by extending the provisions of section 4(1) so as to make them apply to claims made by the children of the deceased and also to a claim made by a widower.

252. On consultation there was a wide measure of agreement that the 1971 Act should be amended so that the remarriage of the widow or her prospects of remarriage should not be taken into account in assessing the damages payable to the children. On balance commentators favoured extending the widow's rights to widowers, but comment was somewhat distorted by the fact that so many abhorred the provision itself and in consequence were unable to stomach its extension to widowers. Our final recommendation is that both the above-mentioned amendments can be justified and are desirable.

Provisional proposals on the Fatal Accidents Acts 1846—1959

253. Published Working Paper No. 41 provisionally proposed two relatively minor changes in the assessment of damages under the Fatal Accidents Acts, namely:—

(*a*) that, as regards the deductions from damages received in such claims, section 2 of the 1959 Act should be extended (subject, perhaps, to certain exceptions) so as to exclude all benefits derived from the estate of the deceased;

(*b*) that the class of recognised dependants under the Fatal Accidents Acts might be slightly extended.

Deductions from damages under section 2 of the Fatal Accidents Act 1959

254. As we said in paragraph 151 of our Working Paper, we have received no criticism of the working of the 1959 Act[208] and we see no reason why it should be altered as regards the benefits which are not deducted pursuant thereto.

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[207] The reason for extending the period after remarriage would be to compensate for the under payment in the early years which would occur were a lump sum merely reduced to an annuity.

[208] s. 2 of the Fatal Accidents Act 1959 provides that in calculating the damages no account shall be taken of any insurance money, benefit, pension or gratuity, which has been or will or may be paid as a result of the death.

255. The 1959 Act does not, however, affect deductions from Fatal Accidents Acts damages of benefits derived from the estate of the deceased. Where, as frequently is the case, the bulk of the estate consists of the matrimonial home, no account is taken of it, but where the estate consists of cash or stocks and shares, the accelerated value of the widow's gain from the estate is taken into account. And this is done even where it was likely that the plaintiff would have received the benefit of the money or property at a later date or where the support lost had not derived from that money or property. It is arguable that in most families the wife would have enjoyed at least some benefit of the money or property during her husband's lifetime, had she wanted or had she needed to. In any event we have thought it unfair that the widow of a deceased who has saved by buying shares should be penalised, whereas, had he purchased a life insurance, she would have been protected. We, therefore, provisionally proposed in our Working Paper that section 2 of the 1959 Act should be extended to exclude all benefits derived from the estate of the deceased. We also suggested that perhaps certain exceptions should be made to this extension, for example an identifiable portion of the estate of the deceased which derived solely from his inheritance by the will or intestacy of another person.

256. On balance, those who commented on the Working Paper favoured the provisional view that no benefits from the estate of the deceased should be taken into account. We received some suggestions that there should be no deduction for any benefit received below a certain figure, but, on consideration, we do not think such a refinement would necessarily be fair. The imposition of death duties on the estate of a wealthy man may mean that his premature death constitutes, in real terms, a serious loss to his dependants. Our view accords with the view of the Scottish Law Commission. We, therefore, recommend that, without limit, benefits from the estate of the deceased should not be taken into account (Clause 9(*a*)).

The class of recognised dependants under the Fatal Accidents Acts

257. In paragraph 154 of the Working Paper we provisionally concluded that there was one change in the class of potential claimants under the Fatal Accidents Acts which seemed desirable, namely, an extension to include children who have been de facto adopted and as such maintained by the deceased. This conclusion was based on our view that it would be logical to adopt and apply in this field the definition of "child of the family" in section 27(1) of the Matrimonial Proceedings and Property Act 1970. We thought the justification for admitting the claims of such children as dependants every bit as strong, if not stronger, than for admitting those of step-children, which are already recognised under the Fatal Accidents Acts. The situation on death is different from that on divorce and we think it right that this extension should apply to "children of the family" from any marriage of the deceased. On consultation there was a wide measure of support for this extension.

258. Consultation produced very little support for any further general extension of the class of dependants. We have contemplated extending the ambit of the Act to such persons as fiancees and "common law wives", but difficulties of definition and social policy have persuaded us not to propose any general extension. We think, however, that there may be a case for examining the legal position of a "common law wife" in all its aspects.

Divorcees

259. We have, however, been persuaded, as the result of consultation, to recommend one further special addition to the class of dependants. It was cogently suggested to us by some of our commentators that there should, at least, be an extension to a deceased's divorced spouse, who might have lost valuable rights of maintenance. A divorced wife who has been awarded maintenance, particularly one who has been divorced against her will after five years separation, may well suffer serious hardship if her former husband is killed and she is not recognised as a dependant for the purposes of a claim under the Fatal Accidents Acts. We, therefore, feel there are real grounds which justify our recommending that a divorced wife be accorded the status of a dependant. Because a divorced husband may have been receiving maintenance from his former wife[209] we think that the class of dependants should be extended to a divorced husband as well.

260. We would, however, point out that the acceptance of this recommendation will involve a policy decision as to whether section 4(1) of the Law Reform (Miscellaneous Provisions) Act 1971 (prohibiting the court from taking account of actual remarriage and remarriage prospects and thus protecting the plaintiff from distasteful cross-examination on such questions) should be extended to a dependant divorced wife. It seems clear that to some divorced wives such an investigation might prove as distressing as to a widow. But, on the other hand, a divorcee knows that the maintenance ordered to be paid to her will in any event be terminated by her remarriage. That the actual remarriage of a woman after the death of her deceased husband (from whom prior to his death she was receiving maintenance) should not be taken into account would, we think, be absurd. Beyond drawing attention to the question we make no recommendation for any extension of the principle of section 4(1) of the 1971 Act.

Recommendations

261. Reluctantly we find ourselves unable to make any proposal for the amendment of section 4(1) of the Law Reform (Miscellaneous Provisions) Act 1971 which would obviate the gross over-compensation of some widows which results from the existing provison.

262. We make the following recommendations:—

(*a*) the remarriage or prospects of remarriage of neither a widow nor a widower should in any circumstances be taken into account (Clause 9(*b*));

(*b*) there should be no deduction from the damages awarded in an action under the Fatal Accidents Acts in respect of any benefits received from the deceased's estate (Clause 9(*a*));

(*c*) there should be added to the list of dependants under the Fatal Accidents Acts "*de facto*" adopted children and divorcees (Clause 8).

(I) INTEREST ON DAMAGES—INTEREST ON PAYMENTS INTO COURT

Introductory

263. The last subject in our survey of the assessment of damages upon which we make proposals for legislation is interest on damages. A radical change in

[209] See Matrimonial Proceedings and Property Act 1970, s. 2.

the practice of the courts followed the enactment of section 22 of the Administration of Justice Act 1969 (amending the Law Reform (Miscellaneous Provisions) Act 1934), and we think that we should take the opportunity in this Report of reviewing the situation in the light of the decisions of the courts since that Act.

The antecedents of the Administration of Justice Act 1969

264. At common law a creditor was entitled to interest on a debt from the time when it became payable only when there was an agreement, express or implied, for the payment of interest or when an obligation to pay it could be supported by reference to the custom of merchants or trade usage. By the Civil Procedure Act 1833[210] interest became payable on contract debts payable at a time certain or made payable on demand, as from the due date of payment and the same Act gave the plaintiff in an action for conversion or trespass to goods a right to interest on the value of the goods at the time of their conversion or removal. By the Judgments Act 1838 money judgments were made to carry interest as from the date of their pronouncement or entry. Awards for damages for personal injuries only allowed for interest on the award in respect of any antecedent period where the principles of Admiralty law applied. The Admiralty Courts, at least in loss of cargo cases, allowed interest to run from the date of the loss[211] and the decision, in *The Aizkarai Mendi*[212], that, in personal injury cases, damages attract interest only as from the date of the Registrar's report on the amount to be awarded may be of doubtful authority.

265. Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 gave the court power to award interest on the sum for which judgment was given in debt or damages in respect of the whole or any part of the period between the date when the cause of action arose and the date of the judgment. It is a curiosity of legal history that from 1934 to 1969 there appear to have been very few contested personal injury cases in England (apart from claims dealt with under the Admiralty jurisdiction) in which interest on damages in respect of the period between the date of the unjury and the date of the award was included in the amount of the award[213]. This is particularly strange because the Law Reform Committee, upon whose Report[214] section 3 of the 1934 Act was based, rejected a suggestion that awards for general damages in personal injury cases should not carry interest for any period prior to judgment.

266. In July 1968 the Winn Committee Report was presented to Parliament. The Report recommended that all awards of general damages for personal injuries should carry interest on the amount awarded from the date of injury and on six monthly totals of special damage. It recommended amendment of section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 to produce this effect[215]. The Committee also recommended certain quite complicated prima facie rules for the courts to apply in awarding interest[216]. It is clear both

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[210] Provisions repealed by the Law Reform (Miscellaneous Provisions) Act 1934. See further para. 265 below.

[211] See *The Northumbria* (1869) L.R. 3 Ad. and Eccles 6 at p. 12. *Liesboch, Dredger* v. *Edison, S. S. (Owners)* 1933 A.C. 449 at p. 468.

[212] [1938] P. 263 at p. 279.

[213] The unreported case of *Noe* v. *Nestor* (1966) is referred to in the report of *Jefford* v. *Gee* [1970] 2 Q.B. 130 at p. 134.

[214] (1934) Cmd. 4546.

[215] (1968) Cmnd. 3691, para. 324.

[216] *ibid.*, para. 325.

from the Report itself and from the content of the suggested rules that the main purpose of the proposal was not to increase the damages awarded to a plaintiff but to encourage expedition in the process of litigation, and the saving of costs[217].

Administration of Justice Act 1969, section 22

267. The main recommendation for the amendment of section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 was implemented by section 22 of the Administration of Justice Act 1969, which required the courts, in making an award of damages for personal injury exceeding £200 to include interest unless satisfied that there were special reasons for not doing so. The section did not, however, include any *prima facie* rules as had been suggested by the Winn Committee. Decision as to what components of the award should carry interest, what the rate should be and for what period interest should be paid is left to the discretion of the court.

The rules laid down in Jefford v. Gee

268. Encouraged no doubt by the report of the Winn Committee the plaintiff in the case of *Jefford* v. *Gee* claimed and was awarded interest on his general damages (but not on his special damages) from the date of the accident to the date of the judgment. Section 22 of the 1969 Act came into operation on 1 January 1970 and, in the following February, *Jefford* v. *Gee* came before the Court of Appeal[218].

269. Lord Denning, M.R. delivered the Court's judgment in March 1970 and the opportunity was taken to lay down general principles to be followed by the courts in awarding interest under section 3 of the 1934 Act, as amended by section 22 of the 1969 Act, in normal cases. These principles, and the reasons supporting them, may be summarised as follows:—

(*a*) Special damage (*i.e.* loss of earnings and medical and out-of-pocket expenses to the date of trial) should carry interest at one-half the "appropriate rate"[219] as from the date of the accident.
The selection of the "half-rate" basis is designed to provide a rough and ready but fair method of averaging out compensation for losses of earnings and out-of-pocket expenses which range over a period and comprise an aggregate of smaller, and often trifling, individual sums.

(*b*) General damages in respect of future pecuniary loss should carry no interest.
The reason given for this rule is that in respect of this component of the award the plaintiff has not been kept out of any money but, in fact, gets a lump sum in advance to compensate him for his future loss.

(*c*) General damages for pain and suffering and loss of amenities should carry interest at the "appropriate rate" from the date of the service of the writ to the date of trial.

270. These rules are based upon two principles. First, the component of the award which (in personal injury cases) reflects compensation for future (*i.e.*

217 *ibid.*, paras. 322–325.
218 [1970] 2 Q.B. 130.
219 The appropriate rate is that payable on money in court which is placed on short term investment account (see Administration of Justice Act 1965 ss. 6 and 7 and the Supreme Court Funds Rules 73–80). If the rate has varied during the period, the appropriate rate is the average rate over that period.

post-trial) pecuniary loss should carry no interest. Second, components of the award, other than those related to pecuniary loss sustained up to the date of trial, which attract interest do so only from the date when the writ is served.

271. Apart from the impact of the *Jefford* v. *Gee* rules on payments into court[220] they do not seem to have caused any practical difficulties. We doubt, however, whether the effect of section 22 of the 1969 Act has been to produce any significant increase in the expedition with which cases are brought to trial[221] and it may have had the effect of slightly increasing rather than decreasing costs. Prior to the 1969 Act plaintiff's solicitors frequently forbore to issue a writ, at the insurer's request, during negotiations. This they can no longer risk doing, because of the rule that interest should run not from the accident but from the date of issue of the writ. We understand however, that agreements between plaintiffs and insurers that a writ shall be deemed to have been served on a particular date are now frequently made.

272. Although the combined result of section 22 of the 1969 Act and the rules in *Jefford* v. *Gee* has been substantially to increase the amount of damages paid by insurers, we do not think that that, in itself, is unjust. There seems to us to be no valid reason why the same principles should not apply to damages for personal injury as apply to other awards of damages. Detailed criticism of the rules in *Jefford* v. *Gee* has, however, led us to examine them to see whether, in the peculiar context of personal injury litigation, their implementation produces a fair result between plaintiff and defendant. In certain respects we have concluded that they do not.

Interest on damages awarded for non-pecuniary loss

273. Because damages awarded for pain and suffering and loss of amenity are intended to compensate a plaintiff by a lump sum award for the whole of his loss both pre-trial and post-trial it was represented to us that only that part of these damages referable to pre-trial loss should bear interest. Whilst we recommend a very much more detailed itemisation of damages[222] than the courts are at present required to make, we think that it would be going too far to require them to itemise in this way what, as we have said[223], is a sum incapable of precise calculation. It would, we think, add a further dimension of artificiality into what is already arbitrary and would lead to difficult comparisons between pain endured and to be endured. This criticism has, however, led us to ask whether damages awarded for non-pecuniary loss should carry interest at all.

274. On this question it was suggested to us on consultation[224] that, in any event, interest can have no relevance where monetary damages are being awarded not as replacement for other money, but as representing the best the law can do in the face of incommensurable loss which is not truly calculable in money. It is said that any award for pain and suffering and loss of amenities must be in the nature of a conventional sum and to award interest upon such a conventional sum becomes supererogatory.

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220 We deal with this subject later in this Report—see paras. 282–284 below.

221 Any improvement in this respect has been due, we think, to improvements in procedure rather than apprehension about the effect of delay on interest.

222 See para. 214 above.

223 See paras. 9 and 20 above.

224 By Mr. Harvey McGregor: and see *McGregor* on *Damages*, 13th ed., para. 449.

275. The question whether awards for non-pecuniary loss should carry interest is linked with the further question of whether awards of damages are keeping pace with inflation. We think that, at any rate in recent years, the judges have been much more ready to increase the level of non-pecuniary damages to keep pace with inflation. Until a comparatively short time ago such increases were only made when the conventional scale award had fallen so far behind the real value of money that a sudden quite dramatic increase was necessary[225], but we believe that the process is now a much more smoothly graduated one and we think that the courts do, from year to year, take into account, in their assessment of the proper scale figure for non-pecuniary loss, changes in the value of money. We certainly approve this tendency and hope that the "Damages Conferences" which we recommend later[226] in this Report may help to strengthen it.

276. The delay between injury and trial is usually substantial and, in assessing damages for non-pecuniary loss, the courts ought not to be required to go back notionally to the date of the accident in order to arrive at the correct scale figure for non-pecuniary loss. Nor do they do so. If a decision of the Court of Appeal increases the "scale figure" for an easily identifiable injury, a plaintiff whose accident preceded the decision would be properly aggrieved if, at the trial of his action after judgment on the appeal, he was awarded the figure which, prior to the appeal, was the conventional one.

277. The fact that the assessment of damages for non-pecuniary loss is, in our opinion, properly made, in the plaintiff's favour, as at the date of trial, leads us to ask whether it is fair to the defendant that interest should run for a period prior to judgment. The plaintiff has, because of the delay between accident and trial, had the benefit of any increase in the scale of damages during that period, and we have come to the conclusion that he should not have interest on the damages as well. He has gained by being "kept out of his money" and he ought not to reap a second gain by an award of interest.

Damages under the Fatal Accidents Acts

278. The rules in *Jefford* v. *Gee* provide that, so far as pecuniary loss in personal injury cases is concerned, interest shall only be awarded on pre-trial loss. We consider that this part of the rules and the reasons for it are correct and fair. In Fatal Accidents Acts claims, however, the rules require that interest shall be awarded on the whole of the damages. The damages awarded, however, are exactly comparable with damages for pecuniary loss to a living plaintiff; they cover loss of dependency incurred up to the date of trial and loss of dependency which will probably be incurred in the future. The pre-trial loss is capable of as accurate computation as the pre-trial pecuniary loss of a living plaintiff. The assessment of future pecuniary loss to a living plaintiff and future loss of dependency is made in precisely the same way and by means of the same sort of calculations. The "multiplier" is at present used in both contexts and is an equally blunt weapon in each case. Actuarial evidence is of equal assistance in each case. The only justification for there being different rules in the two cases is that, in Fatal Accidents Acts claims, the plaintiff does not, in practice,

[225] See para. 20 above and *Gardner* v. *Dyson* [1967] 1 W.L.R. 1497 referred to in Kemp & Kemp, *The Quantum of Damages*, 3rd ed., vol. 1, 7th Supp., where the Court of Appeal effectively doubled the scale figure for the loss of an eye.

[226] See paras. 293–294 below.

claim his accrued loss of dependency as special damages and the court does not itemise its award between pre-trial and future loss. This difference between the two rules as to interest means that dependants are awarded more interest than they are entitled to and this is obviously unjust to defendants. We think that this injustice should be remedied and we accordingly recommend that courts should be required to itemise damages in Fatal Accidents Acts claims between loss of dependency incurred prior to trial and future loss and that interest should only be awarded on the pre-trial loss. In our consideration of "itemisation"[227] we have already referred to this recommendation.

279. The rule that interest should run from the date of the writ has been criticised. It is doubtful whether its acknowledged aim of speeding litigation has been achieved and it has somewhat increased the cost of litigation. However, if our recommendations as to interest on damages for non-pecuniary loss and damages for loss of dependency are implemented, this rule will no longer have much effect. Damages for non-pecuniary loss (excluding damages for bereavement) will no longer include interest and pre-trial loss of dependency will be governed by the same rules as govern special damages in cases of personal injury.

280. We consider that the court should, however, award interest on any award made by way of damages for bereavement which we recommend[228] and this should, we think, run from the date of death. We justify the proposal that interest should be payable in this case on the ground that £1,000 is a finite sum prescribed by statute and accordingly the objection to paying interest on non-pecuniary loss which is at large, as we have explained in paragraph 274 above, does not arise.

The half-rate rule

281. The rule that "special damage" should carry interest at one-half the appropriate rate as from the date of the accident is, we think, a fair and sensible compromise solution to the problem so long as the loss continues up to the date of trial. The same rule should apply to pre-trial loss of dependency. It has, however, been pointed out to us, on consultation, that this rule is unfair to the plaintiff in cases where the special damage has all accrued some time prior to trial, a situation frequently met in county courts. When the whole of the special damages have been incurred long before the hearing there is no logical basis for applying the half-rate rule. We do not think that this situation is one which calls for specific legislative treatment; such a situation would clearly constitute a special reason entitling the court to depart from the rules which we propose and we think that courts faced with this situation ought so to exercise their discretion.

Interest on payments into court

282. The question whether a plaintiff, who wishes to accept a payment into court in settlement of his claim, should be entitled to interest in respect of the money paid in, was canvassed in our Working Paper[229], and excited a fair amount of comment on consultation.

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227 See para. 214(*d*) above.
228 See paras. 177–180 above.
229 Published Working Paper No. 41, para. 264(*b*).

283. In *Jefford* v *Gee*, Lord Denning, M.R. laid down a rule:—

> "If the plaintiff takes the money out of Court in satisfaction of the claim, that is the end of the case. He gets no interest because there is no judgment."[230]

This rule was strictly applied in *Newall* v. *Turnstall*[231] and *Waite* v. *Redpath Dorman Long Ltd.*[232]

The difficulties posed by Jefford v. Gee

284. The situation which causes difficulty because of this rule is the one in which a plaintiff would be prepared to take the money out of court so long as interest were added to it, but considers that, without interest, the money in court is insufficient. If money is paid into court some time after the writ has been served there may be a substantial amount of money due for interest if the claim is contested to judgment. If, however, the plaintiff proceeds to trial and recovers judgment for less than the money in court, although the addition of interest to the judgment may bring the total above the amount in court, the plaintiff will still have to pay costs from the date of payment into court. This result he could only have avoided by accepting a payment which, as the subsequent judgement and award of interest will have shown, was less than his entitlement. It has been strongly represented to us that this is unfair to plaintiffs.

Butler v. Forestry Commission

285. These difficulties were extinguished or, at least, substantially reduced by the decision of the Court of Appeal in *Butler* v. *Forestry Commission*[233]. In that case the Court of Appeal suggested that where a plaintiff is prepared to accept a payment into court in satisfaction of his claim, but considers that he is entitled to a further sum by way of interest, he should write an open letter to the defenddant which may, if necessary, be considered by the court in exercising its discretion as to costs at the trial. We welcome this suggestion of the Court of Appeal in *Butler* v. *Forestry Commission*, and think that it provides adequate protection for a plaintiff faced with a payment into court. It may be that there is a case for an enquiry into the question of interest on money in court in every sort of action but, in the limited context with which we are concerned, we do not think it necessary to advise legislation. The impact of interest in personal injury cases will, in any event, be substantially reduced by our proposals.

Recommendations

286. We recommend that the Law Reform (Miscellaneous Provisions) Act 1934 (as amended by section 22 of the Administration of Justice Act 1969) should be further amended by the addition of *prima facie* rules for the award of interest on damages (Clause 14 and Schedule 2). These rules should provide that, in personal injury actions:—

(*a*) pecuniary loss before judgment should bear interest at half the appropriate rate in respect of the period between the date when the cause of action arose and the date of judgment (Schedule 2, Part I, para. 1);

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230 [1970] 2 Q.B. 130 at p. 150.
231 [1970] 3 All E.R. 465.
232 [1971] 1 All E.R. 513.
233 (1971) 115 Sol. J. 912.

(*b*) no interest should be awarded in respect of future pecuniary loss (Schedule 2, Part I, para. 2);

(*c*) no interest should be awarded in respect of non-pecuniary loss (Schedule 2, Part I, para. 2);

and that in actions under the Fatal Accidents Acts:—

(*d*) pecuniary loss (loss of dependency) before judgment should bear interest at half the appropriate rate in respect of the period between the deceased's death and the date of judgment (Schedule 2, Part II, para. 1);

(*e*) damages for personal bereavement should bear interest at the appropriate rate in respect of the period between the deceased's death and the date of judgment (Schedule 2, Part II, para. 2);

(*f*) no interest should be awarded in respect of future pecuniary loss (Schedule 2, Part II, para. 3).

(J) PAYMENTS INTO COURT GENERALLY

Introductory

287. As a result of Published Working Paper No. 41 we have had comments upon the system of payments into court which raise questions we did not canvass in the Working Paper and which are of general application and not confined to personal injury claims. We accordingly make no recommendations on this subject. We do, however, think that there is a case for an examination of the whole question, not only in respect of personal injury claims, and we accordingly record here the suggestions which have been made to us.

The difficulties experienced: examples

288. The sort of situations which, it has been suggested to us, raise great difficulties for a plaintiff's advisers are those where the "costs risk" is great compared with the amount at stake, and infants' cases, where sometimes difficult decisions have to be taken, not by the plaintiff himself but by his legal advisers. It has been pointed out that the main purpose of permitting a defendant to make a payment into court is to protect him (and his insurers) against the unreasonable plaintiff and that a defendant should not be able to use the device to force a plaintiff into having to make a choice between taking less than he is advised his claim is worth or proceeding to trial with the risk that he will get much less or even nothing at all.

289. If a plaintiff, who has been advised that his claim is worth £1,000, is faced with a payment into court of £850, he has the choice of risking getting nothing or taking £150 less than he is advised the claim is worth. If he is only awarded £800 he will have to pay his own and the defendant's costs from the date of payment in, which may well exhaust the damages awarded. A plaintiff's advisers are placed in great difficulty also by the fact that not only does judge differ from judge in his assessment of damages but also because the very assessment itself is so imprecise. Where the plaintiff is an infant his advisers' difficulties are accentuated. It has been represented to us that a payment into court should not be regarded as a counter in a game of chance.

290. Another situation can arise in an infant's claim where the argument for an alleviation of the rule as to costs is even stronger. All compromise

settlements of infants' claims have to be approved by the court and it not infrequently happens that the court refuses to approve a settlement because it does not think that the amount the defendant has offered is sufficient even though it may be more than the payment into court. If, after such a refusal, the plaintiff is awarded, by another judge, an amount less than the payment into court it seems quite wrong that the court should even have a discretion to mulct the plaintiff in costs.

Possible solutions

291. It has been suggested to us that the difficulties in which a payment into court can place a plaintiff could be alleviated without injustice to defendants by incorporating a "cushion" provision into the rules. This could provide that, in personal injury (and Fatal Accidents Acts) claims, the court should only take into account, in exercising its discretion as to costs, the amount of a payment in, if it exceeded the judgment by, say, £250 or 10 per cent whichever was the greater. Such a provision would provide protection for the plaintiff in the sort of cases where the "costs risk" is out of proportion to the amount at stake; in cases where heavy damages are likely payments in are rarely made other than as a tactical device and as an opening move in "door of court" negotiation, any possible saving in costs being insignificant when weighed against the tactical and financial disadvantages of making a serious payment in.

292. Another comment suggested that what was needed was to persuade the courts to exercise their discretion more frequently in an unsuccessful plaintiff's favour. At present it is very rare for a plaintiff not to be mulcted in costs although his award may be very close to or even equal to the amount in court. Perhaps this change might be appropriately effected by an amendment to Order 62, Rule 5 of the Rules of the Supreme Court, requiring the court to take into account the reasonableness or otherwise of any failure to take or apply to take the money out of court.

(K) A JUDGES' CONFERENCE ON THE ASSESSMENT OF DAMAGES

The precedent of Sentencing Conferences

293. A practical proposal was suggested to us on consultation, the adoption of which would, we feel, be of considerable assistance to the courts in resolving the difficulties which arise in the assessment of the conventional scale for non-pecuniary damages. Despite the demand that is sometimes made for greater lay participation in the assessment of damages, we have concluded that we feel there is no justification for making any substantive changes in the present system of trial by judge alone. We do not recommend a greater use of juries or a special damages tribunal or the use of assessors, or a legislative tariff[234]. However, we feel that the Judges' Conferences on Sentencing in criminal cases are a precedent which could helpfully be followed by the holding of similar Judges' Conferences on the Assessment of Damages.

The function of a Damages Conference

294. We envisage such a Damages Conference as a forum for the informed discussion of the assessment of damages. In addition to the judges concerned with the trial of personal injury cases and specialist lawyers, we suggest that

[234] See above at paras. 32–36, 38–43 and 44–46.

expert laymen with particular insights into the different aspects of personal injury should also attend, such as doctors, persons conversant with the problems of the disabled, trade unionists, economists and actuaries.

(L) THE ACTIONS FOR SEDUCTION, ENTICEMENT AND HARBOURING OF A SERVANT

Abolition of actions for seduction, enticement and harbouring of a servant

295. In paragraph 6 above we referred to the fact that the actions for seducing, enticing or harbouring a spouse or child had been abolished by section 5 of the Law Reform (Miscellaneous Provisions) Act 1970 but that the analogous actions in respect of a servant had not been abolished.

296. The abolition of these archaic causes of action was recommended by the Law Reform Committee in their *Eleventh Report*[235]. In our Published Working Paper No. 19 we also strongly recommended their abolition[236] and there was no opposition to this recommendation from those we consulted. Their abolition was strongly supported by the Bar Council and The Law Society.

Recommendation

297. We recommend the abolition of the actions for seduction, enticement and harbouring a servant (Clause 12).

(*Signed*) SAMUEL COOKE, *Chairman.*
CLAUD BICKNELL.
AUBREY L. DIAMOND.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

15 *June* 1973

235 *Eleventh Report of the Law Reform Committee* (*Loss of Services, etc.*), (1963) Cmnd. 2017.
236 Published Working Paper No. 19, para. 89.

APPENDIX 1

List of those who assisted the Law Commission with advice and information during the preparation of Published Working Paper No. 41 and with comments upon Published Working Papers Nos. 19 and 27.

(A) *Those who submitted written comments relevant to the problems of Family Loss raised in Published Working Paper No. 19—the Actions for Loss of Services, Loss of Consortium, Seduction & Enticement, dated 14 June 1968.*

General Council of the Bar
The Law Society
The Law Society, Liverpool Young Members Group
British Legal Association:—

Mr. B. J. Bird
Mr. J. L. Smith

Mr. Peter Martin (Messrs. Beaumont & Son, Solicitors)
Lloyd's
British Insurance Association
Society of Public Teachers of Law:—

Mr. P. S. Atiyah, Oxford University
Mr. G. de N. Clark, University College, London
Professor J. G. Fleming, University of California
Professor P. S. James, Leeds University
Mr. J. A. Jolowicz, Cambridge University
Mr. E. Johnson, University College, London
Dr. R. W. Rideout, University College, London

National Council of Women
National Federation of Professional & Business Women's Clubs
National Coal Board

(B) *Participants in the Seminar on Damages in Personal Injuries Cases held at All Souls College, Oxford in February 1966.*

The Rt. Hon. Lord Justice Winn, C.B., O.B.E. (Chairman of the Committee on Procedure in Personal Injuries Litigation)
The Hon. Mr. Justice Scarman, O.B.E. (Chairman of the Law Commission)

Mr. Andrew Martin, Q.C. (Law Commissioner)
Mr. John Churchill (Law Commission and Secretary of Winn Committee)
Mr. D. W. R. Brand, Q.C.

Mr. P. O'Connor, Q.C. (now the Hon. Mr. Justice O'Connor)
Mr. M. A. L. Cripps, Q.C.
Mr. R. I. Kidwell, Q.C. (Member of Winn Committee)

Mr. R. B. Thompson (Messrs. W. H. Thompson, member of Winn Committee)
Mr. D. A. Marshall (Messrs. Barlow, Lyde & Gilbert)
Mr. N. G. Scriven (Messrs. Hewitt, Woollacott & Chown)

Mr. T. D. Wilson (Royal Insurance Company)
Mr. C. R. Dale (Secretary, Social Insurance Department, T.U.C.)

Professor H. Street (Manchester, author of 'Principles of the Law of Damages')
Professor O. Kahn-Freund (Professor of Comparative Law, Oxford)
Dr. A. M. Honoré (Reader in Roman-Dutch Law, Oxford)
Mr. D. R. Harris (Balliol College, Oxford)

Also present were the Warden and some Fellows of the College (including Professor A. R. P. Cross, the Hon. Sir Henry Fisher, Mr. F. P. Neil, Q.C. and Mr. J. F. Lever).

(C) *Those who submitted written comments on Published Working Paper No. 27—Itemisation of Pecuniary Loss and the use of Actuarial Tables as an aid to assessment, dated 18 March 1970.*

The Rt. Hon. Lord Wilberforce, C.M.G., O.B.E.

The Rt. Hon. Lord Denning, Master of the Rolls
The Rt. Hon. Lord Justice Russell
The Rt. Hon. Lord Justice Salmon
The Rt. Hon. Lord Justice Winn, C.B., O.B.E.

The Rt. Hon. Lord Parker of Waddington, Lord Chief Justice of England
The Hon. Mr. Justice Veale
The Hon. Mr. Justice Milmo
The Hon. Sir Henry Fisher

Master Harwood, Q.C.
Master Elton
Master Ritchie, M.B.E.
Master Mathews, T.D.

His Honour Sir Walker Carter, Q.C.
The General Council of the Bar
The Law Society
The Society of Public Teachers of Law

Lloyd's
British Insurance Association

Mr. P. S. Atiyah
Messrs. W. H. Thompson, Solicitors
Mr. R. E. Beard, Pearl Assurance Company

(D) *Those who have otherwise assisted the Law Commission with information and advice during the preparation of Published Working Paper No. 41.*

The Institute and Faculty of Actuaries:—

Mr. G. Heywood
Mr. G. V. Bayley
Mr. J. H. Prevett

Government Actuary's Department:—
Sir Herbert Tetley K.B.E., C.B.
Mr. P. R. Cox
Mr. L. V. Martin

British Insurance Association:—
Mr. E. F. Bigland
Mr. A. B. Jenkins
Mr. H. Marshall
Mr. F. W. Mills
Mr. K. W. Mansfield (Joint Secretary)

British Medical Association:—
Mr. H. H. Langston
Dr. G. L. Gullick (Assistant Secretary)

Professor J. G. Fleming
Professor R. F. V. Heuston
Mr. J. A. Jolowicz
Professor O. Kahn-Freund
Mr. David A. MacI. Kemp
Mr. Harvey McGregor
Professor H. Street
Master Harwood ,Q.C.
Master Jacob
Master Elton

His Honour Judge Mais (now the Hon. Mr. Justice Mais)
Mr. P. A. House (Sun Alliance & London Insurance Group, member of the Winn Committee)
Mr. J. F. S. Cobb, Q.C.
Mr. E. B. Gibbens, Q.C. (now His Honour Judge Brian Gibbens, Q.C.)
Mr. G. Heilpern, Q.C.
Mr. B. A. Hytner, Q.C.
Mr. R. I. Kidwell, Q.C.
Mr. P. R. Pain, Q.C.
Mr. M. D. Sherrard, Q.C.
Mr. J. D. Stocker, M.C., T.D., Q.C. (now the Hon. Mr. Justice Stocker)
Mr. G. L. Bindman, Solicitor
Mr. P. R. Kimber, Solicitor
Mr. Vincent Rendel, Solicitor
Mr. J. C. Walker (Messrs. Russell, Jones & Walker, Solicitors)
Mr. N. Schremek and Mr. R. B. Thompson (Messrs. W. H. Thompson, Solicitors)
Mr. R. Hayes, Department of Justice, Eire
New South Wales Law Reform Commission
Mr. P. L. Sharp, Q.C., Bar Chambers, Perth, Western Australia
The Hon. Mr. Justice Walsh, Supreme Court, Eire
The Hon. Mr. Justice J. Wickham, Supreme Court, Perth, Western Australia

Judge Anders Bruzelius, Sweden
Dr. Axel Flessner, Max Planck Institute, Hamburg
Dr. R. Graupner
Professor Jan Hellner, Stockholm
Dr. Kay von Metzler, Hamburg
Dr. E. J. Wells

APPENDIX 2

List of those who have submitted comments on Published Working Paper No. 41

The Rt. Hon. Lord Gardiner
The Rt. Hon. Lord Denning, Master of the Rolls
The Rt. Hon. Lord Justice Megaw, C.B.E., T.D.
The Hon. Mr. Justice O'Donnell (Royal Courts of Justice, Belfast)
The Hon. Mr. Justice Jones (Royal Courts of Justice, Belfast)
The Hon. Mr. Justice Reynolds (New South Wales, Law Reform Commission)

His Honour Judge Bush
His Honour Judge Dow
His Honour Judge Everett, Q.C.
His Honour Judge Francis
His Honour Judge Garrard
His Honour Judge Leech
His Honour Judge Peck
His Honour Judge Wingate, Q.C.

Sir Geoffrey Howe, Q.C., M.P.
Master Ritchie, M.B.E.

The General Council of the Bar
The Law Society
The Society of Conservative Lawyers

The Lord Chancellor's Department
The Scottish Law Commission

Lloyd's
British Insurance Association
British Insurance Law Association
The British Shipping Federation

The Institute & Faculty of Actuaries
Sir Herbert Tetley, K.B.E., C.B., Government Actuary
Mr. L. V. Martin, Government Actuary's Department

Trade Union Congress
Confederation of British Industry

British Medical Association
The Royal College of Surgeons
The Royal College of Physicians

National Council of Women of Great Britain
National Federation of Business & Professional Women's Clubs
Women's National Commission

British Railways Board

Mr. D. B. B. Fenwick
Mr. Douglas Lowe, Q.C. (Criminal Injuries Compensation Board)
Mr. Andrew Martin, Q.C.
Mr. Harvey McGregor
Mr. P. L. Sharp, Q.C. (Western Australia)

Messrs. Bradley, Trimmer & Sons, Solicitors
Mr. P. R. Kimber, Solicitor
Messrs. Lawford & Co., Solicitors
Mr. Vincent Rendell, Solicitor
Messrs. W. H. Thompson, Solicitors

Professor P. S. Atiyah (Australian National University)
Mr. A. I. Ogus (Oxford University)
Mr. W. Horton Rogers (Nottingham University)
Mr. H. Lunz (Melbourne University)
Mr. Alec Samuels (University of Southampton)
Mr. A. Wharam (Leeds Polytechnic)

Judge Reinhardt Hartung (Oberlandesgericht, Celle)

APPENDIX 3

Statistics of personal injuries

Road accidents

The road accidents statistics published by the Department of the Environment, the Scottish Development Department and the Welsh Office[1] give the 1970 figures as:—

	7,500	killed
	93,000	seriously injured
	262,000	slightly injured
Total:	363,000	out of a population of 54,300,000.

Ten years earlier, 1960, the corresponding figures were:—

	7,000	killed
	84,000	seriously injured
	256,000	slightly injured
Total:	347,000	out of a population of 50,900,000.

These figures treat as "seriously injured" anyone detained in hospital as an in-patient, or any one of the following injuries whether or not the victim is detained in hospital: fractures, concussion, internal injuries, crushings, severe cuts and lacerations, severe general shock requiring medical treatment. "Slightly injured" denotes an injury of a minor character such as a bruise or a sprain.

Accidents on the railways

On the railways during 1970[2], 13,458 persons were injured and 143 were killed; 7,558 of those injured were railway servants, 5,625 were passengers and 275 were other persons.

Factory accidents

The Annual Report of H.M. Chief Inspector of Factories 1970[3] gives the total of all *reported* accidents in 1970 as 304,595 of which 556 were fatal.

Accidents in mines

In coal mines during 1970[4] accidents of all kinds killed 91 persons and seriously injured 641.

Claims for industrial injury and disablement pensions

The figures from the Department of Health & Social Security[5] show that in 1971 claims for industrial injury benefit totalled 729,000 compared with 822,000 in 1970 and claims for disablement benefit totalled 165,000 compared with 192,000 in 1970.

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[1] *Road Accidents* 1970—Table 1.
[2] Department of the Environment: *Railway Accidents* 1970, Appendix II at p. 88.
[3] (1971) Cmnd. 4758, pp. 72 and 91.
[4] Report of H.M. Chief Inspector of Mines & Quarries for 1969 and 1970, Table 3 at p. 71.
[5] Department of Health & Social Security Annual Report 1971 (1971) Cmnd. 5019, at p. 112.

APPENDIX 4

Summary of recommendations

The following summarises all the recommendations in Parts III and IV of the Report: reference is also made to a few matters on which the Report makes no recommendation but offers a comment.

MATTERS ON WHICH NO CHANGE IN THE PRESENT LAW IS PROPOSED (PART III)

(A) Periodic payments

1. The introduction of a system of damages based on periodic payments is rejected (paras. 26–30).

(B) The principles of assessment for non-pecuniary loss—a legislative tariff

2. No change is proposed in the principles of assessment for non-pecuniary loss (para. 31).

3. The introduction of a legislative tariff directed to the level of awards for non-pecuniary loss is rejected (paras. 32–36).

(C) Mode of trial: jury trial and a damages tribunal

4. No extension of the use of juries is proposed (paras. 38–43).

5. No advantage would result were a special damages tribunal created and no such tribunal is proposed (paras. 44–45): the suggestion that trial should take place before a judge sitting with assessors as experts is also rejected (para. 46).

(D) Pecuniary loss by a living plaintiff—deductions for expenses saved and for taxation

6. No change is proposed in the present rule regarding deductions for expenses saved (paras. 47–48).

7. No change is proposed in the rule in *Gourley's Case* as to taking tax into account (paras. 49–52).

RECOMMENDATIONS FOR REFORM: LEGISLATION REQUIRED (PART IV)

(A) The rule in Oliver v. Ashman

8. For the reasons discussed in paragraphs 55–85 and as summarised at paragraphs 86–91:—

(*a*) It is recommended that the rule in *Oliver* v. *Ashman* be reversed by legislation and that, in any case where it is proved that the plaintiff's expectation of life has been reduced by his injuries, he should himself be compensated for the loss during the period he would otherwise have lived on the basis of his anticipated income from earnings (and from other sources for the reasons given in paragraph 90) during that period less what he would have spent on his own maintenance (para. 87 and Clause 2(2)).

(*b*) There should be no age limit below which such damages should not be awarded; awards to young plaintiffs will inevitably be small because it will be impossible for such plaintiffs to establish that they would probably have made any savings or supported any dependents out of their earnings, and an arbitrary age limit seems undesirable (para. 88).

(*c*) The court should not be restricted to considering only dependants actually in existence at the time of the accident. It ought to be open to a plaintiff without dependants at the time of his accident to establish as a probability that he would have used his earnings during the lost period otherwise than on himself (para. 89).

(*d*) In line with the reasoning of the Australian High Court in *Skelton* v. *Collins* the plaintiff should be entitled to compensation not only for loss of earnings but for other kinds of economic loss, *e.g.* a life annuity referable to the lost period (para. 90).

(*e*) A plaintiff's income may, however, come from dividends paid on capital assets and, as these assets will themselves, subject to death duties, be able to pass on his death, to his dependants; the court must have a discretion to ignore such lost income in the lost period in its assessment of damages (para. 91 and the proviso to Clause 2(2) (*b*)).

B(i) Expectation of life considered as non-pecuniary loss

9. For the reasons discussed in paragraphs 92–99 and as summarised in paragraph 107(*a*) claims for loss of expectation of life as a separate head of non-pecuniary loss should be abolished, but the court should take into account, in awarding damages for pain and suffering an appropriate additional amount to cover any suffering caused or likely to be caused by awareness of lost expectancy (para. 107(*a*), and Clause 3).

B(ii) Claims under the Law Reform (Miscellaneous Provisions) Act 1934

10. For the reasons discussed in paragraphs 100–106 and as summarised in paragraph 107:—

(*a*) In claims under the Law Reform (Miscellaneous Provisions) Act 1934, claims for damages for non-pecuniary loss (other than for loss of expectation of life) should continue to survive (para. 107(*b*)).

(*b*) For the reasons given in paragraph 105, when a tort victim dies before judgment, legislation should provide against a defendant having to pay twice over to the dependants under the Fatal Accidents Acts and to the estate of the deceased (para. 107(*c*) and Clause 16(3)).

(C) The assessment of damages for pecuniary loss

11. Paragraphs 110–157 contain discussion of four interrelated subjects:—

(i) The principles of assessment for a living plaintiff.

(ii) The actions for loss of services and loss of consortium.

(iii) Collateral benefits and their impact on the assessment of pecuniary loss.

(iv) Loss distribution.

12. The legislative proposals recommended in relation to the above mentioned subjects as summarised in paragraph 159, are the following:—

(*a*) Where others have incurred expense or suffered pecuniary loss on behalf of the victim such expenses, so long as they are reasonable, should be recoverable by the plaintiff from the tortfeasor (para. 159(*a*) and Clause 4).

(*b*) Where a victim gratuitously rendered personal services to anyone within the Fatal Accidents Acts class of dependants prior to his injury he should be able to recover their reasonable past and future value from the tortfeasor (para. 159(*b*) and Clause 5).

(*c*) All actions for loss of services should be abolished (para. 159(*c*) and Clause 12).

(*d*) With the exception of the benefits specially provided for by section 2 of the Law Reform (Personal Injuries) Act 1948, social security benefits should not be taken into account in the assessment of damages for personal injury (para. 159(*d*) and Clause 1 which codifies the present law as to collateral benefits and, by exclusion, implements this particular recommendation in subsection 1(*a*)).

(D) Non-pecuniary loss suffered by persons other than the victims of tortious injury—solatium

13. For the reasons discussed in paragraphs 172–176 and as summarised in paragraphs 177–180 it is recommended that legislation should provide that:—

(*a*) The parents of an unmarried infant child who is killed by another's wrong should be entitled in an action under the Fatal Accidents Acts to recover the sum of £1,000 from the wrongdoer in respect of their bereavement. If both parents bring an action, each should be awarded £500 (para. 177 and Clauses 10(2) and 10(3)).

(*b*) Where a person is killed by the wrongful act of another his spouse should be entitled in an action under the Fatal Accidents Acts to recover £1,000 from the wrongdoer in respect of his or her bereavement (para. 178 and Clause 10(1)).

(*c*) There should be included in any legislation a provision permitting the variation of the figure of £1,000 by statutory instrument (para. 179 and Clause 10(5)). Any such variation should only apply to deaths occurring after it has come into force and awards for bereavement ought, despite the recommendation below as to interest in respect of other non-pecuniary loss, to bear interest from the date of death (para. 179 and Clause 14 and Schedule 2).

(*d*) These claims should be made in proceedings under the Fatal Accidents Acts. It is unlikely that a court would hold any subsisting claim under the Fatal Accidents Acts would survive to the estate of a dependant who died before judgment. But the award which is here envisaged is a very personal award to the person who has suffered the bereavement and therefore it should be made clear in the legislation that claims for damages for bereavement should not survive to the estate of a deceased parent or child (para. 108 and Clause 10(4)).

(E) **Itemisation of the heads of damage—the problem of overlap**

14. For the reasons discussed in paragraphs 181–213 and as summarised in paragraph 214 legislation is recommended to the effect that:—

(*a*) In actions for damages for personal injuries the damages should be itemised under the separate heads numbered 1–12 in Schedule 1 of the annexed Bill. These heads fall into three main divisions namely, pecuniary loss before judgment, future pecuniary loss and non-pecuniary loss (para. 214(*a*) and Clause 7 and Schedule 1).

(*b*) Damages itemised as non-pecuniary loss should not be reduced by reason only of any amount which the court proposes to award in respect of pecuniary loss (para. 214(*b*) and Clause 7(5)).

(*c*) The total amount of the damages awarded should be the sum of the separate itemised amounts (para. 214(*c*) and Clause 7(6)).

(*d*) In actions under the Fatal Accidents Acts damages should be itemised under three heads; damages in respect of pecuniary loss before judgment, damages in respect of future pecuniary loss and damages in respect of personal bereavement (para. 241(*d*) and Clause 11(1)).

(*e*) "loss of earning capacity" should be compensated as a future pecuniary loss and itemised under the head, "loss of future earnings" (para. 214(*e*) and Clause 1(2)).

15. It is further recommended that subject to the views of the competent Rule Committees, the Rules of the Supreme Court and the County Court Rules should be amended to make changes in the rules of pleading whereby particulars of the quantum of damage under the relevant itemised heads would have to be set out in the relevant pleading (paras. 211–213).

(F) **The method of assessment of pecuniary loss—actuarial evidence: allowance for inflation**

16. For the reasons discussed in paragraphs 215–229 and as summarised in paragraph 230 it is recommended that:—

(*a*) Legislation be introduced to promote the use of actuarial evidence (para. 230(*a*) and Clause 13).

(*b*) A technical committee should be set up comprising actuaries, lawyers and economists to compile a set of official actuarial tables (Clause 13(3)). Such tables could include (if this proves feasible) a factor which would allow for inflation (para. 230(*b*)).

(*c*) That any tables approved by the Lord Chancellor should be admissible in evidence (para. 230(*c*) and Clause 13(3)).

(G) **Provisional awards**

17. For the reasons explained in paragraphs 231–238 and as summarised at paragraphs 239–244 it is recommended that:—

(*a*) Legislation (aimed principally at the sort of case the Report describes as a "chance" case) should give the court power to make an award of provisional damages if the plaintiff specifically claims this form of relief (paras. 239 and 243 and Clause 6).

(*b*) Such an award should not be made against a defendant unless:—

(i) the defendant is a public authority; or

(ii) the defendant is insured in respect of the plaintiff's claim; or

(iii) in road accident cases, the defendant is a person exempt from the requirements as to insurance of section 143 of the Road Traffic Act 1972 by reason of his making a deposit with the Accountant General of the Supreme Court, or otherwise (para. 240).

(*c*) The court shall be entitled to order that an application for a final award shall be made, if at all, within a given time, or that the entitlement to make such an application should only end with the plaintiff's death (paras. 241–242).

18. It will be necessary to provide by Rules of Court for the detailed procedures to be adopted where an award of provisional damages is made and it is suggested that this matter be brought to the attention of the Supreme Court Rule Committee. It is further suggested that the form of judgment will probably be most conveniently prescribed by a practice direction (para. 244).

(H) Claims under the Fatal Accidents Acts

19. For the reasons explained in paragraphs 245–260 and as summarised at paragraph 262 legislation is recommended to the effect that:—

(*a*) The remarriage or prospects of remarriage of neither a widow nor a widower should in any circumstances be taken into account (para. 262(*a*) and Clause 9(*b*)).

(*b*) There should be no deduction from the damages awarded in an action under the Fatal Accidents Acts in respect of any benefits received from the deceased's estate (para. 262(*b*) and Clause 9(*a*)).

(*c*) There should be added to the list of dependants under the Fatal Accidents Acts "de facto" adopted children and divorcees (para. 262(*c*) and Clause 8).

20. Reluctantly it has been found impossible to make any proposal for the amendment of section 4(1) of the Law Reform (Miscellaneous Provisions) Act 1971 which would obviate the gross over compensation of some widows which results from the existing provisions (para. 261).

(I) Interest on damages—interest on payments into court

21. For the reasons explained in paragraphs 263–285 and as summarised at paragraph 286 it is recommended that the Law Reform (Miscellaneous Provisions) Act 1934 (as amended by section 22 of the Administration of Justice Act 1969) should be further amended by the addition of prima facie rules for the award of interest on damages (Clause 14 and Schedule 2).

22. It is further recommended that these rules should provide that, in personal injury actions:—

(*a*) Pecuniary loss before judgment should bear interest at half the appropriate rate in respect of the period between the date when the cause of action arose and the date of judgment (Schedule 2, Part I, para. 1).

(*b*) No interest should be awarded in respect of future pecuniary loss (Schedule 2, Part I, para. 2).

(*c*) No interest should be awarded in respect of non-pecuniary loss (Schedule 2, Part I, para. 2).

and that in actions under the Fatal Accidents Acts:—

(*d*) Pecuniary loss (loss of dependency) before judgment should bear interest at half the appropriate rate in respect of the period between the deceased's death and the date of judgment (Schedule 2, Part II, para. 1).

(*e*) Damages for personal bereavement should bear interest at the appropriate rate in respect of the period between the deceased's death and the date of judgment (Schedule 2, Part II, para. 2).

(*f*) No interest should be awarded in respect of future pecuniary loss (Schedule 2, Part II, para. 3).

(J) Payments into court generally

23. No recommendations are made on this subject but it is suggested there is a case for an examination of the whole question of payments into court, not only in respect of personal injury claims (para. 287).

24. Paragraphs 288–289 give examples of the difficulties experienced and paragraphs 291–292 suggest possible solutions.

(K) A Judges' Conference on the Assessment of Damages

25. It is suggested, following the precedent of the Judges' Conferences on Sentencing, that it would be useful to institute Judges' Conferences on the Assessment of Damages (paras. 293–294).

(L) The actions for seduction, enticement and harbouring of a servant

26. For the reaons given in paragraphs 295–296 the abolition of the actions for seduction, enticement and harbouring of a servant is recommended (para. 297 and Clause 12).

APPENDIX 5

Draft Law Reform (Personal Injuries etc.) Bill

ARRANGEMENT OF CLAUSES

PART I

Damages for Personal Injuries

PART II

Amendments of Fatal Accidents Acts

PART III

Miscellaneous and General

Clause

DRAFT

OF A

BILL

TO

Amend the law relating to damages for personal injuries; to amend the Fatal Accidents Acts 1846 to 1959; to abolish actions for loss of services or consortium and for seduction, enticement and harbouring of a servant; to make provision with respect to the reception of actuarial evidence in certain actions for damages; to make further provision as to the awarding of interest in civil proceedings; and for purposes connected with the matters aforesaid.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritial and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

DAMAGES FOR PERSONAL INJURIES

Measure of damages for loss of earnings or profits.

1.—(1) In an action for damages for personal injuries there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, only—

1948 c. 41

(*a*) anything falling to be so taken into account under section 2(1) of the Law Reform (Personal Injuries) Act 1948 (which relates to the value of rights accruing to him from the injuries in respect of certain social security benefits); and

(*b*) in the case of an injured employee, any remuneration or sick pay (however described) which has been or will be paid to him under his contract of employment in respect of any period after the time when he suffered the injuries, except in so far as the employee (or, if he has died, his estate) is under a legal obligation to repay it (including a legal obligation conditional on the recovery of damages for the injuries); and

(*c*) to such extent as may be appropriate in the circumstances of the particular case, any payment on account made to or for the benefit of the injured person (or if he has died, to his estate) in respect of damages for the injuries.

EXPLANATORY NOTES

Clause 1

1. As mentioned in paragraph 159(*d*) of the Report, this clause codifies the law as to the extent to which collateral benefits are to be taken into account in assessing damages for loss of earnings or profits in a personal injuries action. The main purpose of this codification is to implement the recommendation in Part IV Section C at paragraphs 137 and 159(*d*) as to the extent to which social security benefits are to be taken into account for this purpose. The clause also implements the recommendation in Part IV Section E at paragraphs 204 and 214(*e*) as regards damages for loss of earning capacity.

2. Subsection (1) provides that the only matters to be taken into account against any loss of earnings or profits are those specified in paragraphs (*a*) to (*c*). Any matters other than those listed here would thus fall to be disregarded in assessing damages for loss of earnings or profits.

3. Subsection (1)(*a*) brings into account only those social security benefits which are at present brought into account by section 2(1) of the Law Reform (Personal Injuries) Act 1948 (see paragraph 132). The effect of this is to require all other social security benefits to be disregarded unless and until the position is altered by legislation. Existing doubts about whether other social security benefits fall to be taken into account are thus resolved.

Section 2 of the Law Reform (Personal Injuries) Act 1948 was amended by National Insurance Act 1971, Schedule 5, paragraph 1 (which added invalidity benefit to the other benefits listed), and is the subject of a consequential amendment in Schedule 24 Part I of the current Social Security Bill. In accordance with clause 15(2) of the draft Bill the reference to the Act of 1948 is to be read as a reference to it with these amendments.

4. Subsection (1)(*b*) restates the present law as to how far payments made to the injured person by his employer must be taken into account in assessing damages for loss of earnings. The present position—which paragraph (*b*) is not intended to alter—is described in paragraph 141. The effect of subsection(1)(*b*) is to require any remuneration or sick pay paid to an employee under his contract of employment to be taken into account except in so far as the employer is entitled to recover it from him (or his estate). Here the words "in so far as" are used in order to cover cases where the contract of employment makes only a proportion of the sums paid recoverable by the employer.

5. Payments made by an employer otherwise than under the injured person's contract of employment, whether by way of loan or gratuitously, are not within subsection (1)(*b*) and would therefore, as at present, fall to be disregarded, unless within subsection (3).

6. Subsection (1)(*c*) provides for payments on account of damages to be taken into account to an appropriate extent in assessing damages for loss of earnings or profits. Such a payment on account may be made in a case where the tortfeasor is liable in damages under various heads—for example, in respect of expenses already incurred by the victim—so that it is necessary to give the court power to determine how far it is appropriate in the circumstances of the particular case to treat a lump sum paid on account as having been paid on account of the particular head with which the subsection is concerned, namely damages for loss of earnings or profits.

(2) If in an action for damages for personal injuries it is proved or admitted that the injured person's earning capacity has been reduced as a result of the injuries, he shall not be awarded damages in respect of the loss of earning capacity as such, but the loss of earning capacity shall be taken into account in determining the amount of any damages to be awarded in respect of future loss of earnings or profits.

(3) In this section "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, is express or implied, oral or in writing, and whether it is a contract of service or of apprenticeship or a contract personally to perform any work or labour; and related expressions shall be construed accordingly.

(4) For the purposes of this section persons in the service of the Crown shall be treated as employees of the Crown whether or not they would be so treated apart from this subsection.

Clause 1 (*continued*)

7. Subsection (2) implements the recommendation in paragraph 204 and 214(*e*) by providing that a plaintiff shall not be awarded damages in respect of loss of earning capacity as such, but that such loss shall be taken into account in determining the damages to be awarded in respect of future loss of earnings or profits.

8. Subsection (3) defines "employee" and related expressions so as to cover employment under a contract for services as well as employment under a contract of service. It would be unusual for a contract for services to include provision for sick pay; but such a contract may provide for the payment of a retainer to continue despite absence due to personal injuries. Under subsection (1)(*b*) such a payment would fall to be taken into account as remuneration.

9. The Bill is intended to bind the Crown (clause 17(3)). Subsection (4) ensures that all persons in Crown service count as employees for the purposes of subsection (1)(*b*).

Damages for loss of future income where injured person's life has been shortened.

2.—(1) This section applies to any action for damages for personal injuries in which, it being proved or admitted that the injured person's expectation of life has been reduced by the injuries, damages are claimed in respect of loss of income.

(2) Where an action to which this section applies is brought by or on behalf of the injured person, there shall be recoverable as damages in respect of future loss of income both—

(*a*) damages in respect of any loss of income that the injuries will probably cause the injured person to suffer during the period from judgment to the time when, in consequence of the injuries, his life will probably end; and

(*b*) as regards the period after that time for which the injured person would probably have lived but for the injuries ("the lost period"), damages in respect of the amount, if any, by which his probable income (if any) in the lost period would have exceeded his probable expenditure on his own maintenance over that period:

Provided that in determining the amount of any damages recoverable by virtue of paragraph (*b*) above the court may disregard any of the injured person's probable income in the lost period (and in particular any such probable income from invested capital) to the extent that the court is satisfied that in the circumstances of the particular case it is appropriate to do so in order to avoid over-compensation.

(3) Subsection (2) above shall not prejudice any duty of the court under any enactment or rule of law or arising from any contract to reduce or limit the total damages which, apart from any such duty, would have been recoverable in an action to which this section applies.

EXPLANATORY NOTES

Clause 2

1. This clause implements the recommendations in paragraphs 87–91 of the Report regarding the reversal of the rule in *Oliver* v. *Ashman* [1962] 2 Q.B. 210 and its replacement by a rule modelled upon the formula accepted in the Australian case, *Skelton* v. *Collins* (1966) 39 A.L.J.R. 480; (see also paragraphs 62–64).

2. Subsection (1) makes clear that the substantive change in the law introduced by subsection (2) is to apply to all cases at present governed by the rule in *Oliver* v. *Ashman*.

3. Subsection (2) is formulated so as to make clear how (where the plaintiff's life expectancy has been shortened) the court is to deal with the plaintiff's loss of income during both parts of the period from judgment to what, but for the injuries, would have been the probable date of death.

4. Subsection (2)(*a*) provides that damages shall (as at present) be recoverable for loss of income during the period from judgment to the date when, in consequence of the injuries, the plaintiff's life will probably end.

Subsection (2)(*b*) provides that damages for loss of income shall also be recoverable for the subsequent "lost period" of life expectancy, the measure of damages for this period being the difference between the injured person's probable income and his probable expenditure on his own maintenance.

5. The use in subsection (2) of the term "loss of income" is intended to make clear that the plaintiff is entitled to damages not only for loss of earnings but also for other kinds of financial loss, including income of all sorts that would have accrued in the lost period (for example income under an annuity for his life). However, (as pointed out in paragraph 90) a plaintiff's income may come from dividends paid on capital assets and as these assets themselves will (subject to death duties) be able to pass on the plaintiff's death to his dependants, the court must have a discretion to ignore such lost income in the lost period in its assessment of the damages so as to avoid double counting. This is allowed for in the proviso to subsection (2).

6. Subsection (3) makes it clear that the damages recoverable under subsection (2) are liable to be reduced or limited in the ordinary way where this is required by statute (*e.g.* section 1 of the Law Reform (Contributory Negligence) Act 1945) or as a result of a contract. Similar savings appear in other clauses of the Bill, wherever the substantive provisions of the clause might be taken to override the court's duty to reduce or limit its award.

7. It should be noted that in connection with subsection (2), paragraph 105 of the Report explains how, if the injured person dies before prosecuting his claim to judgment, the claim for loss of income during the lost period would survive to his estate under section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 with the result that the defendant would find himself paying damages twice over to the dependants under the Fatal Accidents Acts and to the estate of the deceased. This is dealt with in clause 16(3) and the notes thereon.

Abolition of right to damages for loss of expectation of life.

3. In an action for damages for personal injuries—

(*a*) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but

(*b*) if the injured person's expectation of life has been reduced by the injuries, then, in assessing damages in respect of pain and suffering resulting to him from the injuries, due account shall be taken of any suffering caused or likely to be caused to him by awareness of the fact that his expectation of life has been so reduced.

EXPLANATORY NOTES

Clause 3

1. This clause implements the recommendation in paragraphs 99 and 107(*a*) of the Report.

2. Paragraph (*a*) abolishes loss of expectation of life as a separate head of non-pecuniary loss.

3. Paragraph (*b*), however, provides that where the injured person's expectation of life has been reduced by the injuries, account must be taken, in assessing damages for pain and suffering, of any suffering caused or likely to be caused to the victim by awareness of the fact that his days are prematurely numbered.

Damages in respect of necessary services received gratis by injured person.

4.—(1) In an action for damages for personal injuries damages may be awarded in respect of—

(*a*) any reasonable expenses gratuitously incurred by any other person in rendering or causing to be rendered to the injured person any necessary services, as if those expenses had been recoverable by him from the injured person; and

(*b*) the reasonable value of any necessary services gratuitously rendered to the injured person by any other person, as if their reasonable value had been so recoverable by him.

(2) In this section, in relation to an injured person—

(*a*) "services" includes attending, visiting or communicating with the injured person;

(*b*) "necessary services" means services which it was reasonably necessary for the injured person to receive in consequence of the personal injuries suffered by him, having regard to all the circumstances of the case, including the extent to which it is likely that he would have had to obtain the like services at his own expense if he had not received them gratuitously.

EXPLANATORY NOTES

Clause 4

1. This clause implements the recommendation in paragraph 159(*a*) of the Report (the grounds for which appear in paragraphs 112–114). Its aim is that where others have gratuitiously incurred expenses in providing the victim with necessary services or have themselves rendered him such services gratuitiously, those expenses, so long as they are reasonable, or the reasonable value of the services rendered should be recoverable by the plaintiff from the tortfeasor.

2. The clause broadly reflects the dicta of Paull, J. in *Schneider* v. *Eisovitch* [1960] 2 Q.B. 430 at p. 440. It is intended to establish clearly by statute the extent to which damages are recoverable in respect of the above-mentioned matters and thus to remove the doubt created by the dicta of Diplock, J. in *Gage* v. *King* [1961] 1 Q.B. 188 (see paragraphs 113 and 114).

3. Subsection (1) provides that the plaintiff is entitled to recover from the tortfeasor both reasonable out-of-pocket expenses gratuitously incurred on his behalf by others (paragraph (*a*)) and the reasonable value of services gratuitously rendered to him by others (paragraph (*b*)).

4. The words "as if those expenses had been recoverable by him" (in subsection (1)(*a*)) and "as if their reasonable value had been . . . recoverable by him" (in subsection (1)(*b*)) are intended to assimilate the cases where the assistance of others is gratuitous to the cases where the victim has made a contractual arrangement for the rendering thereof and can, under the present law, recover the resulting cost of the assistance from the tortfeasor (see paragraph 112).

5. By subsection (2)(*a*) the term "services" includes attending, visiting or communicating with the injured person. Damages can be recovered in respect of services such as necessary hospital visiting or telephoning as well as in respect of more substantial kinds such as, driving a person to hospital or flying out to bring him home from abroad.

6. Subsection (2)(*b*) makes clear that for the cost to be recoverable, the services given must be shown to be reasonably necessary having regard to all the circumstances of the case, including (as a guide-line) the extent which it is likely that the victim would himself have had to pay for such services had they not been given gratuitously.

7. The clause does not provide that the making of the award contemplated should be conditional upon the plaintiff undertaking to pay the sum awarded to him to the other person who has rendered the services gratuitously. Under the provisions for itemisation (see Clause 7 and Schedule 1) this particular head of damage will be separately set out in the judgment and its identification will in practice be a strong inducement on the plaintiff to reimburse this sum to the person who rendered the service. There is nothing in the clause to prevent the court from accepting an undertaking from the plaintiff if it thinks appropriate.

Damages in respect of personal services that injured person can no longer render to dependants.

5.—(1) In an action for damages for personal injuries damages may, subject to subsection (2) below, be awarded in respect of the reasonable value of any personal services which as a result of the injuries the injured person has been or will or probably will be unable to render to a dependant, being services which the injured person used to render gratuitously to that dependant before suffering the injuries and which but for the injuries he would probably have continued to render gratuitously to him.

(2) Subsection (1) above applies only to personal services of a kind that can ordinarily be obtained by paying a reasonable amount for them (for example services of a kind that might be rendered by a housekeeper, nurse, secretary or domestic servant, whether full-time or part-time, or services involving the provision of transport).

(3) In determining the reasonable value of any services to which subsection (1) above applies regard shall be had to the amount of any expenses incurred before judgment (whether by the injured person or otherwise) in replacing those services, and to the length of the period after judgment for which, but for the injuries, the injured person would probably have continued to render them.

(4) In this section—

"dependant", in relation to an injured person, means any of the persons for whose benefit an action could have been brought under the Fatal Accidents Acts if the injured person had died as a result of his injuries;

"personal services" means services which a person renders personally.

EXPLANATORY NOTES

Clause 5

1. This clause implements the recommendation in paragraph 159(*b*) of the Report the grounds for which appear in paragraphs 156–157.

2. The need for the provision in this clause stems in part from the recommendation to abolish in all its forms the action *per quod servitium amisit* (see paragraphs 158 and 159(*c*) and Clause 12), which does occasionally ensure that a real loss is compensated.

However as the Report recommends in paragraph 157, recovering of damages on account of this loss should be in the hands of the injured person himself. The clause therefore:—

(*a*) provides a means whereby damages can be recovered from the tortfeasor if the wife is so injured that she is unable to care for her family and extra help has to be employed (see paragraph 121); and,
(*b*) gives to the victim a similar right to recover damages from the tortfeasor in other situations where his or her injury has an impact within the family group by preventing him or her from performing gratuitous services to such persons as are his or her dependants as defined in the Fatal Accidents Acts (see paragraphs 156–157).

3. Subsection (1) specifies the nature of the loss in respect of which damages may be awarded. The gratuitous services must have been personal services, must have been rendered to the dependant and must have been rendered on something of a regular basis ("used to render"). No damages will be recoverable for services which the victim had not actually begun to render at the time of his accident. It will be for the plaintiff to establish that, but for his accident, he would probably have continued to render the services.

4. Subsection (2) provides that damages may be awarded only for personal services of a kind which can ordinarily be obtained by paying a reasonable sum for them and gives examples of the kind of services contemplated by the clause.

5. Subsection (3) provides that in assessing the reasonable value of the services gratuitously rendered by the victim of the injury, the court shall have regard both to any expenses incurred before judgment in replacing the lost services and to the length of time for which, but for his injury, he would after judgment have continued to render them. Thus if there is shown to be a likelihood that the rendering of the services would have been terminated by an event such as the death of the recipient, this factor would fall to be taken into account in determining the amount of the award.

6. In subsection (4) the definition of "personal services" makes clear that the services in respect of which damages are claimed must have been rendered by the victim personally. The definition of "dependant" has the effect of restricting the right to damages under the clause to services that were being rendered to persons who are the injured persons "dependants" within the meaning of the Fatal Accidents Acts (see paragraph 157).

7. Like Clause 4, this clause does not seek of itself to make the plaintiff accountable to those dependants to whom the services were rendered prior to his accident.

Provisional damages.

6.—(1) If, in an action for damages for personal injuries in which judgment is given in the High Court, there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gives rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition, the following provisions of this section shall have effect in relation to the action.

(2) In the following provisions of this section—

(*a*) "the relevant event" means the event of which there is proved or admitted to be a chance as mentioned in subsection (1) above; and

(*b*) "provisional damages" means damages assessed on the assumption that the relevant event will not occur.

(3) Subject to subsection (5) below, the court on the application of the plaintiff may, if it thinks fit, award the injured person provisional damages in respect of matters falling within any of such one or more of paragraphs 7 to 12 of Schedule 1 to this Act as may be specified in the application.

(4) If the relevant event occurs at any time after an award of provisional damages has been made in respect of any such matters, the court may on the application of the plaintiff award the injured person such additional damages in respect of those matters as are appropriate in all the circumstances:

Provided that if in giving judgment for the provisional damages (with or without any other damages) the court has fixed a period running from the date of that judgment within which any application under this subsection must be made, such an application shall not, without the permission of the court, be made after the end of that period.

(5) An award of provisional damages shall not be made under this section unless the defendant or, if judgment has been or is to be given against two or more defendants, at least one of those defendants falls within at least one of the following descriptions, namely—

(*a*) a public authority;

(*b*) a person who is insured in respect of the plaintiff's claim for damages for personal injuries (whether or not the injuries are of the kind mentioned in paragraph (*c*) below);

(*c*) if the injuries are injuries caused by, or arising out of, the use of a motor vehicle on a road, a person whose liability to the plaintiff in respect of the injuries either—

(i) is covered by a security in respect of third-party risks complying with the requirements of Part VI of the Road Traffic Act 1972; or

1972 c. 20.

(ii) would have been required by section 143 of that Act to be covered by a policy of insurance or security in respect of such risks complying with the requirements of the said Part VI but for the fact that a sum had been deposited by him with the Accountant General of the Supreme Court under section 144 of that Act.

Clause 6

1. This clause implements the recommendations with regard to provisional awards in paragraphs 239–243 of the Report.

2. The provisions in this clause are aimed at enabling the court to do justice in a strictly limited type of case, namely that in which the plaintiff can prove that there is a chance, but no more than a chance, that as a result of his injuries serious consequences may occur in the future.

3. In such a case the clause provides that the plaintiff may receive an award in respect of all heads of damage, proved or admitted, but not in respect of the chance of the serious consequences and the award will be assessed on the assumption that the chance will not materialise. The clause goes on to provide that if and when the serious consequences manifest themselves the plaintiff may then return to court and claim additional damages for this further loss.

4. In order to restrict the powers conferred by the clause to those cases where their use will be appropriate the clause provides that:—

(*a*) an award of "provisional damages" (*i.e.* damages assessed on the assumption that the serious consequences of which there is only a chance will not occur) can only be made if the plaintiff claims relief in this form; and

(*b*) even where the plaintiff does apply for "provisional damages", the court has complete discretion whether to make an award in this form.

5. Subsection (1) lays down the basic condition which must obtain if there is to be any award of "provisional damages" namely that there must be a chance that at some time in the future the injured person will, as a result of the act or omission giving rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

6. Subsection (2) labels the event of which there is thus a chance "the relevant event", and defines "provisional damages" as damages assessed on the assumption that this event will not occur. Thus an award of "provisional damages" will always be smaller than an award of full damages, since the latter would include something for the possibility that the relevant event might one day occur.

7. Subsection (3) further restricts the circumstances in which "provisional damages" can be awarded by providing that such an award may only be made on the application of the plaintiff, and goes on to give the court full discretion to grant or refuse such an application—the expectation being that the courts will award provisional damages only in cases of the sort described in paragraph 232 as "chance" cases.

8. The reference in subsection (3) to such one or more of paragraphs 7 to 12 of Schedule 1 as may be specified in the application means that a plaintiff applying for an award of "provisional damages' can choose whether to apply for them in respect of non-pecuniary loss and all heads of future pecuniary loss, or only in respect of some of those heads. Thus a plaintiff may wish to take his full damages for loss of earnings but may wish his damages for pain and suffering and future expenses to be assessed in the first instance on the assumption that his condition will not seriously deteriorate later on, with the possibility of coming back for an additional award in respect of these heads (but not for loss of earnings) if the relevant event occurs.

9. Subsection (4) enables a plaintiff who has been awarded "provisional damages" on the assumption that the "relevant event" in question will not occur

In this subsection "motor-vehicle" and "road" have the same meanings as in the Road Traffic Act 1972, and "public authority" includes the Crown.

(6) If in the action there is proved or admitted to be a chance that two or more such events as are mentioned in subsection (1) above will occur, subsections (2) to (5) above shall apply with such modifications as may be necessary to enable the court, on the application of the plaintiff, to award the injured person provisional damages assessed on the assumption that such one or more of those events as may be specified in the application will not occur and to enable the plaintiff, where more than one of those events is so specified, to make separate applications under subsection (4) above in respect of different events so specified (with power for the court to fix different periods under subsection (4) in relation to different events).

(7) The foregoing provisions of this section shall not prejudice any duty of the court under any enactment or rule of law or arising from any contract to reduce or limit the total damages which would have been recoverable apart from any such duty; and where judgment is given for damages consisting of or including provisional damages under this section, or consisting of additional damages under subsection (4) above, any such duty of the court to reduce the damages recoverable shall apply notwithstanding that the damages recoverable on that occasion may not be or are not the only damages recoverable in the action.

Clause 6 (*continued*)

to come back to the court for additional damages if that event does in fact occur. Any additional damages awarded will be limited to those heads of damages in respect of which provisional (as opposed to full) damages were awarded in the first instance, and will be assessed at whatever amount is appropriate in all the circumstances.

10. As stated in paragraph 240 of the Report, only defendants who are insured or who can properly be treated as if they were insured should have an uncertain liability hanging over them indefinitely and accordingly subsection (5) provides that an award of "provisional damages" cannot be made unless

(*a*) the defendant is a public authority or

(*b*) the defendant is insured or

(*c*) in road accident cases, the defendant has deposited money in the Supreme Court and is thus exempt from the insurance or other requirements of section 143 of the Road Traffic Act 1972.

11. Subsection (6) makes the procedure for obtaining an award of "provisional damages" available in cases where there is a chance of more than one relevant event occurring in the future.

12. Subsection (7) contains a saving similar to the saving in clause 2(3)—see the note on that subsection. Subsection (7) additionally makes it clear that where, for example, the plaintiff's damages are liable to reduction because of his contributory negligence, this reduction must be applied both to the award of "provisional damages" and to any subsequent award of additional damages.

Award and itemisation of damages.

7.—(1) This section applies to actions for damages for personal injuries.

(2) Where in an action to which this section applies any of the matters in respect of which damages are claimed fall within a particular paragraph of Schedule 1 to this Act, then, subject to the following provisions of this section, the court shall determine and state separately any amount awarded as damages in respect of matters falling within that paragraph.

(3) Where an action to which section 2 of this Act (as well as this section) applies is brought by or on behalf of the injured person and damages are claimed in respect of matters falling within paragraph 8 or paragraph 9 of Schedule 1 to this Act, then, subject to the following provisions of this section, the court shall, as regards matters falling within the paragraph in question, determine and state separately—

(*a*) any amount awarded as damages in respect of those matters for the period from judgment to the time when, in consequence of the injuries, the injured person's life will probably end; and

(*b*) any amount so awarded in respect of those matters for the period after that time for which he would probably have lived but for the injuries,

instead of the single amount which would otherwise have had to be determined and stated as regards those matters under subsection (2) above.

(4) Notwithstanding subsections (2) and (3) above, if in an action to which this section applies a sum is determined by agreement between the parties as the total amount of the damages to be awarded in respect of matters which, apart from this subsection, would have to be the subject of two or more separate determinations under those subsections, it shall not be necessary for the court to determine and state separately the amounts awarded in respect of those matters.

(5) Subject to subsection (7) below, the amount to be awarded in an action to which this section applies in respect of any matters falling within paragraph 12 of Schedule 1 to this Act shall be such amount as the court thinks fair and reasonable for those matters; and in determining the amount to be awarded in respect of matters so falling the court shall not make any reduction by reason only of any amount which the court proposes to award in respect of matters not so falling.

(6) Subject to subsection (7) below, the total amount of damages awarded in an action to which this section applies shall be the sum of the separate amounts (if any) determined in accordance with subsections (2), (3), (4) and (5) above.

(7) The foregoing provisions of this section shall not prejudice any duty of the court under any enactment or rule of law or arising from any contract to reduce or limit the total damages which would have been recoverable apart from any such duty.

(8) Nothing in subsection (2), (3) or (5) above shall be read as precluding the court from itemising with greater or, with the consent of the parties, less particularity than is required by that subsection any damages awarded in an action to which this section applies.

Clause 7

1. This clause in conjunction with Schedule 1 implements the recommendations with regard to the itemisation and assessment of damages in personal injury cases set out in paragraphs 214(*a*) (*b*) and (*c*) of the Report.

2. Subsection (1) confines the clause to personal injury cases. Itemisation in Fatal Accidents Acts claims is provided for separately in Clause 11.

3. Subsection (2) provides that, as is relevant to the particular case, the damages shall be itemised under the separate heads numbered 1–12 in Schedule 1. As Schedule 1 shows, these heads fall into three main divisions, namely pecuniary loss before judgment, future pecuniary loss and non-pecuniary loss.

Under heads 4, 5 and 10 in Schedule 1 separate itemisation is required of any award made under clause 4 (damages in respect of necessary services received gratis by the injured person) or under clause 5 (damages in respect of personal services that the injured person can no longer render to dependants). These are the new heads of damage proposed in the Report.

4. Subsection (3) provides for the itemisation of a claim under clause 2. Clause 2 itself implements the recommendation in paragraphs 87–91 regarding the reversal of the rule in *Oliver* v. *Ashman*. Subsection (3) makes clear how the court is to itemise the award so as to show separately the amount awarded for the expected life span for the expected lost period.

5. Subsection (4) is a saving clause which permits the court to dispense with detailed itemisation to the extent that the amount of the award is determined by agreement between the parties.

6. Subsection (5) provides that the amount to be awarded in respect of non-pecuniary loss (*i.e.* matters falling within paragraph 12 of Schedule 1) shall be what the court thinks fair and reasonable, and expressly directs the court not to reduce this amount merely because of what the court is proposing to award in respect of pecuniary loss (*i.e.* matters falling outside paragraph 12).

7. Subsection (6) contains the important provision that the total amount awarded shall be reached by the addition of the amounts separately assessed under the different relevant heads. The provisions of subsections (5) and (6) are specifically designed to eliminate any reduction of the award, as at present, by reason of any possible "overlap" between the awards for pecuniary and non-pecuniary loss (see paragraphs 195–200 of the Report).

8. Subsection (7) contains a saving similar to the saving in clause 2(3)—see the note on that subsection.

9. Subsection (8) reflects paragraph 206 of the Report.

PART II

AMENDMENT OF FATAL ACCIDENTS ACTS

Extension of classes of dependants.

8.—(1) The persons for whose benefit or by whom an action may be brought under the Fatal Accidents Acts shall include a former spouse of the deceased person and any person (not being a child of the deceased person) who, in the case of any marriage to which the deceased person was at any time a party, was treated by the deceased person as a child of the family in relation to that marriage.

(2) In subsection (1) above—

1846 c. 93.
1959 c. 65.

"child of the deceased person" includes anyone who is a child of his within the meaning of the Fatal Accidents Act 1846 as amended by section 1 of the Fatal Accidents Act 1959;

1973 c. 18.

"former spouse", in relation to a deceased person, means a person whose marriage with the deceased was during the deceased's lifetime dissolved or annulled (whether by a decree made or deemed to be made under the Matrimonial Causes Act 1973 or otherwise).

Clause 8

1. This clause, which implements the recommendations in paragraphs 257, 259 and 262(*c*) of the Report, adds two types of persons to the classes of recognised dependants under the Fatal Accidents Acts.

2. Subsection (1) (read in conjunction with the definitions in subsection (2)) provides that the recognised dependants of a deceased person shall in future include:—

(*a*) a former spouse of the deceased; and

(*b*) any person whom the deceased has treated as a child of the family of any marriage of his.

3. The inclusion of a former spouse as a dependant means that a divorced wife, who may have been receiving maintenance from the deceased, will now for the first time be a recognised dependant under the Fatal Accidents Acts. A divorced husband may equally have been receiving maintenance from his former wife (see section 2 of the Matrimonial Proceedings and Property Act 1970). Whether or not the spouses were receiving maintenance, they will be qualified to claim as dependants under the Fatal Accidents Acts. The definition of "former spouse" in subsection (2) is designed to cover cases where the marriage was voidable and was terminated by annulment, as well as cases of divorce. It is intended that the former spouse shall be treated as a dependant irrespective of whether the former marriage was ended by a decree under the law of England and Wales or by one under some other law.

4. The second limb of subsection (1) is framed so as to include as recognised dependants under the Fatal Accidents Acts children of the family from any marriage of the deceased. This definition differs from that in section 52(1) of the Matrimonial Causes Act 1973 in that the child need have been recognised as a child of the family only by the deceased.

Measure of damages.

9. In assessing damages in respect of a person's death in any action under the Fatal Accidents Acts there shall not be taken into account—

(*a*) any benefits which have accrued or will or may accrue from the deceased's estate to any of the persons for whose benefit the action is brought; or

(*b*) as regards any of those persons, the remarriage or prospects of remarriage of the widow or widower of the deceased.

EXPLANATORY NOTES

Clause 9

1. This clause implements two sets of recommendations related to claims under the Fatal Accidents Acts.

2. Paragraph (*a*) implements the recommendations in paragraphs 255, 256 and 262(*b*) by providing that no deduction shall be made from the damages awarded because of any benefit which the dependants may receive from the deceased's estate.

3. Paragraph (*b*), which implements the recommendations in paragraphs 251 and 262(*a*) corrects two anomalies in section 4(1) of the Law Reform (Miscellaneous Provisions) Act 1971 by providing generally that the remarriage or prospects of remarriage of either a widow or a widower shall not be taken into account in assessing damages under the Fatal Accidents Acts. This will apply whether the person for whose benefit the claim is brought is the surviving spouse of the deceased or a child of the deceased, or some other dependant.

Damages in respect of personal bereavement.

10.—(1) Where an action is brought under the Fatal Accidents Acts for the benefit of the husband or wife of the deceased person (with or without other persons) a sum of £1,000 shall be awarded as damages in respect of his or her personal bereavement.

(2) Where an action in respect of the death of a minor who was never married is brought under the said Acts for the benefit of a parent or both parents of the minor (with or without other persons), a sum of £1,000 shall be awarded as damages in respect of the personal bereavement of that parent or, as the case may be, the parents and, if the action is brought for the benefit of both parents, shall (subject to any deduction falling to be made in respect of costs not recovered from the defendant) be divided equally between them.

(3) For the purposes of subsection (2) above "parent"—

(*a*) in relation to an adopted person, means the person or one of the persons by whom he was adopted; and

(*b*) in relation to an illegitimate (and not adopted) person, means his mother.

In this subsection "adopted" has the same meaning as in section 1 of the Fatal Accidents Act 1959.

1959 c. 65.

(4) An action under the said Acts brought for the benefit of a person who dies before judgment is given shall for the purposes of this section be treated as not having been brought for that person's benefit.

(5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by increasing or further increasing the sums specified in subsections (1) and (2); but any such order shall apply only as regards actions brought in respect of deaths occuring after the order comes into force.

(6) Nothing in the foregoing provisions of this section shall—

(*a*) be taken to require any damages to be awarded in the absence of liability on the part of the defendant; or

(*b*) prejudice any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty; or

(*c*) be taken to exempt any sum awarded as damages under this section from proportionate reduction in consequence of any reduction or limit affecting the total damages which would have been so recoverable.

Clause 10

1. This clause implements the recommendations in paragraphs 172–180 of the Report and provides that where an action is successfully brought under the Fatal Accidents Acts an award for personal bereavement may be made in two cases.

2. Subsection (1) provides that a surviving spouse of the deceased shall be entitled to recover the sum of £1,000.

3. Subsection (2) provides that one or both of the parents of a deceased unmarried minor shall be entitled to recover the sum of £1,000, this being divided equally between them if the action is brought for the benefit of both parents.

4. Subsection (2) read in conjunction with subsection (3) provides that an award for bereavement on the death of a minor child shall only be made to parents for their bereavement of a child, to adoptive parents for their bereavement of an adopted child and to a mother for her bereavement of an illegitimate (unadopted) child.

5. As mentioned in paragraph 108 it is thought unlikely that a court would hold that any subsisting claim under the Fatal Accidents Acts would survive to the estate of a dependant who died before judgment. But the award for bereavement made under this clause is very personal to the person who has actually suffered the bereavement and for the avoidance of doubt it should be made clear that claims for damages for bereavement do not survive to the estate of the person who suffered the original bereavement. Subsection (4) therefore contains a provision to this effect.

6. As this clause prescribes the amount of the sum recoverable for bereavement, it is desirable to include a provision (subsection (5)) permitting the figure of £1,000 to be increased from time to time by statutory instrument. Any such increase will only apply to deaths occurring after the order has come into force.

7. Subsection (6) clarifies certain matters. Paragraph (*a*) makes it clear that damages for bereavement are recoverable where the defendant's liability for the death is established. Paragraph (*b*) contains a saving similar to the saving in clause 2(3)—see the note on that subsection. Paragraph (*c*) makes it clear that the specified sum of £1,000 is liable to proportionate reduction (for example because of the deceased's contributory negligence) in the same way as any other damages.

Itemisation of damages.

11.—(1) In awarding damages in respect of a person's death in any action under the Fatal Accidents Acts the court shall determine and state separately—

(*a*) any amount awarded as damages in respect of pecuniary loss suffered before judgment;

(*b*) any amount awarded as damages in respect of future pecuniary loss; and

(*c*) any amount awarded under section 10 of this Act as damages in respect of personal bereavement.

(2) Subsection (1) above shall not prejudice any duty of the court under any enactment or rule of law to reduce or limit the total damages which would be recoverable apart from any such duty.

(3) Nothing in subsection (1) above shall be read as precluding the court from itemising with greater or, with the consent of the parties, less particularity than is required by that subsection any damages awarded in an action under the Fatal Accidents Acts.

EXPLANATORY NOTES

Clause 11

1. This clause implements the recommendation regarding the itemisation of damages in claims under the Fatal Accidents Acts set out in paragraph 214(*d*) of the Report (the grounds for which appear from paragraph 202(*c*) read with paragraph 286).

2. Subsection (1) provides that the court shall determine and state separately the amounts awarded for—

(*a*) pecuniary loss suffered before judgment;

(*b*) future pecuniary loss;

(*c*) personal bereavement under clause 10.

Separate itemisation of these amounts is called for as a result of the recommendations for the payment of interest on damages (see paragraphs 286(*d*), (*e*) and (*f*) of the Report and clause 14 and Schedule 2 under which pecuniary loss before judgment will bear interest at half the relevant rate, as defined in Schedule 2 Part III); no interest will be awarded on future pecuniary loss; and damages for personal bereavement will bear interest at the full relevant rate for the period between the deceased's death and the date of judgment.

3. Subsection (2) contains a saving similar to the saving in clause 2(3)—see the note on that subsection.

4. Subsection (3) like clause 7(8) reflects paragraph 206 of the Report.

PART III

MISCELLANEOUS AND GENERAL

Abolition of actions for loss of services or consortium and for seduction, enticement and harbouring of a servant.

12. No person shall be liable in tort under the law of England and Wales—

(*a*) to a husband on the ground only of his having deprived the husband of the services or society (or both) of his wife;

(*b*) to a parent (or person standing in the place of a parent) on the ground only of his having deprived the parent (or other person) of the services of his or her child otherwise than by raping, seducing or enticing that child;

(*c*) to any other person on the ground only of his having deprived that other person of the services of that other person's menial servant;

(*d*) to any other person on the ground only of his having deprived that other person of the services of that other person's female servant by raping or seducing her; or

(*e*) to any other person for enticing or harbouring that other person's servant.

Clause 12

1. This clause, which implements the recommendations in paragraphs 158, 159(*c*) and 297 of the Report, abolishes the actions for loss of services or consortium and also the actions for seduction, enticement and harbouring of a servant.

2. Paragraph (*a*) abolishes a husband's action for loss of his wife's services or society (consortium).

3. Paragraph (*b*) abolishes the parents' action for loss of services in respect of a child. The words "otherwise than by raping, seducing or enticing that child" are included because section 5(*b*) of the Law Reform (Miscellaneous Provisions) Act 1970 has already abolished, from an earlier date, the parents' action for rape, seduction or enticement of a child.

4. Paragraph (*c*) abolishes the action for loss of services in respect of a menial servant: the expression "menial servant" has been used because it is considered that by reason of the Court of Appeal's decision in *I.R.C.* v. *Hambrook* [1956] 2 Q.B. 641, the action lies only in respect of the services of menial servants. What is abolished is therefore confined to the old action for loss of the services of a menial servant.

5. Paragraphs (*d*) and (*e*) abolish the actions for seduction, enticement and harbouring of a servant which were left in existence by section 5 of the Law Reform (Miscellaneous Provisions) Act 1970.

Actuarial evidence in certain actions for damages.

13.—(1) Where—

(*a*) in an action under the Fatal Accidents Acts damages are claimed in respect of future pecuniary loss; or

(*b*) in an action for damages for personal injuries damages are claimed in respect of future pecuniary loss (including future pecuniary loss consisting of the reasonable value of any services to which section 5(1) of this Act applies, being services that would probably have been rendered after judgment),

then, subject to any relevant rules of court and without prejudice to any power or discretion of the court as to the costs of or incidental to any proceedings, subsection (2) below shall apply in relation to that claim.

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

(3) The Lord Chancellor may, after consultation with such persons or bodies of persons as appear to him requisite, by order approve for the purposes of this section any actuarial table or set of actuarial tables which in his opinion merit such approval; and any such table or set of such tables that is for the time being so approved shall, as regards any claim in relation to which subsection (2) above applies, be admissible in evidence for the purpose mentioned in that subsection in so far as it is relevant for that purpose.

For the purposes of this subsection any notes or other explanatory material issued in conjunction with any actuarial table or set of actuarial tables shall be treated as part of that table or set.

(4) The power of the Lord Chancellor to make orders under subsection (3) above shall include power to revoke a previous order and shall be exercisable by statutory instrument.

EXPLANATORY NOTES

Clause 13

1. This clause implements the recommendations in paragraphs 224–226, 228 and 230 of the Report.

2. As is explained in paragraphs 222–223 of the Report the clause aims to facilitate the tendering of actuarial evidence the use of which has been restricted by the dicta of the House of Lords in *Taylor* v. *O'Connor* [1971] A.C. 15 and of the Court of Appeal in *Mitchell* v. *Mulholland* No. 2 [1971] 2 W.L.R. 1271.

3. Subsection (1) provides that the provisions of subsection (2) as to the tendering of actuarial evidence shall apply where a claim for future pecuniary loss is made either in an action under the Fatal Accidents Acts or in an action for damages for personal injuries, but makes clear that the tendering of such evidence will be subject to any relevant rules of court (for example those restricting the admissibility of expert evidence referred to in paragraph 226 of the Report) and to any power or discretion of the court as to costs.

4. Subsection (2) provides that where there is a claim for future pecuniary loss, or for damages under clause 5, a party shall be entitled to lead and rely upon admissible actuarial evidence, and that the court shall pay due regard to any actuarial evidence relied on. It is not intended by this provision to fetter the court in any way when it comes to deciding what weight, if any, be attached to any particular evidence.

5. Subsection (3) is specifically directed to the recommendation in paragraph 228 of the Report and recognises the fact that the Lord Chancellor will need to seek such advice as he may consider appropriate before approving any actuarial tables. The concluding words of the subsection are designed to ensure that the court may take cognizance of any notes or other explanatory material accompanying the tables.

6. Subsection (4) is designed to enable approval of the tables to be withdrawn, whether by an order doing no more than this, or by one approving a fresh or amended set of tables. It also provides for orders under the clause to be statutory instruments.

Award by courts of record of interest on debts and damages.

14.—(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section—

(*a*) shall authorise the giving of interest upon interest; or

(*b*) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(*c*) shall affect the damages recoverable for the dishonour of a bill of exchange.

(2) Where in any such proceedings as are mentioned in subsection (1) above judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part **or parts** of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) In considering what is appropriate in any case in which interest falls to be given in pursuance of subsection (2) above, and at what rate any interest so given ought to be calculated, the court shall be guided by such of the rules set out in Schedule 2 to this Act as are applicable in the circumstances, except in so far as the court is satisfied that there are special reasons for departing from those rules.

(4) Without prejudice to subsection (1) above, subsections (2) and (3) above shall not apply as regards any additional damages awarded on an application under section 6(4) of this Act.

(5) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section.

1959 c. 22.

(6) For the avoidance of doubt it is hereby declared that in determining, for the purposes of any enactment contained in the County Courts Act 1959, whether an amount exceeds, or is less than, a sum specified in that enactment, no account shall be taken of any power exercisable by virtue of this section or of any order made in the exercise of such a power.

The reference in this subsection to the County Courts Act 1959 is a reference to that Act as it has effect for the time being.

Clause 14

1. This clause implements the recommendation at paragraph 286 of the Report (as explained in paragraphs 263–285) that the Law Reform (Miscellaneous Provisions) Act 1934 (as amended) should be further amended by the addition of *prima facie* rules for the award of interest on damages in personal injury actions and actions under the Fatal Accidents Acts.

2. Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (which gave the court power to award interest on the sum for which judgment was given in proceedings for the recovery of any debt or damages) was amended by section 22 of the Administration of Justice Act 1969 (which required the courts, in making an award of damages for personal injury or death exceeding £200 to include interest unless satisfied that there were special reasons for not doing so). Section 22 of the 1969 Act did not, however, include any rules for the amount of the interest to be awarded as had been suggested by the Winn Committee.

3. *Prima facie* rules for the award of interest were subsequently laid down by the Court of Appeal in *Jefford* v. *Gee* [1970] 2 Q.B. 130, but as explained in paragraphs 268–284 these rules are considered unsatisfactory in various respects. Accordingly the aim of clause 14 is further to amend section 3 of the 1934 Act (as amended) by the addition of the *prima facie* rules for the award of interest which are considered desirable and appropriate.

4. It is considered that the most convenient way of formulating the necessary legislation is to repeal section 3 of the 1934 Act (as amended) and to re-enact it, with the appropriate additional provisions, as clause 14 and Schedule 2 of the present Bill.

5. The provisions which clause 14 adds to section 3 of the 1934 Act are contained in subsections (3) and (4) which, for convenience sake, are printed in bold type so as to identify the amendments now proposed.

6. Subsection (3) provides for the application of the rules regarding the award of interest and the rate of any interest which are set out in detail in Schedule 2 (see further the explanatory notes on Schedule 2).

7. Subsection (4) provides that the rules provided for in subsection (3) and Schedule 2 shall not apply as regards any additional damages awarded on application under clause 6(4) of this Bill, *i.e.* upon any additional award which may follow an award of "provisional damages" under clause 6(1). The effect of the subsection is to leave the court free to award under subsection (1) such interest, if any, as it thinks fit on any additional damages.

8. Subsections (1), (2), (5) and (6) re-enact the existing provisions of section 3 of the 1934 Act (as amended). In subsection (2), the words "or parts" (printed in bold type) have been added to allow for the fact that under the rules in Schedule 2 interest may fall to be given on more than one part of the damages awarded.

Interpretation.

15.—(1) In this Act—

"action" includes counterclaim;

"action for damages for personal injuries" includes an action for damages for personal injuries arising out of a contract;

"defendant" includes a plaintiff against whom a defendant is counterclaiming;

"the Fatal Accidents Acts" means the Fatal Accidents Acts 1846 to 1959 and Part II of this Act;

"future", in connection with an action for damages, means subsequent to the date of the judgment in the action or, if the action is one in which provisional damages are awarded under section 6 of this Act, subsequent to the date on which judgment is given for those damages;

"pecuniary loss" means loss in money or money's worth, whether by parting with what one has or by not getting what one might get, except that it includes matters for which damages are available under section 4 or 5 of this Act;

"personal injuries" includes any disease and any impairment of a person's physical or mental condition, and "injured" shall be construed accordingly;

"plaintiff" includes a defendant counterclaiming.

(2) References in this Act to any enactment shall, except where the context otherwise requires, be read as references to that enactment as amended by or under any other enactment, including this Act.

Clause 15

1. This defines various expressions used in the Bill. Only two of these call for special comment.

2. The definition of "future" in connection with an action for damages is intended to make clear that in the Bill "future" pecuniary loss means:—

(*a*) loss subsequent to the date of judgment in the action or,

(*b*) if the action is one in which "provisional damages" are awarded under clause 6 of the Bill, loss subsequent to the date on which judgment is given for those damages. What is often loosely called "pre-trial loss" is in the Bill more accurately referred to as loss suffered "before judgment" (see Schedule 1, Part I).

3. The definition of "pecuniary loss" has been formulated so as to make clear that such loss includes the two new heads of damages in personal injury cases recommended in the Report *i.e.* the damages which may be awarded under clause 4 (damages in respect of necessary services received gratis by the injured person) and under clause 5 (damages in respect of personal services that the injured person can no longer render to dependants).

Amendments and repeals.

16.—(1) Section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 (effect of death on certain causes of action) shall be amended as provided in subsections (2) and (3) below.

(2) In subsection (2)(*a*) (which provides that where by virtue of that section a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of his estate shall not include any exemplary damages) after "exemplary damages" there shall be inserted "or any damages in respect of the reasonable value of any services to which section 5(1) of the Law Reform (Personal Injuries etc.) Act 1973 applies other than services which would probably have been rendered by that person in the period between the date when the cause of action arose and the date of his death".

(3) After subsection (2) there shall be inserted as subsection (2A)—

"(2A) Where an action for damages for personal injuries to which section 2 of the Law Reform (Personal Injuries etc.) Act 1973 applies is by virtue of subsection (1) above brought after the death of the injured person for the benefit of his estate, no damages shall be recoverable in respect of loss of income as regards any period after his death."

(4) Schedule 3 to this Act (which contains consequential amendments) shall have effect.

(5) The enactments mentioned in Schedule 4 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

Clause 16

1. Subsections (4) and (5) provide for amendments and repeals which are consequential upon the substantive provisions of the Bill.

2. Subsections (2) and (3) however are substantive amendments of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 which are necessary to implement the recommendations in paragraphs 157 and 107(*e*) of the Report. These amendments are needed to deal with two cases in which a defendant might have to pay damages twice over, once to the estate of the deceased by virtue of section 1 of the 1934 Act, and again to his dependants under the Fatal Accidents Acts.

3. Subsection (2) is designed to prevent the defendant paying damages twice over where a tort victim has died but has, in an action brought by him during his lifetime, included a claim under clause 5 of the Bill for damages in respect of personal services that he can no longer render to his dependants.

Where the plaintiff has died after bringing his action, it is clearly proper that any damages available under clause 5 for the period between the date when the cause of action arose and the date of his death should survive to his estate under the 1934 Act. However, it would be wrong to allow a claim for damages under clause 5 for any period after the deceased's death to survive to his estate, because this claim might duplicate the claim brought by his dependants under the Fatal Accidents Acts for loss of dependency.

To avoid duplication of the damages in this situation, it is in effect provided that any damages assessable under clause 5 for any period after the deceased's death shall not survive to his estate under the 1934 Act. Subsection (2) amends section 1 of the 1934 Act to this effect.

4. Subsection (3) is designed to deal with the problem discussed in paragraph 105 of the Report (the impact of the reversal of the rule in *Oliver* v. *Ashman* on the Law Reform (Miscellaneous Provisions) Act 1934) and implements the recommendation in paragraph 107(*c*).

The reversal of the rule in *Oliver* v. *Ashman* (by clause 2) makes it necessary when a tort victim dies before obtaining judgment for his injuries, to provide against a defendant having to pay damages twice over in respect of the injured person's loss of future income in the "lost period" (*i.e.* the period for which he would probably have lived on but for the injuries: see clause 2(2)(*b*)), once to the dependants under the Fatal Accidents Acts and again to the estate of the deceased by virtue of section 1 of the 1934 Act.

Subsection (3) therefore amends section 1 of the 1934 Act so as to provide that where any action to which clause 2 of the Bill applies is brought after the death of the injured person for the benefit of his estate no damages shall be recoverable by the deceased's estate in respect of loss of income as regards any period after his death.

Short title etc.

17.—(1) This Act may be cited as the Law Reform (Personal Injuries etc.) Act 1973.

(2) Part II of this Act and the Fatal Accidents Acts 1846 to 1959 may be cited together as the Fatal Accidents Acts 1846 to 1973.

(3) This Act binds the Crown.

(4) This Act does not extend to Scotland or Northern Ireland.

(5) The provisions of this Act other than those mentioned in subsection (6) below shall come into force on.

(6) The following provisions of this Act, namely sections 7, 11 and 14, Schedules 1 and 2 and Part II of Schedule 4, shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint, and different dates may be appointed under this subsection for different purposes.

(7) A provision of this Act shall apply only as regards actions brought in respect of causes of action accruing after the time when that provision comes into force.

Clause 17

Subsection (2) provides for the Fatal Accidents Acts 1846 to 1959 and Part II of this Bill to be cited as the "Fatal Accidents Acts 1846 to 1973".

By subsection (3) the Bill binds the Crown: and subsection (4) limits its operation to England and Wales.

Subsection (5) provides that except for the provisions mentioned in subsection (6) the Bill shall come into force on a specified date.

Subsection (6) provides that the following provisions of the Bill shall come into force upon a day to be appointed by order:—

Clause 7 and Schedule 1	Award and itemisation of damages in personal injury claims.
Clause 11	Itemisation of damages in actions under the Fatal Accidents Acts.
Clause 14 and Schedule 2	Award by courts of record of interest on debts and damages.
Part II of Schedule 4	Repeals consequential on the substantive provisions mentioned in subsection (6).

Sections 6 and 7.

SCHEDULE 1

HEADS FOR ITEMISATION OF DAMAGES IN PERSONAL INJURY ACTIONS

PART I

PECUNIARY LOSS BEFORE JUDGMENT

1. Expenses incurred before judgment.
2. Loss of earnings or profits suffered before judgment.
3. Loss of income (other than earnings or profits) suffered before judgment.
4. Matters for which damages are available under section 4 of this Act.
5. The reasonable value of any services to which section 5(1) of this Act applies, being services which would probably have been rendered before judgment.
6. Pecuniary loss suffered before judgment, not falling within any other paragraph of this Part of this Schedule.

PART II

FUTURE PECUNIARY LOSS

7. Future expenses.
8. Future loss of earnings or profits (including any loss of earning capacity taken into account as provided by section 1(2) of this Act).
9. Future loss of income (other than earnings or profits).
10. The reasonable value of any services to which section 5(1) of this Act applies, being services which would probably have been rendered after judgment.
11. Future pecuniary loss not falling within any other paragraph of this Part of this Schedule.

PART III

NON-PECUNIARY LOSS

12. Pain and suffering, loss of amenities, and any other matters not falling within Part I or Part II of this Schedule.

EXPLANATORY NOTES

Schedule 1

This schedule lists, as is explained in paragraph 3 of the notes on clause 7, the separate heads numbered 1—12 by reference to which, as may be relevant in the particular case, the damages awarded in personal injury cases are to be itemised by the court.

Section 14.

SCHEDULE 2

RULES AS TO THE GIVING OF INTEREST IN CASES FALLING WITHIN SECTION 14(3) OF THIS ACT

PART I

RULES RELATING TO DAMAGES FOR PERSONAL INJURIES

The following rules relate to damages in respect of personal injuries to the plaintiff or any other person, where those damages are awarded in a case falling within section 14(3) of this Act (and are not additional damages such as are mentioned in section 14(4) of this Act):—

1. On any such damages awarded in respect of matters falling within Part I (pecuniary loss before judgment) of Schedule 1 to this Act, interest at half the relevant rate should be given in respect of the period between the date when the cause of action arose and the date of the judgment.

2. No interest should be given on any such damages awarded in respect of matters falling within Part II (future pecuniary loss) or Part III (non-pecuniary loss) of Schedule 1 to this Act.

PART II

RULES RELATING TO DAMAGES IN RESPECT OF A PERSON'S DEATH

The following rules relate to damages awarded in respect of a person's death in an action under the Fatal Accidents Acts:—

1. On any such damages awarded in respect of pecuniary loss suffered before judgment, interest at half the relevant rate should be given in respect of the period between the date when the cause of action arose and the date of the judgment.

2. On any such damages awarded under section 10 of this Act in respect of personal bereavement, interest at the relevant rate should be given in respect of the said period.

3. No interest should be given on any such damages awarded in respect of future pecuniary loss.

PART III

RULES AS TO THE RELEVANT RATE OF INTEREST

For the purposes of Parts I and II of this Schedule references to the relevant rate shall be construed in accordance with the following rules:—

1. Subject to rule 2 below, the relevant rate in respect of any period is the rate which, as regards that period, was prescribed as the rate at which interest was to accrue on moneys placed to short-term investment accounts (or, if no such rate was prescribed as regards that period, a rate of 5 per cent. per annum).

Schedule 2

1. This schedule is to be read in conjunction with clause 14(3) and sets out the rules by which (in the absence of special reasons) the court is to be guided as to the award of interest on damages in personal injury actions and in actions under the Fatal Accidents Acts. The schedule thus provides a detailed implementation of the recommendations in paragraph 286 of the Report.

2. Part I contains the rules as to the award of interest on damages for personal injuries and implements the recommendations in paragraphs 286(*a*), (*b*) and (*c*) of the Report.

3. Part II contains the rules as to the award of interest on damages in respect of a person's death where an action is brought under the Fatal Accidents Acts and implements the recommendations in paragraphs 286(*d*), (*e*) and (*f*) of the Report.

4. Part III contains rules for ascertaining the relevant rate of interest for the purposes of Parts I and II.

Under rule 1 the relevant rate in respect of any period is the rate which, as regards that period, was prescribed as the rate at which interest was to accrue on moneys placed to short-term investment accounts (or if no such rate was prescribed for the relevant period, a rate of 5 per cent. per annum). The rule also defines "prescribed" as here meaning prescribed by rules made under section 7(1) of the Administration of Justice Act 1965 or, as regards the County Court, under section 168 of the County Courts Act 1959 which are both provisions relating to interest on funds in court. The rate of interest described in rule 1 as the "prescribed" rate is what Lord Denning, M.R. in *Jefford* v. *Gee* called the "appropriate rate" (see paragraph 219 of the Report).

Rule 2 which qualifies rule 1, provides for how the rate of interest is to be calculated if the rate according to rule 1 is different in respect of different parts of the period for which interest is awarded.

In this rule "prescribed", as regards proceedings in the High Court, means prescribed by rules made (or having effect as if made) under section 7(1) of the Administration of Justice Act 1965, and as regards proceedings in the County Court means prescribed by rules made under section 168 of the County Courts Act 1959.

1965 c. 2.

1959 c. 22.

2. If the relevant rate according to rule 1 above is different in respect of different parts of the period for which interest is given, the order made under section 14 of this Act should either provide for interest to be calculated at different rates in respect of different parts of that period or be based on such rate as the court thinks fit to take as the relevant rate in respect of the whole of that period, being a rate that in the opinion of the court represents a fair average of the different rates applicable to different parts of that period.

Section 16.

SCHEDULE 3

CONSEQUENTIAL AMENDMENTS

1934 c. 41.

The Law Reform (Miscellaneous Provisions) Act 1934

1. In sections 1(5) and 2(3) of the Law Reform (Miscellaneous Provisions) Act 1934, for "1908" substitute "1973".

1935 c. 30.

The Law Reform (Married Women and Tortfeasors) Act 1935

1959 c. 65.

2. In section 6(3)(*a*) of the Law Reform (Married Women and Tortfeasors) Act 1935, as amended by section 1(4) of the Fatal Accidents Act 1959, for "1959" substitute "1973".

1945 c. 28.

The Law Reform (Contributory Negligence) Act 1945

3. In sections 1(4) and 4 of the Law Reform (Contributory Negligence) Act 1945, for "1908" substitute "1973".

1963 c. 47.

The Limitation Act 1963

4. In section 7(1) of the Limitation Act 1963, for "1959" substitute "1973".

1971 c. 22.

The Animals Act 1971

5. In section 10 of the Animals Act 1971, for "1959" substitute "1973".

Schedule 3

Clause 17(2) provides for Part II of this Bill and the Fatal Accidents Acts 1846 to 1959 to be cited together as the Fatal Accidents Act 1846 to 1973. The amendments provided for in Schedule 3 have the common purpose of updating the references in various enactments to the Fatal Accidents Acts by converting them into references to the complete set of those Acts (including Part II of the Bill), as they will stand when the Bill is fully in force.

Section 16.

SCHEDULE 4

REPEALS

PART I

REPEALS AS FROM THE DATE MENTIONED IN SECTION 17(5) OF THIS ACT

Chapter	Short title	Extent of repeal
4 & 5 Geo. 5. c. 59.	The Bankruptcy Act 1914.	In section 28(1)(*c*) the words "under a judgment against him in an action for seduction or".
23 & 24 Geo. 5. c. 36.	The Administration of Justice (Miscellaneous Provisions) Act 1933.	In section 6(1)(*b*), the word "seduction".
24 & 25 Geo. 5. c. 41	The Law Reform (Miscellaneous Provisions) Act 1934.	In section 1(1), the words "or seduction".
12, 13 & 14 Geo. 6. c. 51.	The Legal Aid and Advice Act 1949	In Part II of Schedule 1, paragraph 1(*c*).
7 & 8 Eliz. 2. c. 22.	The County Courts Act 1959	In section 39(1)(*c*), and in section 94(3)(*b*), the word "seduction".
1971 c. 43.	The Law Reform (Miscellaneous Provisions) Act 1971.	Section 4.

PART II

REPEALS AS FROM DAY APPOINTED UNDER SECTION 17(6) OF THIS ACT

Chapter	Short title	Extent of repeal
24 & 25 Geo. 5. c. 41.	The Law Reform (Miscellaneous Provisions) Act 1934.	Section 3.
10 & 11 Geo. 6. c. 44.	The Crown Proceedings Act 1947.	Section 24(3).
1969 c. 58.	The Administration of Justice Act 1969.	Section 22. In section 34(3), the words from "and" onwards.

Schedule 4

This makes the appropriate consequential repeals. Those in Part I are consequential on substantive provisions of the Bill that are to come into force on the date eventually inserted in clause 17(5). Those in Part II are consequential on the substantive provisions which are to come into force on a day appointed under clause 17(6).

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