THE AMERICANISERS

by Martyn Day

As one of those lawyers who has been accused of Americanising the British personal injury system I have been asked to give my views on the future of personal injury law with particular concern for the possible impact on the insurance market.

Lessons from the States

There is no question that personal injury lawyers in the UK have paid increasing attention to the work of their American cousins over the last 10 years. The American Trial Lawyers Association holds an annual convention where the British contingent has grown from just a handful in the 1980s to around 50 at the last conference in Boston. The lessons we have learned are:-

* the importance of specialisation and of knowing the subject matter of complex cases intimately;

* the need to share ideas and use the joint strength of personal injury lawyers to bring about change, which is seen in the rapid growth of the Association of Personal Injury lawyers, the British equivalent of ATLA;

* the need, at times, to be more pro-active, which is perhaps the most controversial of the developments.

In addition to these changes the system in which we operate has also been moving in the direction of the US. The introduction of the conditional fee is an adaptation of the American contingency system and further, the increasing deregulation by the Law Society of advertising has meant that lawyers' advertisements in newspapers, magazines and on the TV and radio have become commonplace.

None of this would have been of much significance if it had not been happening alongside an increasing desire on the part of the British citizen to

sue wherever injury has arisen. It is this development that has most concerned newspapers but the reality is that as people's expectations in life have grown it is a natural corollary that if a person's life is damaged that person is far less likely now to shrug his or her shoulders than was the case when we were more of a cap-doffing nature. Newspaper editors can hark back to the old days all they like but the reality is that the compensation culture is here to stay.

The USA

In the USA there has been an explosion of claims over the last 10-15 years and in particular of group actions, or class actions as they call them. Some of the most notable claims have been:-

* 250,000 people sued the makers of Agent Orange;

* some 200,000 claims were made in relation to the use of the Dalkon Shield;

* 50,000 people sued in relation to the use of Bjork-Shiley heart valves;

* over a thousand sued in relation to the drug DES;

* around 1,800 claims were made in relation to the drug Bendectin,

* some 200,000 asbestos claims have been made;

* since 1994 there have been a whole plethora of individual claims, class action claims and State Medicaid claims in relation to the use of tobacco;

* 440,000 women registered as claimants in relation to Breast Implants;

Some of these claims have massively hit the American Corporate world sometimes for many, many millions and, at times, billions of dollars. As a result a number of companies have been forced into Chapter 11 bankruptcy, such as the asbestos company, the Johns-Manville Corporation; A.H Robins,

the Dalkon Shield manufacturer; and Dow Corning, the manufacturers of breast implants. Further, many insurers have been badly hit, particularly in relation to the asbestos claims.

The scale and impact of these claims has never seen anything to remotely match them in the UK.

Britain

In Britain there have been a number of disasters such as the Manchester Air Crash, Zeebrugge, Hillsborough, "Marchioness" and Lockerbie where the companies have been forced to pay out millions of pounds. Further, there have been other group claims such as Thalidomide, Opren, Myodil, and Camelford where the defendants have settled claims. However, in all of these cases the defendants have paid out only a few millions of pounds, ie. a tiny fraction of the US settlements.

One of the reasons for this massive difference is the comparative natures of the two countries. The American market is potentially extremely lucrative for any company succeeding in gaining a significant market share with many of the wealthiest companies in the world based there. However, running alongside these benefits the Americans place a very large responsibility on manufacturers to ensure that they do not harm their consumers with very severe penalties against those who transgress this responsibility.

In America it is jurors who determine personal injury claims rather than the British judge. As well as generally awarding more substantial damages for the claims than is the case here, these members of the American public are also able to award punitive damages against companies when it is thought that they have acted in a way that demands society's punishment.

We saw, therefore, the US$10 million awarded by a jury to a woman who spilt her McDonald's coffee over her lap, primarily under the head of punitive damages, because McDonalds had been found to have known of a previous 300 or so cases of similar burns resulting from their superheating their take-away coffees. This is a larger sum than any criminal fine ever imposed on

companies transgressing regulations in the UK. The power of American juries is, therefore, formidable, although it should be added that the Mcdonald's judgment was reduced on appeal.

An additional reason for the difference between the two systems is that, in the USA, lawyers take their cases under the contingency fee system, ie. the lawyers keep a proportion of the damages (usually between 25-40%) if the case is won and nothing if it is lost. Equally the defendants rarely claim any costs from the plaintiffs if the claim is lost which means that injured plaintiffs can pursue claims without the worry of losing out, whatever their means.

This is in comparison to the UK where costs follow the event, allowing for the defendants to claim their costs from the plaintiff if the claim is lost. With costs in any of these claims being in the millions this is extremely off-putting for most potential plaintiffs. The recently introduced conditional fee system is a step in the right direction in terms of enfranchising a greater proportion of the British population, with plaintiffs lawyers now being able to act on a no win no fee basis with their receiving a success fee in this of a percentage of costs if this claim is won.

The Accident Line Protect scheme and other insurance companies will usually take up the risk of the defendants' costs for a one-off relatively low cost premium although this does not usually apply to group actions.

Where this leaves us is with a system in the US where as a result of the combination of contingency fees, punitive damages and class actions, lawyers can make huge sums. The desire to join the superleague of lawyers like John O'Quinn, Joe Jemail, Ron Motley, Stan Chesley and Fred Baron, who have made many tens and even hundreds of millions of dollars in the pursuit of their claims, ensures that lawyers up and down the length and breadth of the country are looking for the big case that will take them into that bracket.

In the UK there is nothing like the same rewards and, therefore, there is much more of a tendency for lawyers to take the safe option - not to take risks and not to put the pro bono time into developing new areas of work.

Whatever changes there have been in the UK, they have to be seen in this context and unless the jury system is brought in to determine personal injury cases in this country I certainly cannot see the scale of claims ever being in the same league as happens in America.

There are, however, signs that the British are on the move even within a more limited context than the Americans, with the number of group actions (the British equivalent of the class action) steadily increasing.

The area that has seen most movement is probably that of birth control. With claims now ongoing in relation to the alleged side effects of various birth control systems, it would appear this is an area where insurers of pharmaceutical companies will need to be careful in terms of the extent of their cover. It would appear, however, that the level of claim in relation to the majority of those cases is likely to be relatively small and probably under £10,000 each.

The closing down of the benzodiazapine litigation, at a cost of over £30 million to the taxpayer, has undoubtedly left a legacy making it extremely difficult to persuade the Legal Aid Board to fund other types of complex drugs claims although there are still a few continuing, related claims such as that considering the side effects of the MMR vaccine (measles, mumps and rubella).

Other areas of potential development are set out below.

Electromagnetic fields - over the 18 years since the publication of the epidemiological study by Wertheimer and Leper we have seen some dozen or so further studies primarily showing that there is around a two to three-fold increased risk of contracting childhood leukaemia for children living in the immediate vicinity of electric pylons. The review published by the US National Academy of Sciences, in October 1996, confirmed that the excess of childhood leukaemias remained robust and was unlikely to be an artefact of the study designs.

The key remaining question is whether it is the electromagnetic fields emanating from the pylons or some other confounding feature such as traffic density or socio-economic status that is causing the excesses.

More and more work has gone into reviewing the biology of the hypothesised link and some plausible mechanisms have been identified suggesting how electromagnetic fields may be impacting in a way that brings about the onset of cancer. However, there is little doubt that the very large epidemiological studies considering the hypothesised link and being carried out by the American National Cancer Institute and by the United Kingdom Childhood Cancer Survey team will influence the debate enormously. The American study is due out this summer with the British study not being available probably for another 12 months after that.

The current state of play in court is that there are two test cases that are on-course to go to trial probably towards the end of 1998/early 1999 and if those claims are successful they would undoubtedly have a massive impact on society. It is likely that such an impact would be more in relation to the housing market than it would be in terms of the financial cost to the electricity industry of having to pay out on childhood cancer claims.

It is unlikely that there will be a large number of individual cases but anyone living close to a pylon is likely to find their property becoming next to worthless and the question then would be who could claims be made against in relation to that drop in value. There have been ongoing debates within the Institute of Chartered Surveyors about what they should be writing in their survey reports of properties within the vicinity of pylons and other significant sources of electromagnetic fields, with pressure being brought to bear on them not to make statements that are too discouraging to purchasers but at the same time with the Institute wanting to ensure that its members are protected from litigation.

It may well be that surveyors, building societies, builders and the electricity industry itself would be forced onto centre stage if these claims are successful.

Tobacco - I am in the process of pursuing a number of individual cases of lung cancer against Imperial Tobacco and Gallaher Limited here in the UK which move alongside the myriad of claims ongoing in the United States. Undoubtedly whatever happens in the States will have a major impact on the claims in the UK, not least in terms of the atmosphere surrounding the cases.

In the United States the claims are mainly related to the allegation that the tobacco companies manipulated the nicotine levels in cigarettes whereas in the United Kingdom the claims are more based within the concept that the defendants failed to minimise risk by reducing the tar levels and as a result this failure materially contributed to the onset of the individual plaintiff's lung cancers.

The British cases are due to go to court probably in 18 months to 2 years time and it is likely that many of the American cases will already have verdicts within that sort of timescale.

Rumour upon rumour has circulated in the financial legal worlds in terms of the insurance of the industry. No insurer has yet surfaced and it remains totally unclear as to whether any insurance company stands to take a major hit if the tobacco cases in the US and the UK are successful.

One of the primary features of the British system is that if a Judge is allocated to tobacco cases, which seems likely, and if the initial group of cases are successful this would be a major precedent for other lung cancer sufferers to use. With over 30,000 people a year contracting lung cancer and with 90% of those likely to have contracted it from smoking, it has been estimated that some 20,000 lung cancer sufferers a year may be able to make such a claim and with an average value of around £50,000, it can be seen that the value of the tobacco claims in this country could be extremely substantial.

Asbestos - although there have been many individual claims in the United Kingdom, primarily taken by union law firms, there has been nothing like the scale of claims that one has seen in the United States.

With it being predicted that the level of mesotheliomas will rise dramatically over the next few years it may well be that the number of asbestos claims in the UK will also dramatically rise and perhaps the focus will switch more to the lower grade injuries such as pleural plaques which have featured heavily in the recent mass settlements of cases in the US. However, it seems rather unlikely that the British level of claims will be anything other than a minor fraction of those in the United States.

The success by the Plaintiffs from Armley, who were exposed to asbestos dust emanating from the asbestos factory in the area, may well be followed by other claims. The recent action commenced by former Boots employees against that company in relation to cancers suffered allegedly as a result of their working with asbestos in gas masks during the Second World War, may well lead to other older cases being pursued but again it is not anticipated that these are likely to become the tidal wave that we have seen in the United States.

Lead in Paint - a major area that is now being developed in the United States is in relation to the mental impact of children eating paint with a high lead content. Few, if any, cases have yet been brought in the United Kingdom but this may well be an area where the paint manufacturers and DIY companies end up being hit by litigation although the problem of proving mental instability will always be a difficulty in these cases.

Occupational cases - there have been significant developments in occupational claims such as vibration white finger, stress and RSI although again it would seem more likely that we will see a steady stream of cases rather than any sort of flood.

BSE/CJD - so far there have been less than 20 families where the CJD is said to have been contracted as a result of exposure to BSE and, therefore, even if all the claims were paid off, the amount would be relatively small. It seems unlikely that a claim could be mounted against anyone other than the Government and therefore, it may well be that insurers do not become involved in these claims.

Trying to prove a CJD claim against a manufacturer, producer or supplier, seems highly unlikely unless there is an individual who purchased or used beef from a very specific producer which seems extremely unlikely.

Gulf War Syndrome - as the evidence unfolds in this it looks increasingly plausible that the Government is going to have to pay out substantial damages to the former servicemen who allege that they contracted Gulf War Syndrome. Again, however, this is unlikely to be an issue for insurers.

Future Funding

As the legal aid system is tightened, it may well be that the prospect of gaining this type of funding for group actions will dramatically reduce in the coming years which will leave lawyers to have to decide whether to pursue them under the conditional fee scheme, as is already happening with the tobacco cases.

It seems to me that it may well be that law firms in the field will be prepared to take on one or two cases in this way. The result of this might prove to be the reverse of what the defendant companies had hoped in that rather than preventing claims going ahead it may well free lawyers to take cases on without having to go through all the red tape of the legal aid system.

I think we may, therefore, see rather more of these group actions coming to the fore than perhaps might have been appreciated. However, except for the odd exception referred to above, it seems unlikely that companies and their insurers will be hit by massive claims in the near future.

Americanisation?

It is quite clear that the British personal injury system has moved toward the American way, but it still has an enormous way to go before the systems are in any serious way compatible. In response to any suggestion that we have been moving the UK field of personal injury across the Atlantic toward New York I would say that we have set off and have just about reached Dublin.

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