BRITISH INSURANCE

BULLETIN

LAW ASSOCIATION

Bulletin No. 22 April, 1970

In Memoriam

It is with deep regret that we have to record the death of our President, Dr. C. E. Golding, on 21 January last.

Most of our members will have seen obituary notices which have already appeared in other journals, so that it is unnecessary to recite here the many and varied facets of his long and distinguished career. It was late in life, when he was well into the eighties, that he accepted an invitation to become President of B.I.L.A. I well remember his ready response when I went to see him about accepting the office; in his characteristic manner he said, "Whatever you want me to do, dear boy", and as President he took a keen interest in all activities of the Association, attending its meetings whenever he was able to do so.

Several of the officers and members of the Association attended the Memorial Service held at St. Paul's Cathedral on 12 February.

Permanent Health Insurance

Our next meeting will be held on Tuesday, 12 May 1970, at Aldermary House, Queen Street, London, E.C.4, at 6.30 p.m. Coffee will be served as usual from 6 p.m. Mr. J. Hamilton-Jones, M.A., F.I.A., a manager of the "Mercantile & General", has kindly accepted an invitation to address the Association at this meeting on the subject of Permanent Health Insurance. There seems to be a dearth of knowledge about the subject in this country and we think this fact should assure Mr. Hamilton-Jones of a good attendance on 12 May.

Luncheon Meeting

The midsummer luncheon meeting is now becoming an annual feature. It has proved a very popular and enjoyable occasion, providing an opportunity for members to meet socially Your Committee has arranged for this year's luncheon to be

held on Wednesday, 24 June 1970. The venue will be the Law Society, and other details will be circulated later. In the meantime, members are advised to note the date in their diaries.

The Liabilities of Contractors in Construction Work

It is gratifying to report that the joint meeting of this Association and the Bar Association for Commerce, Finance and Industry, held at the United University Club on 17 March, was a great success on all counts. Members of both Associations turned out in good numbers and, although seating for 80 people had been provided, additional chairs had to be hurried in to accommodate many who found standing room only. David Sprigge and Frank Eaglestone, representing B.A.C.F.I. and B.I.L.A. respectively, both gave us an authoritative but lucid exposition of the liability and insurance clauses of the R.I.B.A. and I.C.E. standard forms of contract. There followed a good discussion under the chairmanship of James Keir.

When the joint meeting was first mooted, some doubt was entertained as to whether we could find some common ground likely to be of interest to members of both Associations. Any lingering doubts were quickly dispelled when the response to the meeting became apparent. Plans are already being made for a further meeting with our friends in the Bar Association early in the next session.

Paris Congress

About a dozen members of the Association, some accompanied by their wives, will be attending the Third World Congress of A.I.D.A. to be held in Paris from 27 to 30 April. This Association through its two working parties will be submitting contributions in respect of the two main themes, i.e., (1) the rights of third parties against insurers, and (2) insurance and fluctuations in monetary values. It is hoped to give a general report of the Congress in the next issue of the Bulleti

Oxford Colloquium

The proceedings of the First International Insurance Law Colloquium to be held in the U.K. at Oxford in September 1969 have now been published in a handsomely bound volume. These are available to members of the Association at 7s.6d. per copy. The price for non-members is 25s. Orders, together with remittance made payable to B.I.L.A., should be sent to the Editor, B.I.L.A. Bulletin, 21 Aldermanbury, London, E.C.2. The edition is limited so that early application is advisable.

Modern Trends in Swedish Pension Systems

Professor Jan Hellner, who was unable to be present at the Oxford Colloquium because of illness, submitted a paper on the Swedish State Scheme which is included with the other papers in the proceedings of the Colloquium. In addition, Professor Hellner has kindly made available about two dozen copies of a booklet outlining modern trends in Swedish pension systems. It deals with agreements, benefits, financing, legislation, and taxation. The booklet, which is in four languages including English, is published jointly by

Federation of Swedish Industries
Pension Guarantee Mutual Insurance Company
Swedish Employers' Confederation
Swedish Staff Pension Society.

A copy of the booklet will be sent gratis to the first 24 members to apply to the Editor, B.I.L.A. Bulletin, 21 Aldermanbury, London, E.C.2.

Subscriptions

Members are reminded that subscriptions became due on 1 March and it would be appreciated if those members who have not yet paid would kindly forward their subscriptions to the Hon. Secretary, B.I.L.A., 54/55, Piccadilly, London, W.1. Subscriptions are £2. 5s. Od. for individual members and a minimum of £5. 5s. Od. for corporate members.

Justice Ball

Members of this Association are invited to attend the Justice Ball which is being held at the Savoy Hotel on Friday, 5 June. Tickets price £4. 4s. Od. each are obtainable from the Secretary, Justice, 12 Crane Court, Fleet Street, London, E.C.4. It is understood that the Lord Chancellor and the Attorney-General have both accepted invitations to attend. Russ Henderson's Band and Robert Morrison's Discotheque have been engaged.

A.I.M.I.C. Educational Conference

Our friends the Association of Insurance Managers in Industry and Commerce have sent us details of another one-day educational conference which they are holding at the Royal Garden Hotel, Kensington, London, W.8, on Wednesday, 6 May 1970.

The conference covers a wide range of subjects, including

risk management in the United States, the Motor Insurance Repair Research Centre at Thatcham, contract conditions for liability and insurances on building and engineering work, the economics of industrial safety, and the capacity of the insurance market to meet the needs of industry in the 1970s.

The fee for the conference is £6. Os. Od. for members and £8. Os. Od. for non-members, which includes morning coffee, lunch and afternoon tea. Registration forms and further details may be obtained from Mr. G. V. Hoon, Insurance Manager, The British Oxygen Co.,Ltd., Hammersmith House, London, W.6.

The R.I.B.A. Contract and Insurance

Mr. F. N. Eaglestone, a member of this Association, has already established himself as an authority in the field of insurances for the building trade. A third edition of his book The R.I.B.A. Contract and the Insurance Market has become necessary because of important revisions made in 1968 to the 1963 R.I.B.A. Conditions of Contract. These revisions have necessitated a substantial rewriting of the book and the opportunity has been taken to add new chapters on consequential loss with reference to the new contract wording, on the new Standard Form of Contract for Minor Building Works, and on contract guarantees. There is also a new section on the Sub-Contract Warranties issued by the R.I.B.A.

The author makes a detailed comparison between the 1963 R.I.B.A. Conditions of Contract and the latest revision. He deals first with clause 18 and explains how a contractor's liabilities may arise and how they may be varied by the Conditions of Contract. Extended treatment is then given to the insurance clauses 19 and 20. These have been reconsidered by the Joint Contracts Tribunal in consultation with the British Insurance Association. In consequence of this welcome consultation the risks and perils specified in the new clauses 19 and 20 correspond with standard or common policy wordings in a number of cases.

The text is well illustrated both from the author's own wide experience in insurance and contractors' problems and from case law. There is a table of cases cited, a useful bibliography, and appendices setting out specimen wordings for a contractors' combined policy (which includes E.L., P.L. and "all risks" sections), an R.I.B.A. liability policy providing cover in accordance with clause 19(2)(a), a specification for advance profits insurance, and a specimen performance bond. We can fully endorse the

publishers' claim about this book that "whatever the occupation of the reader whether contractor, building owner, architect, quantity surveyor, insurance broker or insurer he should find this book of interest and, it is hoped, of assistance".

The book is published by PH Press Ltd., Waterloo Road, Stockport, Cheshire, price 45s.

PERSONAL INJURY LITIGATION: ASSESSMENT OF DAMAGES

In its First Programme, issued back in 1965, the Law Commission divided the criticisms and proposals for reform in the field of personal injury litigation into two sections, (a) jurisdiction and procedure and (b) assessment of damages. It decided to set up an Ad Hoc Committee to deal with (a), and the findings of the Winn Committee which considered this topic were published in 1968 (Cmnd.3691, H.M.S.O.). The Commission itself decided to examine the methods and basis of assessment of damages for personal injuries and to include in the examination such items as:

(1) the usefulness of the jury;
(2) the impact of tax;
(3) the use of an actuarial approach;
(4) the proper principles which should govern the award of damages for pain and suffering and for loss of the amenities of life; and
(5) the adequacy and consistency of current awards of damages.

The Commission's work has now reached the point where it hopes to publish a comprehensive Working Paper for general consultation in the summer of this year. In the meantime, Working Paper No. 27* has been published for comment and criticism, and the Commission points out that this does not represent its final views.

The Working Paper is in two sections, the first of which deals with recommendations with regard to itemisation of pecuniary loss, while the second recommends the availability of a set of actuarial tables to assist in the difficult task of assessing with an acceptable degree of precision the present value of future pecuniary losses. While the recommendations with regard to itemisation would call for

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*The Law Commission's Published Working Paper No. 27 - First Programme Item VI B - Personal Injury Litigation: Assessment of Damages, obtainable on application to J. Churchill, Law Commission, Conquest House, 37/38 John Street, Theobald's Road, London, W.C.1 (Tel: 01-242-0861).

legislation, the publication of actuarial tables would not, and the use to be made of them would be left to the discretion of practitioners and judges. The Commission is of the opinion that recent developments in case law give a degree of urgency to their recommendations. In particular, they have taken note of the House of Lords decision in the case of Taylor v. O'Connor (1970) 2 W.L.R.472 in which their Lordships approved the "multiplier" technique as the normal or primary method of assessing the present value of future losses. The Commission does not express any views on the relative merits of the two methods and its suggestion is that a certain type of actuarial table can provide a useful aid in calculating or checking on the calculation by other methods of the present value of future pecuniary losses.

Section I - Itemisation of Pecuniary Loss

In an introductory paragraph the Commission draws the distinction between pecuniary and non-pecuniary loss. The former includes pre-trial expenses and loss of earnings, post-trial expenses and loss of future earnings, all of which are capable of being compensated by payment of a sum of money. Non-pecuniary loss includes our old friends, pain, suffering, and loss of expectation of life, which cannot be measured in monetary terms. Nevertheless, the duty of the court where liability is admitted is to award a sum as compensation for the whole of the injured person's loss, subject to allowance for any contributory negligence or limitation by contract. The Commission examines the present practice of the courts in which judges of first instance have found it helpful to itemise their awards, and notes that the Court of Appeal until recently discouraged this procedure. In Watson v. Powles (1968) 1 Q.B.596 Lord Denning, M.R., expressed the Court of Appeal's attitude in the following terms:

> "It is not the judge's duty to divide up the total award into separate items. He may do so if he thinks it proper and helpful, but it is not his duty to do so".

The changed attitude of the Court of Appeal is reflected in the case of Kirby v. Vauxhall Motors Ltd. (unreported, No.256A (C.A.) of 7 July 1968) where Lord Denning, M.R., said:

> "On further consideration, I would modify this a little (Watson v. Powles (supra)): in the ordinary way it is both proper and helpful for a judge to itemise the damages".

Edmund Davies, L.J., concurred in this for the reasons that

> "it is generally salutary for a trial judge to address himself to the problem of itemisation. It is helpful to this court also to know how he has solved that problem as a means of arriving at the overall figure".

In Ford v. Middlesbrough Co-operative Society Ltd. (unreported, No.259 (C.A.) of 7 July 1969) the Master of the Rolls said:

> "The judge awarded her £2,750 in all. This is one of those cases where I would wish he had given the items. It would make our task easier".

In Jefford v. Gee (The Times, 4 March 1970) the Court of Appeal, in laying down the general principles governing the award of interest on damages under Section 22 of the Administration of Justice Act, 1969, made it clear that the requirements of that Section provide a compelling reason for the court to itemise the award. It is curious to note that, having now come down in favour of itemising damage under various heads, the Court of Appeal do not advocate that the judge should add them up and award the total sum of them. In Kirby v. Vauxhall Motors Ltd. (supra) Lord Denning, M.R., said:

> "The judge's duty is to award one overall figure. There is only one cause of action for personal injuries, not several causes of action for the several items. The judge is not bound to add up the items and award the sum of them. He must consider them all and then award fair compensation".

The Court of Appeal felt it had a similar duty.

In proposing changes, the Commission thinks that it is eminently desirable that encouragement of itemisation should be hardened, so far as pecuniary loss is concerned, into a legal requirement. At the same time it does not share the view that the component elements of pecuniary loss should not be added up to arrive at the total compensation. The Commission is therefore proposing legislation on two points:

(a) that in every case where the plaintiff or the personal representative of a deceased person (claiming under the Law Reform (Miscellaneous Provisions) Act, 1934) claims damages in respect of personal injuries and the court makes an award which includes damages for pecuniary loss, such loss should be assessed under such of the following

heads as may be relevant:

(i) pre-trial expenses
(ii) pre-trial loss of earnings
(iii) post-trial expenses
(iv) post-trial loss of earnings

(b) that where an award includes damages in respect of pecuniary loss the court should separately state the assessments made under each head and the sum of the amounts so assessed should be a non-reducible part of the overall award.

Draft clauses for the proposed legislation are given in Appendix A to the Working Paper.

In making these proposals the Commission points out that it is not intended to alter the principle that a plaintiff has but one cause of action for his injury and that in respect thereof he is entitled to only one award. Nor is it intended to change the principles of law governing the assessment of the plaintiff's expenses and loss of earnings in respect of such items as making allowances for the incidence of taxation, collateral benefits received, expenses saved, and the like.

As regards pre-trial expenses and loss of earnings, the Commission's proposals would merely enact the present practice whereby these two items must be pleaded as special damages. The Commission also recognises that in some cases there will be no post-trial loss of earnings, although there may well be loss of earning capacity, and while it may be very difficult to estimate the loss of earning capacity suffered, the court has to make the best estimate it can and this assessed loss of earning capacity will be included under loss of earnings.

Where multiple injuries are suffered it is not intended that the court should be required to itemise the award separately for each injury, although the court should not feel inhibited from itemising its award with greater particularity than that which is proposed in the Commission's recommendations.

So far as claims under the Fatal Accidents Acts are concerned, the Working Paper points out that, apart from funeral expenses, there is only one head of loss, namely, the amount of dependency, and that therefore itemisation in this connection does not strictly arise. Nevertheless, there is much to be said for the court stating as explicitly

as possible how the award for loss of dependency has been reached.

In the Commission's view, the main arguments in favour of the proposed changes are:

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

(b) Full compensation for pecuniary loss cannot be achieved unless all the component elements of pecuniary loss are ascertained and the sum total of them awarded.

(c) The availability to the parties of as much information as possible regarding the component elements of the damages assessed is likely to have the desirable consequence that fair settlements will be promoted.

In addition, the itemisation of pecuniary loss would make compensation assessed for non-pecuniary losses easily identifiable and therefore open to more effective review by the Court of Appeal.

The Commission's proposals are made in the knowledge that most personal injury cases are tried by a judge alone, and in the rare case where there is a jury it is considered that the jury should be required to itemise the relevant sub-heads of pecuniary loss in the same way as a judge.

As regards non-pecuniary loss, it is thought that the courts will continue to make awards in accordance with the existing conventional scale and there is no proposal that this item should be broken down into its component elements, although a judge is not precluded from so doing, where considered desirable. Moreover, in addition to making a conventional award for the plaintiff's loss of general amenity, for example, the loss of a limb, the court may think it just and proper to increase the amount of that award by making allowance for the loss of a special amenity, for example, the plaintiff's capacity to play golf.

Method of Assessment. The Commission considered whether in framing its proposed legislation it was desirable or otherwise to require the court also to set out the details of the method employed in arriving at the relevant amounts. This is pertinent to claims under the Fatal Accidents Acts where Section 4 of the 1846 Act in effect

requires the plaintiff to deliver to the defendant full particulars of the dependency. In the majority of cases the trial judge sets out with some particularity the basis of his award for the lost dependency. The Commission considers that a similar practice should be encouraged in claims for personal injury. At present the court sometimes, but not generally, states the multiplier it has employed in assessing a continuing loss and, similarly, where the award is based on actuarial calculations the judgment will sometimes explain the manner in which account has been taken of the actuarial evidence. The Commission welcomes these tendencies, believes that itemisation as a general practice would almost of necessity promote them, and therefore sees no case for legislation on these points.

Possible Effect of Itemisation on Appeals. If itemisation were to reveal that on occasion trial judges, 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 errors should be corrected. The fact that this may lead to increases in the number of appeals cannot be a valid argument against reform if otherwise the case for reform is made out. The Commission does not anticipate that a generalised practice of itemisation would increase the number of appeals which are unjustifiable, and further advances the view that, in a field of litigation which is dominated by trades unions, insurance companies and the Legal Aid Fund, the risk of unnecessary appeals is small.

Change in the Rules of Pleading. The Commission realises that greater particularity in pleadings could lead to undesirable delay. The view is therefore taken 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 give in the statement of claim particulars of the quantum of damage under the relevant itemised heads. This would greatly assist the trial judge in the itemisation of the award. The Working Paper includes suggested amendments to the Rules of the Supreme Court and the county court rules, respectively, to achieve this.

Section II - The Use of Actuarial Tables

The Commission considers that in appropriate cases the use of actuarial techniques as an aid to or check on the assessment of present value of pecuniary losses would be helpful, and this section of the Working Paper deals with

the question as to how to make such techniques more easily available. From the outset it is appreciated that only in a limited number of substantial claims is the cost of calling actuaries as expert witnesses justifiable. The Commission therefore considered whether actuarial techniques could be introduced cheqply and expeditiously into a wider range of cases without necessarily calling actuaries as witnesses, and in this connection it has consulted closely with a joint Working Party of the Institute of Actuaries and the Faculty of Actuaries. The conclusion was that the publication of a set of actuarial tables specially prepared for use in relatively simple cases with suitable explanatory notes for their use would be a practicable way of providing this kind of assistance to the courts and the legal profession.

Appendix B to the Working Paper contains four specimen tables illustrative of the 64 tables prepared by the Institute of Actuaries and the Faculty of Actuaries which would comprise the complete set. The appendix is prefaced with a note, the sole purpose of which is to explain by an illustrative step-by-step process the kind of decisions that the user will have to make in order to find, out of the 64, the one table which is most likely to meet the requirements of the instant case and to eliminate the other 63. The usefulness of the tables is limited to cases where the facts are relatively simple and straightforward, and are designed to deal only with cases where the plaintiff is aged 15 or more and thus give no assistance where the plaintiff is an infant under 15.

Included with the tables are explanatory notes which set out the assumptions on which each of the tables is prepared, since it depends upon the coincidence of these assumptions with the facts found by the court in the instant case whether any particular table can be used. Also contained in the explanatory notes is a guide to the way in which the tables can be used, together with three illustrations of the use of the tables.

The tables have been prepared on the basis of the present law and, in particular, it has been assumed in the construction of the tables that

(a) the court is under no duty to take account of inflation but is not precluded from doing so;

(b) while the law requires the court to assume that the lump sum will be invested by the plaintiff and earn some income for him, the law leaves it

for the court to decide what, in the instant case, would be a reasonable annual investment income for the court to assume, due account being taken of the incidence of taxation on that income.

It is recognised that the practical usefulness of the tables would be impaired if the court could not treat them as evidence of the mathematical correctness of the calculations contained in them without either express agreement between the parties or formal proof of the tables by an actuary in the witness box. In order, therefore, to remove any doubt concerning the admissibility of the tables, the Commission suggests adding a new rule to the Rules of the Supreme Court to the effect that, in any action for damages for personal injury, evidence may be given of the capital value of any loss of income by the production of a table published by or by the authority of the Institute of Actuaries and the Faculty of Actuaries containing a calculation of that value which is applicable in the circumstances of the case.

Issued by the British Insurance Law Association
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