MEMORANDUM TO THE LAW COMMISSIONS

SUBMITTED BY THE BRITISH INSURANCE LAW ASSOCIATION*

EXCLUSION OF LIABILITY FOR NEGLIGENCE AND EXEMPTION CLAUSES (WORKING PAPER NO. 39)

---

1. The Association appointed a Working Group of seven members to consider Working Paper No. 39 of the Law Commission and the Scottish Law Commission. The Working Group reports as follows. The views expressed are those of the members of the Group and may not be those of all members of the Association.

A. SALE OF GOODS

2. The Group supports the proposals in para. 82(a) and (b) of the Working Paper that in a "consumer sale" any contractual provision purporting to exclude or limit the seller's liability for negligence should be void and that a manufacturer or intermediate distributor should not be able to exclude his liability to make reparation, by means of a "guarantee" or similar document. This support is subject to the point that a seller ought to be permitted to stipulate that claims arising out of an alleged defect should be notified to the seller within a specified period of the claimant having knowledge of injury or damage arising as a result of the defect. Sellers could otherwise be placed in an unfair position by delay, and precluded from checking a claim; the goods indeed might no longer be available for inspection. Fraudulent and doubtful claims are not unknown. The Working Group appreciates that time-limit clauses are sometimes unduly rigorous and would not object to a statutory minimum, for example, one month.

3. In considering the proposals for sales of goods other than "consumer sales" (para. 82(c)) the Group took the view that there was no sufficient reason for a differentiation between the two types of sale and that the principle proposed by the Law Commissions for consumer sales could be applied to all sales of goods. It was thought that a reasonableness test would create uncertainty, would delay the settlement of claims and lead to further recourse to litigation which the buyer might not be in a financial position to sustain, so that he might be forced to acquiesce in an unsatisfactory situation or accept a compromise settlement. The majority of business sales, it was pointed out, are by large manufacturers to small retailers, often under standard contracts, and these small trade buyers need protection as much as most consumers. In the matter of products liability insurance the Group was of the opinion that more often than not underwriters in quoting a rate gave no reduction on account of expectation of benefit from reliance on clauses

contracting out of liability for negligence in the contract of sale. It was not uncommon to find that sellers, when it came to the point, did not wish to plead such clauses in a particular case. Underwriters were aware too that the Courts tended to view such clauses with critical eyes. For the reasons stated in para. 2 the Group considered that a time-limit clause for the notification of claims should be permissible.

B. SUPPLY OF SERVICES

4. Contracts for the supply of services are so diverse in nature as to make any simple solution to the problem of exemption clauses difficult if not impossible. The Group accepts the principle that in general parties to a contract for the supply of services should not be allowed to contract out of their common law liability but it also accepts that there may be circumstances in which it is reasonable to contract out. This point is dealt with in para. 5d below.

5. Despite the practical inconveniences and uncertainty resulting from a judicial test of reasonableness for exemption clauses the Group considers that it is the best basis for any restrictions that may be imposed in this field on the freedom of parties to contract. The Group agrees:

a) that statutory guide lines, as contemplated in para. 64 of the Report, should be provided, but that the list in para. 64 should not be treated as exhaustive so as to exclude any other grounds;

b) that in written contracts contracting-out provisions should be given adequate typographical prominence such as is insisted on, for example, in hire purchase contracts;

c) that, contrary to the view expressed in para. 45 of the Working Paper, there should be facilities for a court to give prima facie advance approval to standard conditions of contract, which govern so many transactions. Indeed, the Group suggests that, in addition, County Courts might be empowered to approve in advance the contracting-out provisions in specific contracts;

d) that, where a need is shown to arise for special treatment for some class of contract, there should be a statutory control of conditions of contracts of that class, imposed by means of statutory instruments under an enabling Act.

6. After considering the provisional conclusions of the Law Commissions in paras. 82(d)-(l) the Group comments as follows :

82(d) The Group accepts that a separation of "private user" contracts for services from other such contracts should not be made.

(e) The Group agrees that legislation dealing separately with individual types of contract is not a full solution.

(f) The Group accepts the proposed test of reasonableness, subject to what is said in para. 5 of this present memorandum. The Group considers that for exemption clauses other than those relating to liability for death or personal injury the onus of proof should lie on the party challenging the clause.

* This Memorandum was prepared by Messrs. H. A. L. Cockerell
I. D. G. Alexander
A. M. Binning
D. G. Cole
D. R. Hanson-James
D. G. Sasserath
G. C. Stephenson

B. I. L. A. GROUP REPORT ON LAW COMMISSION WORKING PAPER NO. 41 *

Paragraph 49 - Desirable Objects of Law Reform

Sub-paragraph (f)

Social services generally do not fit the compensation to the loss, the limiting factor being economic feasibility. No extensions of what is at present a reasonably fair and workable system of awarding damages for personal injury should be contemplated without recognising that they will call for additional financial contributions from the community. Many injuries cannot, in any event, really be properly compensated in money. There must be an element of compromise.

LAW COMMISSION WORKING PAPER PROVISIONAL CONCLUSIONS Appendix I

Paragraphs 52-58 (A) The Rule in Oliver -v- Ashman

The injured Plaintiff will be fully compensated for the remainder of his reduced life expectancy but the Group finds the Rule in Oliver -v- Ashman is unfair to dependants existing at the time of trial and should be amended. The amendment should be in the form of sub-section (c) of paragraph 57 but the Court award or negotiated settlement should be an end of the matter as far as the Defendant is concerned, irrespective of later developments.

If dependants do not exist at the time of trial we suggest (a) it is too speculative to go into the possibility of a Plaintiff acquiring them during the remainder of his reduced life expectancy (b) capital awaiting future dependants consequent upon his death might cause unhealthy alliances with the Plaintiff (c) the Plaintiff might spend the compensation before he acquired dependants (d) it is unfair to the Defendant to saddle him with this heavy monetary liability on such nebulous possibilities (e) all these considerations outweigh the taking away from the Plaintiff of his ability to offer security to anyone who might become dependant on him in the future.

Similarly we think it is too speculative to consider the probability that a Plaintiff with no dependants would have used his earnings during the lost years otherwise than upon himself.

Damages for dependants should be calculated as under the Fatal Accidents Acts, allowing for expectancy and hazards of life and economic uncertainties.

Paragraph 59-67 (B) Loss of expectation of life considered as a non-pecuniary loss - Claims under the Law Reform (Miscellaneous Provisions) Act 1934.

Paragraph 64 - Living Plaintiff

The Group feels it is really impossible to value any particular person's enjoyment of life (so many variables, so many imponderables). People with all the apparent advantages often have concealed crosses. One cannot differentiate between individuals as to their chances and degree of happiness. We suggest maintain conventional acknowledgment of loss at £500, subject to revision upwards with the fall in the value of money if this continues.

Paragraphs 65 and 66 - Dead Plaintiff

Agree Report's conclusion.

Paragraph 67 - Other items of non-pecuniary loss survival

Agree Report's conclusion.

Paragraphs 68-116 (C) The Principles of the assessment of non-pecuniary loss for a living Plaintiff

Paragraphs 80-87

We think there should be no compensation for loss of amenities where the Plaintiff is completely unconscious since the accident and where the diagnosis is positive that the Plaintiff will never recover any degree of consciousness. Where a degree of consciousness is likely damages for loss of amenities should be suitably scaled down from what would have been awarded had the Plaintiff been fully conscious.

Paragraph 89

We agree Courts should not base their award on compensation for non-pecuniary loss upon an assessment of loss of happiness.

Paragraphs 90 and 91

We agree that the Law should not take account of the fact that a Plaintiff cannot use damages awarded to him, provided he is conscious and able to understand the "satisfaction" given to his claim for damages as representing an attempt to compensate for the wrong done to him.

Paragraphs 91-97

We favour a trial by Judge alone, and if the present unofficial scale remains Judges should continue to fix it. We cannot see that the present Tribunals of High Court, Court of Appeal and House of Lords can in practice be bettered.

Paragraphs 93-104

We find it difficult to see that an injury quantum tariff would lead to more negotiated settlements - so many variables arise, both in relation to degree of injury and its' particular effect on individual Claimants. Certainly the degree of fairness achieved under the present system in matching as far as possible the compensation to the particular circumstances might be impaired.

T he extravagant ideas of a difficult Plaintiff might be curbed but at present the salutary remedy of a payment into Court is open to the Defendant in such a case.

We are unconvinced that there would be any real gain in disturbing the existing system, and firmly of the opinion that the flexibility of the existing system is strongly in its' favour because of the almost infinite number of variations to which a Court may pay regard in an individual case.

Paragraphs 105-115 - Overlap of compensation for loss of amenities and future earnings.

We are not inclined to agree with the conclusions in paragraphs 115 and 116. In such cases the Plaintiff is likely to receive a very substantial damages in any event, and we think that our opening remarks under the Heading Paragraph 49 above should be borne in mind.

Actuaries on opposite sides might well differ, but economists, were their evidence admitted, would probably exhibit even wider gulfs.

It might be a helpful gesture to make the income from damages in cases of very severe injury subject to special tax reliefs.

As to how inflation should be taken into account in any precise manner, we find this a very difficult problem but consider that probably the method suggested by Lord Diplock in Mallett -v- McMonagle of assessing damages on the basis that the Plaintiff will be able to invest them at the rate available at the date of award in good growth equities is the best available. We do not agree that this would imply a method of computing damages based on an actuarial approach.

Paragraphs 191-207 (G) Losses incurred by others.

We support the abolition of actions for loss of consortium and for loss of services by a parent in respect of a child.

We agree paragraph 195(a).

As regards Paragraph (b), we do not agree that payment should be made for services which one would expect to be rendered by either spouse to the other as a matter of marital duty and responsibility. If the spouse has to give up work in order to nurse then we agree that the wage loss should be recoverable, provided it does not exceed the cost of employing a nurse or other assistance.

We agree paragraph (c).

We disagree paragraph (d) for the same reasons as we give regarding paragraph (b) above.

As regards paragraph (e), regarding the cost of visits to the injured Plaintiff, we think this whole question should be left to the discretion of the trial Judge but that only such expenses as are fair and reasonable in the circumstances should be allowed.

We agree paragraphs 197-203.

In regard to paragraph 203, we think that non-pecuniary loss of this kind should not be recoverable.

Paragraphs 208-217 (H) The Mode of Trial for the Determinations of Claims.

We agree with paragraphs 28 and 29 Page 157.

Paragraphs 218-221 (I) Itemisation of the Heads of Damage.

Regarding Paragraphs 220-221, we disagree the suggestion of further itemisation and the treatment of loss of earning capacity as a future pecuniary loss.

As to further itemisation, we see no real advantages, only more complication and more grounds for dissatisfaction and "picking at" the Judge's decision. Judges should not be "held down" on the more trivial aspects of a claim.

As regards later loss of earning capacity being treated as future pecuniary loss, we think the present system of considering it as an item of General Damage is reasonable. Here again one is looking into the future and cannot be precise. Loss of future earning capacity may not in the event be translated into actual wage loss, perhaps through intervening circumstances and perhaps through good fortune in the Claimant's particular employment. We think the Judge should be allowed to "do the best he can".

Paragraphs 222-256 (J) Periodic payments of provisional awards.

We agree paragraph 32 Page 159 and for the reasons given in the main text of Working Paper 41.

We also agree paragraph 33 Page 159.

Paragraphs 257-273 (K) Interest on Damages.

Regarding paragraph 34 Page 159, in our experience no hardship has become apparent to the Plaintiff but we feel strongly that it is completely illogical and unfair to a Defendant that a Widow's future loss of dependency, that is her future pecuniary loss, should attract interest.

Regarding paragraph 35 Page 159, we agree Conclusions (A).

As to a Plaintiff being given interest earned on a payment into Court when he takes it out, instead of it going to the Defendant as of now, we think it is preferable to leave the position as it is. We are not sure how alteration in the manner suggested will much benefit the Plaintiff where there is only fourteen days to make up his mind otherwise he is at risk on further costs incurred by the Defendant. Where there is considerable delay in taking out the payment into Court but this is eventually done, the Plaintiff has not been kept out of his money by the Defendant. He himself or his advisers are responsible for the delays.

As regards (d), a line must be drawn. We feel that any alteration to Lord Denning's dictum would lead to utter confusion and many more cases going to trial. We agree with the first sentence of paragraph 272 Page 142 but not the rest.

* This Memorandum was prepared by Messrs. K.S. Cannar
K.D. Bond
J. Kennerley
R. Lawrence