THE DAMAGES LOTTERY

P. S. ATIYAH
Formerly Professor of English Law
University of Oxford

HART PUBLISHING
OXFORD
1997

Hart Publishing
Oxford
UK

Published in the United States by Hart Publishing

Hart Publishing is a specialist legal publisher based in Oxford, England. To order further copies of this book or to request a list of other publications please write to:

Hart Publishing, 19 Whitehouse Road, Oxford, OX1 4PA
Telephone: +44 (0)1865 434459 or Fax: (0)1865 794882
e-mail: hartpub@janep.demon.co.uk

Payment may be made by cheque payable to 'Hart Publishing' or by credit card.

British Library Cataloguing in Publication Data
Data Available
ISBN 1-901362-05-1 (cloth)
1-901362-06-X (cloth)

Typeset in 12pt Bembo
by SetAll, Abingdon
Printed in Great Britain on acid-free paper
by Biddles Ltd. Guilford and Kings Lynn

TABLE OF CONTENTS

PREFACE

THIS book is designed for the ordinary reader who may, perhaps, have read accounts of strange cases in which huge damages have been awarded for bizarre events, and wonders whether the law has gone mad. It is written in non-technical language and requires no previous knowledge of the law or the legal system. For the same reason it is not stuffed with learned references and lengthy footnotes. That does not mean that the facts and statistics presented here have been plucked out of the air — they are all capable of being documented and come from reputable scholarly sources or government publications. Anybody who seeks this documentation will find most of it in the author's *Accidents, Compensation and the Law*, the fifth edition of which, by Mr Peter Cane, was published in 1993 by Butterworth & Co. Although the present book has not been written for lawyers, some of them may find material here which will probably provoke them, and may even cause them to think more seriously about the issues discussed.

Some readers (especially those who may themselves have been involved in claims for damages) may feel that this book displays a lack of sympathy and compassion for accident victims. I entirely accept that sympathy and compassion have their proper place, but that place is in personal relationships. Those who care for the accident victim, even public officials like police and doctors, must provide their services with due regard for the emotional needs of accident victims. But legal and social structures, which deal with hard cash, must be subjected to rational discussion from time to time, and that kind of discussion is hindered rather than helped by emotional responses. It is that sort of rational approach which is offered in this book.

I am grateful to Peter Cane and Jane Stapleton for many helpful suggestions, and thanks are also due to my son Julian for the diagram in Chapter 4, and above all to Christine for giving me her reactions to the first draft in the capacity of 'ordinary reader'.

P.S. Atiyah

1. SUING FOR DAMAGES

IN 1995–96 two stories were reported in the national press. The first was about a man who slipped on a dance floor and fractured his leg. It was quite a bad injury which caused him some pain, and he was off work for several months, though in the end he made a full recovery. The dance hall was owned by the local authority and the injured man obtained over £10,000 in damages against them (which was in effect an award against the public taxpayers) because he was able to prove that the floor had been over polished and was hence too slippery. The second story was about a little girl of five years of age who was taken to hospital with a severe attack of meningitis. The doctors saved her life, but in order to do so they had to amputate both her legs. She had no chance of obtaining damages from anybody because her injuries were nobody's fault. It was just bad luck.

This book is largely about the different responses of the law to these two cases. They are not, of course, unique. There are many injured and disabled or handicapped people in our society. Some are unfortunate enough to be born with disabilities or handicaps; others suffer disabilities or injuries in accidents, others suffer disabling diseases or other conditions. There are also many accidental deaths, and many premature deaths from natural causes. Most of these people are entitled to some benefit or other from the social security system; some get assistance from local authorities' social service departments. But a tiny handful receive large damages under the system of civil liability – what lawyers call the law of torts. Who are the few who receive such damages? Why do they get such generous treatment compared to the thousands of others who suffer similar injuries or handicaps? Who is actually paying for the damages? How fair is the system? How efficient is it?

In recent years actions for damages for injuries, real or imagined, appear to have become far more common. Levels of damages, for some cases at least, are far higher than they were a few years ago – in the most serious cases of personal injury, damages may now be of the order of a million pounds or more. New types of cases are constantly being recognised by the courts, especially claims for post-traumatic stress and other psychological conditions. Over the past fifty years the law has been stretched in many directions – in nearly every case the stretching is favourable to plaintiffs by enlarging the number of cases in which damages can be awarded, or by improving the levels of damages. The stretching is still going on, though some judges are at last beginning to resist the attempt to enlarge legal liability still further at the frontiers. Complaints are often heard that we "are going down the American road" without, very often, explaining what the American road is, and what is wrong with it. But what is increasingly obvious is that the present system is as unjust and inefficient as it could be. A lot of people – especially lawyers – think the present system is unjust because too few people are entitled to damages, and they get too little. They think accident victims are badly treated by the legal system. This book has been written in the conviction that the truth is precisely the reverse of this. The system is indeed unjust, but for quite different reasons. Many of the wrong people get compensated, they get too much and the wrong people pay for it – in fact, the public pays for it, but not in fair shares. The system is not only unjust, but also exceedingly costly and inefficient, and this has been proved time and again by research studies all over the world.

This book attempts to explain to the concerned citizen

some of the issues involved, gives a brief account of the law, and discusses what has gone wrong. In the concluding chapter some suggestions are offered for a completely new approach to the problems of compensation for personal injury. Although the details are complex, in its essentials the subject is straightforward and not difficult to understand even for those with no knowledge of the law, or the legal system.

THE LAW OF NEGLIGENCE

I start with a very brief account of the law of negligence. The first thing that must be grasped is that the law of damages, or more accurately, the law of civil liability, is not generally designed to *punish* anyone. Punishment is the function of the criminal law; compensation is the function of the civil law. The possibility of punishing those guilty of causing injuries is dealt with more fully in Chapter 7, but for the moment we will concentrate on the compensation question.

In very straightforward cases the law of negligence is really perfectly simple. In general terms the law provides that any person who is injured by the *fault* of another can claim damages for those injuries. Lawyers call the complaining or suing party the plaintiff, and the person who is being sued, the defendant, and it will be convenient to stick with these words. In simple cases there is nothing esoteric about the legal concept of fault – lawyers define it as a failure to take reasonable care according to all the circumstances of the case. In the case of road accidents, with which most people are familiar, the concept of negligence includes such simple faults as driving too fast in the conditions, overtaking on a dangerous corner or bend, failing to keep a proper look-out for other road users, and so on. What is more, in simple cases like this, most people would find the law not only quite straightforward and intelligible, but also entirely fair. If we put aside injury cases for the moment and consider a simple case where one person's vehicle is damaged by the fault of another driver, not many people would disagree with the fairness of the law which says that in these circumstances the person at fault should pay for the damage done. People may, of course disagree strongly about *who* actually was at fault in a particular situation, but where the element of fault is quite clear, very few people would find it unfair that the guilty party should pay for the damage. For example, where a person damages a car by carelessly reversing into it in a car park, there is not much room for argument over whose fault the accident is, and in a case like this, where the damage is likely to be quite modest, a reasonable motorist would readily agree that the guilty party should pay – even where he is himself the guilty party. The existence of insurance is a complicating factor, which will have to be considered at length later, but in a very simple case like this, insurance is often disregarded by both motorists for very good reasons, and the justice of requiring the guilty driver to pay would generally be unquestioned.

The law only requires *reasonable care* – it does not require all possible care, nor does it generally impose legal liability where damage or injury is caused by pure accident. For example, staying for the moment with road accidents, which are likely to be within the experience of many people, a driver who causes an accident because he is stricken with a sudden incapacitating heart attack may be acquitted of negligence, because the accident simply was not his fault. He may have caused the accident, but he has not necessarily been guilty of a lack of reasonable care. But that assumes that the heart attack has come suddenly and without warning. A reasonable driver who feels seriously ill while driving, and is aware, or ought reasonably to be aware, that he may be unable to control the vehicle properly, ought perhaps to pull over and wait until he feels

better. If he carries on regardless, he may be guilty of negligence. Notice how I say that the driver *may* be, rather than that he *is* guilty of negligence in such circumstances. That is because negligence must be looked at according to *all the circumstances of the case*. So, for instance, whether a driver who feels ill ought to pull over and rest, or is justified in carrying on, may depend on a whole range of factors – how ill does he feel, is he aware that he may have heart disease, what are the road conditions at the time, what kind of road is he on (motorway or country lane?), does he have good reasons for wishing to press on, and so on.

On the other hand, although the law only requires reasonable care, it is no defence for a driver to say that he was doing his best. His best may simply not be good enough. Drivers do not have to display the abilities and skill of a Damon Hill or a Michael Schumacher, but they must display the abilities of the ordinary reasonably careful driver. And a driver who is simply unable to do this, because he just is a bad driver, or even because he has a physical disability, will be guilty of negligence just the same.

It must be stressed that negligence is a very minor kind of fault, in the legal sense. All sorts of acts may be held to be negligent by lawyers which are only marginally blameworthy – a doctor, for instance, fails to ask a patient whether he is allergic to penicillin, or an employer fails to provide his workers with earmuffs when they are engaged in noisy work which may over a long period damage their hearing. Although negligence can sometimes be followed by devastating consequences (for example, serious injury or even death), and the lay public may for that reason tend to think that some serious fault has occurred, lawyers insist – and rightly insist – that consequences like this are often more or less accidental, for example because they were not really foreseeable. A minor act of negligence is not made more morally culpable because, by mischance, it leads to very serious injuries to another person. Nor must we think that, because a defendant is held to have committed some act of negligence, he has necessarily done something which would be morally blameworthy.

STRICT LIABILITY

In addition to liability for negligence, lawyers recognise another form of liability which they call "strict liability". In these cases it is not necessary to prove negligence at all in order to claim damages, but it is relatively unusual to be able to claim damages for injury in a strict liability case. There are two kinds of cases in which such a claim may be made which could be of relevance for our purposes.

First, a person who can sue for damages for breach of contract may not have to prove negligence, so if you buy dangerous or defective goods (which is in law a contract) you can claim damages from the seller, not merely for the value of the goods themselves (or the cost of repairing them) but also for any any damage done *by* the goods. So if, for instance, you buy a new washing machine which is, say, electrically faulty, and it blows up throwing water all over your kitchen, destroying the clothes in it, and perhaps injuring you into the bargain, you can claim damages for all these things. You will not need to prove the seller was negligent; it is sufficient that the goods you have bought are faulty within the definitions laid down in the Sale of Goods Act. And these definitions are very wide indeed. Similarly, if you buy infected meat from a butcher, and the meat poisons you, it is not necessary to prove it was the butcher's fault that the meat was infected, because buying meat is a contract of sale of goods just as much as buying a washing machine.

Second, there are other cases where you may sometimes be able to claim damages for defective goods under the Consumer Protection Act 1987, without proof of negligence. As against the seller this is not very important because your rights under the Sale of Goods Act are so extensive; but if you want to sue the manufacturer or importer (rather than the seller), or if a member of your family is injured and wants to sue someone, it may not be possible to claim under the Sale of Goods Act. In this case it is sometimes possible to sue under the Consumer Protection Act, and again negligence is not needed. But you will still have to show that the goods were "defective" and in practice this kind of strict liability will not often add a great deal to your right to sue for negligence.

A consumer's right to claim damages for faulty goods is of course an important part of the law, but his right to sue for damage done *by* faulty goods is less important, and in this book I shall in general ignore these possible strict liability claims for damages. Statistically speaking they are of very minor importance compared to the great mass of claims for damages for negligence.

INTENTIONAL TORTS

Naturally, the civil law provides redress for intentional wrongdoing as well as in cases of negligence and strict liability. So there are obvious torts like assault and wrongful arrest (strictly, false imprisonment), though here too the "stretching" process goes on, and the judges have recently recognised harassment as a new intentional tort, which may well prove an important "growth" area of the law. In general this book is not concerned with these intentional torts, and certainly no proposal will be found here to abolish or reduce the liability of a person who commits an intentional tort. But there are some cases which do raise issues with intentional torts which are really identical to issues which arise with negligence, and which are discussed more fully later. These cases concern the liability of employers or others for the actions of a wrongdoer. When, for instance, a policeman uses excessive force in arresting someone (and thereby commits a tort) the police authority will be liable for the damages, just as much as the policeman himself. This kind of liability – which is actually the liability of the public in the last resort – is very much the concern of this book, and raises problems in no way different from the liability of police officers for negligence. But apart from that this book is not concerned with intentional torts which do not give rise to anything like the volume of claims and litigation which negligence does.

LIABILITY FOR HOW MUCH?

Lawyers commonly keep quite separate two important questions. The first is the question of *liability*, which is largely dependent on the proof of negligence, as already explained; the second is the question of what damages are to be awarded. But when the fairness or justice of the law is being examined many people might find it odd to separate these two questions. Surely, most people would say, whether the law is fair depends not only on whether a defendant is held liable, but on *how much* he is liable for? The reason that lawyers do not generally perceive this is probably because they take the basic principle of the law of damages to be entirely self-evident and reasonable: the defendant is liable to pay whatever sum of money is necessary to put the plaintiff back in the position, so far as money can do it, in which he would have been if there had been no negligence, no injury at all. In very simple cases of damage to property (such as the road accident which damages a car but causes no injury) this principle works perfectly easily. The defendant has to pay the cost of repairing the damaged car, or if it has to be written off altogether, the market value of the car.

But in cases of personal injury, and in fatal cases, the basic principle has to be supplemented by so many further rules,

that things get a lot more complicated. At the moment we will try to concentrate on the essentials, leaving further details to be elaborated later.

Injury cases: financial losses

In injury cases the damages to which the plaintiff is entitled fall into two categories. First, there are damages to cover the plaintiff's money losses. For instance the plaintiff may have been off-work for a few weeks and so lost wages of so many hundred pounds. These are recoverable in full as part of the damages. This means that high earners will recover much larger damages than low earners, or those who are not employed at all. The higher your earnings, the more your losses will be if you are deprived of them. Monica Seles, the tennis star, is currently suing for some £10 million for her lost earnings as a result of being stabbed by a deranged spectator at a German tennis tournament, though she has lost the first legal round of her claim. A QC who suffers a minor injury and so misses a single court appearance may lose several thousand pounds, and can recover the whole lot in damages (less tax). A labourer might recover only £50 for his lost earnings for that period; a housewife not gainfully employed will not recover anything for loss of earnings because she has lost none, and the same is true of an unemployed person. (On the other hand, it is also true that some highly paid employees will actually suffer little or no loss of earnings for short-term incapacities, because their employers will continue to pay their salaries for a few weeks' or even months' of absence, where a lower paid employee may actually lose his pay.)

The plaintiff is not, however, limited to claiming for past lost earnings – if he suffers a long-term injury he will be able to claim for estimated future losses, and it is these future losses which often inflate the damages into very large figures. Naturally, when a young person suffers a permanent injury, and is compensated for loss of earnings for his whole working life, the damages may be enormous. Even if he was not earning at all when injured, because (for instance) he was then unemployed, or was still a student who had not begun to work, he may be able to recover for future earnings losses, because he might have had reasonable expectations of securing some employment in the future.

If the plaintiff is so badly injured that he will never work again, everything that he might have earned in the future is treated as a "loss", so it will be necessary to estimate the entire loss of earnings throughout his life in order to calculate the damages. This is often a difficult business: where the plaintiff suffers his injury at a relatively young age it is necessary to predict what would have happened to him if he had not been injured – would he, for example, have been promoted, would he have had a successful professional career, or in the case of a woman, would she have married and had children, or would she have remained in employment throughout her life, and so on. It is even necessary to estimate how much the plaintiff might have earned by way of pension – years before he has reached retiring age. Obviously all these questions can only be answered with rough and ready estimates – "guesstimates", perhaps. In theory judges are supposed to make allowance for the fact that they are indeed making estimates about uncertain possibilities, so the damages are discounted (reduced) because even if the plaintiff had not been injured in this accident he might in the future have anyhow had periods of unemployment or sickness. One does wonder, though, whether these discounts adequately reflect the possibility that work prospects in our society may themselves be changing quite radically.

Where the plaintiff's injuries are really serious – where he is, for instance, permanently paralysed or bedridden – it is obviously necessary that he should have an income from

some source or other, throughout his life, and it is hardly surprising that if he is entitled to damages, they will cover his whole working life. But today judges often seem to be very generous in assuming that other less serious injuries will render the plaintiff permanently unemployable. There are, for instance, many claims for post-traumatic stress these days in which relatively young people are declared by doctors to be incapable of working again, and judges accept these findings, apparently without question. In 1996 a case of this kind came before the Court of Appeal in which over £1.3 million had been awarded but the plaintiff had made an almost complete recovery within a few months. Because the facts came to light before the court's final order was drawn up the damages were substantially reduced as a result – but if the facts had come to light only a few months later, the plaintiff would probably have kept the whole lot.

When a person suffers injuries or shock of this kind, he can respond in one of three ways. He may, first, make every effort to rehabilitate himself, to overcome his handicaps, and try to fit himself so far as he can for a job, and as normal a life as possible. Not every injury prevents a person working – after all there are many disabled people who manage to lead useful and fulfilling lives – there are blind and deaf members of parliament, for instance. Other blind people have had very successful careers as academics or in other walks of life. Douglas Bader became a famous ace-pilot in the war despite having lost both legs in a pre-war accident. Franklin Roosevelt served as President of the United States for over twelve years, though crippled by polio and unable to walk unaided. Not everybody can be a Bader or a Roosevelt, but many disabled people, forced to use wheelchairs for their transport, are vigorous in their demands that working opportunities should be opened for them. It is paradoxical, and undesirable, that when a claim for damages is pending, such people should be told that they cannot be expected to work again.

Faced with this sort of response, it is not surprising if the victim responds to his injuries in quite a different way. He may simply assume that he can never lead a normal life again, never work again, and make no effort to rehabilitate himself. A third possibility is that an injured person may decide that he cannot hope to recover while his claim for damages is pending, and may prefer to get that settled before he decides what to do with his life.

A major problem with the law at present is that it penalises the person who reacts in the first way described above, and rewards anybody who responds in the second or third way. In these respects the law clearly sends out the wrong messages to accident victims. It positively invites them to exaggerate their symptoms, to make no effort to rehabilitate themselves before their claims are settled. Those who manage to find some useful employment will only recover damages for the difference between what they can now earn and what they might have earned if they had not been injured. Those who can persuade the judge that they can never work again will receive the highest damages – though once they are awarded the plaintiff is not prevented from then trying to find useful work to do. It may well be that the severity of the recent recession, with high unemployment rates, has resulted in an increase in the levels of damages, as those who are seriously injured are likely to have more difficulty in finding work when they have recovered, and may also find it easier to persuade judges that they will never work again. Of course judges who have to decide whether an injured victim is likely to be able to work again have to base their decisions on the evidence, and doctors seem as much to blame for the present state of affairs as judges. They appear far too willing to tell a serious injury victim that he has no chance of ever working again, and to encourage the victim to believe just that.

It is unhappily true that the disincentive effects of compensation systems are not confined to cases in which

damages are claimed. Social security and private insurance systems may also suffer to some degree from the same problem, but the situation is greatly aggravated by the fact that damages are usually paid in a single lump sum.

In addition to losses of earnings, there may be all kinds of medical and even social costs to be estimated as well. Despite the existence of the NHS an injured person is entitled to seek private medical and hospital treatment, and have all the costs (and estimated future costs) paid for by the defendant as part of the damages. This right extends to nursing care, too. For instance the plaintiff, if so seriously injured that he is likely to remain bedridden, may be entitled to claim the estimated cost of private nursing care throughout his life (for 24 hours a day, in the most serious cases). Then there are what may be called social costs. A housewife who is injured may be able to recover the cost of employing someone to do her work while she is out of action, even though she cannot recover for lost earnings. In other cases there may be additional costs such as the adaptation or even the purchase of a specially suitable house, a car, and other amenities. Damages to cover these expenses are often awarded on the most generous basis, which it may seem mean to question given the very serious injuries which the plaintiff may have suffered. Yet it has to be remembered constantly that many others who suffer equally (or even more) devastating injuries, not caused by anybody's fault, receive no damages at all. When this is borne in mind, the extreme generosity displayed by the law to plaintiffs who are entitled to damages seems more questionable.

In principle these claims to financial losses are simple: the plaintiff is entitled to be compensated for every penny of his financial losses, once it is understood that all future losses are also included in this term. In practice, of course, the process often requires difficult estimates to be made. In addition, there is the further complication that whenever an estimate is made of future financial loss, but the damages are to be paid at once, the total figure must be discounted, that is reduced, to reflect the fact that the plaintiff is going to receive it now, and obviously a lump sum today is worth more than a future income which would have been received over many years. The method of discounting these future financial losses is complex and controversial, but the details need not concern us. What does need to be understood is that many of these difficulties stem from the fact that the damages are usually estimated and paid once for all. Under a different system, where the compensation is paid weekly, or monthly, it would be unnecessary to make these guesses about the future.

Injury cases: non-pecuniary loss

The second head under which the plaintiff is entitled to be compensated is for non-pecuniary losses – what are sometimes called damages for pain and suffering, or damages for loss of amenity. Lawyers take the view that the plaintiff would not be fully compensated if he did not receive something for the injury itself, over and above the financial losses he has suffered. In the most serious cases of all, where the plaintiff is permanently incapacitated – rendered a quadriplegic, for example, paralysed in all four limbs – simply replacing his financial losses does not come anywhere near to offering him genuine compensation. So the plaintiff is entitled to additional damages for these "non-pecuniary losses". Although sometimes called damages for pain and suffering, actual pain and suffering do not have to be proved. In fact these damages can be awarded (though usually at a somewhat lower rate) even to a plaintiff who is in a permanent vegetative state, and never recovers at all. For this reason judges now tend to call the damages for non-pecuniary loss awards for "loss of amenity".

Of course there is a serious problem about these damages for loss of amenity, because there is no way of putting any

real financial figure to them – there is no market value for these "losses". This difficulty has been solved by the courts by the adoption of a sort of tariff in which the most serious injuries of all are given a value of (today) around £130,000, while other injuries are then tested against this figure. Nobody pretends that this is a completely satisfactory method of solving the problem, but it has some advantages. First, it is administratively workable, because the judges and barristers and insurance administrators who operate the system know the tariff and can usually predict fairly closely the point on the scale where the plaintiff's case will fall. So, although nobody can expect to predict the exact figure which a judge is likely to award for non-pecuniary loss, an experienced barrister can usually say that the case is likely to fall within the range (say) of £10,000 to £15,000, or perhaps of £60,000 to £70,000 in a more serious case. The second advantage of the system is that it has a reasonable internal consistency, in that the more serious injuries will usually be compensated more generously. In general, damages for non-pecuniary losses are no more for higher earners than for lower earners.

Is the maximum figure for damages for non-pecuniary loss too low at around £130,000? Many people probably think it is, though it must be remembered that, in cases where the maximum is likely to be awarded, the damages for the pecuniary losses could easily be a million pounds or more. English judges would agree that it is exceptionally difficult to fix an actual figure for the highest levels of damages for non-pecuniary loss (from which figures for all less serious cases are ultimately derived) but would argue that there is simply no purpose in piling on the damages in these cases. As a judge once said of an unfortunate girl who was permanently paralysed and bed-ridden, in one sense all the gold in the Bank of England would not really compensate her for what had happened. There is simply no point in awarding immense sums to injured people who will never really get much benefit from them. Provided that their medical and other needs are met, and something can be done to let them enjoy their lives to the limits of their medical condition, still further payments serve no real purpose.

What is more, although it may seem callous to draw attention to the fact, it has to be faced that where the plaintiff is so badly injured that he is unable to use the compensation to any great degree, much of it is likely to pass to his heirs in due course, and frequently after no great length of time. Those who suffer the sort of terrible injuries which lead to the highest damages generally have a shortened expectation of life. To some degree this problem is now alleviated by the fact that in the worst cases of all the damages are often awarded by means of an annuity, which will of course come to an end when the plaintiff dies.

Although in very serious injury cases the damages for non-pecuniary loss will be a relatively small proportion of the total damages awarded, this is not generally true of less serious injury cases. Indeed, at the time of the Pearson Royal Commission Report in 1978 it was estimated that about two thirds of all damages were paid as compensation for non-pecuniary loss. This was much higher than most people thought, and it tends to confirm doubts about the utility of the whole system. Once it is understood that damages are not meant to punish the defendant, and that they will not actually be paid by the wrongdoer anyhow, it must be accepted that damages for non-pecuniary loss are in most cases plainly a lower priority than damages for pecuniary loss. It is clearly more important that the victim have an income, than that he has something extra for pain and suffering, especially for minor injuries. If you doubt this, ask yourself which risk you yourself would choose to insure against if you were buying the insurance and paying the premium – loss of your income, or pain and suffering? Yet a very large part of the cost of the whole system is

actually devoted to funding these small claims for non-pecuniary loss.

Damages for non-pecuniary loss have probably declined over the last few decades as a proportion of the total damages awarded in injury cases, but the reason for this is that there has been a corresponding increase in damages for pecuniary loss. This has occurred because plaintiffs' lawyers nowadays try to think up every conceivable way in which an injured person may have suffered financial loss as a result of his injuries, and then claim for these losses. For example, a plaintiff who used to do – as most of us do – his own gardening, or home decorating and other DIY jobs round the house, may now claim he is unable to do these as a result of his injuries, and so has to pay someone else to do them. Very well – an estimate of these sums (past and future) now becomes a pecuniary loss which can be recovered by the plaintiff. Or again, the plaintiff now has to remain at home when before he went out to work, so in the winter his house has to be heated all day. So increased winter fuel bills become another item of financial loss, recoverable by the plaintiff.

The result is that damages for non-pecuniary loss may well be somewhat lower (allowing for inflation) than they used to be. They are certainly very far from American levels, where, as is well known, such damages often run into millions even for relatively minor injuries. This is certainly one road we have not gone down, and there is no likelihood that we will, because damages in America are usually fixed by juries and in England by judges. Juries are apt to be profligate with other people's money, and may not appreciate that they, in common with other members of the public must in the end pay for the damages they award through their insurance premiums and other payments. Some American insurance companies have tried to educate juries on these matters, even to the extent of handing out leaflets to potential jurors saying: "Higher verdicts mean higher premiums". That too is a road down which we are unlikely to travel in England.

All the elements of the damages are of course cumulative, so the plaintiff is entitled to the figure for his financial losses and his non-pecuniary losses, added together. In addition he is often entitled to interest on the totals because in serious cases it is often years before the money is paid.

Members of the public sometimes get an exaggerated idea of the amount of damages that can be claimed in minor cases. They read in the press of someone receiving £30,000 for being bullied in school and they may well think that this is an absurd amount of compensation for such a minor injury as being bullied. Or again, they may read of the plaintiff who was awarded £200,000 for post-traumatic stress following the death of his brother in the Hillsborough disaster.[1] This book argues that damages *are* often too high, but it must be understood that awards of this kind are likely to be based on the assumption that the plaintiff has suffered substantial losses of earnings. Figures like this are based on medical evidence suggesting that the plaintiff has been so traumatised that he has suffered a serious mental illness which has prevented him from working for some considerable time, or perhaps, will prevent him working again at all. In other words these damages are being awarded not *because* the plaintiff has been bullied or *because* he has lost his brother. They are awarded because the plaintiff has lost earnings (which will have to be demonstrated) as a result of the trauma following the bullying or the death of his brother.

Fatal cases

Fatal cases present special difficulty. They fall into two classes. First, there are cases falling under the Fatal Accidents Acts, where the plaintiff claims for the financial

[1] *The Times*, 12 December 1996, p. 9.

losses he (or more usually she) has suffered as a result of the death of someone on whom he may have been dependent. A wife who is being maintained by her husband, or a child maintained by a parent, is generally held to suffer financial losses when the spouse or parent is killed in an accident. That financial loss is recoverable against a negligent defendant in very much the same way that a living accident victim can recover for his financial loss. First it is necessary to estimate how much the deceased used to spend on the spouse or child, then to estimate for how long this dependency would probably have lasted, and then to make some global estimate, discounting the future loss because a capital sum is going to be awarded. As in the case of a living victim, the principle is relatively straightforward – the plaintiff is entitled to full compensation for every penny of financial loss – but obviously the precise quantification is often a bit of a rough estimate. Once again, the dependants of a high earner will receive much higher compensation than those of a lower earner. What is more, the young wife of a wealthy earner who is completely maintained by him will recover much higher damages than the young working wife who keeps herself and shares the bills with her husband.

The second class of case concerns the death of someone who has left no dependants (or probable future dependants). For instance, when a minor child is killed, or when an elderly retired person is killed, there will often be no financial loss to anyone. So in principle, nobody would be able to sue at all in this situation. But many people would find this logic too much to stomach, and the law does therefore make some provision for a very modest form of compensation for the death of an unmarried minor child, or of a spouse, which is in addition to any claim for financial loss. The amount to be awarded in this type of case is fixed by statute and is at present £7,500. Many people clearly find this sum extremely low as compensation for the shattering loss of a young child, and certainly in other legal systems, such as most of the United States, enormous awards of damages may be made for death in such a case.

But this is an American example which our law has so far not followed, and surely with good reason. What is the point of awarding large damages for the death of a small child? It will not bring the child back, and it can surely do nothing to assuage the grief which must be felt by the parents. It is natural to feel sympathy for the grieving parents who have lost their child in what may be a horrible accident, but what purpose is served by translating this sympathy into cold pounds? Once again, it must be accepted that not all the gold in the world would really compensate a parent for loss of a child. It seems very likely that what motivates parental demands for higher damages in such cases (if it is not distasteful gold-digging) is a desire to punish those they believe to be responsible for the accident. But as we have seen, the civil law is not concerned with punishment. If the responsible party has committed a crime, he can and should be prosecuted, and dealt with by the criminal courts, but requiring large damages to be paid will achieve nothing. It will achieve nothing because the damages will not actually be paid by the party responsible, but by his employer, or most likely by an insurance company. Once again, one can test the validity of these arguments by asking whether you would want to insure the life of your children if you were paying the premiums yourself. Surely most people would find the very idea repulsive (and it is actually illegal anyhow). Nobody wants financial compensation for the death of a child, looking at the possibilities in the future.

We shall see later (p. 56 ff.) that increasingly lawyers are finding a way round the limit of £7,500 which is recoverable by the parents of young children killed in accidents. What has been happening lately is that lawyers are persuading judges that the parents are entitled to damages *in their own right* for the trauma they have suffered (and its consequences) following the death of a child. In this way they may succeed in recovering vastly more than £7,500.

WHO PAYS?

Who pays these damages? That is actually quite a complex question which will be dealt with in some detail in Chapter 5, but it is such an important question, and it is so interrelated with the subject-matter of this and the next two chapters, that a few preliminary words must be said about it here. Although it is often difficult to say who exactly does (in the last analysis) pay for awards of damages, it is at any rate clear who does *not* pay them. The damages are hardly *ever* paid by the actual wrongdoer, the negligent party. They are usually paid, in the first instance, by insurance companies, or by public bodies like the government or trust hospitals. But insurance companies do not (as some people seem to think) just pay these sums out of "profits". They pay them out of premiums paid by the public, directly or indirectly. Ultimately, most damages are paid for by the public, very much as they pay taxes; that is, the cost is spread around fairly thinly. But as everybody knows, taxes add up, and so do damage awards. So the first thing to be grasped here is that any demand for more damages and higher damages must lead to higher premiums for the public. This is a vital point because much public and even legal commentary on the desirability of extending legal liability or awarding higher damages seems to assume that the damages fall from the sky. The fairness of the system of damages and the appropriate sums that should be paid in damages, are often discussed entirely without reference to the other side of the equation. Even the Law Commission (an independent body of expert lawyers with a general responsibility for law reform) whose proposals are usually well thought-out, is quite prepared to discuss the question whether damages for injury are too low without asking what the effect of increasing damages would be on insurance premiums. This is absurd. It is just like calling for higher social security benefits without asking what extra taxes will have to be raised to cover them. Most people today know that that kind of thing is irresponsible, but everybody should understand that calls for higher damages are equivalent to calls for higher insurance premiums and also (as we shall see) higher prices for goods and services.

SUING AND SETTLEMENTS

In order to understand, even in general terms, how the present system works, the reader needs to realise that most claimants who recover damages do not actually need to sue. Most claims – about ninety-nine percent in fact – are simply presented by a solicitor acting on behalf of the plaintiff, and are then bargained over between the solicitor and the insurance company representing the party responsible. Strictly speaking therefore there may never be an actual law suit, there is no suing, and the parties never actually become plaintiff and defendant, the terms appropriate to legal proceedings. But it is convenient to continue using these terms anyhow. Both parties are well aware that it is a lengthy and costly business actually to fight out a case in court, and so it is usually in the interests of the parties to "settle" the case out of court, if they can do so. In most cases, after a certain amount of correspondence and haggling between the parties or their representatives, the insurance company will make an offer to the plaintiff which he is willing to accept, and that will be the end of the case. So the plaintiff never actually has to go to court to give evidence.

The bargaining process in personal injury cases sometimes favours the insurance company rather than the plaintiff, particularly in very serious cases. Sometimes this

happens simply because the insurers (and their lawyers) are much more experienced in handling cases of this kind than some solicitors acting for plaintiffs. Sometimes it happens because the plaintiff may be in rather desperate financial straits, and so may be willing to settle for less than he could expect to get if he held out for more. Sometimes it is because of an important rule about costs. Suppose the insurance company offers a definite sum to settle the case – say, £10,000 – and the plaintiff refuses the offer. If the case goes to trial, the plaintiff is indulging in a high risk strategy because even if he wins the action he will be ordered to pay a large part of the costs of the action if he is eventually awarded less than £10,000. This may swallow up most or even all of the damages, in which case the plaintiff won't actually receive anything at all – in fact he may even be left owing his solicitor a substantial debt. So the plaintiff is under great pressure to accept what may be offered.

On the other hand in less serious cases, the pressure to settle may be the other way. Every claim, no matter how trivial, has a nuisance value, and will cost the insurance company money to handle and process. So the temptation to pay off a small claim for a few hundred or even a few thousand pounds may be very great even though the insurance company may strongly suspect that the claim is largely a put-up job, with very little merit – for example, because they think the plaintiff was himself to blame for the accident. Or because they are very sceptical of his claim for financial losses, or to have had any real pain and suffering. What is more, many plaintiffs can easily obtain legal aid in these personal injury cases (provided only that they qualify under the means test), and in legal aid cases the plaintiff cannot be required to pay the defendant's costs if he loses his action. This means that the insurance company is often on a hiding to nothing in cases of this kind. Suppose their costs are likely to amount to at least £5,000 even for a fairly