DAMAGES for PERSONAL INJURY and DEATH

Second Edition

Edited by
David Kemp QC

Damages for Personal Injury and Death

Edited by David Kemp,
one of Her Majesty's counsel
Assisted by Rupert Anderson
Barrister of the Inner Temple

Oyez Longman

21/27 Lamb's Conduit Street
London WC1N 3NJ

ISBN 0 85120 730 8

First published 1980
Second edition 1983

Set in Times by Input Typesetting Ltd, London

Printed in Great Britain by
Biddles Ltd, Guildford, Surrey

Damages for Personal Injury and Death

Acknowledgments

'Actuarial Assessment of Damages' by J H Prevett (Chapter 5) includes material from an article by the same author that originally appeared in 35 MLR 140, 257, and we are grateful to the *Modern Law Review* for permission to refer to and reproduce this material.

The note of the judgment in *Chambers* v *Karia* (1979) is reproduced in Appendix A by kind permission of the plaintiff's solicitor, the late Mr Bernard Engler.

The note of the judgment in *Rialas* v *Mitchell* (1982) is reproduced in Appendix B by kind permission of the Palantype Organisation Limited.

Extracts from the Rules of the Supreme Court are reproduced in Appendix D from the consolidated loose-leaf edition of the *Rules of the Supreme Court* (available from HMSO) by kind permission of the Controller of Her Majesty's Stationery Office.

The table in Appendix E showing the value of the pound sterling at various dates was prepared by Mr Prevett (from monthly figures supplied by the Department of Employment) and it is reproduced by his kind permission.

The draft affidavits in Appendix F were prepared by Mr Hughes and are reproduced by his kind permission.

Preface

Earlier this year Legal Studies and Services Limited arranged a conference at the Royal Lancaster Hotel, London, on damages for personal injury and death. The emphasis was on the practical approach to this class of litigation. The speakers included Mr Thomas Saunt, Mr Alan Hughes, Mr John Prevett and myself.

This book is an edited record of those parts of the proceedings at the conference that the speakers felt could usefully be reproduced in print. It also includes additional material that was not available at the conference; for example, a consideration of the important decision of the House of Lords in *Lim Poh Choo* v *Camden and Islington Area Health Authority*, which was given on 21 June 1979 and reported at [1979] 3 WLR 44; extracts from the judgment of Smith J in *Taylor* v *Glass* (see Appendix B), where the award of £293,000 plus £17,000 interest is the highest recorded award so far made by an English court (there is an appeal pending on quantum); and an expanded contribution from Mr Prevett, an actuary who has made a special study of actuarial evidence in this class of litigation and who has given expert evidence in a number of serious personal injury cases. The latter includes material from an article by Mr Prevett in 35 MLR 140, 257, and we are grateful to the publisher of the *Modern Law Review* for permission to reproduce this material.

At the conference I drew attention to the then unreported case of *Walker* v *John McLean & Sons Ltd*, now reported in [1979] 1 WLR 760. I expressed the view that the courts should make awards that kept up with inflation more fully than they had done in recent years. This is one of the topics considered in my postcript to the conference, which is the last chapter of this book. Some recent awards show that the courts have already applied the reasoning of the Court of Appeal in *Walker's* case. *Taylor* v *Glass* mentioned above is one example. Others are: the £262,500 agreed award approved by the court in *Shewan* v *Kensington, Chelsea and Westminster Area Health Authority (Daily Telegraph* 30 October 1979), the £269,700 award in *Croake* v *Brent & Harrow Area Health Authority (Daily Telegraph* 6 November 1979) and the £200,000 award in *Hyde* v *Tameside Area Health Authority (Daily Mail* 30 October 1979).

The appendices contain various statutory provisions and rules of court that are referred to in the main text. They also include extracts from two recent decisions illustrating the court's approach in practice to the assessment of damages. One of these is the case of *Taylor* v *Glass* already mentioned; the other is *Chambers* v *Karia*, a decision of O'Connor J in

which he had to consider a number of problems, including the assessment of 'lost earnings during the lost years'. So far as I know this is the first case in which a trial judge has had to apply the ruling of the House of Lords in *Pickett*'s case. In addition, there is a table showing the value of the pound sterling at various dates. I hope that practitioners will find it useful to have this material conveniently accessible.

D A McI K
November 1979

Preface to the Second Edition

In 1979 Legal Studies and Services Limited arranged a conference at the Royal Lancaster Hotel, London, on damages for personal injury and death. The emphasis was on the practical approach to this class of litigation. The speakers included Mr Alan Hughes, Mr Thomas Saunt, Mr John Prevett, O B E and myself. The first edition of this book was an edited record of those parts of the proceedings at the conference that the speakers felt could usefully be reproduced in print. The genesis of the book dictated its scope, since it is impossible in the course of a single conference to cover the entire field of this subject-matter. Nevertheless, we hoped that the topics covered by the various speakers would prove of value to practitioners in this field. The warm reception given to the first edition is some evidence that our hopes were justified.

The second edition follows the same basic pattern as the first, with the relevant Chapters and Appendices brought up to date. For instance, we have substituted for the decision in *Taylor* v *Glass* in Appendix B the recent decision of Forbes J in *Rialas* v *Mitchell* as being a very recent example of the pratical assessment of damages in a case of maximum severity. The Administration of Justice Act, 1982, has made significant changes in the relevant law and practice. The text of the relevant provisions of this Act is incorporated in Appendix C and their effect is considered in the body of the book. One reviewer kindly said of the first edition that it would 'become a useful vade-mecum for practitioners'. If this edition fulfils his prophesy, we shall be content.

D A McI K
September 1983

Contents

1
Pre-Trial Considerations

by Alan Hughes, *Solicitor*

Contents

. . . .

1 Establishing liability

101 The emphasis of this work is on quantum but even the biggest case will fail at trial if the plaintiff cannot establish the defendant's liability. In considering pre-litigation enquiries, therefore, a few points about liability and contributory negligence should be remembered.

(*a*) *Oral evidence*

102 The first point is of general importance to both liability and quantum: namely, that the basic rule relating to evidence, contained in RSC Order 38, rule 1 (see Appendix D), provides that questions of fact should be proved at the hearing of any action begun by writ by the examination of witnesses orally in open court. Thus, the best way of proving anything that the other side will not agree to is to be prepared to call the witness to give evidence about it at trial. Remember that a subpoena, once issued is valid only for twelve weeks and must be served not less than four days before the trial unless the court fixes a shorter period. More than one witness can be named in a subpoena ad test but not in a subpoena duces tecum. Under section 36 of the Supreme Court Act 1981 a subpoena can be issued for service on a witness anywhere in the UK.

(*b*) *Hearsay*

103 However, Order 38 is expressed to be subject to the Civil Evidence Act 1968 (see Appendix C) under which hearsay evidence in documents can be put in at trial if a party cannot call the witness. This and the Civil Evidence Act 1972 (see Appendix D) allow the court to admit hearsay evidence of fact and opinion from both lay and expert witnesses. The power is wide enough on the one hand to allow the statement of an eye-witness to an accident to express an opinion (eg, that one of the drivers was going too fast) and on the other hand to allow a party to put in a medical report from a doctor who has died or who cannot be called for any other reason. It would obviously include statements relevant to quantum, such as statements from deceased employers about earnings. Rules 21 to 27 of Order 38 deal with the procedure for putting in, objecting to and getting directions about hearsay statements. There are five specific reasons for not calling a witness given in rule 25—namely, that the witness is dead or beyond the seas or unfit by reason of bodily or mental condition to attend as a witness or that, despite the exercise of reasonable diligence, it

has not been possible to identify or find him or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement. If the party serving a rule 21 notice intends to rely on one of those for not calling the witness he must say so. The cases of *Rasool* v *West Midlands Passenger Transport Executive* [1974] 3 All ER 638 and *Piermay Shipping Co SA* v *Chester* [1978] 1 WLR 411 make it clear that these five reasons are disjunctive so that the party serving the rule 21 notice can rely on any one of them. Under rule 29 hearsay statements can be admitted at trial, even though the rules have not been complied with because there has been no rule 21 notice. The criterion is fairness, however, and if a party has deliberately concealed a statement until the trial in order to secure an advantage, as happened in *Ford* v *Lewis* [1971] 1 WLR 623, his breach of the rules will not be excused and the statement will be excluded. In *Cable* v *Dallaturca* (1977) 121 SJ 795, the defendant who deliberately withheld an expert's report was given leave to call him at trial but was deprived of half the costs of the hearing. The time for serving a hearsay notice set by Order 38, rule 21 is twenty-one days from setting down. While it is clear that the court can and will exercise discretion, it is obviously wise to check on the availability of witnesses before setting down.

(*c*) *Plans and photographs*

104 Order 38 also deals with plans and photographs. It is not enough just to get directions to admit them, a party who wants to put them in at the trial must give the other side the opportunity of inspecting them at least ten days before the hearing (rule 5).

(*d*) *Convictions*

105 Under section 11 of the Civil Evidence Act 1968 (see Appendix C) parties can plead convictions against one another if they are relevant to issues in the civil proceedings. Obvious examples are convictions for driving offences, for defective vehicles under the Motor Vehicles (Construction and Use) Regulations 1978 (SI 1978 No 1017) and in prosecutions by HM factory inspectors. The fact of the conviction can be proved just by putting in the certificate from the convicting court. As to the certificate generally, see section 18 of the Prevention of Crimes Act 1871. Notes of the evidence given in those proceedings may be admissible under section 2 or section 4 of the Civil Evidence Act 1968 (see Appendix C).

106 There are special rules of pleading in Order 18, rule 7A (see Appendix D) that must be observed: the party who is facing a pleaded conviction cannot simply traverse his opponent's pleading otherwise he runs the risk of having his own pleading struck out. He must either deny the fact of the conviction or admit it, and, if he wants to, allege that it was erroneous or irrelevant. If the defendant states he was wrongly convicted, he puts that fact in issue in the civil proceedings. The plaintiff must then put in the notes of evidence from the magistrates' court (or the Crown Court) with a rule 21 notice and apply for directions under rule 28 in order to force the defendant to call all the witnesses from the magistrates' court to give evidence in the civil trial. It is important to remember that the effect of pleading a conviction is to transfer the legal as well as the evidential burden onto the convicted party (*Stupple* v *Royal Insurance Co* [1971] 1 QB 50). Where the defendant alleges that his conviction is irrelevant to the issues in the civil trial, which is the usual line counsel takes, the plaintiff will have to prove its relevance. This may mean having to call some or all of the witnesses from the magistrates' court or Crown Court and he may not just be given leave to put in the notes of evidence. A defendant who pleads that he was erroneously convicted is putting up a positive case and can be asked for particulars. A defendant who admits his conviction but denies its relevance is probably also putting up a positive case and not just relying on a denial of which particulars would not normally be ordered.

In most cases the defendant will be hard put to it to give convincing particulars and the results of failure to do so, in different circumstances, are vividly illustrated in *Butcher* v *Dowlen* [1981] RTR 24.

107 If the judge is undecided on the other evidence after he has heard both sides then the conviction is conclusive, but the judge is not precluded from making a finding of contributory negligence against the plaintiff or accepting (in an appropriate case) a defence of volenti non fit injuria (*Murphy* v *Culhane* [1976] 3 All ER 533).

108 The definition of 'contributory negligence' in section 1(1) of the Law Reform (Contributory Negligence) Act 1945 refers to 'the claimant's share in the responsibility for the damage' (*not* the responsibility for the cause of the damage). This has been highlighted in two recent lines of decisions in road traffic cases where the plaintiffs' damages have been reduced, even though they in

no way caused or contributed to the accidents in which they were injured. These are the seat belt cases and the drink cases.

(*e*) *Seat belts*

109 In every case the onus lies on the defendant to prove that the plaintiff should have been wearing a seat belt and that his injuries would have been less severe if he had been. While the effect of the Motor Vehicles (Wearing of Seat Belts) Regulations 1982 has yet to be judged, it is clear that the onus will remain on the defendant to prove that the plaintiff was not wearing a seat belt. His task will be easier if the plaintiff is convicted under these regulations for failing to wear one because that conviction can be pleaded under section 11 of the Civil Evidence Act 1968, throwing the onus on to the plaintiff. The defendant will still, of course, have to prove that wearing a seat belt would have avoided or reduced the plaintiff's injuries. A good example of this was *Owens* v *Brimmell* [1977] QB 859 where the plaintiff sustained catastrophic brain injury. The court accepted that the plaintiff's injury could have been caused by a brain shake without any actual blow to the head. No reduction in damages was made for the plaintiff's failure to wear a seat belt even though he was found after the collision hanging out of the defendant's car and had suffered a severe blow to the head.

110 Whether there should be a reduction for contributory negligence and the amount of such reduction is a question of fact to be decided on the circumstances of the particular case. But the Court of Appeal laid down some rough guidelines in *Froom* v *Butcher* [1976] QB 286 when it decided that the defendant who succeeded in establishing that a plaintiff's injuries could have been avoided by wearing a seat belt would have the benefit of a 25 per cent reduction in the plaintiff's damages, even though the plaintiff was otherwise an innocent party. If the injuries would have been simply reduced by wearing a seat belt the damages may be reduced by 15 per cent. The decision in *Froom* v *Butcher* was based on 'the duty of every driver of a vehicle and every front seat passenger to take reasonable precautions for his own safety by wearing a seat belt at all times'. That it is now compulsory to do so, does not seem to increase that duty and, correspondingly, the plaintiff's share in the responsibility for the damage he suffers. However, it seems that the court will not now have to judge whether the plaintiff has taken 'reasonable precautions'. The exceptions to the

regulations are very limited and the question of whether it is medically inadvisable to wear a seat belt, considered in *Froom* v *Butcher*, for obese or pregnant plaintiffs, or in *Mackay* v *Borthwick* (1982) 5 CL 1346 where the plaintiff suffered from a hiatus hernia will probably be pre-empted by paragraph 5(d) of the regulations. This requires a certificate of exemption signed by a registered medical practitioner, to avoid conviction for not wearing a seat belt otherwise made compulsory by the regulations.

111 In *Roberts* v *Sparks* [1977] CLY 2643, where the plaintiff was thrown out of the defendant's vehicle, the court reduced his damages by 25 per cent because the injuries he suffered would clearly have been avoided by wearing a seat belt; but it added back 5 per cent for the injuries he would have suffered if he had been wearing a seat belt. This point was developed in *Traynor* v *Donovan* [1978] CLY 2612, where the court refused to make any reduction because the plaintiff's injuries would have been just as severe, but of a different nature, if she had been wearing a seat belt. The argument that the court should take account of the fact that the wearing of a seat belt would have caused other injuries of a different nature was rejected as a matter of principle in *Patience* v *Andrews* (1982) *The Times*, 22 November: it is respectfully submitted that this decision is wrong and does not give effect to the provision in section 1 of the Law Reform (Contributory Negligence) Act 1934, that damages should be reduced to such extent as the Court thinks just and equitable. It is surely not just and equitable to reduce the damages if the court is satisfied that as severe, or more severe, damage would have been caused if a seat belt had been worn. The decision in *Traynor* v *Donovan* [1978] CLY 2612 is to be preferred.

112 The common point about such cases is of course that expert evidence can be called to dispute the allegations about seat belts, and that must always be borne in mind in these cases. Sometimes the expert evidence is given by a medical witness; more often, an expert motor engineer who has studied the effect of crashes on bodies in a car would be a more appropriate witness.

(*f*) *Drink and driving cases*

113 In cases where drink is alleged to be a contributory factor, the leading case is *Owens* v *Brimmell* [1977] QB 859. There the plaintiff's damages were reduced by 20 per cent because he had been out drinking with the defendant and a lot of beer had been

consumed by both the plaintiff and the defendant. The plaintiff's share of the responsibility for the damage he had suffered in the accident arose out of the finding that either he ought to have known that the defendant's ability to drive was impaired or, more likely, that he had drunk so much himself that he was unable to tell that the defendant's ability was in fact impaired. But the latter is not an automatic finding, however high the blood-alcohol level might be, as was demonstrated by *Traynor* v *Donovan* [1978] CLY 2612. There the court accepted forensic evidence called by the plaintiff that, while a blood-alcohol level of 168 milligrammes represented an excessive intake of alcohol, it would not necessarily produce symptoms apparent to a lay person, such as the plaintiff, who had met the defendant in a pub only half an hour before the accident. No reduction was made in that case.

114 It is not yet clear how courts would treat the combined effects of, say, negligent driving and failing to wear a seat belt. It seems likely from *Gregory* v *Kelly* [1978] RTR 426 that they will simply take a global figure, and not aggregate separate percentages for each type of contributory negligence.

115 In *Gregory's* case the plaintiff, who was injured in a way that could have been avoided by wearing a seat belt, suffered a 40 per cent total reduction since he was also travelling as a passenger in a car knowing that it had defective brakes. In conclusion, one must remember that in all cases of contributory negligence the burden of proof lies on the party alleging it.

(*g*) *Latent defects*

116 Finally, on pre-litigation investigation one should bear in mind the need for experts in cases involving latent defects and inexplicable accidents. The balance might well be tipped by forensic evidence. In personal injury cases the damage caused is usually all too painfully obvious even though its cause was a negligent act or omission many years before; and time runs from the injury and not from the act or omission causing it. For instance, a workman may be injured by a chip of metal flying off a hammer which had been negligently manufactured a long time before. Time runs from the date of the injury not from the date of the negligent manufacture. Where the damage is insidious and not discovered until later, eg industrial diseases, the provisions of section 14 of the Limitation Act 1980 which define 'knowledge'

may delay the running of limitation even further, until the plaintiff knows not only that he is ill but also the likely cause. See also *Leadbitter* v *Hodge Finance Ltd* [1982] 2 All ER 167 below.

117 In latent defect cases the onus of proof is on the party setting up the defect as a defence (*Henderson* v *Henry E Jenkins & Sons and Evans* [1978] AC 282). The first obstacle is, of course, to show that the defect caused the accident. There is no point in a defendant blaming his defective brakes if he was going so fast that nothing could have stopped him, or in blaming a puncture if he was driving on a tyre that was worn down to the canvas.

118 Usually the onus is on the plaintiff to establish the defendant's fault, but the plaintiff will not necessarily fail if he cannot say exactly how an accident happened. Thus if two vehicles collide and neither driver can say what happened after (and there is no corroborative evidence), the judge cannot simply refuse to make any finding. If he cannot deduce that one or other party was to blame he cannot send them both away empty-handed but must find that both contributed (as happened in *Baker* v *Market Harborough Industrial Co-operative Society*, *Wallace* v *Richards* (Leicester) [1953] 1 WLR 1472 and *Oram* v *Wilson* [1976] CLY (unreported case 353)). Of course, that does not always happen because the judge is entitled to draw a reasonable inference from the evidence that one party was entirely to blame even though he cannot decide on the basis of the evidence *exactly* how an accident happened. This is illustrated in *Knight* v *Fellick* [1977] RTR 316 (which is worth reading). *Hinds* v *London Transport Executive* [1978] CLY 1426 is a salutary reminder that engineering evidence will only be admissible in road cases if it actually deals with issues of engineering. If, as happened in *Hinds* and happens so often in practice, the engineer's report just argues out the cause of the accident without dealing with any real engineering matters, it will be excluded at trial even though it is no longer necessary to obtain specific directions to call the engineer (see below).

2 Establishing damage

(*a*) *Medical evidence*

119 The keystone of any personal injury case, apart from the plaintiff's own evidence, is the medical evidence. This can be the keystone of the defence as well, although the defendant might be prepared to accept the plaintiff's evidence if it contains nothing