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PERSONAL INJURY LITIGATION: ASSESSMENT OF DAMAGES

ITEMISATION OF PECUNIARY LOSS
AND
THE USE OF ACTUARIAL TABLES
AS AN AID TO ASSESSMENT

All correspondence should be
addressed to:-

J. Churchill,
Law Commission,
Lacon House,
Theobald's Road, W.C.1.

Tel: 01-405-8700 Ex: 188

After 13th April 1970

Conquest House,
37/38 John Street,
Theobald's Road W.C.1

Tel. 01-242-0861

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THE LAW COMMISSIONPERSONAL INJURY LITIGATION: ASSESSMENT OF DAMAGESWorking Paper No. 27ITEMISATION OF PECUNIARY LOSSANDTHE USE OF ACTUARIAL TABLESAS AN AID TO ASSESSMENTTABLE OF CONTENTSParagraphs

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THE LAW COMMISSION

PERSONAL INJURY LITIGATION: ASSESSMENT OF DAMAGES

Working Paper No.27

ITEMISATION OF PECUNIARY LOSS

AND

THE USE OF ACTUARIAL TABLES

AS AN AID TO ASSESSMENT

GENERAL INTRODUCTION

1. Under Item VI(b) in our First Programme we are carrying out a general study of the methods and basis of assessment of damages for personal injuries and our work in this regard has reached the point when we hope to be able to publish a comprehensive working paper for general consultation in the summer of this year.
2. In our general study we have come to the provisional conclusion that the "itemisation" of pecuniary loss is a necessary starting point for any programme of reforms. The present practice whereby the court is under no absolute duty to specify the various components of the damages awarded in one lump sum should be reconsidered with a view to generalising what is already the practice of many Judges, namely to "itemise" under separate heads the amounts awarded in respect of pecuniary loss.

3. It seems to us that, having regard to some recent developments in the case law (to which reference will be made below), this reconsideration has become a matter of urgency. In fact we have been requested by the Lord Chancellor to supply him with an interim report on this limited issue so that if, in the light of consultation, it were decided that the matter called for legislation, the necessary Bill could be introduced as soon as opportunity offered. Our provisional conclusions and recommendations with regard to itemisation are set out in Section I of this paper and the relevant draft clauses appear in Appendix "A".

4. If the change we recommend with regard to itemisation were introduced it would plainly be desirable that courts and legal practitioners should have readily available to them all the aids that could be of assistance in the difficult task of assessing with an acceptable degree of precision the present value of future pecuniary losses. One form of assistance, that could be made readily and cheaply available for use as an aid or check in appropriate cases, would be a set of actuarial tables specially prepared to meet the requirements of relatively simple cases. In Section II of this paper, therefore, we make recommendations for the publication with such official commendation as may be appropriate, of a set of tables (with accompanying explanatory notes) of which examples are given at Appendix B. The publication of such tables would not, of course, involve legislation and the use to be made of

them would be left to the discretion of practitioners and judges. (1)

SECTION I - ITEMISATION OF PECUNIARY LOSS

Introductory

5. In the assessment of damages for personal injuries a convenient and meaningful distinction can be and has been drawn between pecuniary and non-pecuniary loss. Pecuniary loss is the term used to describe the loss of money in the past, in the present or in the future. Pre-trial expenses, pre-trial loss of earnings, post-trial expenses, and loss of future earnings are all included within the term. Their common feature is that the loss, whether actual or estimated, is capable of being fully compensated by payment of a sum of money. In contrast, non-pecuniary loss includes such heads of damages as "loss of amenity", pain and suffering, and loss of expectation

(1) On 21 January 1970 when this paper was ready for publication, the House of Lords gave their decision in the case of Taylor v. O'Connor. We have given careful consideration to the speeches delivered by their Lordships in that case and to their approval of the "multiplier" technique as the normal or primary method of assessing the present value of future losses. We are not, in our present Working Paper, expressing any views on the relative merits of that method of assessment as compared with the actuarial method. We are suggesting no more than that, in conjunction with the itemisation of pecuniary losses, a certain type of actuarial tables such as follow and are explained in Appendix B, can provide the courts and practitioners with a readily available aid in calculating, or checking on the calculation by other methods of, the present value of future pecuniary losses.

Taylor v. O'Connor is now reported in [1970] 2 W.L.R. 472.

of life. Their common feature is that, though perforce the law can offer only money in compensation, the loss is not really measurable in money terms.

6. A court's award of damages has to cover both types of loss. The duty of the court if liability is proved or admitted is to award a sum as compensation for the whole of the injured person's loss, after making due allowance for contributory negligence, limitation by contract and the like. As the law stands at present the damages so awarded are given in the form of a once-and-for-all lump sum.

7. As briefly indicated before, it appears to us that it would considerably help towards the proper compensation of injured persons if, in assessing the elements of pecuniary loss (as we have explained that term), the court were required to consider and assess separately each item of such loss and were also required to include in the final award the sum total of the amounts so assessed. As at present advised, we also take the view that the only practical way of effecting the proposed change is by legislation; our reasons for this provisional conclusion are briefly set out in paragraph 30 below.

The present practice

8. There is to be found in the law reports a substantial number of cases in which judges of first instance have found it

helpful to itemise their awards.⁽²⁾ Nevertheless in personal injury cases - though not it would seem in contract cases - the Court of Appeal has not, until quite recently, encouraged the itemised assessment of damages. The Court of Appeal's attitude was explained by Lord Denning M.R. in Watson v. Powles 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".⁽³⁾

This view was re-stated in similar terms by the majority of the Court in Fletcher v. Autocar & Transporters Ltd.⁽⁴⁾

9. However, the Court of Appeal has now changed its position to some extent. In Kirby v. Vauxhall Motors Ltd.⁽⁵⁾ Lord Denning M.R. after quoting the above passage from Watson v. Powles made the following observation:-

"On further consideration, I would modify this a little: in the ordinary way it is both proper and helpful for a judge to itemise the damages: and he should be encouraged to do so for two reasons. First, it shows that the judge has himself applied his mind to all proper considerations and has worked out the damages in the way it should be done. Second, it is a great help to this Court on an appeal, so that this Court in turn can themselves review the items in computing the overall figure."

(2) See for example: Wagman v. Vaux Motors Ltd., [1959] 1 W.L.R. 853. Wise v. Kaye [1962] 1 Q.B. 638
Oliver v. Ashman [1962] 2 Q.B. 210
Elstob v. Robinson [1964] 1 W.L.R. 726
Havery v. Sharman [1964] C.L.Y. No.1003/85
Janney v. Gentry [1966] C.L.Y. No.3269
Garber v. Rhodes [1966] C.L.Y. No.3284
Fletcher v. Autocar and Transporters Ltd., [1968] 2 Q.B. 322.

(3) [1968] 1 Q.B. 596 at p.604.

(4) [1968] 2 Q.B. 322 at p.336.

(5) Unreported, No. 256A (C.A.) of 7 July 1968 - and see (1969) 113 Sol. J. 736.

In the same case Edmund Davies L.J. said:-

"I respectfully agree with the Master of the Rolls 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 another case decided on the same day, Ford v. Middlesbrough Cooperative Society Ltd.,⁽⁶⁾ 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."

More recently still in Jefford v. Gee (the Times 4th 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, has made it quite clear that the requirements of that Section provide a compelling reason for the court to itemise the award. Lord Denning M.R. said in terms:-

"In order to carry out the 1969 Act, the court will in future have to itemise the damages in most personal injury cases".

10. On the further question whether the trial judge, after itemising the various heads of damage, should proceed to add them up and award the total sum of them, Lord Denning M.R. in Fletcher v. Autocar & Transporters Ltd., made the following general observation:-

"I think that the judge was wrong to take each of the items separately and then just add them up at the end. The items are not separate heads of compensation. They are only aids to arriving at a fair and reasonable compensation. That was made clear by the decision of this court in Watson v. Powles given after the judge had given his judgment.

"There is only one cause of action for personal injuries, not several causes of action for several items. The award of damages is, therefore, an award of one figure only, a composite figure, made up of several parts ... At the end all the parts must be

(6) Unreported No.259 (C.A.) of 7 July 1969 - and see (1969) 113 Sol. J. 735.

brought together to give fair compensation for the injuries.

There is, to my mind, a considerable risk of error in just adding up the items. It is the risk of over-lapping."(7)

11. In Kirby v. Vauxhall Motors Ltd., Lord Denning M.R.

adhered to the views he expressed in the dicta quoted in the foregoing paragraph and said:-

"The items having been stated, the question still remains: what is the total award to be? 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 same on appeal to this Court. After considering the individual items, we must look at them all together. It may be that one item is too small, but another may be too high. Eventually we must see whether the total compensation is fair and reasonable, remembering that it must bear comparison with other awards in like cases. We have to look at the overall figure and come to a just award."(8)

The proposed change

12. It seems to us eminently desirable that:-

- (a) The encouragement of itemisation, as expressed in the dicta cited at paragraph 9 should be hardened, as far as pecuniary loss is concerned, into a legal requirement, and
- (b) It should be made clear that the dicta cited in paragraphs 10 and 11 are not applicable to pecuniary loss.

(7) [1968] 2 Q.B. 322 at p.336 Lord Denning's observation was general in the sense that it was not specifically directed against the adding up of the component elements of pecuniary loss.

(8) For reference see footnote 5 above. It is submitted that what was said in footnote 7 about the generality of Lord Denning's observations in Fletcher's Case on the subject of "adding up" applies equally to his corresponding observation in Kirby's Case.

13. It is our provisional conclusion that the attainment of these objectives requires legislation on two points:-

(a) It should be provided 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 sustained by the plaintiff or any other person and the court makes an award which includes damages for pecuniary loss, the court should assess the pecuniary loss 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) It should further be provided that where an award includes damages in respect of pecuniary loss:-

- (i) the court should separately state the assessments made under each head and that
- (ii) the sum of the amounts so assessed should be a non-reducible part of the global award.

14. Our proposals are in no way intended to alter the principle that the plaintiff has but one cause of action for his injury and that in respect thereof he is entitled to only one award. Nor are they intended to change, save as expressly provided in the draft clause, the principles of the present law governing the assessment of the plaintiff's expenses and loss of earnings, e.g. making allowances for the incidence of taxation, collateral benefits received and expenses saved and the like.

15. As regards pre-trial expenses and pre-trial loss of earnings the proposal under paragraphs 13(a)(i) and (ii) above would merely enact the present practice whereby these two items must be pleaded as special damages⁽⁹⁾ in most cases these amounts are agreed between the parties.

16. As regards post-trial loss of earnings it is self-evident that where these can be predicted and calculated with reasonable certainty the award under this head will be for the sum so ascertained.

17. In some cases there will have been no post-trial loss of earnings though there may well have been loss of earning capacity; and there will be cases where it may be very difficult to estimate the victim's future loss of earnings even though serious and permanent or long-term loss of earning capacity may have been suffered. Nevertheless the court perforce has to make the best estimate it can. As the annexed draft clause provides, the assessed loss of earning capacity will be included under loss of earnings.

18. It is not intended that where multiple injuries were suffered, the court should be required to itemise the award separately for each injury: in the majority of cases this would be impracticable. On the other hand there is no reason why the court should ever feel inhibited from itemising its award with even greater particularity than that which is proposed under paragraph 13 above. For example there may be cases where it might be helpful to sub-divide post-trial expenses into medical and other expenses but even in such cases the question of sub-divisions should be left to the

(9) The plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly, either in his pleading or particulars. (Hayward v. Pullinger & Partners Ltd. [1950] 1 All E.R.581; Anglo-Cyprian Trade Agencies Ltd. v. Paphos Wine Industries Ltd. [1951] 1 All E.R. 873) Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of the trial must be pleaded and particularised, otherwise it cannot be recovered (Ilkiw v. Samuels [1963] 1 W.L.R.991; [1963] 2 All E.R.879, per Diplock L.J.).

court's discretion.

19. To sum up: subject to an adjustment, where appropriate, for limitation of liability by contract or for contributory negligence, a court's award of damages would consist of

- (a) the sum total of the different heads of pecuniary loss: and
- (b) fair and reasonable compensation for non-pecuniary loss.

The two sums together would constitute the global award.

Claims under the Fatal Accidents Acts

20. Apart from funeral expenses there is only one head of loss in fatal accident claims, namely the amount of the dependency. It follows that itemisation in the sense propounded in this paper does not strictly speaking arise. Nevertheless, in the preliminary consultations which we have undertaken, it has been strongly urged upon us by practitioners of great experience that it would be desirable for the court to state as explicitly as possible how the award for loss of dependency has been reached. We revert to this point in paragraphs 26-28 below.

Arguments for the proposed change

21. The public and press display a lively interest in all the aspects of personal injury litigation - not least in the way in which judges assess damages and the amount of their awards. The general argument that justice should clearly be seen to be done militates strongly for itemisation. The specific arguments in favour of the change which we propose are as follows:-

- (a) Itemisation would ensure that all the elements of pecuniary loss are properly evaluated in the assessment of damages. (10)
- (b) So far as pecuniary loss is concerned it is generally accepted that full compensation should be awarded. (11) In our view this result cannot be achieved unless all the component elements of pecuniary loss are ascertained and the sum total of them is awarded.
- (c) It is plainly desirable that there should be available to the parties as much information as is reasonably possible regarding the component elements of the damages assessed in cases which appear to be comparable with the particular case on which they seek advice. This is likely to have the desirable consequence that fair settlements will be promoted.

22. In the course of our preliminary consultations experienced practitioners have expressed the view, with which we agree, that the non-itemisation of awards can have consequences bearing unjustly on the plaintiff. It is said in particular that, where there is no itemisation, too little is sometimes

(10) See Kemp & Kemp, The Quantum of Damages: (3rd ed. 1967) Vol.I., p.xv.

(11) In Mayne & McGregor on Damages (12th ed. 1961), p.650 the basic principle is stated succinctly as follows:

"The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss that he has suffered. This is today a clear principle of law."

See also the dicta of Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 at p.39 and of Earl Jowitt in B.T.C. v. Gourley [1956] A.C.185 at p.197.

awarded for loss of future earnings; this occurs particularly in those cases where there is a large award for non-pecuniary loss. On the other hand there may well be cases where the absence of itemisation favours the plaintiff. It is plainly desirable to eliminate the possibility of such divergences.

It is equally desirable that, as far as possible, non-pecuniary losses should be assessed on uniform principles. The itemisation of pecuniary loss would help in that the compensation assessed for non-pecuniary losses would thereby become identifiable and open to more effective review by the Court of Appeal. For all these reasons we greatly welcome the encouragement that the process of itemisation has recently received from the Court of Appeal in the cases referred to in paragraph 9 above.

23. Our proposals would introduce three important, and, in our view, beneficial changes into the process of quantifying damages for personal injury:-

- (a) First, they would make general and obligatory what is already the practice of many judges and is now approved by the Court of Appeal, i.e. to assess separately the various heads of pecuniary loss.
- (b) Secondly, the process of itemisation and addition would ensure that the court always awards full compensation for the plaintiff's pecuniary loss.
- (c) Thirdly, by making the ascertainment of the plaintiff's pecuniary loss the first step in the process leading to the global award, the proposed

change would ensure that the court deals with "the risk of overlapping" (to which Lord Denning M.R. referred in the passage quoted at the end of paragraph 10 above) in the context of the plaintiff's non-pecuniary loss. It is only at this stage of the process of assessment that the problem of "overlapping" arises.

24. Our proposals are framed in the knowledge that the vast majority of personal injury cases are tried by a judge alone. In the very rare case where there is a jury we consider that it should be required to itemise the relevant sub-heads of pecuniary loss in the same way as a judge and we do not envisage any difficulties in their receiving, from the judge, the necessary direction to enable them to do so.

25. As regards non-pecuniary loss we do not propose that this too should be broken down into its component elements, unless, of course, the judge were to consider that in the instant case it would be desirable to itemise the non-pecuniary loss as well. The draft clause put forward in Appendix "A" requires awards for such losses to be "fair and reasonable" and it is our expectation that in the great majority of cases the courts will continue to make awards for non-pecuniary loss in accordance with the existing conventional scale. There will, of course, be cases where in addition to making a "conventional" award for what may be termed the plaintiff's loss of "general amenity" (e.g. the loss of a limb as such) 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 (e.g.

the plaintiff's capacity to play golf). In cases of this kind there is nothing in our proposals to prevent the court, when valuing the loss of the "special amenity" from taking into account the expenditure that the plaintiff would have had to incur in order to enjoy the special amenity concerned.

The detail of the method of assessment

26. We have considered the question whether it would be desirable and practical so to frame proposed legislation as to require the court in addition to itemising its assessment of pecuniary loss, to set out the details of the method employed in arriving at the relevant amounts. This is particularly relevant as we have remarked in paragraph 20 above, to claims under the Fatal Accidents Acts.

27. In fatal accident claims the plaintiff is at present required, by section 4 of the Fatal Accidents Act 1846, to deliver to the defendant "a full particular ... of the nature of the claim in respect of which damages are claimed", i.e. full particulars of the dependency. In the majority of cases the trial judge does in fact set out with some particularity the basis of his award for the lost dependency and we consider that this practice is to be encouraged.

28. We consider, moreover, that a similar practice should be encouraged in claims for personal injuries. At present, it is sometimes, but not generally, the practice of the court to state the multiplier it has employed in assessing a continuing loss. Again, where the award is based on actuarial calculations the judgment will sometimes, but not generally, explain the manner in which account has been

taken of the actuarial evidence. We welcome these tendencies in the practice of the courts and we believe that itemisation as a general practice would, almost of necessity, promote them. Accordingly we see no case for legislation on these points.

The possible effect of itemisation on appeals

29. During the initial period after bringing the proposed legislation into force it may well be that appeals would increase while insurance companies and trades unions "test the market": but once this period is over we see no reason why the number of appeals should not again decline. In any event, however, 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 possible increase in the number of appeals cannot be a valid argument against reform if otherwise the case for reform is made out. Moreover we do not anticipate that a generalised practice of itemisation would increase the number of appeals which are unjustifiable in the sense that, while the judge may have erred in the assessment of one particular head of damage, his final award was correct or nearly so: in our view competent legal advisers are unlikely to encourage a litigant to appeal if they consider that the appeal would at best produce a marginal change in the final award. 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.

The need for legislation

30. We have carefully considered whether there are any possible methods other than legislation by which the proposed change could be brought about. If generalised itemisation were the only purpose of the change, this could be achieved by Rule or possibly by practice direction but we have concluded that legislation is the only practicable method of implementation for the following reasons:-

- (a) As it is an essential element of our proposal that the award for pecuniary loss should be the sum total of the itemised amounts, we are to this extent contending for a change in the law of damages and such a change could only be introduced by legislation.
- (b) The most recent decisions of the Court of Appeal as cited above do not amount to a general requirement of itemisation but only to an encouragement of that practice in contrast to its previous discouragement by the same Court. Moreover the Court of Appeal has continued to stress the point that the trial judge is not bound to award the sum total of the itemised assessments.
- (c) The House of Lords could only lay down a change in the present rules by a judgment delivered on appeal in a relevant case. It is impossible to be sure that such an opportunity will arise in the near future.

A change in the rules of pleading

31. We realize that to insist on greater particularity in pleadings could lead to undesirable delay. We nonetheless take the view that, as a corollary to itemisation, it would be 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. We have reason to believe that such a change in the rules of pleading would receive strong support from the Queen's Bench Masters.

32. The desired change, so far as the High Court is concerned, could be brought about by an amendment to R.S.C. Order 18 Rule 12 (requiring a plaintiff in personal injury actions to give particulars of the pecuniary loss suffered) to the following effect:-

(a) In any action to which the rule applies, where the damages claimed consist of or include any pecuniary loss, the pleading must contain particulars of the amount of such loss and how such amount, or if such amount comprises more than one item, how the amount of each item is arrived at.

(b) For the purpose of the rule pecuniary loss includes any:-

- (i) pre-trial expenses
- (ii) pre-trial loss of earnings

- (iii) post-trial expenses
- (iv) post-trial loss of earnings
- (v) loss of dependency under the Fatal Accidents Act 1846-1959

(c) The classes of actions to which the rule applies are those mentioned in the proviso added to section 2(1) of the Limitation Act 1939 by section 2 of the Law Reform (Limitation of Actions etc.) Act 1954.

33. So far as the County Court is concerned, a similar change could, and as we suggest ought to be, brought about by so amending Order 7 of the County Court Rules 1936 that in personal injury actions the plaintiff should be required to specify in his Particulars of Claim the particulars mentioned in paragraph 32 above.

34. If there were legislation on itemisation, we would suggest that depending on the outcome of the present consultation the competent Rule Committees should examine the suggested amendments to the Rules of the Supreme Court and the County Court Rules respectively.

SECTION II - THE USE OF ACTUARIAL TABLES

35. As mentioned in paragraph 4 above we consider that in appropriate cases the use of actuarial techniques as an aid to or check on the assessment of the present value of future pecuniary losses would be helpful. The question is how to make such techniques more easily available and to this subject we now turn.

36. Actuarial evidence is clearly admissible in personal injury litigation but in only a limited number of substantial claims is the cost of calling actuaries as expert witnesses justifiable. Moreover, the tendering of actuarial evidence in the conventional way is limited not only by considerations of cost but also considerations of time and by the fact that there are only some 100 actuaries in the whole profession who are available as expert witnesses.

37. We have therefore addressed ourselves to the question whether it might be possible to devise means whereby actuarial techniques could be introduced cheaply and expeditiously into a wider range of cases, without necessarily calling actuaries as witnesses. With this aim in mind we have consulted closely with a joint Working Party of the Institute of Actuaries and the Faculty of Actuaries from whom we have received the most valuable and generous co-operation. Our discussions led to the conclusion that a practicable way of affording the courts and the legal profession the kind of assistance we had in mind would be the publication of a set of actuarial tables specially prepared for use in relatively simple cases with suitable explanatory notes for their use.

38. At Appendix B we annex the document which has resulted from the above-mentioned consultation. It consists of four specimen tables (illustrative of the 64 tables which will comprise the complete set) plus the relevant Explanatory Notes; there is also a Preface which is in effect a short summary of the Explanatory Notes in the form of a simple guide to the selection of the appropriate table. The Institute

and the Faculty have been responsible for the preparation of the tables; the Preface and the Explanatory Notes have been drafted by them in co-operation with ourselves. We understand that if, in the light of our consultation, we were to recommend the use of the annexed tables with accompanying explanatory notes as an aid to or check on the assessment of pecuniary loss, and if our recommendation were acceptable, the Stationery Office would be able to publish these materials and sell them at a reasonable price. If so, their use could be officially commended in whatever form was regarded as appropriate.

39. As will be apparent from the Explanatory Notes the usefulness of the annexed tables is, of necessity limited to certain categories of cases, but these categories are wide enough to represent a relatively large proportion of those cases where the calling of actuaries as witnesses in the conventional way would be inhibited by the considerations mentioned in paragraph 36 above. On the very rare occasions when jury trial is granted by reason of the novelty of the injury causing the non-pecuniary loss, there is no reason in principle why tables should not be a useful aid to the jury's assessment of the plaintiff's pecuniary loss. In practice, however, it seems most unlikely that tables will be used by the jury in such a case.

40. It should be stressed that the assumptions on which the tables have been prepared, are based upon the law as it now stands. 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.

41. The practical usefulness of the annexed tables would be impaired if the court could not treat them as evidence of the mathematical correctness of the calculations contained therein 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 in the sense stated above we suggest that it would be desirable to add a new rule to R.S.C. Order 38 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.

42. The relevance of the tables and of the assumptions on which they are based to any particular case will, of course, always be a matter to be decided by the court. In suggesting that the tables should be admissible as evidence without formal proof or agreement between the parties we are in no way intending to prejudge the question of relevance.

43. It may well be that, in connection with the use of the tables, the courts will in some cases wish to receive some additional assistance from an actuary; for instance in order to check whether the calculations which the court had itself made on the basis of the tables were free from any technical error. In this limited area a helpful role could possibly be played by what we might call a "Court Actuary" or "Court Actuary's Office". We are advised by the Institute and the Faculty that the giving of this type of assistance would in principle be acceptable to the actuarial profession. It occurs to us that perhaps the Government Actuary's Department might be an appropriate body to render this kind of service.

44. At this stage we do not ourselves make positive recommendations on the subject / ^{of the Court Actuary,} but we intend to commend its further examination by the Lord Chancellor's Department as a proposal which might be a useful first step toward building up in due course, as an integrated part of the machinery of the courts, an actuarial service available to the courts and legal advisers alike.

18th March 1970

LAW COMMISSION DRAFT CLAUSES

Award and
itemisation
of damages
in personal
injury
actions.

(1) This section applies to actions (whether founded in tort or contract) in which damages are claimed in respect of personal injuries sustained by the plaintiff or any other person.

(2) Where in an action to which this section applies damages are claimed in respect of any of the following matters:-

- (a) expenses incurred before judgment;
- (b) expenses incurred after judgment;
- (c) loss of earnings suffered before judgment;
- (d) loss of earnings suffered after judgment;

the court shall determine and state separately any amount awarded by way of damages in respect of each of those matters, except so far as a total amount is agreed between the parties for two or more of those matters, and in determining the amount to award in respect of any such matter the court shall not reduce it by reason only of any amount which the court is proposing to award in respect of a matter not mentioned in paragraphs (a) to (d) above.

(3) Subject to subsection (5) below the amount awarded by way of damages in an action to which this section applies in respect of any matters not mentioned in subsection (2)(a) to (d) above shall be such as the court thinks fair and reasonable for those matters.

(4) Subject as aforesaid the total amount of damages awarded in an action to which this section applies shall be the sum of the amounts, if any,

determined in accordance with subsections (2) and (3) above.

(5) The foregoing provisions of this section shall not prejudice any duty of the court under any enactment or rule of law or arising from any contract to reduce or limit the total damages otherwise recoverable.

(6) The foregoing provisions of this section shall apply to a claim before an arbitrator as they apply to an action with the substitution of references to the award and the arbitrator respectively for references to judgment and the court.

(7) In this section -

"loss of earnings" includes loss of profits or any capital sum and loss of earning capacity;

"personal injuries" includes any disease and any impairment of a person's physical or mental condition.

ACTUARIAL TABLES
FOR USE IN PERSONAL INJURY CASES

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ACTUARIAL TABLES FOR USE IN PERSONAL INJURY CASES -

[See paragraph 38 of Working Paper]

These actuarial tables have been prepared by the Institute of Actuaries and the Faculty of Actuaries as an aid to the calculation in personal injury cases of the present value of future pecuniary losses.

PREFACE - A SIMPLE GUIDE TO SELECTING THE
APPROPRIATE TABLE

Introductory

1. The reader will find in this pamphlet 64 annuity tables. They have been compiled on certain assumptions; these are explained in some detail in the Notes found at the end of the pamphlet.

With the detail of the underlying assumptions this Preface is not concerned. Its sole purpose 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.

2. The usefulness of the tables is limited to cases where the facts are relatively simple and straightforward.⁽¹⁾ In complex cases the expert assistance of an actuary may well be required.

3. The common feature of the tables is this: that each of them allows the user to read off the table the present capital value of a £100 "slice" of the net annual income lost by the

(1) The tables have been designed to deal only with cases where the plaintiff is aged 15 (i.e. has reached the minimum age of employment) or more. Thus they can give no assistance where the plaintiff is an infant under 15.

plaintiff as a result of the accident. Thus the tables provide the user with a ready means of making the necessary mathematical calculations, but they do not tell him how to assess the plaintiff's annual net loss - the process of assessment is a matter of decision-taking by the user himself in the light of the evidence and the applicable principles of the law of damages.

The arrangement of the tables

4. In all, there are 64 tables: a series of 32 for males and another series of 32 for females.

5. Each series comprises four sets of 8 tables. The purpose of including 8 tables in each set is to give the user a choice of 8 different discount-rates ranging from 3% to 10%; and the purpose of providing four sets of tables is to cater for four typical situations, viz:-

- (i) the plaintiff's loss continues, at a constant rate, throughout the plaintiff's life (printed on white sheets);
- (ii) the plaintiff's loss continues, at a constant rate, until an assumed retiring age (65 for males and 60 for females) (printed on white sheets);
- (iii) the plaintiff's loss continues throughout his/her life but is assumed to increase at a uniform compound rate of 5% per annum ⁽²⁾ (printed

(2) The tables are prepared on the basis that the increase will be at a uniform compound rate of 5% per annum. This rate is purely illustrative and has been chosen only for the sake of convenience in the sense that it is believed by those who prepared the tables to be applicable to a relatively large number of cases. For cases where the uniform compound rate of increase is more or less than 5% see paras. 15-16 of the Explanatory Notes.

on green sheets);

- (iv) the plaintiff's loss continues only until the age of 65 or 60 respectively but is assumed to increase at a uniform compound rate of 5% per annum⁽³⁾ (printed on green sheets).

6. The tables printed on green sheets can be used in several situations which may result in a uniform compound increase of the net annual loss, notably:-

- (a) the existence of a salary scale reflecting increasing seniority and promotion
- (b) increasing productivity on a national or industrial scale resulting in an increase of actual earnings
- (c) general inflation
- (d) a combination of some or all of these factors

The process of selection

7. This can be conveniently demonstrated as a step-by-step process of elimination, as follows:-

First Step:

If the plaintiff is a male person, the user will eliminate the 32 "female" tables; or vice versa. Thus after the first step, the user is left with 32 tables.

Second Step:

The user will decide on the evidence if the plaintiff's loss is likely to continue throughout life. If so, he will eliminate the 16 tables (8 white and 8 green) dealing with

(3) See footnote 2 above.

losses which continue only until the plaintiff's retiring age.

Contrariwise, if the user decides that the plaintiff's loss will continue only until retiring age, he will eliminate the 16 tables (8 white and 8 green) dealing with losses continuing throughout life.

Thus, after the second step, the user is left with 16 tables (8 white and 8 green).

Third Step:

The user will decide, as a mixed question of fact and law, if the plaintiff's annual loss is to be assumed to remain constant throughout the period selected at the second step.

If so, he will eliminate the 8 remaining green tables.

Contrariwise, if the user decides that the plaintiff ought to be compensated on the basis that his/her loss is increasing at a uniform compound rate, he will eliminate the remaining 8 white tables.

Thus, after the third step, the user will be left with either 8 white tables or 8 green tables.

Fourth Step:

At this stage, the user is concerned to decide which of the 8 different discount-rates to use and a clear distinction must be drawn between the two different situations with which he may be confronted as a result of the third step:

- (a) The user has been left with 8 white tables: i.e. he has decided that there will be no incremental increase in the plaintiff's loss. The white tables have no built-in factor to take account of any such increment, whether

attributable to inflation or any other cause. To choose the appropriate discount-rate the user will have to make the following decisions:-

(i) If the user wishes to take account of inflation (even though he is not in law required to do so) he should at this stage select a discount-rate corresponding to the average gross yield on an investment in equities, the most readily available method for the plaintiff to protect himself against inflation. At present the average gross yield is, say, 5%.

(ii) Next, the user will take into account any tax that will be payable by the plaintiff on his income from investing the lump sum award. If he finds that the plaintiff would pay very little or no tax, then the user will stand by the 5% table as the one to be finally selected. But if the user finds that the plaintiff would be more likely to pay tax at the standard rate (at present slightly over 40%), his final selection will be the 3% table, 3% being the discount-rate resulting from applying a 40% rate of income-tax to a 5% gross income yield on equities.

(b) The user has been left with 8 green tables: i.e. he has decided that there will be a uniform compound increase in the plaintiff's future loss attributable to a salary

(4) This can be readily ascertained from the F.T. - Actuaries Share Indices published daily in the Financial Times; and notably from the column headed "Dividend Yield" forming part of the so-called "All-Share Index (600 Shares)".

scale, inflation or other causes. The green tables have a built-in factor to take account of such increments, however arising. To choose the appropriate discount-rate the user will have to make the following decisions:-

(i) The user may have selected a set of green tables solely in order to take account of an increment arising from the existence of a salary scale or changes of salary on promotion. If, in such a case he also wishes to take account of inflation he should select a low discount-rate corresponding to the average gross yield on equities, say, 5%.

(ii) If, however, the user has selected the green tables to take account of inflation he should select a "high-discount" rate corresponding to the yield of undated government securities - at present, about, 9%. The reason for this choice is that inflation has already been taken into account in the tables and accordingly the plaintiff can afford to invest his compensation in securities which afford no protection against inflation but give a high yield instead.

(iii) Mutatis mutandis the procedure outlined under (a)(ii) above (selection of a discount-rate allowing for the taxation of the plaintiff's investment income) also applies in the case of the green tables.

As a result of the decisions to be taken under (a) or (b) above, the user will be left, after taking the fourth step, with one single table from which to ascertain the present

value of each £100 "slice" of the plaintiff's lost net annual income.

General contingencies

8. Except for average mortality risks, the tables themselves make no allowance for these; but the subject is discussed in paragraphs 26-28 of the Notes.

TABLE

INTEREST 3% : MALES

Value of prospective net loss of £100 per annum
ceasing at age 65

<u>Age at date of assessment</u>	<u>Value</u> £
15	2,509
16	2,484
17	2,459
18	2,434
19	2,408
20	2,381
21	2,354
22	2,326
23	2,297
24	2,267
25	2,236
26	2,204
27	2,171
28	2,136
29	2,101
30	2,065
31	2,028
32	1,990
33	1,951
34	1,910
35	1,869
36	1,826
37	1,783
38	1,738
39	1,692
40	1,645
41	1,596
42	1,547
43	1,496
44	1,444
45	1,391
46	1,337
47	1,282
48	1,225
49	1,167
50	1,108
51	1,048
52	987
53	924
54	860
55	794
56	726
57	657
58	586
59	513
60	437
61	357
62	275
63	188
64	97

TABLE

INTEREST 5% : MALES

Value of prospective net loss of £100 per annum
ceasing at age 65

<u>Age at date of assessment</u>	<u>Value</u>
	£
15	1,818
16	1,808
17	1,797
18	1,786
19	1,775
20	1,763
21	1,751
22	1,738
23	1,725
24	1,710
25	1,695
26	1,679
27	1,662
28	1,645
29	1,626
30	1,607
31	1,587
32	1,565
33	1,543
34	1,520
35	1,496
36	1,470
37	1,444
38	1,416
39	1,387
40	1,357
41	1,326
42	1,293
43	1,259
44	1,223
45	1,187
46	1,148
47	1,108
48	1,067
49	1,024
50	979
51	933
52	884
53	834
54	782
55	728
56	672
57	613
58	551
59	486
60	417
61	345
62	267
63	185
64	96

TABLE

INTEREST 3% : MALES

Value of prospective net loss of £100 per annum
ceasing at age 65 and increasing at the rate of
5% per annum compound

<u>Age at date of assessment</u>	<u>Value</u>
	£
15	7,721
16	7,479
17	7,243
18	7,013
19	6,788
20	6,568
21	6,351
22	6,139
23	5,930
24	5,724
25	5,521
26	5,323
27	5,127
28	4,935
29	4,747
30	4,563
31	4,382
32	4,205
33	4,031
34	3,860
35	3,693
36	3,529
37	3,369
38	3,211
39	3,057
40	2,906
41	2,759
42	2,614
43	2,472
44	2,334
45	2,198
46	2,066
47	1,936
48	1,810
49	1,686
50	1,565
51	1,447
52	1,332
53	1,220
54	1,109
55	1,002
56	896
57	793
58	691
59	591
60	491
61	393
62	295
63	198
64	99

TABLE

INTEREST 5% : MALES

Value of prospective net loss of £100 per annum
ceasing at age 65 and increasing at the rate of
5% per annum compound

<u>Age at date of assessment</u>	<u>Value</u>
	£
15	4,686
16	4,589
17	4,492
18	4,397
19	4,302
20	4,207
21	4,112
22	4,016
23	3,921
24	3,825
25	3,729
26	3,633
27	3,536
28	3,440
29	3,343
30	3,247
31	3,150
32	3,054
33	2,958
34	2,862
35	2,766
36	2,670
37	2,575
38	2,479
39	2,384
40	2,289
41	2,194
42	2,100
43	2,006
44	1,912
45	1,819
46	1,726
47	1,633
48	1,541
49	1,450
50	1,359
51	1,269
52	1,179
53	1,089
54	1,000
55	912
56	823
57	735
58	647
59	558
60	469
61	379
62	287
63	194
64	98

EXPLANATORY NOTES THE ASSUMPTIONS
ON WHICH THE TABLES HAVE BEEN PREPARED AND
THE METHOD OF THEIR USE

INTRODUCTORY

1. The accompanying actuarial tables have been prepared by the Institute of Actuaries and the Faculty of Actuaries and these explanatory notes for their use have been similarly prepared but in consultation with the Law Commission. The aim of the tables is to provide an aid to the assessment of compensation for pecuniary loss in personal injury cases. ⁽¹⁾ Each of the tables is prepared on certain assumptions and 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. Three examples illustrating the use of the tables are given in paragraph 30 below.

THE COMMON FEATURES OF THE TABLES

2. One common feature of all the tables is that each of the figures given is the present capital value of a sum of £100 net annual income lost after tax by the plaintiff as a result of the accident on either of two assumptions namely:-

- (a) that the loss continues for life or
- (b) that it continues until normal retiring age
(assumed to be 65 for males and 60 for females)
or death, whichever occurs first.

(1) The tables are primarily designed to assist in calculating the present value of future loss of income. They may, however, also be helpful in other situations where it is desired to calculate the present value of a series of future pecuniary losses e.g. recurrent medical expenses.

3. Another common feature of the tables is that they are based on English Life Table No.12, the latest published table of general population mortality in England and Wales. The general population mortality rates, as derived from English Life Table No.12, are applicable to the bulk of persons who are likely to be plaintiffs with claims for personal injury damages. It has been thought unnecessary and likely to lead to undesirable complications to produce tables based on special high or low-mortality rates. In any event, particular mortality rates which in theory could have been used in the preparation of the present annuity tables would have resulted in relatively small differences in the present capital value of those annuities which is the end-product of the present tables.

THE ARRANGEMENT OF THE TABLES

4. The total number of tables is 64, the distinctions being made between:-

- (a) Male and female plaintiffs
- (b) Losses continuing throughout life and losses ceasing at a given age
- (c) Losses which are constant throughout the period selected under (b) and losses increasing throughout that period at the uniform compound rate of 5% per annum
- (d) Eight rates of interest ranging from 3% to 10%, i.e. eight rates for discounting future losses, which in the legal profession are commonly described (although inaccurately from the

actuarial standpoint) as "discount rates". For convenience the expression "discount rate" is generally adopted in what follows.

5. Thus there is a set of 32 tables for males and 32 tables for females each set comprising the following:-

- (a) 8 tables for losses continuing throughout life at a constant rate
- (b) 8 tables for losses continuing throughout life but increasing at a uniform compound rate of 5% per annum
- (c) 8 tables for losses continuing only until a given age at a constant rate
- (d) 8 tables for losses continuing only until a given age but increasing at the uniform compound rate of 5% per annum.

6. The tables allowing for a loss which increases at the uniform compound rate of 5% per annum as mentioned in paragraphs 5(b) and 5(d) are printed on green sheets: those making no such allowance are printed on white sheets.

MATTERS TO BE DECIDED IN CONJUNCTION WITH THE USE OF THE TABLES

7. In order that the user may turn to the tables as an aid to the assessment of compensation for pecuniary loss, certain decisions as to law and fact (apart from the obvious fact that the plaintiff is male or female) must be reached in accordance with existing legal principles.

Duration of loss

8. It will be a matter of evidence in the instant case whether the loss will continue throughout life or only to

the age of 65 in the case of males or to 60 in the case of females - these being the retirement ages which have been assumed in the preparation of the tables.

9. The evidence in a particular case may, of course, be that the plaintiff would have retired at some age other than 60 or 65. If this is so and the instant plaintiff's retiring age does not fit the ages assumed there is no means by which an appropriately adjusted figure can readily be ascertained from the attached tables - in such a case the assistance of an actuary would be necessary.

The assessment of net loss of earnings

The incidence of tax

10. In accordance with the principle in B.T.C. v. Gourley [1956] A.C. 185 it is, as referred to in paragraph 2 above, the plaintiff's net loss after tax that has to be compensated. This net loss is to be ascertained by comparing the ^{rate of} earnings less tax before the accident with the ^{rate of} earnings less tax after the trial. (Pre-trial loss of earnings is almost invariably an agreed figure).

11. It follows that it will be necessary for the user of the tables in all cases:-

- (a) to ascertain the pre-accident ^{rate of} earnings less tax
- (b) to estimate the post-trial ^{rate of} earnings less tax

In the result the net loss for which the plaintiff will be entitled to receive compensation will be the balance of (a) over (b) above and the tables will enable the user to ascertain the present capital value of such net loss. Where the plaintiff has suffered a total loss of earnings or earning capacity, (b) above will be nil.

Constant or increasing earnings

12. There enters into the estimate of future net earnings the question whether, in the instant case, the future income is likely to remain constant or whether it must be deemed to increase. (2)

13. The sets of tables under paragraphs 5(b) and 5(d) above (which are printed on green sheets) are provided for their potential use in cases where the user may find that the loss of income will not remain constant and where he may wish to be aided in assessing as precisely as is possible the impact on the total award of increases in the annual loss of net income.

In many cases that arise in practice the increases in the income loss will not follow a simple uniform pattern. Changes may occur, for example, at intervals of longer than a year or occur at different rates. For such cases the tables make no provision. Their usefulness is limited to cases where the increase in annual net loss is uniform throughout the period or the user of the tables decides so to treat it, as a practical approximation.

14. The tables printed on green sheets are capable of being used in several situations which may result in an increase of the net annual loss and accordingly the user can employ them in order to give effect to a variety of factors, notably:-

- (a) the existence of a salary scale in the pre-accident employment of the instant plaintiff

(2) In cases where the future loss of net earnings is likely to decrease, no assistance in its calculation can be derived from the tables.

reflecting increasing seniority and promotion

- (b) increasing productivity on a national or industry-wide scale resulting in an increase of actual earnings in the future
- (c) general inflation in the future of wages, salaries and professional incomes
- (d) a combination of some or all of these factors.

With regard to the factors under (b) and (c) above, the legal position under the existing law is that the court is under no duty to take account of inflation or the effects of increasing productivity nor is it precluded from doing so.

15. The tables printed on green sheets have been prepared on the assumption of a 5% uniform compound increase in the net annual income. However, this particular percentage is purely illustrative and has been chosen only for the sake of convenience in the sense that it is believed to be applicable at the present time to a relatively large number of cases. It should also be noted that no assumption has been made as to the proportion of the illustrative 5% increase which is attributable to any of the factors mentioned in paragraph 14 above.

16. In some cases the court may take the view that the increase will be less than 5% and in others that it may be more. In such cases an approximate result can be obtained by a process of interpolation between the white and green tables or by a process of extrapolation (See Examples 2 and 3 in paragraph 30 below).

The discount rate - gross and net

17. As the law stands, the court, in assessing the lump sum amount payable to the plaintiff in respect of lost future earnings, is required to assume that the lump sum will be invested so as to produce income and to take account of this income as a factor contributing to the replacement of the plaintiff's loss.

18. Where actuarial techniques are employed as an aid to the assessment, the method by which the court can give effect to this factor is by discounting for accelerated payment the total loss of net income over the relevant period.

Where actuarial techniques are not employed the usual method of giving effect to this factor has been to multiply the annual net loss not by the total number of years in respect of which the loss is to be compensated but by a reduced multiplier. In effect the multiplier has been reduced to provide, inter alia, a discount for accelerated payment.

The following tables cater exclusively for the first-mentioned method of taking account of the income to be obtained from investing the damages award - and for no other.

19. The tables have been prepared on the assumption that the court will select the appropriate discount rate on the basis of its findings on two different points namely:-

- (a) the gross annual rate at which the lump sum assumed to be invested will produce income
and
- (b) the net rate at which such income will accrue to the plaintiff after making the appropriate

deduction for any tax payable on the income derived from investing the lump sum award.

20. It is further assumed that in a case where the user has decided in his own mind not specifically to make allowance for any increase in the future loss because of inflation or increased productivity, he will turn to a table based on an interest rate which at the date of trial approximates to the average gross yield obtainable on growth-orientated equities. At the present time this is about 5%.

The underlying reasoning here is that as no allowance is being specifically made for the impact of inflation in calculating the plaintiff's net annual loss, a prudent plaintiff would be expected to choose, or be advised to choose, investments for his damages which provide some hedge against inflation.

21. Equally, where the user has decided to allow, when assessing the plaintiff's annual loss of net income for a constant annual increment representing solely a salary scale or changes of salary or wages on promotion (and not at the same time to allow for the impact of inflation) he would, according to the assumptions underlying the preparation of the tables, likewise select a table at a low discount rate; the reasoning being the same as indicated in the preceding paragraph.

22. Conversely the tables have been prepared on the further assumption that in certain cases the user of the tables will have decided in his own mind that it would be right specifically to take account of an increase in the plaintiff's

future loss of income arising from the impact of inflation and/or an assumed increase in productivity. In such cases he will, when considering the question of the plaintiff's assumed investment income select to begin with a table based on a discount rate which at the time of trial approximates to the average gross yield on Government securities. At the present time this is 9% or thereabouts.

The reasoning which underlies this assumption is that, allowance being specifically made for the effects of inflation and/or arise in productivity, it is neither necessary nor would it be fair to the defendant, to allow the plaintiff to provide himself with a second hedge against inflation by investing in growth-orientated securities producing a low yield.

23. Still according to the assumptions underlying the tables, the selection of a table at either a low or high discount rate as envisaged in paragraphs 20-22 above is not the last step in the selection of the final table from which the capital value, at the date of trial, of the plaintiff's annual net loss can be read off.

There still remains to be considered (as indicated in paragraph 19(b) above) the incidence of taxation upon the plaintiff's assumed investment income, i.e. the net rate of discount which should be used in the calculation of the present value of the loss. If the incidence of taxation on the investment income were left out of account, the amount destined to compensate the plaintiff for his annual net loss of income would be reduced by giving credit for his gross

investment income - a result which would be unrealistic, except in a case where the plaintiff is not liable to taxation at all.

The position may be summed up by saying that the lump sum for pecuniary loss should be assumed to be that capital sum which, if invested at the rate assumed by the court, will be sufficient to meet, by recourse to both capital and net investment income, the plaintiff's net annual loss over the period covered. It should be stressed that a recourse to both sources has been taken into account in the construction of the tables.

24. To determine the precise rate at which the plaintiff's notional investment income will be taxed would be an extremely complicated process; for a precise calculation would have to take into account any hypothetical changes in the plaintiff's tax position from time to time (e.g. on the termination of certain allowances), as well as assumptions as to future changes in the rate of taxation.

In the preparation of the whole set of tables it has been assumed that in the type of case which is suitable for their application the court will find it unnecessary to determine with a very high degree of precision the incidence of taxation upon the plaintiff's notional investment income, and that the court will be content to arrive on the available evidence at the approximate average rate at which the investment income should be assumed to be taxed. It is further assumed that in selecting an approximate average rate the user of the tables will address his mind to the impact of the

whole award (including any award that may be made for non-pecuniary loss) upon the plaintiff's tax position.

25. To give an illustration of how to make allowance for the taxation of the plaintiff's notional investment income; if the user were to select a 9% table (see paragraph 22 above) and came to the conclusion that the plaintiff's investment income on the global award (including, where appropriate, non-pecuniary loss and other items) would be taxed at the present standard rate, he would in the final result select a 5% table as representing the proper net interest rate; for at the present standard rate of income tax, income at the gross rate of 9% would be equivalent to a net income rate of about 5 $\frac{1}{4}$ %.

General contingencies

26. As a matter of practice the courts usually make a further deduction from the amount destined to compensate the plaintiff for his loss of future earnings. This deduction is in respect of the risks and vicissitudes common to other earners of income (including the instant plaintiff) such as sickness, accident (other than the accident giving rise to the instant plaintiff's claim), trade disputes, and other unforeseeable factors, all of which may result in a temporary loss or reduction of income. In making allowance for these contingencies where actuarial evidence has not been given the courts have either made a further reduction in the "multiplier" or they have applied a further percentage reduction to the assessment already adjusted for "accelerated payment" (i.e. for the plaintiff's assumed investment income). Except, of course, for average mortality rates, the tables make no

allowance for these general contingencies.

27. It follows that, if in any given case the user of the tables, after he has calculated the plaintiff's net annual loss and, by applying the appropriate discount, has replaced that loss by a capital value taking account of the plaintiff's assumed net investment income, still wants to make allowance for "general contingencies", he cannot find guidance as to the appropriate further reduction in the tables themselves. If the case came to trial the court would in every such case have to decide for itself what the appropriate further reduction should be. The only guidance that those by whom the tables have been prepared can give is to the effect that the further reduction for general contingencies should be within the range of 2-4% of the capital value obtained from the tables. For example, a higher percentage within the range indicated would be appropriate to a plaintiff who

- (a) either is in an occupation with a bad record of strikes or redundancy, or
- (b) while not being a person of sub-standard health or a person whose expectation of life has been reduced by the accident, has a medical history showing that even before the accident he had a more than average propensity to losses of employment through some recurrent condition, such as bouts of asthma.

Conversely a reduction near the lower end of the range indicated would be appropriate for a person of normal health enjoying conditions of stable employment.

28. Where the plaintiff's health both before and after the accident has been substandard in the sense of being lower than the average state of health which is reflected in the English Life Table No.12; and similarly, where the accident itself resulted in a diminution of the plaintiff's expectation of life, the attached tables are not, without some further guidance, suitable to serve as a basis of the court's calculations. They require to be supplemented by the advice of an actuary based on medical evidence.

SUMMARY

29. After the user of the tables has reached the decisions explained in paragraphs 7-28 above (which demonstrate, as must be stressed, that the steps in selecting the table appropriate to a particular case involve a number of interrelated decisions), the actual method of selecting the final table can be summarized as follows:-

- (a) First comes the selection of the 32 tables for male or female plaintiffs as the case may be.
- (b) From this set of 32 tables, the next choice lies between the 16 tables for losses continuing throughout life and the 16 tables for losses continuing to a given age.
- (c) In the step of selecting the table with the appropriate gross rate of discount three alternative courses are open. It can be decided to use the tables with no built-in factor for increments attributable to a salary scale inflation or other causes (the white tables) or to use the tables which have such

a factor (the green tables). If the white tables are chosen the user would, according to the assumptions underlying the tables, then select a table with a low discount rate. If the green tables are chosen solely to give effect to the existence of a salary scale or changes in earnings on promotion and not to give effect to the impact of increasing productivity or inflation, then, as explained in paragraph 20 above, a low discount rate would still be appropriate. If the green tables are chosen specifically so as to give effect to the impact of increasing productivity or inflation, then a high discount rate would be selected.

- (d) Finally, and still on the assumptions underlying the tables, whichever gross discount rate has been chosen this must be reduced to a net discount rate in order to allow for the particular tax consideration that the plaintiff may have to pay income tax on the income from the investment of his award. The table for the net rate of discount thus finally arrived at will be the table appropriate for calculating the present capital value of the instant plaintiff's future loss of income.

EXAMPLES

30. The following examples are given in order further to explain the use of the tables, no account being taken of

general contingencies. For illustrative purposes they are all based on the following assumptions:

- (a) That if it is decided to use the tables with no built-in factor for inflation and other increments (the white tables); the low interest rate selected at the present time would be 5%.
- (b) That if it is decided to use the tables which have such a factor (the green tables), then
 - (i) if the green tables are chosen as a convenient way to take account of inflation the high interest rate selected at the present time would be 9%.
 - (ii) if the green tables are chosen solely to give effect to increases in salary resulting from factors other than inflation, the low interest rate selected at the present time would be 5%.

Example 1

A farm labourer aged 43 suffers permanent annual loss of earnings of £700 gross. He would have retired at age 65. He pays negligible income tax. It is not desired to take specific account of inflation.

The appropriate table is the white table at 5% interest for a male life and for a loss continuing until age 65, i.e. Table No. . The appropriate figure from the table for each £100 per annum loss is £1,259.

Thus the present value of the plaintiff's prospective loss is 7 times £1,259, i.e. £8,813.

Example 2

A company executive aged 51 suffers a permanent annual loss of earnings of £2,000 net after deduction of tax. He would have retired at age 65. It is desired to take account of the fact that under the operation of a salary scale his earnings would have increased at the rate of $2\frac{1}{2}\%$ per annum compound, but it is not desired to take account of inflation. It is assumed that the plaintiff will suffer tax at the standard rate on the investment income from his damages award thus reducing the gross interest rate of 5% to a net interest rate of 3%.

It is necessary to derive the figure for a rate of increase of $2\frac{1}{2}\%$ per annum by interpolation between the appropriate figure for a constant loss and that for a loss increasing at 5% per annum. The appropriate tables are at 3% interest for a male life with loss continuing until age 65, and the interpolation required will be between the white table and the green table, i.e. Tables Nos. and .

The figures for each £100 loss are from the 3% white table £1,048 and from the 3% green table £1,447, so that the figure for a loss increasing at $2\frac{1}{2}\%$ per annum is that half way between these two figures, i.e. £1,248.

Thus the present value of the plaintiff's prospective loss is 20 times £1,248, i.e. £24,960.

Example 3

The facts here are as in Example 2 above but it is desired not only to allow for salary increments at the annual rate of $2\frac{1}{2}\%$ but also to take account of the probability

that, because of inflation, the plaintiff's salary would have been increased by a further 5% per annum, i.e. he would have enjoyed a total annual increment of 7½%. On this basis the gross interest rate of 9% would reduce in order to allow for income tax to a net interest rate of 5%.

It is necessary to derive the figure for a rate of increase of 7½% per annum by extrapolation from the appropriate figure for a constant loss and that for a loss increasing at 5% per annum. The appropriate tables are at 5% interest for a male life with loss continuing until age 65, and the extrapolation required will be from the white 5% table and the green 5% table, i.e. Tables Nos. and .

The figures for each £100 loss are from the 5% white table £933 and from the 5% green table £1,269, so that the figure for a loss increasing at 7½% per annum is obtained by adding to the green table figure one half of the difference between the figures from the white table and green tables. This difference is £336, so that one half of the difference is £168 and if this is added to the green table figure of £1,269 the resulting figure is £1,437.

Thus the present value of the plaintiff's prospective loss is 20 times £1,437, i.e. £28,740.