

Questioning the Social Desirability of Product Liability Claims

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ABSTRACT

Questioning the Social Desirability of Product Liability Claims

This thesis seeks to answer the primary question as to whether Product Liability Claims are socially desirable by reference to three Product Liability case studies and a survey of 132 archived Product Liability claims. These constitute a representative random sample of Product Liability cases handled by the Author's Legal Practice. This practice has provided a window through which serious failings are identified in

- (i) the strict liability based Product Liability Directive;
- (ii) tort itself as a mechanism for compensating injured persons; and
- (iii) the procedural infrastructure in which claims are made, as recently reformed in accordance with Lord Justice Jackson's recommendations.

This thesis tests Product Liability claims against the objectives of tort: deterrence; corrective justice; retribution and vindication; distributive justice and compensation. It is found that Product Liability claims fail to meet the defined standard of social desirability.

There is nothing special about products to necessitate or justify a bespoke system of liability. Product Liability claims for damages represent in microcosm the broader picture of personal injury claims as a whole. This thesis highlights the failings of a system which relies heavily on gambling upon outcomes; perpetuates a 'have a go' culture; rewards the lucky few; builds in an unacceptable element of moral hazard and tolerates and generates the costs of a high volume of claims which serve no practical or legal purpose.

It is concluded that

1. The Product Liability Directive was introduced as an emotive response to the Thalidomide tragedy but it would fail to provide a remedy in a similar disaster. Instead it treats sufferers of minor mishaps as victims and contributes to a litigation industry that inculcates in society a false and unnecessary sense of entitlement.

2. The Product Liability Directive should be repealed as a flawed and misconceived piece of legislation that fails to achieve its key goal of protecting consumers and harmonising the law.
3. Support is found in this practical research for much of what Atiyah advocated in his seminal work *The Damages Lottery*. The possibility of an all-embracing no-fault liability system should be reconsidered subject to strict controls, including thresholds, to ensure that it compensates and rehabilitates only those with genuine needs.
4. A first party insurance market would have to develop to fill the gaps.

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CHAPTER ONE – INTRODUCTION AND METHODOLOGY

INTRODUCTION

Perhaps surprisingly, no one to our knowledge has attempted to examine the question whether, or in what circumstances, product liability is socially desirable, considering its major benefits and costs.¹

A. Mitchell Polinsky and Steven Shavell (2009)

This is a PhD in Legal Practice and the subject matter is viewed from the perspective of the author's legal practice. This introductory chapter explains the research questions that this thesis addresses, the methodology applied to answer the questions and the way the answers have been organised in the subsequent chapters.

1.1 The Central Questions and their importance

Polinsky and Shavell ask, above, whether, or in what circumstances, product liability is socially desirable. This thesis explores the social desirability of UK product liability ('PL') claims. Whilst some issues are identified as peculiar to PL, in many of the matters explored, PL is merely the window through which the system for making tort based claims is viewed. Thus it deals not only with the substantive legal theory of PL but also with deficiencies of tort based claim and the practical procedural framework in which tort claims operate. The first seven chapters deal with substantive law issues arising from the choice of strict liability for defective products. The subsequent chapters consider a combination of substantive and procedural matters relating to the system by which personal injury claims (of which PL is a small subset) are made.

This research is important, relevant and topical for three reasons. First, the UK was the first EU Member State to transpose the PL Directive ('the PL Directive').² The PL Directive introduced a system of quasi-strict liability (i.e. strict liability with certain

¹ A. Mitchell Polinsky and Steven Shavell, 'The Uneasy Case for Product Liability' Discussion Paper No. 647 09/2009 Revised November 19, 2009 Harvard Law School Cambridge, MA 02138 The Harvard John M. Olin Discussion Paper Series:

< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1468562 > accessed 18 June 2015 - 'Uneasy Case'

² COUNCIL DIRECTIVE of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC) (OJ L 210, 7.8.1985, p. 29)

limited statutory defences) upon the producer, which includes the manufacturer or the importer into the EU, for damage (including death and injury) caused by a defect in his product.³ Thus, an injured party only needs to prove the existence of the defect and that it caused his injury. Taking fault out of the substantive law equation simplifies the making of claims by reducing the elements of proof and the variability of judicial perception of what amounts to negligent conduct. The advent of the The Civil Procedure Rules 1998 (CPR), in the wake of the Woolf Reforms,⁴ in turn simplified the procedural aspects of making claims and minimised the costs risks for the claimant. PL claims constitute a small proportion of the overall spread of claims for personal injury⁵ but in the last decade they have played their part in the personal injury litigation bonanza. The PL Directive having developed from US law, these claims form a central part of the debate about whether the UK is gripped by ‘compensation culture’ imported from the US.

Second, on 1 March 2013 the PL Directive reached the landmark of being in force in the UK for 25 years. Thus it might be expected that there is a considerable volume of data available from which to judge its success or failure. There is not.

Third, PL falls into the general category of personal injury for procedural purposes and is therefore subject to the reforms stemming from the *Review of Civil Litigation Costs* by Lord Jackson⁶ (‘the Jackson Report’) in the same way as motor claims and employer’s liability claims. It is therefore of topical interest to see how these reforms, which came into force on 1 April 2013, impact on PL. This inevitably illuminates the wider topic of personal injury claims as a whole.

³ Article 1 PL Directive (n. 2)

⁴ The Right Honourable the Lord Woolf, Master of the Rolls *Access to Justice Final Report*, July 1996, (The Woolf Report)

< <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm> >

⁵ According to the Compensation Recovery Unit for the year 2014/2015 out of 998,359 injury claims registered 76.3% were motor claims, 10% public liability and 10.4% employers’ liability. These figures may include some PL claims but the precise number is not recorded. see

< https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/424356/cases-registered-cru-2014-15.csv/preview > accessed 18 June 2015

⁶ See Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs, Final Report*, December 2009 (The Jackson Report) <<http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>> accessed 8 November 2011 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012

In seeking to answer the question posed by Polinsky and Shavell, in the context of English law⁷ and procedure, this thesis explores and offers reasoned answers to the following central questions:

Does PL achieve the socially beneficial goals of tort? It is first necessary to explore what these goals are by reference to academic authority. Having established the main objectives of tort, it is considered whether in practice PL attains them. In doing this, false assumptions underlying the perceived desirability of PL are highlighted.

Why is strict liability perceived to be needed? This is important because the imposition of strict liability presupposes that there must be a special need to interfere with the usual burden of proving fault: such as the protection of a vulnerable section of society.

Does PL actually compensate injury?

Article 9 of the PL Directive Art 9 provides that damage means damage caused by death or personal injuries but that ‘This Article shall be without prejudice to national provisions relating to non-material damage’. It is necessary therefore to examine, in the context of the English legal system why society awards monetary damages for injury – particularly pain suffering and loss of amenity unaccompanied by special damage? The payment of damages can be traced back to the end of the third millennium BCE.⁸ This suggests that the need for compensation and the so called ‘compensation culture’ is not solely the product of the current legal system.

These questions involve a mixture of substantive and procedural law. In this regard PL law produces an interesting paradox. As far as the substantive element is concerned, PL is treated as *sui generis* but as Stapleton observes ‘...the fact that PL can be defined as a distinct legal category does not itself establish the wisdom of

⁷ More specifically the Laws of England and Wales

⁸ Ca 2050 BC, King Ur-Nammu, who reigned during the Sumerian Third Dynasty of Ur, established and regulated an unchangeable, consistent, uniform and predictable standard of weights and measures based on ‘Shekels’ of silver, which enabled specific values to be ascribed to rights. King Hammurabi reigned from 1792 until 1750 BC during the first dynasty of Babylon. His legal code, dating from around 1750 BC, written in cuneiform on stone stele, (an example of which can be seen in the Louvre Museum, Paris) sets out a table of compensatory payments for a variety of wrongs from personal injury to nuisance.

separating it out from the general organisation of civil obligations.⁹ Procedurally, however, PL is typically treated in the same way as any other form of personal injury.

This thesis argues:

1. The perceived need for PL is based on headline cases such as the Thalidomide tragedy, with complex causation and multijurisdictional reach but these are extremely rare and could be better managed by social welfare.
2. The need for damages for pain and suffering is based on public perception of necessity. Society is guided by the legal profession which faces a conflict of interests as litigation is a source of business. The rhetoric underlying the need for compensation focuses on major cases involving serious injuries and wrecked lives.
3. The real world of personal injury consists of a welter of small and often trivial claims, benefiting the fortunate few at a cost to the many through insurance premiums and uplifts to prices to pay not only for the compensation but also for the disproportionate transactional costs.
4. The traditionally recognised benefits of tort law such as deterrence, retribution, vindication and satisfaction or correcting wrongs fail to justify PL litigation.
5. Reforms have concentrated on limiting and reallocating costs rather than questioning the benefits of claims, with the undesirable effect of causing claims to be rubberstamped.
6. This is an inefficient and undesirable distribution of rights.

1.2 Starting Point

The title of this thesis is '*Questioning the Social Desirability of Product Liability claims*'. '*Social desirability*' is not a term of art. It is borrowed from a polemical debate between Professors A. Mitchell Polinsky and Steven Shavell on the one hand and Professors John C.P. Goldberg and Benjamin C. Zipursky on the other. It is set out in the former's '*The Uneasy Case for Product Liability*'¹⁰ (the Uneasy Case), from which the quotation at the beginning of this introduction is taken, and the latter's '*The Easy*

⁹ Jane Stapleton, *Product Liability* Butterworths 1994 ISBN 0-406-03503-2, p. 3

¹⁰ Uneasy Case (n. 1) p. 3

Case for Products Liability Law: A Response to Professors Polinsky and Shavell,¹¹ (the Easy Case). The former have the last word in '*A Skeptical Attitude About PL is Justified: A Reply to Professors Goldberg and Zipursky*'¹²

In these papers Polinsky and Shavell argue that that the social case for PL is doubtful and Goldberg and Zipursky defend the benefits of PL. The Uneasy Case is that on a cost/benefit analysis 'there are strong reasons for doubting [PL's] desirability':

- In relation to high volume products, the need for PL to encourage safety is reduced considerably by market forces and regulation;
- Price signalling benefits are limited and largely if not entirely offset by price distortions arising from litigation costs and awards for non-pecuniary loss;
- PL does not substantially promote compensation because this is achieved to a significant extent by insurance;
- Indeed, it detracts from the compensation goal because it provides damages for non-pecuniary loss (which plaintiffs do not really want – otherwise they would buy insurance for such losses);
- The costs of the system are disproportionately large.

The Easy Case, in response, is that PL is beneficial to society because:

- PL is an amalgam of negligence, misrepresentation and warranty that holds manufacturers accountable to injury victims;
- It empowers and enables victims so that they are able to vindicate their rights;
- It 'instantiates notions of equality' and reinforces norms of responsibility;
- It deters [making bad products];
- It provides welfare enhancing compensation.

This debate is the starting point for the investigations underpinning this thesis. In the UK, Atiyah's book '*The Damages Lottery*'¹³ picks up the major themes, in the wider

¹¹ John C.P. Goldberg and Benjamin C. Zipursky, 'The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell' Electronic copy available at: <<http://ssrn.com/abstract=1577653>> accessed 19 June 2015 - 'Easy Case'

¹² Uneasy Case (n. 1) p. 1949

¹³ P.S. Atiyah, *The Damages Lottery* Hart Publishing 2000 ISBN 1-901362-05-1

context of personal injury litigation, from the perspective of a leading academic. Atiyah, predating two decades of procedural reforms, reaches the heterodox conclusion that 'the action for damages for personal injuries should simply be abolished, and first-party insurance should be left to the free market.'¹⁴

This thesis takes up the challenge in relation to PL claims from the perspective of a practitioner who deals on a daily basis with personal injury claims. The legal basis for PL is viewed through the prism of the experience of a small firm of solicitors with a particular specialisation in PL (the Practice),¹⁵ by reference to 3 case studies and to a wider review of 132 closed PL cases from the Practice's archives.

1.3 Comparative law elements

It is necessary to consider a number of elements of comparative law. It shall become apparent that strict liability for defective products is a creation of, and an import from, the US. This thesis draws heavily from US literature on the substantive law of PL as the US shares the UK's Common Law tradition.

Differences in approach between the US and the UK are discussed. PL in the US is wider in scope than in the UK. According to the Easy Case, in the US, 'in addition to asserting claims of product defect, the complaint may also contain counts for negligence and breach of warranty, as well as fraud, negligent misrepresentation, consumer fraud, civil RICO¹⁶, and/or medical monitoring.'¹⁷ It is not merely the differences in substantive law that are of interest and relevance. Procedural differences abound and there is an exploration into whether these differences explain some of the anomalies of UK PL law. Obvious examples of these are punitive damages, contingency fees¹⁸ and costs generally.

¹⁴ *The Damages Lottery* (n. 13) p. 189

¹⁵ See <<http://www.foxhartley.com/product.htm>> accessed 30 January 2015. The Practice was established in 2000. The author is the Senior Partner and has specialised in this area of law since qualifying as a Solicitor in 1987.

¹⁶ Racketeer Influenced and Corrupt Organizations Act 84 Stat. 922-3 the idea being that the product is so bad that it was simply designed as a mechanism for defrauding consumers of their money.

¹⁷ Easy Case (n. 11) p. 6 Medical monitoring claims are for the cost of monitoring a plaintiff's medical condition where the defendant's tort has not actually caused an injury but has put the plaintiff at risk.

¹⁸ Only relatively recently permissible in the UK under The Damages-Based Agreements Regulations 2013 SI 2013/609.

The cost of litigation (described by Lord Jackson as ‘grotesque’)¹⁹ distinguishes the English system from the US and indeed the other members of the EU. This is in the process of major reform, following the Jackson Report. This thesis will comment on the social desirability of the cost structure of litigation.

Reference is also made to other Common Law jurisdictions: Australia and New Zealand. These are of special interest, because of divergences from the UK legal system. Examples of this are the no-fault system introduced in New Zealand and thresholds for recoverability of damages introduced in Australia.

Comparisons also have to be drawn with other European jurisdictions. The UK enjoys the distinction of being one of only two Common Law jurisdictions out of the 27 Member States of the EU (the other being Ireland).²⁰ Thus the UK has become accustomed to the difficulties inherent in harmonising laws across Europe. Again, an explanation is offered for some of the anomalies of UK PL Law by reference to differences between UK law and the laws of other European Member States. A prime example of this is the disparity between the methods of calculation of damages across Europe.

1.4 Product Liability

In the UK, in common with the rest of the EU, the principal legal basis of PL is quasi strict liability for defective products under the PL Directive - referred to as PL throughout this thesis. The PL Directive is transposed into UK law by the Consumer Protection Act 1987. Some familiarity with the history of the evolution of the PL Directive will help in understanding its shortcomings, which become apparent as this thesis develops.

¹⁹ *James Pankhurst v Lee White, Motor Insurers Bureau* [2010] EWCA Civ 1445 [52].

²⁰ To be strictly accurate, according to the University of Malta website, Maltese Law is ‘a "mixed" legal system, which blends Common and Civil law elements’: see < <http://www.um.edu.mt/laws> >

As observed by the American Law Institute, the choice of strict liability often owes more to history than legal principle.²¹ Strict liability is applied to a number of scenarios with particular elements that a Plaintiff must prove to bring the rule into play.

Just as there is no single rule of strict liability in tort, but rather a range of specific strict-liability doctrines, so it is appropriate to observe that there is no single theory for strict liability in tort. While a number of rationales and policies are generally available in explaining both the coverage and the limits of strict-liability doctrines, each of the particular doctrines may balance or accommodate these rationales and policies in its own distinctive way... Moreover, each of these doctrines has its own history...²²

This theory is exemplified by PL in Europe.

1.4.1 The Strasbourg Convention holds the key to European thinking on PL

The Strasbourg Draft Convention²³ holds the key to European thinking on the subject. It was promulgated by the Council of Europe in the 1970s and the final draft open for signature in 1977 requiring three ratifications to come into force. It was only ever signed by Austria, France, Belgium and Luxembourg and was not ratified by any Member State, presumably because it was ultimately superseded by the draft EEC Directive²⁴ largely based on the modified Strasbourg Draft Convention. The Strasbourg Draft Convention introduced the following key concepts:

- Strict liability by reference to a defective product (Article 3);
- Defect defined by reference to safety (Article 2c)

²¹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 4 scope note (Proposed Final Draft No. 1, 2005). American Law Institute ISBN: 978-0-314-23194-3

<http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=61> accessed 17 June 2015

²² RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 4 (n.21)

²³ Strasbourg Draft Convention 1977, Appendix B to Law Commission Working Paper No 64; The Scottish Law Commission Memorandum No 20 *Liability for Defective Products*) Printed in England for Her Majesty's Stationery Office by Oyez Press Limited Dd 506997 K24 6/75, pp. 127-133

²⁴ EEC Draft Directive, memorandum, text and explanatory note, Appendix C to Law Commission Working Paper No 64; The Scottish Law Commission Memorandum No 20 *Liability for Defective Products* Printed in England for Her Majesty's Stationery Office by Oyez Press Limited Dd 506997 K24 6/75 pp. 153-172)

- Circumvention of horizontal and vertical privity of contract, placing liability on the producer, labeller, importer or supplier who does not identify the producer (Article 2b and 3(2))
- Longstop 10 year extinction of right of action (Article 7)
- Optional contributory negligence (Article 4)
- Optional limitation of liability - to 200,000DM per person or 30,000,000DM for “batch” liability. (ANNEX 2)

The Draft Explanatory Report²⁵ on the Strasbourg Draft Convention records the genesis of the text. The first concern was that industrial development and technological progress had led to producers’ liability acquiring an ‘international aspect’. It was noted that most Member States had no discrete PL law as such but showed a ‘tendency in judicial decisions to impose greater liability on producers...’²⁶ This translated directly into the later draft EEC Directive:

a trend towards such stricter liability has been developing in all those Member States both in the practice of the courts and in academic opinion generally²⁷

A committee of experts was set up in 1970 to exchange views on the basis of a comparative study produced by Unidroit, on the legal position in the different States relating to producers’ liability²⁸ and to propose measures with a view to ‘harmonising the substantive law of the Member States in the area of producers’ liability’²⁹. Numerous non-European countries were invited as observers (including USA and Japan) and written observations sought from some major industrial organisations including the European Association of Aerospace Manufacturers and the European Council of Federations of Chemical Industry.

Drafting took place over seven meetings spread out over 3 years to 1975. The difficulty of overcoming differences between Member States in relation to both contractual and

²⁵ Strasbourg Draft Convention, Draft Explanatory Report, (n. 23) pp. 134-152

²⁶ Draft Explanatory Report (n. 23) p. 134

²⁷ Appendix C, EEC Draft Directive, (n. 24) p. 162

²⁸ Strasbourg Draft Explanatory Report (n. 25) p. 134 [4]

²⁹ Strasbourg Draft Explanatory Report (n. 25) p. 134 [2]

non-contractual liability was dealt with by inventing a completely new overriding 'special unitary system of liability'.

As for liability generally the

the majority of the Committee agreed that the notion of "fault" - whether the burden of proof lay with the person suffering damage or with the producer - no longer constituted a satisfactory basis for the system of products liability in an era of mass-production, where technical developments, advertising and sales methods had created special risks, which the consumer could not be expected to accept.³⁰

As for the specific basis of liability, a number of mixed views are recorded as being held by the experts on the Committee:

a. that a list of potentially dangerous products could be constructed.

This solution would have the advantage of indicating clearly the reason for the existence of a system of strict liability in respect of damage caused by products, namely the "risk" inherent in them.³¹

b. the notion of 'dangerous product' was equivocal and unsatisfactory because of the difficulty of deciding at the outset what products were dangerous;

c. a list of dangerous products would be arbitrary and incomplete;

d. liability based on defect was more sound as a manufacturer would not be liable for all damage but just that arising from a defect;

e. this might be too restrictive in excluding a product that causes injury by reason of its dangerous nature.

Ultimately the solution was a compromise retaining the dangerous characteristics and the defect. The final version was to rely on 'defect' defined as 'absence of safety which a person is entitled to expect'.³² This appeared in the Strasbourg Draft Convention:

³⁰ Strasbourg Draft Explanatory Report (n. 25) p. 136 [10]

³¹ Strasbourg Draft Explanatory Report (n. 25) p. 137 [12]

³² Strasbourg Draft Explanatory Report (n. 25) p. 137 [12-15]

a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product³³

This leaves a considerable margin of uncertainty yet justifies the imposition of strict liability on the basis of a perceived developing academic and judicial trend towards stricter liability.

1.4.2 The EEC Draft PL Directive

The first draft of the PL Directive and explanatory memorandum are appended to the Law Commission consultation paper,³⁴ which explains the rationale behind the draft PL Directive to be the generalisation that modern products were perceived to be 'technically complicated and specialised' and 'therefore involve the risk of defects more than the simple hand-made products of past eras.' Types of defects anticipated include inadequate design and defective manufacture. It was also noted that with highly technical products the defectiveness may only emerge after further scientific development (the Thalidomide tragedy being cited as an example) with wide reaching consequences compared with 'previous eras'.³⁵

The European Commission was influenced by two major disasters of the time. The first was the Paris Air Disaster of 1974 in which a Turkish Airlines DC10 crashed in the Ermenonville Forest as a result of a defect in the rear cargo door latching system (resulting not so much from a product defect as from the 'incomplete application of Service Bulletin 52-37' and from 'incorrect modifications and adjustments')³⁶ causing 346 fatalities, the largest number in a single air crash at the time. The second was the Thalidomide (Contergan) tragedy of the early 1960s (in relation to which litigation is still pending). Both of these disasters were referred to in the original explanatory memorandum accompanying the Draft PL Directive.³⁷

³³ Strasbourg Draft Convention Article 2 (n. 23) p. 128

³⁴ Preliminary Draft Directive, (n. 24) p. 153

³⁵ Preliminary Draft PL Directive (n. 24) p. 154

³⁶ See Department of Trade Accidents Investigation Branch Turkish Airlines DC-10 TC-JAV Report on the accident in the Ermenonville Forest, France on 3 March 1974 (Translation of the report published by the French Secretariat of State for Transport)
<http://www.aaib.gov.uk/sites/aaib/cms_resources/8-1976%20TC-JAV.pdf> accessed 24 January 2012

³⁷ Preliminary Draft PL Directive (n. 24) pp. 153 & 154

Against this background the memorandum explains that the legal situation of an injured person varies from state to state. Initial consultations were held with Member States' representatives with a view to Community legislation designed to approximate the Member States' laws.

1.4.3 Principles underlying PL

In July 1978 the Economic and Social Committee delivered its opinion on the draft Directive.³⁸ The Committee set out the principles upon which a PL law should be based:

- Enabling effective and more rapid remedies;
- Apportioning in an optimum manner, i.e. in the least costly but most equitable way, both the financial burden of the damage caused by defective products to their users and the expenses incurred in spreading the cost of such damages;
- Eliminating, or at least reducing, the number of defective products coming on to the market, without curbing the marketing of safe products;
- Not giving rise to (or maintaining) distortions of competition between firms;
- Following developments in the field of liability for defective products in both international law and national law...

As for strict liability, it is said of the manufacturer, 'If it is impossible for him to avoid a manufacturing defect despite careful checks, it does not seem unfair that he should

³⁸ *Opinion of the Economic and Social Committee* (161st plenary session, Brussels 12 and 13 July 1978) Official Journal of the European Communities No C 114/16 7.5.79

also bear the burden of the consequences of unavoidable defects in order to protect the consumer'.³⁹

It is suggested first that a buyer's decision where to buy goods may be influenced by what protection the buyer has from financial loss:⁴⁰

When deciding from which sub-contractor to obtain semi-finished products, the manufacturer of the end product will also be guided by a consideration of the extent to which the sub-contractor is liable to him for damage. He will favour those who are exposed to the greatest liability while those who are not liable to an equivalent extent could be discriminated against. This can result in trading relationships which are economically unjustifiable insofar as they are caused by differences in the rules governing liability in individual states.⁴¹

The directive goes on to claim that liability without fault is the 'sole means of solving the problem peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production'.⁴²

It is argued below that strict liability for defective products was misconceived, inappropriate and ultimately unnecessary, with the result that it fails to satisfy the balance of social desirability.

1.5 Existing Research and the importance of the subject

Existing research on the PL Directive is not extensive. The Directive itself requires periodical reporting to the European Commission: 'Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.'⁴³

The earliest report was the first five year review of the application and implementation of the PL Directive, The Hodges Report of May 1994.⁴⁴ At that time only ten Member

³⁹ Preliminary Draft PL Directive (n. 24) p. 157

⁴⁰ Preliminary Draft PL Directive (n. 24) p. 158

⁴¹ Preliminary Draft PL Directive (n. 24) p. 159

⁴² PL Directive Recital 2 (n. 2)

⁴³ PL Directive Article 21 (n. 2)

⁴⁴ Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products. Study Contract No. Etd/93/B5-3000/MI,06, McKenna & Co, May 1994

States had implemented the PL Directive. There were only three reported cases. Hodges explained that experience was limited and likely to develop slowly. Information was gathered by way of a survey containing a mixture of purely factual questions, e.g. Has there been an increase in the number of claims resulting from the implementation of the Directive? and open questions tending to court opinions e.g. What comments do you have on the use in practice of the Directive in your or any other Member State of the Community? In which situations has it been used or useful? (p47)

The report concluded:

It is clear that there has not been a significant increase in product liability claims, with the possible exception of small claims. (p41)

The Green Paper in 1999 was the Commission's attempt at a wide ranging data capturing exercise in order to review the operation of the PL Directive over the previous 15 years leading up to its Second Report in 2000, to meet its obligations for periodic reviews set out in article 21 of the PL Directive.

It set out guidelines for discussion of the most potentially contentious issues including burden of proof; the development risks defence; financial limits; limitation and settlements.

One of the primary objectives of the Green Paper was to establish whether the application of the PL Directive has 'brought more benefits than costs.'⁴⁵ It is not clear how such the benefits were to be evaluated or quantified in a way that could be compared with the costs or how the 'costs' of the application of the Directive could be calculable. It was conceded: 'However, it is quite difficult to put an exact figure on these costs and to assess their impact on competitiveness...'⁴⁶ The Commission acknowledged 'One of the difficulties in assessing the impact of the Directive remains the lack of reliable data because of the absence of an analysis methodology to measure its effects.'⁴⁷

⁴⁵ Commission of the European Communities Green Paper *Liability for Defective Products*, Brussels, 28.07.1999 COM(1999)396 final, p. 8

⁴⁶ Green Paper (n. 45) p. 16

⁴⁷ Green Paper (n. 45) pp. 8 & 9

There is no obligation on producers to keep records of claims against them; nor are the national authorities obliged to keep track of the number of cases reported.⁴⁸

Survey methodology

In the absence of reliable hard data, those responsible for reporting on the PL Directive have turned to a survey methodology to gather information. The second report in 2001 reviewed information gathered in response to the Green Paper.⁴⁹

In reaching its conclusion the Commission said:

Many observations indicate that the Directive functions properly in practice. This is considered to be due to the fact that it has created a well-balanced and stable legal framework which takes into account the concerns of both the consumers and the producers. However, it is important to note that only little information about the application exists and statistics, if available, are not complete.⁵⁰

The Law firm Lovells was commissioned to make a study of PL systems across the EU Member States in 2001⁵¹. The study included not only the application of the Directive but also existing domestic provisions still having effect under Article 13. The objectives were put as follows: 'The Study considered the extent to which there was a need further to harmonise PL laws in the EU, or to make any amendments to the Directive.' A principal aim was to establish to what extent the potential liability of producers and

⁴⁸ Green Paper (n. 45) p. 28

⁴⁹ EU Commission Second Report, on the application of Directive 85/374 on Liability for Defective Products Brussels, 31.1.2001 COM(2000) 893 final p. 7

'The Commission received some 100 comments in response to the Green Paper emanating from four different groups:

- national and European consumer organisations;
- national industry associations as well as national and European unions representing sectors of industry concerned (in particular pharmaceuticals, cars, insurance, chemicals, agricultural products, electrical equipment);
- public administrations of Member States (Austria, Denmark, Germany, Finland, France, Netherlands, Greece, Portugal, Spain, United Kingdom) and other European countries (Iceland, Norway, Slovenia, Switzerland);
- bodies specialising in PL (e.g. Pan-European Organisation of Personal Injury Lawyers, US Defense Research Institute, Special Committee on European PL Law).'

⁵⁰ EU Commission Second Report, (n. 49) p. 8

⁵¹ Lovells, *PL In The European Union A report for the European Commission* February 2003 European Commission Study MARKT/2001/11/D

suppliers varied between Member States and by extension how opportunities for compensation differed.

The Lovells report acknowledged both the difficulty in gathering data on numbers of PL claims and amounts of damages concluding that such data 'would in itself be of limited practical value, even if it could be reliably gathered.'⁵² The study was based largely on a survey of four categories of interested participants:

- Consumers
- Producers and suppliers
- Insurers; and
- Lawyers

In response to a question about the legal bases upon which PL claims are brought Lovells stated:

Whilst a good number of participants were prepared to provide estimates in response to the question, many did not have sufficient experience of PL to do so. There was also a lack of consistency in the answers of those who did comment. Caution should be taken in interpreting the answers.⁵³

This is not surprising as it is rare to find 'PL specialists' in European jurisdictions. More typically European lawyers have a wider practice of which the occasional PL claim may form a part. Indeed, it is unusual in the UK to have a practice based largely on PL work. In the circumstances it is suggested that the responses to all the questions about PL and the incidence of claims should be treated with caution. Where questions require the participant to give an answer based on opinion, the responses are predictably partisan. For example, in relation to the burden of proof:

There remains a perception on the part of some Consumer Representatives that consumers are unfairly disadvantaged by the burden of having to prove defect and/or causation in PL claims ... Producers and Insurers, on the other hand, are concerned that any relaxation of the rules relating to the burden of proof might have the effect of encouraging "spurious claims".⁵⁴

⁵² The Lovells Report, (n. 51) p. 6

⁵³ The Lovells Report, (n. 51) p. 37

⁵⁴ The Lovells Report (n. 51) p. v

In 2002, the Rosselli Institute was appointed by the Commission to study the economic impact of the Development Risks Defence and particularly whether removal of the defence would stifle innovation.⁵⁵ There are a number of flaws in the whole concept of their investigation:

- The impact of the clause will inevitably vary enormously from industry to industry and product to product. Therein lies a fundamental issue with the Directive itself applying across the whole spectrum of manufactured products.
- Any research lacks empirical data and is therefore purely theoretical. The defence virtually never applies in practice.
- Innovation is driven by competition: the need to produce new, better, more attractive products which are cheaper to make. If, hypothetically the cost of insurance were increased materially for a particular product because of the removal of the development risks defence, then this would apply to all manufacturers of that type of product. It ought not *per se* to stifle innovation as manufacturers would still need to innovate to keep up with or ahead of the competition.

In describing its methodology, Rosselli made attempts to elicit original data through desktop research and then by questionnaires, each of which failed. The information provided in response to the first set of questionnaires was 'incomplete, partial and superficial.'⁵⁶ A subsequent simpler questionnaire and telephone interviews was said to be more effective and was deemed by it a reliable basis for its conclusions - although the response rate was not high enough to allow 'proper statistical estimation and generalisation of results'.⁵⁷

⁵⁵ Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products Study for the European Commission* Contract No. ETD/2002/B5

⁵⁶ The Rosselli Report (n. 55) p. 13

⁵⁷ The Rosselli Report (n. 55) p. 13

It is evident from Rosselli's summary of responses to its research⁵⁸ that a significant number of those asked (35.9%) expressed no opinion - suggesting that it was not considered an important issue by them. 35% opined that removing the defence would hinder innovation. However we do not know the basis for this opinion: whether it was suggested to them, thought up independently, or based on supposition or hard evidence. Similarly with regard to the opinion that it would be impossible to insure development risks (10.7%) it is not known how this conclusion was reached. It may be conjecture. 13.6% of those asked felt that society benefits from innovation and should accept the development risks.

As for the period monitored by the EU Commission Fourth Report (2006-2010) there is little information about the sources of data surveyed, beyond that they came from 'national experts and advisory groups'. The Commission states that it 'sent a questionnaire to the Member States and the members of informal advisory groups requesting information, in particular concerning the issues raised in the previous report.'

Using the same methodology as for the third report, in the Fourth Report the Commission invited the national authorities and interested parties who are members of the informal advisory groups to express their opinions on the application and effectiveness of the Directive during the reference period. The task was to assess the practical impact of the Directive and the issues raised in the previous report, the different interpretations of which by national courts could at times lead to differences in the application of the Directive from one Member State to another.⁵⁹

On the basis of such data, it concluded that in some states there has been an increase in the absolute number of PL cases and an increase in the use of the PL Directive in contrast with other causes of action. It is submitted however that the basis for this conclusion lacks scientific rigour. This is a longstanding problem in the field of PL.

The reasons for this are that:

⁵⁸ The Rosselli Report (n. 55) p. 34

⁵⁹ EU Commission Fourth Report, on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, Brussels.9.2011 COM(2011) 547 final pp. 6 & 7

- Historically there have not been any reliable systems of data capture;
- It will always be difficult to capture data on PL because the concept of a product is so wide that it overlaps with other areas of legal categorisation. For example, a vehicle collision caused by brake failure might be captured by one method as a motor claim and by another as a PL claim;
- Existing data capture systems in this jurisdiction glean very little information about claims. It is inconceivable that any 'informal advisory group' in the UK would pick up information on all PL claims rejected or settled privately by insurers;
- Using Law Reports as a basis for information is unreliable. Only a negligible proportion of cases go to court. Many of these are not reported and those that are reported are not necessarily representative of PL cases generally;
- Within the UK one of the most useful data capture tools is the CRU 1 form used by the Compensation Recovery Unit of the Department of Work and Pensions in order to recover certain sums paid to claimants by way of state benefits and NHS charges whether a case is fought or settled.⁶⁰ This has provided reliable data for statistics. However the options for describing the 'type of liability' are Employer; Public; Motor; Clinical Negligence; and Other. PL claims might fall into any of these five categories;
- There is no reliable means of capturing property damage claims due to PL.

This thesis has the benefit of being able to refer to actual data on PL cases handled by the Practice over the past fifteen years. The data sample is inevitably small and heavily biased towards one sector of products: automotive. It must therefore be acknowledged that there are limitations on the scientific value of this exercise. Nevertheless, the quality of the data should be recognised as it adds to the overall benefit of the project.

The lack of data also reflects the fact that PL is not a major area of law in the UK. This does not mean it is unimportant. On the contrary:

⁶⁰ Social Security (Recovery of Benefits) Regulations 1997 Regulation 6 - Any person receiving a claim has a statutory duty to complete this form.

a) On 25 April 2013 the Enterprise and Regulatory Reform Act 2013 achieved Royal Assent. Section 69 amended section 47 Health and Safety at Work Act 1974 with effect from 25 April 2013 to remove civil liability for breach of Health and Safety Regulations,⁶¹ some of which impose strict liability, unless specific regulations are made imposing liability. This leaves injured employees to rely on a cause of action in negligence. The arguments which led to this radical change in the substantive law of Employers' Liability,⁶² including the interaction between strict liability and the perception of a 'compensation culture', resonate within the field of PL. However, strict liability for defective products could not be removed without legislation at European level.

Note, however, that a claimant can still make a claim under the (now almost forgotten but still in force) Employers Liability (Defective Equipment) Act 1969. However, the important point about these Regulations is that they only apply to defective equipment – which essentially means products.⁶³

It is arguable that if the manufacturer supplies a defective product such as would give rise to liability under the Consumer Protection Act 1987, then this is an 'act or omission

⁶¹ Health and Safety at Work Act 1974 s 47 (2A) 'Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide...'

⁶² See Professor Ragnar E Löfstedt, *Reclaiming health and safety for all: An independent review of health and safety legislation* November 2011 Cm 8219.

< <https://www.gov.uk/government/publications/reclaiming-health-and-safety-for-all-lofstedt-report> > accessed 1 May 2013 and

Lord Young, *Common Sense Common Safety: A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*. Cabinet Office October 2010

< <https://www.gov.uk/government/publications/common-sense-common-safety-a-report-by-lord-young-of-graffham> > accessed 1 May 2013

⁶³ The Employers Liability (Defective Equipment) Act 1969 provides:

1 Extension of employer's liability for defective equipment.

(1) Where ...

(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and

(b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.

...

"fault" means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland;

which gives rise to liability in tort'. Thus the employer would be strictly liable for the defective product. This places accidents caused by products in a separate liability category from other work accidents. The relaxation of the law on employer's liability is defeated in cases that arise from defective products. This is potentially an anomaly. Professor Löfstedt,⁶⁴ in his review for the Government of the burden of health and safety legislation on business, referred specifically to the case of *Stark v The Post Office*⁶⁵ in which an employer was held strictly liable under Reg 6(1) of the Provision and Use of Work Equipment Regulations 1992 (then in force) for the injury sustained by a postman whose bicycle collapsed due to a hidden defect in the frame. Professor Löfstedt said

It is not clear that the outcomes are either reasonable or what the Government intended. In some cases these duties may be necessary and in other cases may be required to comply with a European Directive, but awarding compensation on the basis of a technical breach where there is no opportunity for the defendant to be aware of the danger, and no actions could have been taken to prevent the accident, clearly has the potential to stop employers taking a common sense approach to health and safety.⁶⁶

This was a motivation for the legislative change. However, *Stark* would probably still succeed if he pleaded the Defective Equipment Act.

b) PL is a sub-order of personal injury generally and observations on the costs of litigation and on the ability of the legal system to deliver compensation are applicable equally to other bases of liability for personal injury;

c) The mere fact that the issues may be relatively small does not mean they should be ignored any more than medical science should decline conducting research on a disease because it is rare;

d) The Practice is small – 13 fee-earners: there are many other firms of lawyers and loss adjusters handling PL cases, in addition to the customer services departments of manufacturers and distributors fielding routine complaints extending to many other types of product.

⁶⁴ Löfstedt Report (n. 62)

⁶⁵ *Stark v Post Office* [2000] P.I.Q.R. 105

⁶⁶ Löfstedt Report (n. 62) p. 92

METHODOLOGY

The methodology in this thesis is designed to introduce an original perspective on the above questions by

- Establishing a definition of *social desirability*;
- Testing three representative case studies from the Practice against this yardstick.
- Analysing a sample of 132 closed PL files handled over the past 15 years.

1.6 Defining Social Desirability

Social Desirability is intended to convey a measure of the social utility of the matter under consideration weighed in the balance against the cost. Fletcher expresses it thus:

If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover.⁶⁷

It must be recognised that this is a thesis in 'Legal Practice' rather than legal theory. In practical terms the social desirability of a law boils down to whether it is good for society in the sense that it is a fair distribution of rights taking into account the cost to society, not merely financial but in terms of other rights which are compromised. This means weighing up whether:

- PL deters accidents;
- safety and quality of products can be regulated effectively through private litigation;
- imposition of strict liability is apt to correct wrongs;
- litigation is suitable for public recognition of rights;
- private revenge is appropriate to a modern society when compared to the built in protections of a criminal legal system with its wide range of punishments;
- Defective products warrant the special protection of a bespoke system of liability;

⁶⁷ George P. Fletcher, 'Fairness and Utility in Tort Theory' Harvard Law Review Vol. 85 No. 3 (Jan 1972), 537-573, p. 542

- PL provides necessary compensation for the injured.

Nevertheless, it is important that the practice is firmly grounded in sound legal theory to avoid falling foul of Atiyah's criticism that 'English lawyers are not only more inclined to the pragmatic and somewhat hostile to the theoretical approach, but positively glory in this preference.'⁶⁸

Stapleton explains that whilst introduction of strict liability for defective products in the 1960s in the US and then in the 1980s in the UK was essentially pragmatic – to protect consumers - it is important to examine to what extent it fits into the wider theory of law in order to evaluate the law normatively and to interpret difficult cases purposively.⁶⁹

It is axiomatic that laws provide the framework of rights and duties upon which societal relationships are constructed. Laws provide the series of commands to be obeyed to enable society to establish controlling norms of behaviour and the rules which enable individuals and facilitate the 'structure of rights and duties for the conduct of life'.⁷⁰ It can reasonably be assumed as a starting point, therefore, that tort law is intended to benefit society.

There is a wealth of academic literature on the purposes of tort. The approach followed, therefore, has been first to seek to identify the aims which academic writings ascribe to the law of tort – and by extension, to the sub-order of PL. Then, the extent to which PL achieves these traditional purposes of tort is judged in the context of the case studies. The principles distilled from this initial phase of research into the key goals of tort, against which PL is measured, are set out as part of this methodology.

Clerk and Lindsell describes the functions of tort as compensation, vindication, corrective justice, distributive justice and retribution (tempered by justice, morality and

⁶⁸ P S Atiyah, 'Pragmatism and Theory in English Law' The Hamlyn lectures, Thirty-ninth Series, Pub. Stevens 1987 p. 3

⁶⁹ Jane Stapleton, *Product Liability* (n. 9) p. 90 *et seq.*

⁷⁰ H. L. A. Hart 'Positivism and the Separation of Law and Morals' Harvard Law Review, Vol. 71 (1958), 593-529 p. 604

policy).⁷¹ Atiyah, in 'Accidents Compensation and the Law', in a chapter entitled 'Functions of Compensation', describes corrective compensation, redistributive compensation, equivalent compensation, substitute and solace, risk allocation, punishment, vindication and satisfaction, deterrence and prevention and accident prevention.⁷² It is evident from these descriptions that whether compensation is treated as a means to one of the other goals of tort or as a primary goal itself, the following key concepts emerge: deterrence and consumer protection; corrective justice; retribution; vindication; compensation and distributive justice. These terms are explored in more detail in Chapter 2.

1.7 Case Studies

These are sample PL cases that have been handled by the author and are since closed and archived. They have been anonymised to preserve client confidentiality. Each case study has been placed immediately before the section of the thesis which it most directly illustrates, although later sections also refer back to earlier case studies where especially relevant. The three studies comprise:

- a claim involving the alleged failure of a hand brake in a car whilst stationary on a hill (immediately before Chapter Three on Deterrence) exemplifying the lack of deterrent value of UK claims;
- a fatal air crash in which the controls became jammed by the passenger's harness (immediately before Chapter Five on Corrective Justice). This study shows that in complicated cases – such as those involving aviation and pharmaceuticals – the outcome is unlikely to be as simple as attributing liability to the manufacturer of the defective product. There is a concatenation of events and errors. Many parties may potentially be brought in, some facing strict liability and other fault based liability. There is no logical reason why the manufacturer should be deemed to have perpetrated a wrong in need of

⁷¹ Anthony Dugdale and Michael Jones, *Clerk and Lindsell on Torts 20th Ed.* Chapter 1 'Principles of Liability in Tort' (Sweet & Maxwell; 20th Revised edition (22 Oct 2010) ISBN-13: 978-1847037961) p. 7 *et seq*

⁷² Peter Cane (ed), *Atiyah's Accidents Compensation and the Law 7th Ed.* (Cambridge University Press 2006 ISBN 978-0-521-68931-1)

corrective justice whilst fault must be proved in respect of other agents in the causal chain, such as the pilot. The PL Directive does nothing to simplify and reduce costs in practice.

- a car engine mounting failure leading to whiplash claims with psychological issues (immediately before Chapter Seven on Compensation). This case study focuses on the system of compensatory damages under the English legal system and whether claims for such damages are socially desirable.

1.8 PL Claims Survey

This is a survey of PL cases handled by the Practice that have been closed and archived. The paper files were retrieved from archives and reviewed. The sample represents approximately 10 cases per year ranging from the smallest soft tissue injuries to paraplegic and fatal cases. These cases are used throughout the thesis to illustrate points. Appendix 4 is an Excel Spreadsheet recording the data captured from the review of these files. Sheet 1, entitled 'SURVEY', contains the criteria examined. These include

- Details for identification (subsequently removed for client confidentiality);
- The date of the accident, the claim and closure;
- The allegations made;
- The outcome;
- The value of the case (assuming liability was not in issue). Where the file contained an evaluation of quantum, this was used. Where there was no valuation a rough assessment was made using the 12th Edition of the Judicial College Guidelines for the Assessment of General Damages.⁷³ The post Jackson figures have been used for consistency. These are 10% higher than the pre-Jackson figures but the difference is not material in the context of the research which is the subject of this thesis. Where there is a range of figures, the approach has been reasonably generous to the

⁷³ *Guidelines for the Assessment of General Damages in Personal Injury Cases*, OUP Oxford; 12 edition (19 Sept. 2013), ISBN-10: 019968782X, ISBN-13: 978-0199687824

claimant, assuming the higher end of the bracket. If a less generous approach had been taken, a few more cases would have fallen into the lowest value bracket, but the numbers are not material;

- Whether any particular aspect of the case had a special relevance to the subject matter of this thesis;
- Whether causation was in issue;
- Whether a 'nuisance value offer' was made, meaning an offer to dispose of the case regardless of the actual liability;
- The division between non-pecuniary damages and pecuniary damages claimed.

On sheet two of the Excel file, 'COUNT', a further spreadsheet was created converting the data into yes/no answers. A 'yes' answer is represented by a '1' and a 'no' answer is represented by a '0'. This enabled simple counts to be made. For example it could be determined easily that the number of cases worth less than £5,000 was 86 or that the number of cases in which overall costs exceeded the ultimate value of the claim (taking into account the actual outcome) was 119.

A summary of the analysis of the data together with the full methodology can be found at page 327 (immediately before Chapter 11). The raw number of cases is relatively small. It is not suggested that there is a flood of PL cases. However the volume of cases must be seen in the context of personal injury claims as a whole. A research project of the Legal Aid Board Research Unit analysing 762 injury cases identified only 8 as being PL claims.⁷⁴ Therefore the figures can be scaled up to reflect the wider cross section of personal injury claims.⁷⁵

⁷⁴ Pascoe Pleasence, Legal Aid Board Research Unit, *Report of the Case Profiling Study, Personal Injury Litigation in Practice, Research Paper 3*, (1998) ISBN 0 9529882 2 4 pp. 47-51 & pp. 59-62.

⁷⁵ It is also important to note that the one major PL group action handled by the Practice was left out of account because it consisted of almost 800 individual claims arising from a common alleged defect. The claims failed in their entirety. They were however atypical in that most PL claims involve a single claimant; Group Actions are extremely rare; and this would have completely skewed the figures and led to misleading results.

ORGANISATION OF CHAPTERS

Chapter 2 defines more clearly the goals of tort by which PL's desirability is judged. Chapter 3 considers whether PL is an effective deterrent against manufacture of dangerous products and so protects consumers. It is then asked in Chapter 4 whether this is a necessary role in light of the deterrent power of regulation and market forces. Chapter 5 tackles the issue of whether PL is required to intervene correctively in the manufacturer/consumer relationship and whether it can be said to be correcting a wrong when liability is applied strictly, irrespective of fault.

In Chapter 6 the claimant's need for satisfaction by way of vindication of rights and retribution against the wrongdoer is considered. The role of PL in this process is questioned both in terms of its ability to fulfil this function and whether society has better means of achieving this goal. It is explained in Chapter 7 why strict liability under the PL Directive was a mistaken choice for dispensing distributive justice as it was founded on confused ideology.

The thesis then turns to the remaining goals of torts that are mainly matters of procedural law. Chapter 8 examines the practical implementation of distributive justice as delivered by recent reforms. This is necessary because the desirability of PL claims cannot be judged without examining the overall system within which claims are pursued. The arguments extend beyond PL to tort based personal injury claims generally.

The most recognised aim of PL (and tort claims generally) is addressed in Chapter 9: to compensate the injured person. The chapter focuses on damages for non-pecuniary loss (which make up a considerable proportion of all personal injury damages awarded, and the vast majority of damages in smaller claims) and evaluates the perceived need for such compensation.

This exercise of establishing the jurisprudential basis for damages is contrasted with practice in Chapter 10 which demonstrates how compensation in low value⁷⁶ personal injury claims has become a 'commodity'.

Chapter 11 reaches conclusions as to the shortcomings in the social desirability of PL which has failed to deliver compensation in the major inter-jurisdictional cases and instead has become a vehicle for generating low value claims of doubtful social benefit.

⁷⁶ 'Low value' implies that such claims have *some value* – which might be taken as prejudging the fundamental question in this thesis. However, this is more or less a term of art today and so it will be used interchangeably with 'small claims'.

CHAPTER TWO - THE SOCIALLY DESIRABLE GOALS OF TORT EXPLAINED

This Chapter introduces the key goals of tort thought to be socially desirable and clarifies their definition for the present purposes. This is important because these goals are the benchmark for judging whether PL is socially desirable. The case studies will be evaluated by reference to these goals. This analysis is to be preferred to previous reviews of PL which are considered to be unreliable because of the lack of robust data available or clear criteria upon which to judge PL.

2.1 Deterrence and safety enhancement

A perceived principal benefit of PL is enhanced product safety through deterrence against producing dangerous products.

Deterrence works in two ways. The first is a direct effect. A manufacturer who produces a defective product may be liable to pay an injured person damages. Therefore the manufacturer is discouraged from making defective products and takes care. This is the theory underpinning the PL Directive:

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective.⁷⁷

As James put it

to cut down accidents ... the manufacturer is in a peculiarly strategic position to improve the safety of his products, so that the pressure of strict liability could barely be exerted at a better point ...⁷⁸

The second means of deterrence is by indirect economic effect. This theory came to prominence in the US in the 1970s. The traditional test of negligence was set out in a formula known as the 'Learned Hand Formula', so-called after the dictum of a judge of that name in *United States v Carroll Towing*, in which he explained that negligence is

⁷⁷ PL Directive Recital 4 (n. 2)

⁷⁸ Fleming James, Jr., 'General Products — Should Manufacturers Be Liable Without Negligence?' 24 TENN. L. REV. 923 (1957); (cited by Easy Case p. 47)

a function of three variables: (1) The probability of the accident occurring; (2) the gravity of the resulting injury; and (3) the burden of adequate precautions:

... if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.⁷⁹

Calabresi and Hirschoff explain that if the Learned Hand test is applied perfectly, it accomplishes the goal of minimising the sum of accident costs and the costs of accident avoidance:

By placing the costs of the accident on the injurer when and only when it was cheaper for him to avoid the accident costs by appropriate safety measures than to pay those costs. *Assuming injurers had the requisite foresight*, this would cause potential injurers to avoid all accidents worth avoiding, i.e., those where avoidance costs less than the accident, and to have only those accidents not worth avoiding.⁸⁰

According to Landes and Posner, economic efficiency is a normative foundation for tort. For them economic theory provides the complete rationale for causation:

If the basic purpose of tort law is to promote economic efficiency, a defendant's conduct will be deemed the cause of an injury when making him liable for the consequences of the injury would promote an efficient allocation of resources to safety and care; ... the injurer 'causes' the injury when he is the cheaper cost avoider...⁸¹

Fundamental to this theory is the concept that 'costs should be borne by the activity which causes them'.⁸² Thus the economic theory of tort is based on targeting the source of accidents and internalising the costs of accident avoidance. Atiyah explains how this is supposed to work as a deterrent:

The basic idea is that making people pay for the accidents they cause is not so much a deterrent to particular accidents, but is a way of persuading them to spend the appropriate levels of money on safety...⁸³

⁷⁹ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

⁸⁰ Guido Calabresi & Jon T. Hirschoff, 'Toward a Test for Strict Liability in Tort', 81 YALE L.J. 1055 (1972) p. 1057

⁸¹ William M. Landes and Richard A. Posner, 'Causation in Tort Law: An Economic Approach' *The Journal of Legal Studies* Vol. 12 No. 1 (Jan 1983) pp. 109-134.

⁸² Jane Stapleton, *Product Liability* (n. 9), p. 102 note 14, citing Calabresi 'Some thoughts on Risk Distribution and the law of Torts' (1961) 70 Yale LJ 499, 533

⁸³ P.S. Atiyah, *The Damages Lottery* (n.13) pp. 165 & 167

A simple criticism of this theory is that it fails to explain why liability falls on one of the litigants rather than on a third party who might be the cheapest cost avoider:

Economics, in other words, cannot explain the most basic feature of tort law, namely, the implicit decision to allocate losses as between respective litigants.⁸⁴

This requisite allocation is explained by Coleman in terms of the need to annul wrongful losses and gains: in other words, *corrective justice*.

2.2 Corrective Justice

The concept of corrective justice is fundamental to tort theory. It is best explained by Weinrib who contrasts two approaches to tort law. The first sees tort as a vehicle for achieving independent perceived socially desirable goals (such as, inter alia, deterrence). The second envisages tort as a normative force:

Liability reflects a normative relationship between a particular plaintiff and a particular defendant. The idea of a wrong in tort law must be understood in as giving legal expression to the requirements of fairness between the parties and of conceptual coherence within their relationship. On this view, tort law involves not the specification of independently desirable goals but the disclosure of the normative structure that, as a matter of fairness and coherence, is immanent within the relationship of plaintiff and defendant. This second approach is what Aristotle termed “corrective justice.”⁸⁵

Gardner asks whether corrective justice can properly be called a goal of tort and refers to Coleman and Weinrib thinking of tort ‘performing a constitutive as opposed to an instrumental role’. However he concludes that:

to fulfil its morally constitutive role, tort law’s norm of corrective justice *must* be evaluated as an instrument ... of improved conformity with the very moral norm that it helps to constitute.⁸⁶

The basic precept is that the law intervenes in the ‘relationship’ between the *injurer* and the *injured* and makes an adjustment to right the wrong. The adjustment is made

⁸⁴ Jules Coleman, ‘Corrective Justice and Wrongful Gain’, *The Journal of Legal Studies*, Vol. 11, No. 2 (Jun., 1982), pp. 421-440 p. 442 footnote 5

⁸⁵ Ernest Weinrib, ‘Tort Law as Corrective Justice’: http://ivr-enc.info/index.php?title=Tort_Law_as_Corrective_Justice > accessed 2 November 2011

⁸⁶ John Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice’ *Legal Research Paper Series Paper No 1/2010* January 2010 < <http://ssrn.com/abstract=1538342> > accessed 19 October 2013

on basis of wider deontological considerations than the fortuity of the particular accident or injury. As corrective justice is a legal intervention between the claimant and defendant, it will be of prime importance in the investigation of the subject of compensatory damages.

For corrective justice, the correlative structure of liability matches the structure of the injustice that liability corrects...the injustice done by the defendant and the injustice suffered by the plaintiff are not independent items. Rather, they are the active and passive poles of the same injustice...⁸⁷

Posner⁸⁸ explains Aristotle's conception of corrective justice as seeking to equalise a disruption of the relationship between the injurer and the injured. The correction is not to the wrong *per se* but to the effect of the wrong. As Aristotle put it:

... it makes no difference whether a good man has defrauded a bad man or a bad man a good one ... the law looks only to the distinctive character of the injury, and treats the parties as equal...⁸⁹

This is further illustrated by tort's 'eggshell skull rule' which suggests that the rights of the injured have primacy over the character of the wrongdoer's breach of duty. Here the damages are unforeseeably higher than would be incurred if the injurer injured an ordinary person, yet the injured person is entitled to such damages.

The importance attached to correction of wrongs is evidenced by the contrast between the perceived need for compensation for a tortious injury and the absence of need to compensate a family when the bread-winner dies of natural causes or as a result of an accident with no third party to blame. This may be explained by the absence of insult to fairness or justice in the case of a non-negligent injury or illness. Anyone might succumb to illness and so there is nothing intrinsically unjust about it. Cane describes this thus: 'by awarding compensation the law aims to restore and redress the balance of fairness or justice which the tortfeasor has upset by negligence or by creating risk of injury.'⁹⁰ Lord Bingham explains why it is of benefit to society for the law to intervene,

⁸⁷ Ernest Weinrib, 'Tort Law as Corrective Justice'(n. 85)

⁸⁸ Richard A. Posner, '*The Concept of Corrective Justice in Recent Theories of Tort Law*' *The Journal of Legal Studies* Vol. 10 No. 1 (Jan 1981) pp. 187-206.

⁸⁹ Aristotle, *The Nichomachean Ethics of Aristotle* (Peters Translation) 14th Edition, Kegan Paul, Teench, Trubnee & Co., Ltd. London Book V p. 148

⁹⁰ Peter Cane (ed), *Atiyah's Accidents, Compensation and the Law* (n. 72)

in terms of the need for justice to be available to people, so that grievances are not allowed to build up over unrectified wrongs:

Tort law is about compensating those who are wrongfully injured. But even more fundamentally...righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognising important wrongs and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be.

Per Lord Bingham in *Fairchild v Glenhaven*⁹¹(quoting McLachlin J, extra-judicially)⁹²

What Lord Bingham seems to be saying is that rights need to be vindicated. Those who are wronged must have the means to right the wrong and society must be able to see that the wrong has been righted. This cultivates trust in the system and belief that the system will be there for everyone if and when they need it.

2.3 Vindication

The rationale for vindication may be twofold and is perhaps best summarised by Lord Hewart's aphorism that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'⁹³ The doing of justice satisfies the injured person; the visibility of justice being done satisfies society.

It is easy to understand that vindication goes to the root of a tort such as defamation but perhaps more difficult to be certain that it has a role in tort generally. However, there is a recent striking example of how vindication may have a place in tort, in *Ashley v Chief Constable of Sussex*.⁹⁴ Here a police officer, PC Sherwood, shot James Ashley during a night-time raid on his flat. He was acquitted of murder on the basis of self-defence. Ashley's father and son brought a civil action for tortious assault and battery, negligence and false imprisonment. The defendant admitted negligence and false imprisonment and agreed to pay all damages flowing from the incident, but denied

⁹¹ *Fairchild v Glenhaven Funeral Services Ltd and others Fox v Spousal (Midlands) Ltd Matthews v Associated Portland Cement Manufacturers (1978) Ltd and others* [2003] 1 AC 32 p. 45

⁹² McLachlin J *Negligence Law—Proving the Connection*, in Mullany and Linden *Torts Tomorrow, A Tribute to John Fleming* LBC Information Services 1998, p. 16

⁹³ *R v Sussex Justices Ex parte McCarthy* [1924] 1 KB 256 p. 259 (Lord Hewart CJ)

⁹⁴ *Ashley v Chief Constable of Sussex* [2008] UKHL 25

liability for assault and battery on the grounds of self-defence. The House of Lords had to consider whether the assault claims should be allowed to proceed to trial. Lord Scott of Foscote said that the purposes of damages 'are not confined to a compensatory purpose but include also ... a vindicatory purpose'.⁹⁵

He explained, citing Lord Hope of Craighead in *Chester v Afshar*,⁹⁶ that 'the function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.' The Ashleys were motivated to have the trial not to obtain greater damages but to secure 'public vindication'.⁹⁷ Lord Carswell considered that vindicatory damages should only be available when there is no other remedy which will meet the case.⁹⁸ Using the civil courts to conduct public inquiries was an abuse but he did recognise vindication as a goal of tort in some limited circumstances.

Lord Neuberger also acknowledged the principle that there may be appropriate cases for a court to allow a case to proceed 'to vindicate a contention'.⁹⁹

So whilst the vindicatory nature of damages is acknowledged, it is clear that this role is relatively minor and it would be truly exceptional for the courts to allow a claim to proceed merely on the basis of vindication. From the claimant's point of view, his rights are vindicated if the wrongdoer is punished or found liable to pay compensation.

2.4 Retribution

The concept of retribution - literally payback – as a goal of tort is one of the major differences between the US and UK legal systems. In the UK the paths of retribution and compensation diverged long ago. Retribution is a matter for the criminal law in the UK. In the US, punitive damages may be available for PL claims (although not in every State) as a means of the jury expressing its outrage at the wrong.¹⁰⁰

⁹⁵ *Ashley v Chief Constable of Sussex* (n.94) Lord Scott of Foscote [22]

⁹⁶ *Chester v Afshar* [2005] 1 AC 134, [87]

⁹⁷ *Ashley v Chief Constable of Sussex* (n. 94) Lord Scott of Foscote [23]

⁹⁸ *Ashley v Chief Constable of Sussex* (n. 94) Lord Carswell [80]

⁹⁹ *Ashley v Chief Constable of Sussex* (n. 94) Lord Neuberger of Abbotsbury [108]

¹⁰⁰ See generally Helmut Koziol, 'Punitive Damages - A European Perspective', 68 La. L. Rev. (2008)

Kotler is a lone voice in arguing that punishment is *fundamental* to tort. He rejects instrumentalist theories of tort based on social utility or economic efficiency and argues:

... the development of tort doctrine as a whole can be seen as an attempt to punish conduct which violates certain core values that comprise the underlying basis of moral intuition. Punishment in this context is not a means of accomplishing some other goal - efficient cost allocation or accident reduction, for example - but a means of exacting revenge or retribution.¹⁰¹

There is perhaps wider support for retribution playing a small subsidiary role in tort. Perry suggests retribution may play a significant role in the layman's understanding of tort.¹⁰² He cites a fascinating insight from plaintiff trial lawyer Rheingold, who explains that plaintiff lawyers prefer to run a negligence case than one based on strict liability because:

It is easier to prevail by showing that the defendant did something wrong than that there is something technically defective about the product. It is easier to win (and collect substantial damages) by showing that a drug company concealed information about side effects than to show that in fact there was no warning on the labeling about the risks.¹⁰³

Perry says:

'Empirical evidence suggests that juries do not attempt to promote optimal deterrence, but to "punish" wrongdoing, with at most a signal designed to ensure that certain misconduct will not happen again.'¹⁰⁴

This emphasises a difference between the UK and the US, in that UK lawyers do not have to appeal to a Jury.

¹⁰¹ Martin A. Kotler, 'Utility, Autonomy and Motive: a Descriptive Model of the Development of Tort Doctrine' *Cincinnati Law Review*, Vol 58, 1990 1231 – 1281 p. 1232

¹⁰² Ronen Perry, 'The Role of Retributive Justice in the Common Law of Torts: A descriptive Theory', *Tennessee Law Review* Vol 73:163 177-236 p. 189

¹⁰³ Paul D. Rheingold, 'The Expanding Liability of the Product Supplier: a Primer' 2 *Hofstra L. Rev.* 521 1974 p. 531

¹⁰⁴ Ronen Perry, 'The Role of Retributive Justice' (n.102) p. 228

2.5 Distributive justice

It can be argued that whatever the specific purposes of tort these fit within an overarching scheme of distributive justice. Distributive justice is about the apportionment of rights between social groups, whether drivers and pedestrians or manufacturers and consumers. Aristotle put it this way:

But of justice as a part of virtue, and of that which is just in the corresponding sense, one kind is that which has to do with the distribution of honour, wealth, and the other things that are divided among the members of the body politic (for in these circumstances it is possible for one man's share to be unfair or fair as compared with another's) ...¹⁰⁵

Cane sees it as a principle of distributing rights and remedies but also as a burden.¹⁰⁶ In tort the right is not to be harmed and the right to corrective justice. The reciprocal burden is not to harm and to supply safe products and to repair harm done. Cane explains distributive justice as the distribution of the resource and burden of liability.¹⁰⁷

the activities of making rules and principles that define the grounds and bounds of tort liability and of choosing the rule to be applied to any particular case are matters of distribution, while doing corrective justice involves applying those rules and principles to individual cases¹⁰⁸

The legislature makes decisions of a distributive nature and the courts in their quasi-legislative role (or clarificatory role – such as defining the extent of the duty of care) dispense distributive justice. In their judicial function the courts give effect to corrective justice - ‘distributive justice redone following a disruptive intervention’.¹⁰⁹

Gardner distinguishes between tort’s role in distributing rights and duties and any ‘hubristic’ claim that it is has the ability to distribute risks of loss. ‘So tort law is not the only (and in some societies may not even be the main) institutional distributor of the risk of tortious losses, never mind losses more generally.’¹¹⁰ The point made is that

¹⁰⁵ Aristotle, *The Nichomachean Ethics of Aristotle* (n. 89) Book V pp. 143 -144

¹⁰⁶ Peter Cane, ‘Distributive Justice and Tort Law’ 2001 N.Z. L. Rev. 420 2001 p. 401

¹⁰⁷ Peter Cane, ‘Distributive Justice and Tort Law’ (n.106) p. 405

¹⁰⁸ Peter Cane, ‘Distributive Justice and Tort Law’ (n. 106) p. 416

¹⁰⁹ John Gardner, ‘What Is Tort Law For? Part 2. The Place of Distributive Justice’ University of Oxford Legal Research Paper Series Paper number 62/2013 (May 2013) Social Science Research Network electronic library at <http://ssrn.com/abstract=2269615> p. 11

¹¹⁰ John Gardner ‘What Is Tort Law For? Part 2. The Place of Distributive Justice’ (n. 109) pp. 28 & 29

there are other institutions within society that may pick up losses without the need to find a tortfeasor to blame.

However, regardless of whether a particular piece of law has distributive intentions, 'tort law has distributive effects that need to be justified if tort law is to be judged an acceptable legal and social institution.'¹¹¹

The relevant social desirability question to be drawn out of this vast area, for present purposes, is whether the distribution of rights effected by PL law is objectively fair. Harm yields an unfair distribution.¹¹² It is a fundamental principle of law that 'corrective justice involves appealing at a certain stage to the just *distribution of risk* in a society.'¹¹³ The question is 'whether the system justly distributes access to the corrective justice it dispenses.'¹¹⁴

This thesis concentrates on the distribution of rights of those injured by products. How rights are distributed in society is a matter of politics, reflecting the choices of society.¹¹⁵ Cane describes Weinrib's conception of the distinction between private and public law thus: 'A judgment that a situation is distributively just cannot be made without reference to some 'extrinsic' principle of distribution; and such a principle is 'political''.¹¹⁶

That is not to say it has no moral basis. Political targets must be grounded by probity in addition to economic prudence. The political advancement of the PL Directive undoubtedly had a strong moral basis:

¹¹¹ Peter Cane, 'Distributive Justice and Tort Law' (n. 106) pp. 404/405

¹¹² Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (74 SO. CAL. LAW REV. 193 (2000)) p. 202

¹¹³ 'The Morality of Tort Law: Questions and Answers' in Honoré, *Responsibility and Fault* (Oxford: Hart Publishing 1999), 67 p. 80

¹¹⁴ John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice' (n. 109) p. 11

¹¹⁵ John Rawls, 'Justice as Fairness: Political not Metaphysical' *Philosophy and Public Affairs*, Vol. 14, No. 3. (Summer, 1985), pp. 223-251; Ernest J Weinrib, *The Idea of Private Law* Oxford University Press 2012 ISBN 978-0-19-966479-5 p. 210

¹¹⁶ Peter Cane, 'Corrective Justice and Correlativity in Private Law The Idea of Private Law by Ernest J Weinrib Review' *Oxford Journal of Legal Studies*, Vol. 16, No. 3 (Autumn, 1996), pp. 471-488 p. 425

all consumers will be contributing through the prices that they pay for the compensation to a few unfortunate injured victims. I do not think that anyone would quarrel with that concept.¹¹⁷

Typically activities subsidised by society as a whole must benefit society as a whole. Activities whose benefits are limited in scope to individuals must be paid for privately. Examples include healthcare and education. Society is willing to pay for a basic level of care and education through taxation. It benefits the whole of society that its members are cared for in sickness and are educated. Society will pay for medical treatment of even rare diseases, though only a few may require it, because it benefits society as a whole to know that should they contract the disease, they will be protected. Avraham claims that '... few egalitarian theorists, if any, would disagree that bodily integrity falls within the core of interests that must be collectively insured, that is, inside the DJ machine.'¹¹⁸

However, if individuals want to go beyond the basic levels available to all, and have private rooms in hospitals or low teacher/pupil ratios in the classroom, they must pay privately. PL does not fit this pattern. Society meets the basic costs of injuries through the NHS and sickness benefits. However, individuals do not top up their benefits through first party insurance. Perversely, PL insurance is an example of potential victims insuring each other rather than themselves. Premiums cannot be geared to the amount the potential victim has at stake.¹¹⁹ Consumers cannot opt out.¹²⁰ Moreover, benefits and NHS charges paid by the state are recoverable by the state from the compensator.¹²¹

At this stage it will help to explain the current disposition of injured persons' rights. In essence, those rights are controlled by a combination of i) social welfare; ii) first party insurance; and iii) third party insurance in conjunction with Tort law.

¹¹⁷ Mrs Sally Oppenheim, Minister for Consumer Affairs,
< <http://hansard.millbanksystems.com/commons/1980/nov/04/european-community-product-liability>>
[1111/2] accessed 17 June 2015

¹¹⁸ Ronen Avraham 'Accident law for egalitarians' *Legal Theory* 2006, 12(3), 181-224 p. 190

¹¹⁹ P. S. Atiyah, 'Compensating the Accident Victim' *The Australian Quarterly*, Vol. 43, No. 2 (Jun., 1971), 16-24 pp. 17/18

¹²⁰ P.S. Atiyah, *The Damages Lottery* (n. 13) p. 128

¹²¹ The Social Security (Recovery of Benefits) Act 1997 and the Road Traffic (NHS Charges) Act 1999

2.5.1 Social Welfare

Welfare benefits fall under the aegis of the Department of Work and Pensions.¹²² The Department lists among its responsibilities ‘encouraging disabled people and those with ill health to work and be independent’ and as a priority ‘helping to reduce poverty and improve social justice’ and ‘enabling disabled people to fulfil their potential’.¹²³

Whilst the underlying theme is rehabilitation, the Department also pays benefits for those who cannot work or who need assistance to enable them to work. Benefits include weekly cash sums and tax exemptions. The following is a brief summary of the benefits:

BENEFIT	SUMMARY
Disability Living Allowance	(being replaced by Personal Independence Payment) Care component up to £81.30 pw Mobility component up to £56.75 pw
Carer's Allowance	£61.35 pw to help look after someone with substantial caring needs
Employment and Support Allowance	Up to £106.50 pw if illness or disability affects ability to work
Access to Work	A grant for, inter alia, adaptations to equipment; special equipment; fares to work
Attendance Allowance	Up to £81.30 pw to help with personal care due to disability.
Blind Person's Allowance	Personal tax threshold of £2,230
Carer's Credit	Credit in respect of National Insurance contributions
Coal health compensation claims	British Coal and National Coal Board employees affected by pneumoconiosis can claim compensation through the Coal Workers Pneumoconiosis Scheme (CWPS).
Disability Living Allowance (DLA) for children	Up to £81.30 pw care and £56.75 mobility
Disability premiums (Income Support)	Up to £31.00 pw
Disabled Facilities Grants	Help towards the costs of adaptations to housing
Disabled Students' Allowances	Up to £20,520 pa

¹²² The DWP is also responsible for Health and Safety.

¹²³ See DWP website < <https://www.gov.uk/government/organisations/department-for-work-pensions/about> > accessed 26 April 2014

Industrial Injuries Disablement Benefit	Up to £166 pw
Constant Attendance Allowance	Up to £129.40 for care and attention
VAT Relief	VAT exemption on certain goods and services for person with disability or long term illness.
Disabled Child Benefits	Includes childcare; education support; home adaptations; care at home; short breaks
Child Tax Credit	Up to £3,100 for a disabled child plus £1,255 if severe
Incapacity Benefit	Being replaced with Employment and Support Allowance
Income Support	Up to £72.40 pw
Independent Living Fund	Assistance to employ a carer or personal assistant or care agency to provide personal care and help with domestic duties (now closed)
Personal Independence Payment (PIP)	Replaces Disability Living Allowance (DLA) up to £81.30 pw daily living component, £56.75 mobility component
Reduced Earnings Allowance	Up to £64.64 pw where earnings reduced due to work related accident or disease
Severe Disablement Allowance	Replaced with Employment and Support Allowance (ESA)
Vaccine Damage Payment	One-off tax-free payment of £120,000 for person severely disabled as result of vaccination against diphtheria; tetanus; pertussis; poliomyelitis; measles; mumps; rubella; tuberculosis; haemophilus influenzae type B; meningitis C; pneumococcal infection; human papillomavirus; swine flu; smallpox

Table 1 Source DWP <https://www.gov.uk>

It is apparent from this brief summary of benefits that the sums might fairly be described as the ‘bare minimum’. There is no sum equivalent to general damages for pain and suffering and loss of amenity. The sums are more akin to special damage.¹²⁴ However, they reflect subsistence amounts for basic needs rather than seeking to replace the actual earnings lost through accident, in the way that damages would in litigation.

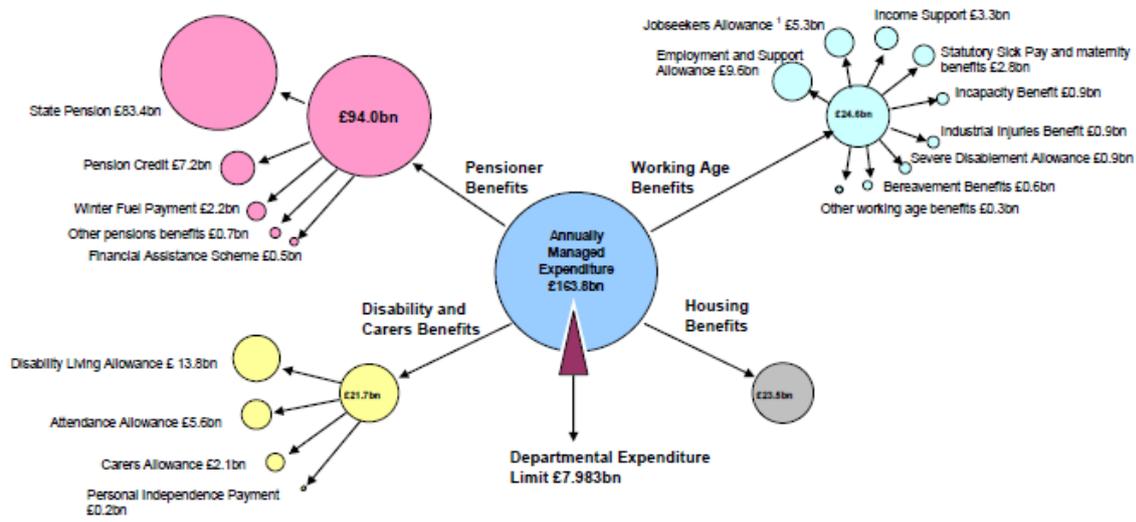
From the following chart it can be seen that that the overall annual budget for disability and carer benefits is £21.7bn and working age benefits £19.3bn (after deducting Jobseekers Allowance from the total of £24.6bn). Between February 2011 and May 2012 the average number of benefit claimants (excluding those solely on jobseekers

¹²⁴ By comparison the basic State Pension at the time of writing is £113.10 pw and Jobseeker's Allowance (unemployment benefit) up to £72.40 pw.

allowance or widows benefit) was 4,301,471¹²⁵ (out of a total population of 63.61 million 2012.)¹²⁶ On that basis the average annual benefit is a little under £9,000.

Indicative Budget Allocation

This chart sets out details on how the Department will allocate its £171.8bn 2013/14 financial settlement.



¹ Universal Credit included within Jobseekers Allowance

Figure 1 Source DWP <http://transparency.number10.gov.uk/assets/client/pdf/dwp-expenditure.pdf> accessed 21 April 2014 09:02

It will be considered in Chapter 7 whether an extension of the system to cover accident claims currently dealt with by tort, along the lines of the no-fault accident compensation system in place in New Zealand,¹²⁷ might be more desirable than the existing system.

2.5.2 First Party Insurance

First Party insurance is a term for insurance that pays the insured in respect of loss or damage to the insured property, in contrast with third party insurance which indemnifies an insured in relation to the insured's liability to a third party. A typical motor policy is a combination of first and third party insurance. The first party element pays out the value of the loss where the insured's vehicle is damaged or stolen.

¹²⁵ <<http://www.ons.gov.uk/ons/about-ons/business-transparency/freedom-of-information/what-can-i-request/previous-foi-requests/economy/gdp/benefits-data.xls>> accessed 26 April 2014

¹²⁶ <<http://data.worldbank.org/country/united-kingdom>> accessed 26 April 2014

¹²⁷ See Accident Compensation Corporation website <<http://www.acc.co.nz/>> accessed 26 April 2014

First party insurance is available to cover a number of potential losses suffered by an insured. Relevant examples include: Health Insurance; Personal Accident Insurance; Life Insurance; and Property Insurance. Critical Illness cover can also be purchased. Atiyah observes: 'Whatever the reason may be, few people insure their own earning capacity although this is by far the most valuable asset that the ordinary person has.'¹²⁸ Polinsky and Shavel make the point that people do not generally buy first party insurance for pain and suffering – because they do not want it.¹²⁹ The reality may be that if tort did not exist, a market would be generated for such insurance and it would become more sophisticated and more easily available. At present typical Personal Accident policies pay small sums and require serious incapacitating injuries, such as death, loss of one or more limbs, loss of sight and permanent total inability to attend any occupation or business.¹³⁰

First party insurance may be either indemnity insurance or contingency insurance.¹³¹ The difference may be explained as follows: indemnity insurance indemnifies the Insured up to an agreed amount in respect of a particular provable loss in the event that the loss is suffered, whereas contingency pays out an agreed sum in respect of a loss that has no specific value, in the event that a contingency occurs. By way of illustration, private medical insurance (such as BUPA) is indemnity insurance whereas life and personal accident insurance is contingency insurance. The significance here is that indemnity insurance is taken into account in a tort claim in the sense that the insurer who pays out becomes subrogated to the insured's right of recovery in tort. Therefore the injured insured can only recover his actual loss. If he has the benefit of insurance, he recovers his loss from the insurer who then has the option of recovering the same from a liable third party. However, in the case of accident insurance, the insurer does not have a right of subrogation. Therefore the injured insured may recover twice. He may collect his payment under the insurance and additionally recover damages in tort from a responsible third party.

... an accident insurance policy, the moneys from which he can deploy as he cares between the payment of his medical expenses and the

¹²⁸ P. S. Atiyah, 'Compensating the Accident Victim' (n. 119) p. 20

¹²⁹ Uneasy Case (n. 1) p. 31

¹³⁰ See for example < <http://www.theaa.com/insurance/car-insurance-motor-accident-plan.html> > accessed 8 April 2015

¹³¹ See Malcolm A. Clarke, *The Law of Insurance Contracts*, 4th Ed 2002, ISBN 1-84311-170-5 p. 111

replenishment of his lost earnings, or which indeed he may spend in any other way he chooses. Here there should be no deduction ...¹³²

2.5.3 Third Party Insurance and Tort

Recovery in tort is inexorably bound up with the incidence of insurance: whether indirectly - because liabilities are usually insured; or directly - because the courts might go so far as to consider the availability of insurance in reaching their decisions on legal duties.

... the number of comments indicating that the existence of liability insurance is a relevant consideration, made both before and after 1995 is now too large to be dismissed summarily.¹³³

If the overall policy of distribution of rights in PL is based on tort backed by insurance, it is submitted that it is an excessively permeable policy. There is no compulsory insurance in the field of PL, as there is in the fields of Motor Insurance and Employers' Liability. The relevance of this is that whilst it might be argued that there is a coherent policy of distributive justice in relation to road traffic accidents and accidents at work, no such case can be made in respect of PL. Some defendants may not have liability insurance for a variety of reasons and this could leave the injured party with nothing more than a paper judgment. PL Claimants face a greater degree of recovery risk than those injured on the road or in the workplace.

Reliance on the law of tort introduces a high degree of chance, not merely in causation¹³⁴ but also in the procedure of civil litigation. The nature of a trial is such that there is a considerable element of chance. Unless there are special reasons for going to trial it might be presumed that both parties have been advised that they have better than even prospects of winning. One side will lose. Most cases do not reach court but the costs risks engineered by CPR Part 36 render injury litigation a calculated gamble. In considering the social desirability of PL, a relevant question is whether a remedy is necessary or merely a desirable bonus or windfall. If it is necessary, then why should

¹³² Harvey McGregor, *McGregor on Damages* Eighteenth Edition 2009 ISBN13: 9781847034984 ISBN: 1847034985 35-225 p. 1429; see also Tettenborn, 'Case Comment Personal injury claims and assignment: interesting times?' P.N. 2012, 28(1), 61-66 p. 65 notes 24 to 29.

¹³³ Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75(3) MLR 301-323 p. 323

¹³⁴ Tony Honoré, *Responsibility and Luck*, L.Q.R. 1988, 104(Oct), 530-553

recovery be subject to a gamble, rather than by way of a straightforward right, enforceable procedurally with certainty?

It is submitted that if one were to design from scratch a system of distribution of rights arising from injuries, the idea of introducing an element of gambling in the procedure might be considered strange. Fairness demands certainty, yet a claimant faces an artificial obstacle to recovery. If damages for PL are necessary, then it is even more curious that such an obstacle would be put in the way of recovery.

The need for lawyers in the process is also a factor to take into account in judging desirability. Tort involves heavy transactional element. Bringing a claim usually requires a claimant to employ a lawyer. The Jackson Reforms are focused on trying to rationalise minimise and distribute the burden of the costs of that process. By comparison, if PL were simply a matter of making an insurance claim under an Accident Insurance policy, it would not be necessary to involve a lawyer to pursue the claim. Lawyers would only rarely be involved in a small minority of claims where a live dispute arose. Making a claim would be procedural and usually non-contentious. However, Lord Justice Jackson's reforms did not start with a blank canvas. He had the task of balancing the interests of all those already involved in the litigation industry: not merely a distribution of rights between claimants and defendants but also between lawyers, doctors, court staff and insurers. What is wrong, it may be asked, with these professionals making an honest living? If society considers that these transactional costs are justified in providing rights of recovery to injured claimants then, superficially, nothing is wrong. However the situation is more complicated than this:

a) People may not understand the costs involved in litigation. In the experience of the Practice, insured defendants who have not had experience of the litigation process are often horrified by the process and the costs involved;

b) Wealth maximisation must not trump morality. Posner seeks to justify a market in 'Babies and Body Parts'. He explains that, at the time of his article, there was a shortage of babies for adoption and says that for an economist, for whom wealth maximisation is the guiding normative principle, there is no immorality in the sale of babies. A regulated market would be preferable to a black market. Likewise where

there is an acute shortage of kidneys, a free market in kidneys would be 'wealth maximising and a good thing'. Posner acknowledges contradictory arguments such as the psychological effect on the babies having been bought, and the potential encouragement of eugenic breeding but dismisses them as 'thin and unconvincing'.¹³⁵

Moazid is critical of Posnerian wealth maximisation:

...the economic calculus treats human beings as mere numerical units like any other fungible commodity, and is consequently able to override morality and legal rights in the interest of efficiency...¹³⁶

It is submitted that Posner fails to consider the undesirability of a potential army of 'baby farmers' or 'kidney farmers' canvassing people with a view to persuading them to sell a kidney or a baby in the way that 'claims farmers' have been able to market their services in the name of Access to Justice. An acknowledgement that such activities may be a 'problem' and may need to be regulated has been made in the court of Appeal by Lord Phillips of Worth Matravers CJ on behalf of himself and Longmore LJ:

I accept that the activities of "ambulance-chasing" claims farmers may have an adverse effect but it seems to me that the way to deal with that problem is by the regulation of their activities rather than by taking measures affecting the substantive law.¹³⁷

Chapter 8 examines key parts of the Jackson reforms that have a major impact on the distribution of rights between claimants and defendants and reviews whether the procedures now in place represent a fair distribution of rights.

2.6 Compensation

Compensation developed as a substitute for talionic punishments.¹³⁸ The theory is that both punitive and compensatory remedies evolved from the *lex talionis*: the retaliatory laws described in Exodus. Talionis means 'of such kind'. It denotes retaliation on a

¹³⁵ Richard A. Posner, 'Utilitarianism, Economics, and Legal Theory' *The Journal of Legal Studies* Vol. 8 No. 1 (Jan 1979) pp. 103-140

¹³⁶ Ali Moazed, 'Posner in pursuit of wealth: taking rights seriously' *UCL Juris. Rev.* 1997, 4, 1-24 p. 22

¹³⁷ *Rothwell v Chemical & Insulating Co Ltd and another* [2006] I.C.R 1458 at [140]

¹³⁸ Francesco Parisi, 'The Genesis of Liability in Ancient Law' *American Law and Economics Review*, Vol. 3, No. 1, pp. 82-124, 2001

kind for kind basis (an eye for an eye; a tooth for a tooth).¹³⁹ Parisi explains that the transition from unregulated retaliation to monetary compensation was a gradual endogenous evolutionary process – from personal revenge to measured pecuniary penalties. Compensation replaced retribution.

There are two distinct academic approaches to the purpose of compensation in modern times. The first sees compensation as one of several goals of tort: deterrence; retribution; vindication and satisfaction; correcting wrongs; compensating loss. Weinrib says: ‘One approach sees tort law as forwarding independently desirable goals (such as loss spreading, compensation, economic efficiency, deterrence, and punishment)...’¹⁴⁰

Fletcher, comments:

The fashionable questions of the time are instrumentalist: What social value does the rule of liability further in this case? Does it advance a desirable goal, such as compensation, deterrence, risk-distribution, or minimization of accident costs?¹⁴¹

Honoré goes further in asserting the primacy of compensation as a goal of tort. Clerk & Lindsell borrows heavily from Honoré’s work describing the function of tort as ‘to define and give content to people’s rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed’.¹⁴² Thus compensation is seen not merely as a tool of tort law but as the ultimate objective of tort.

The second approach is that compensation is merely one of the means by which tort seeks to achieve its goals, rather than a goal in its own right. In other words it may be that wrongs can be righted without compensation. If this is correct it is necessary to consider the relative merits of compensation and other means by which the goals of tort are achieved. Certainly this understanding is consistent with Atiyah in *Accidents*

¹³⁹ ‘23 And if any mischief follow, then thou shalt give life for life,
24 eye for eye, tooth for tooth, hand for hand, foot for foot,
25 burning for burning, wound for wound, stripe for stripe.’ Exodus 21:23

¹⁴⁰ Ernest Weinrib, *Tort Law as Corrective Justice* (n. 85) p. 85

¹⁴¹ George P. Fletcher, ‘Fairness and Utility in Tort Theory’ (n. 67) p. 538

¹⁴² Honoré, ‘The Morality of Law in Owen (ed), *Philosophical Foundations of Tort Law*’ Oxford (1995), p. 75.

*Compensation and the Law*¹⁴³ when he describes, in a chapter entitled 'Functions of Compensation': corrective compensation, redistributive compensation, equivalent compensation, substitute and solace, risk allocation, punishment, vindication and satisfaction, deterrence and prevention. In other words compensation is the means by which to achieve these separate goals.

Both Fletcher and Weinrib above (page 54) assumed the desirability of compensation. Weinrib writes of 'independently desirable goals' and Fletcher starts with the fundamental assumption that compensation is a 'desirable goal' in itself. Importantly, Fletcher uses the term by way of contrast with deterrence.

The significance of these points should not be underestimated. The perception that compensation is a socially desirable goal in its own right permeates substantive and procedural policy. In terms of substantive law, it underpins the PL Directive:

The right to compensation of a victim who has suffered damage through using or consuming a defective product, or through exposure to a defective product, is essential in a single market open to everyone.¹⁴⁴

Not merely compensation but *full* compensation is needed:

protection of the consumer requires that the injured person should be able to claim full compensation for the damage ...¹⁴⁵

As far as procedural reforms are concerned, both the Jackson Reforms and the Woolf Reforms before them are predicated on this misconception. They assume that compensation is unquestionably of benefit to society and merely modify the procedure by which litigation delivers that compensation. This is one of the unlearnt lessons of the failure of the Woolf Reforms, perpetuated in the Jackson reforms.

However, it will be argued that it should not simply be assumed that compensation is desirable *per se*. Furthermore, even if compensation is desirable (as it undoubtedly is in many cases), it is not necessarily a rationale for PL law. The questions that need to

¹⁴³ Cane (ed), *Atiyah's Accidents Compensation and the Law* (n. 72)

¹⁴⁴ Green Paper (n. 45) p. 6

¹⁴⁵ PL Directive Recital 5 (n. 2)

be answered are what purpose does compensation actually fulfil? Does it make good the damage suffered? If not, why is it deemed to be necessary?

Case Study 1: Deterrence

Martin v Kudo (GB) Motor Company¹⁴⁶

This claim began with a request to Kudo to examine a vehicle that had been involved in an incident on 14 April 2007 in which the vehicle's handbrake had allegedly failed.

Kudo inspected the vehicle on 18 April 2007. It took the car to an independent MOT test station who confirmed that the parking brake efficiency was 26%, this being 10% above the required legislation. The parking brake adjustment/travel was checked against the factory specifications of 4-6 clicks at 20Kgf.

The incline where the vehicle had been parked was measured and found to be at 4°. The parking brake was applied in the following sequence and the result noted.

Table 2 Handbrake test results

Parking lever clicks	Result
1	Vehicle Moved
2	Vehicle Moved
3	Vehicle Moved but parking brake could be felt to be operating
4	Vehicle held stationary

On 31 July 2008 Kudo received a solicitor's letter claiming that Martin had parked his Kudo vehicle on an incline with the hand brake applied and whilst he was at the rear of the vehicle with his daughter and wife, the vehicle began to roll backwards. They allege negligence and lack of fitness for purpose and enclose an engineer's report. It was alleged that Martin injured his back as a result of the incident and also suffered time off work due to the injury.

¹⁴⁶ See Appendix 1 for verbatim extracts from the key documents in the case. The only alteration is to the parties' names for anonymity.

The engineer measured the force required to raise the hand brake a click at a time:

Table 3 handbrake application force measurements

Number of Clicks	Force
1 Click	5.56 Kgf
2 Clicks	6.21 Kgf
3 Clicks	10.23 Kgf
4 Clicks	24.71 Kgf
5 Clicks	16.74 Kgf
6 Clicks	30.00 Kgf

Martin was asked to park the car on a 15° incline and the brake pulled on 'normally'. After standing for 10 minutes, no movement of the car was detected.

Critically, Martin's expert stated that he could find no mechanical fault with the parking brake which operated both near side and off side rear brakes as designed. However, he reported that it became more difficult to pull the brake up, the further the hand brake was pulled past the fourth click. This position on the hand brake would not fully hold the vehicle on the 15° slope, and a further click requiring 24.71 Kgf was needed to retain the car fully in its position.

Martin found some papers in the car which had been left there inadvertently by the Kudo engineer who inspected it. Martin's expert referred to these and in particular a Kudo campaign which required this model to be checked for braking efficiency and, if it was below the MOT standard, a process of buffing and bedding in the shoes was required. In addition, the papers included a note from a Kudo engineer expressing an unfavourable opinion about the strength required to pull a hand brake on to hold a car on a 12° hill.

Kudo's expert could not usefully examine the car as his involvement (due to the issue of proceedings) was some 3 years after the event. However, using Martin's own test data he observed that Martin's expert failed to equate his physical effort with the parking brake's efficiency. In fact Martin's expert had established little more than that once the brake shoes were in contact with the drum it became harder to pull up the

lever (i.e. more force was required), which is to be expected because pulling the lever upwards tensions the parking brake cables.

Once the car started to move, it would have been relatively difficult for anybody to stop it moving by pulling up the parking brake lever, because parking brakes are not designed or intended to be used efficiently to bring moving vehicles to a standstill.

Proceedings were issued alleging that Kudo (GB) was the manufacturer of the vehicle purchased by Martin's wife. The vehicle had been parked on an incline with the hand brake applied but the hand brake failed so that the vehicle began to roll backwards. Martin was putting his daughter into a pram and attempted physically to arrest the roll of the vehicle and in doing so suffered injury.

Martin pleaded specifically that the brake was defective under the Consumer Protection Act 1987 because it took '5 clicks on the ratchet' to hold it on a 15° slope which required a force of 24.71 Kgf and that this was because the friction surface of the brake had required buffing and bedding in, relying on the document inadvertently left by the engineer. Alternatively it was claimed that Kudo was negligent in fitting a hand brake which required excessive force to retain the vehicle on a slope, and failing to recall the vehicle.

Martin's injuries were pleaded as soft tissue injuries to the neck, back, upper limbs and lower limbs; pain, discomfort and restriction of movement; shock and upset. There were special damages:

Table 4 Special damages

Damage to pram	£90.00
Miscellaneous travel expenses, telephone calls, postal charges etc	£50.00
Loss of earnings (details awaited from Claimant's employer)	£ TBA

In its defence Kudo pleaded that the vehicle had been checked at an MOT test station and passed the test: the brake did as a matter of fact operate to specification. Mr

Martin's contributory negligence was put in issue, in failing to apply the handbrake properly and failing to leave the vehicle in gear when parking on a slope in accordance with the Highway Code.

A nuisance value CPR Part 36 offer of £2,000 plus costs to be assessed was made on 17 May 2010 and when this was rejected, the offer was withdrawn and the defence was amended to plead that the design complied with the EU Directive¹⁴⁷ (the Braking Devices Directive) specifying the limits of force allowed to apply a hand brake, which permits a design which requires up to 400N of input force (equivalent to approximately 40.8 kgf).

Martin was invited on 6 August 2010 to discontinue in the face of this pleading, on the basis that Kudo would bear its own costs. This met a detailed reply from Martin's expert that the brakes had not been 'buffed' or 'bedded in' properly as evidenced by the fact that Martin said he applied the brake in his 'normal way' but it failed to hold the car. He claimed that the VOSA Type Approval manual requires that the brake be capable of being 'operated and released whether the vehicle is stationary or moving' and that the car failed to hold when Martin's wife applied the brake: thus it failed to conform to the manual.

As for the MOT test, he speculated as to whether the tester would have used one hand or two to pull the brake on, concluding that testers 'do have a tendency to use both hands ...'.

He refused to accept that the specification in the Braking Devices Directive was appropriate, questioning the figure of 40 kgf or 400N and referred to guidance on handling weights while seated in the Manual Handling Operations Regulations 1992.

Finally he explained that as Martin's representatives were not present at the MOT testing of the car, 'it could well be' that the brakes were 'buffed in' before the test.

¹⁴⁷ COUNCIL DIRECTIVE of 26 July 1971 on the approximation of the laws of the Member States relating to the braking devices of certain categories of motor vehicles and of their trailers (71/320/EEC) OJ L 202, 6.9.1971, p. 37)

Martin's medical evidence comprised a report from a GP listing numerous minor injuries to his neck, shoulders, back, spine, legs, elbows, wrists, knees, heels and toes as reported to him by Martin, and moderate to severe anxiety whilst driving (all this one year and four months after the incident).

Martin is said to have been on sick leave from his job as a financial advisor for the past two months. His injuries are claimed to have affected his ability to lift, his ability to look after his children, his sex life, management of his personal care, and his ability to play a range of sports.

The doctor's opinion was that 'some of the symptoms are not related to the accident' and recommended examination by a rheumatologist. He added that 'perseverance of travelling will improve self confidence in travelling and hence will also help him with his psychological recovery.'

On 4 October 2010 a Calderbank offer of £5,000 inclusive of costs was made by Kudo. On 15 December 2010 Martin made a CPR Part 36 offer to accept £2,000 plus costs. The damages were equal to Kudo's original withdrawn offer but Martin's costs were by then considerably higher. Martin's solicitors indicated that their disbursements exceeded £4,000. Kudo responded with an all-inclusive Calderbank offer of £7,500 on 1 March 2011. This was not accepted.

The case proceeded to trial and judgment was given for Kudo with costs assessed at £20,000.

CHAPTER THREE – PL FAILS TO DETER

‘...dans ce pays-ci, il est bon de tuer de temps en temps un amiral pour encourager les autres’

Voltaire, 1759¹⁴⁸

INTRODUCTION

3.1 Consumer Protection means deterrence.

The fourth recital to the PL Directive states that ‘protection of the consumer requires that all producers involved in the production process should be made liable, insofar as their finished product...was defective...’ This implies that there must be a correlation between liability and consumer protection. It is not expressly explained how the Directive provides ‘protection of the consumer’. Whilst damages may compensate an injured claimant, it is not clear that this protects them in any way. *Protection* suggests a preventative element. If the making of defective products is deterred, consumers in general will be protected. Indeed one of the bases on which Goldberg and Zipursky justify PL is that ‘it contributes in direct and indirect ways to deterrence’.¹⁴⁹

Deterrence is arguably a more important justification for PL than individual compensation, in the sense that it benefits society as a whole, whereas compensation benefits only the few individuals who have cause to bring a claim.

This chapter considers whether, in the UK, PL law acts as a deterrent against making defective products and thus protects consumers. The key questions are a) whether PL is effective as a direct or indirect deterrent; and b) whether there are better deterrents, rendering nugatory PL’s deterrent qualities.

It will be argued in this chapter that PL’s deterrent effect in the UK is subliminal. There are a number of reasons for this, some of which are which are particular to the UK PL regime and others of which apply more generally. These include the following:

¹⁴⁸ Voltaire, *Candide, ou L’Optimisme*, Paris 1759

¹⁴⁹ The Easy Case (n.11)

- Awards in the UK are too small to hurt any but the smallest manufacturers, in comparison with the US, where the principal reason that tort acts as a deterrent is that awards may be large enough to damage the defendant;
- Strict Liability under the PL Directive is inapt to incentivise the producer to take care;
- PL is indiscriminate in its effect and fails to target the decision makers able to affect the safety of the product;
- PL may 'over-deter' so that producers abandon production of products involving risk, to the detriment of the consumer;

SCALE OF AWARDS

3.2 By comparison with US awards, UK damages awards are too small to deter

Products liability verdicts have become so run-of-the-mill that even nine-digit verdicts and their aftermath receive only local or specialty press coverage, with cursory national coverage¹⁵⁰

It is unsurprising to find that PL awards have a deterrent effect in the US. The scale of awards and potential awards is so great that they cannot be ignored. In contrast, awards in the UK are too small to have any appreciable deterrent effect. In the Kudo Case Study, damages were eventually agreed, subject to liability, at £2,000: a sum that bears no comparison with damages in US PL claims where 'The possibility of jackpot-size damages gives an incentive to plaintiffs' attorneys to pursue cases of questionable social utility and merit'¹⁵¹ – in addition, presumably, to claims of unquestionable social utility and merit. In the PL Claims Survey (Appendix 4) 65.6% of all claims were quantified at less than £5,000.

There are two main reasons for the disparity between US and UK awards. The first is that punitive damages may be available in PL claims in many States and these are out of proportion to compensation levels for injuries in the UK. Second, class actions in PL

¹⁵⁰ Ted Frank, 'Rollover Economics: Arbitrary and Capricious PL Regimes', AEI OUTLOOK SERIES (Am. Enterprise Inst. for Pub. Pol'y Res., AEI Online, Wash., D.C.) Jan. 4, 2007, page 1 available at <<http://www.aei.org/outlook/25395>> accessed 12 November 2012

¹⁵¹ Ted Frank, 'Rollover Economics: Arbitrary and Capricious PL Regimes' (n. 150)

cases in the US can generate huge damages awards due to the sheer number of claimants within a class.

3.2.1 Punitive damages may be available in the US but not in the UK

The first significant punitive damages award in a PL claim was in 1978 in *Grimshaw v Ford Motor Co*¹⁵² when a jury awarded \$125m in a case arising from the death of a driver and serious injury to a passenger when their Ford Pinto burst into flames after being struck from behind, due to the location of the fuel tank. The jury found that Ford knew about the danger and had an inexpensive remedy for it which it failed to apply because of the cost. The award was ultimately reduced to \$3.5m, still a substantial sum in the 1970s, which was affirmed by the California Court of Appeals, characterising Ford's behaviour as 'reprehensible in the extreme'.¹⁵³ Owen concluded that punitive damages constitute a beneficial 'tool of legal control over corporate abuses' but also expressed concerns about abuses of the punitive damages doctrine. He saw punitive damages as having a place in appropriate cases as a matter of principle but noted that large awards were becoming 'almost common' and might at some stage threaten the stability of industry.¹⁵⁴ Punitive damages are recoverable in all but 5 States according to a comprehensive state by state review of punitive damages by US PL law firm Wilson Elser.¹⁵⁵ Furthermore, punitive damages are uninsurable as being against public policy (unless imposed vicariously), in about 20 States.¹⁵⁶

Such awards are made by juries to reflect reprehensible conduct by the defendant and act as a strong deterrent against delinquency. In *Buell-Wilson v Ford Motor Co*¹⁵⁷ a jury awarded \$368m to the plaintiff, who was paralysed when her SUV overturned in

¹⁵² *Grimshaw v. Ford Motor Company* No. 19-77-61 (Super. Ct., Orange Cty., Cal., Feb. 7, 1978), *aff'd as amended*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

¹⁵³ *Grimshaw v. Ford Motor Company* (n.152) p. 388

¹⁵⁴ David G. Owen, 'Problems in Assessing Punitive Damages Against Manufacturers of Defective Products' 49 U. Chi. L. Rev. 1 1982 p. 59

¹⁵⁵ Wilson Elser *Punitive Damages Review*

< <http://sites.wilsonelser.vulturevx.com/26/373/landing-pages/web-form-12-2013.asp> > accessed 8 April 2015

¹⁵⁶ Dan A. Bailey, 'Insuring Uninsurable Punitive Damages' <www.baileycavalieri.com> accessed 10 June 2013

¹⁵⁷ *Buell-Wilson v. Ford Motor Co.*, 141 Cal. App. 4th 525 (2006).

swerving to avoid a piece of metal falling from a motor-home. The California Court of Appeals decided that this Award was the “product of passion and prejudice” and reduced the total non-economic damages to \$23 million, with another \$55 million in punitive damages - still a sum larger by orders of magnitude than would be awarded in a UK case.

3.2.2 The arbitrariness of punitive damages awards enhances their deterrent effect

Frank observes that the arbitrariness of such awards ‘... is highlighted by the appellate court’s reasoning that damages should be capped at \$18 million because that was all that the plaintiffs’ attorney thought to ask for in his closing argument...’.¹⁵⁸ By contrast, it has been argued that emphasis on the arbitrariness of damages and the comparison between damages and a lottery¹⁵⁹ is misleading ‘aimed at undermining public confidence in the tort system in order to strengthen popular support for various reforms.’¹⁶⁰ The argument is that the outcome of litigation ‘is far from being a lottery-like system of random outcomes’. Whether or not this is accepted, the sums potentially involved certainly have the flavour of lottery wins. Unlike a lottery, however, in which the lottery organiser controls the amount of money paid out and so always wins, in litigation the defendant may involuntarily be drawn into the plaintiff’s gamble. In this way the defendant stands to lose a large (or possibly enormous) sum of money. That is the deterrent.

3.2.3 There is no equivalent to US punitive damages in the UK

There is nothing remotely similar to US style punitive damages in the UK, the closest concept being exemplary damages, which are trivial in comparison and limited in application.¹⁶¹ Indeed as a matter of European Law, punitive damages are generally discouraged. According to Recital 32 of Rome II:

¹⁵⁸ Ted Frank, ‘Rollover Economics: Arbitrary and Capricious PL Regimes’ (n. 150)

¹⁵⁹ See generally P.S. Atiyah, *The Damages Lottery* (n. 13)

¹⁶⁰ Timothy D. Lytton Robert L. Rabin and Peter H. Schuck, ‘Tort as a Litigation Lottery: A Misconceived Metaphor’ *Boston College Law Review* [Vol. 52:267] p. 278

¹⁶¹ See generally The Law Commission Item 2 of the Sixth Programme of Law Reform: *Damages Aggravated, Exemplary and Restitutionary Damages* LC 247 <http://lawcommission.justice.gov.uk/docs/lc247_aggravated_exemplary_and_restitutionary_damage_s.pdf> accessed 27 May

In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.¹⁶²

Moreover, it is acknowledged that ordinary damages (non-punitive damages) do not have a deterrent effect:

Damage awards equal to the victim's damages provide inadequate deterrence against such deliberate, concealed harms, since the wrongdoer's expected damage payment is frequently less than his immediate gain.¹⁶³

3.2.4. US class actions may generate huge awards which cannot fail to deter

The position is magnified in class actions: collective actions which can pull in hundreds or thousands of plaintiffs.¹⁶⁴ The highest reported class action award by a jury is \$144.8bn against 'the tobacco industry'¹⁶⁵ - although this was ultimately overturned by the Florida Supreme Court. That is not the end of the story, however, as the main players in the US tobacco industry entered into an industry-wide Master Settlement Agreement¹⁶⁶ with 46 States to settle Medicaid costs and fund anti-smoking advertising in return for immunity from suit, under which each manufacturer agreed with various States to pay its market share of around \$8bn per annum, totalling in excess of \$200bn. Unsurprisingly, there has been litigation over the exact payments under this agreement.

¹⁶² REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) Official Journal of the European Union L 199/40 31.7.2007

¹⁶³ William M. Landes and Richard A. Posner, 'New Light on Punitive Damages' Regulation, September/October 1986 33 p. 33

¹⁶⁴ See generally for a concise description of the US Class Action: Michael Black QC Ingrid Gubbay His Honour Judge Graham Jones Alistair Kinley Professor Rachael Mulheron Robert Musgrove John Sorabji *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions A Series of Recommendations to the Lord Chancellor* Civil Justice Council Final Report November 2008

<http://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf> accessed 4 February 2015

¹⁶⁵ Brian H. Barr, 'Engle v. R.J. Reynolds: the Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers' Florida State University Law Review 2001 [Vol. 28:787]

¹⁶⁶ RJ Reynolds Tobacco Company, Master Settlement Agreement Text <<http://www.rjrt.com/MSAFullText.aspx>> accessed 21 April 2015

Whilst the popularity of class actions has waned and the courts have acted to decertify areas of litigation such as tobacco related injury¹⁶⁷ and legislation has been introduced to curb excesses,¹⁶⁸ they remain a serious deterrent in the US not least because of the sheer potential size of awards they might generate. Depending on one's view point, that is either the basis for 'prudent corporate decisions'¹⁶⁹ or 'legalized blackmail'.¹⁷⁰ The social benefit or otherwise of the class action, per se, however, is not the issue here: it is merely that the scale of awards acts as a deterrent.

3.2.5 By contrast, Group Actions in the UK have been unsuccessful and unpopular

The closest equivalent in the UK is the Group Litigation Order.¹⁷¹ Group Litigation Orders provide for the management of claims which give rise to common or related issues of fact or law. Once a group is established, ordered and registered it is publicised and, ultimately, judgments bind all members of the group. Group Litigation Orders are listed on the HM Courts and Tribunals Service website¹⁷² from which data the following chart is derived. There have been 77 Group Litigation Orders registered since the procedure first became available. The chart shows the numbers of Group Litigation Orders by year. The total number of Group Litigation Orders is shown in blue and those related specifically to PL in red.

¹⁶⁷ See particularly for a history of US tobacco litigation Henderson, James A. Jr. and Twerski, Aaron, 'Reaching Equilibrium in Tobacco Litigation' (2010). Cornell Law Faculty Publications. Paper 175. <<http://scholarship.law.cornell.edu/facpub/175>> accessed 25 May 2012

¹⁶⁸ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005)

¹⁶⁹ Myriam Gilles, 'Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action' Michigan Law Review, Vol. 104, No. 3 (Dec., 2005), pp. 373-430 – 'My intuition, again, is that class actions do far more good than harm; that many prudent corporate decisions are made precisely because the palpable threat of class action liability hangs in the boardroom'.

¹⁷⁰ Milton Handler, 'The Shift from Substantive to Procedural Innovations in Antitrust Suits' - The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV.1, 9 (1971). 'Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure--it is a form of legalized blackmail.' See also for a detailed explanation of the class action blackmail issue: Thomas S. Ulen, 'An introduction to the law and economics of class action litigation European Journal of Law & Economics' 2011, 32(2), 185-203

¹⁷¹ CPR 19.10: A Group Litigation Order ('GLO') means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').

¹⁷² <<http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>> accessed 17 June 2015



Figure 2: Group Litigation Orders from 1999 to 2012

The use of such orders has seen a steady decline.¹⁷³ Given that virtually everyone uses motor vehicles as a consumer and that they obviously have the significant potential to injure if defective, it might seem surprising that there has only ever been one motor related PL Group Action since the procedure has been available.¹⁷⁴ Mulheron insists, of Group Litigation Orders, ‘This is not a “solution in search of a problem”’.¹⁷⁵ It would seem however that the Group Action is unpopular. The following reasons might explain this: funding of Group Actions has been problematic with a number of such actions collapsing when funding was withdrawn;¹⁷⁶ there is no incentive for a claimant to join a group if he can obtain individual no risk funding (such as became available with the advent of ATE insurance); it is unattractive to a claimant’s lawyer to hand a client over to the Group’s lawyer and lose out financially.

¹⁷³ LSC figures suggest a similar decline in LSC funded multi-party actions which would presumably include actions where no GLO was obtained – see See Hodges Global Class Actions Country Report: England and Wales
<http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf> accessed 4 February 2015

¹⁷⁴ Scania 4 Series Group Litigation (in which the Practice represented Scania):
<http://webarchive.nationalarchives.gov.uk/20110110161730/http://www.hmcourts-service.gov.uk/cms/150_529.htm> accessed 17 June 2015

¹⁷⁵ Michael Black et al, *Improving Access to Justice through Collective Actions* (n.164) p. 101

¹⁷⁶ see Jon Robins, ‘Group Litigation: the coming of class actions?’ *Law Society Gazette* Thursday 11 December 2008

In the US the class action is seen as a 'normative polestar' in forcing defendants to internalise the social costs of their actions.¹⁷⁷ In the UK the Group Action is little more than a procedural umbrella under which like-minded claimants can simplify their litigation by having common issues tried together. It has been observed wryly, in the context of the EU Commission's Green paper on collective redress,¹⁷⁸ that whilst improving claimants' access to the machinery of justice and incentivising the bringing of claims and penalising wrongdoing may be beneficial, 'It is naïve to believe that more litigation would improve an economy'.¹⁷⁹

3.2.6 The adoption of elements of US litigation could affect the deterrent quality of PL

It has been suggested that the European courts are less likely than US courts to hand out 'unpredictable and disproportionate damage judgments'¹⁸⁰ for the following reasons:

- Absence of contingent fees
- Loser pays winner's attorney fees
- Discouragement of massive discovery filings
- Lower damage judgments
- Absence of punitive damages
- Non-use of juries in civil cases¹⁸¹
- Lower expectations of damages

Presser advocates harmonising the US PL law with Europe. Ironically, while the US Supreme Court, State Courts and Federal Courts have striven to limit the effect of

¹⁷⁷Myriam Gilles Gary B. Friedman, 'Exploding the Class Action Agency Costs Myth: the Social Utility of Entrepreneurial Lawyers' 104 University of Pennsylvania LAW review [vol. 155]: 103 p. 105

¹⁷⁸ EU Commission Green Paper On Consumer Collective Redress Brussels, 27.11.2008 COM(2008) 94 final

¹⁷⁹ Christopher Hodges, 'From class actions to collective redress: a revolution in approach to compensation' C.J.Q. 2009, 28(1), 41-66 p. 66

¹⁸⁰ Stephen B Presser, 'How Should the Law of Products Liability Be Harmonized? What Americans Can Learn from Europeans' Global Liability Issues. Vol. 2 February 2002.

¹⁸¹ The use of a jury to make damages awards does not automatically mean that the awards will be disproportionate. Scotland still uses civil juries and in the Report of the Scottish Civil Courts Review 'the allowance of jury trial, or the possibility of it, has a significant influence in the maintenance of settlements in personal injury cases at realistic levels. There seems to be a general tendency for judge-made awards of damages to fall behind the level of jury awards as time goes by, with the result that it takes the occasional large jury verdict to return negotiated settlements to realistic levels. In our view, jurors in such cases have often had a more perceptive appreciation of the value of damages than the courts over the years.' (Report of the Scottish Civil Courts Review 2009 ISBN: 978-0-9552511-2-2 Volume 1 of 2 RR Donnelley B60185 9/09)

But see Harvey McGregor, *McGregor on Damages* (n. 132) [39-023] *et seq* for an account of runaway jury awards in libel cases in the 1980s.

punitive damages and class actions,¹⁸² the UK has opened its doors to elements of the US litigation system: including in particular contingency fees and Qualified One-Way Costs Shifting.¹⁸³ It is foreseeable that this could in appropriate cases make Group Actions more attractive. The Civil Justice Council Working Party on Damages Based Agreements reported in July 2012 that special controls are necessary where large numbers of claimants are involved and funding options very limited but that lawyers who wish to use a DBA to fund a collective action should apply to the Court for approval of the level of the contingency fee within the regulated cap on the deduction from damages. However they concluded that ‘the collective action is precisely the type of civil claim that will benefit from the introduction of DBAs to ensure access to justice’.¹⁸⁴

Subsequently the EU Commission has issued a memo stating:

To counter possible abuses of collective redress, the European Commission is recommending a number of important procedural safeguards. Member States should for example not permit contingency fees for legal services.¹⁸⁵

At the time of writing, in the UK, Damages Based Agreements are permissible for Group Litigation. If, hypothetically, there had in fact been a defect in the Kudo handbrake which caused 5,000 claimants to suffer minor injuries worth £2,000 each, Kudo would face an exposure of £10m plus costs. A solicitor could surely be found who would take on a group action for £2.5m (25% of the general damages).¹⁸⁶

The Scania Group Litigation (see footnote 174 above) was funded by a Trade Union. There were almost 800 claimants. The case collapsed and the successful defendants

¹⁸² See generally Francis E. McGovern, ‘Punitive Damages & Class Actions’ Louisiana Law Review 2010 Vol 70 435-462; and Myriam Gilles ‘Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action’ (n. 169) pp. 373-430

¹⁸³ Qualified One-way Costs Shifting or QOCS is a procedural rule which provides that subject to certain exceptions a successful defendant may not recover its legal costs from the unsuccessful claimant. The implications for PL are explored in Chapter 8.

¹⁸⁴ Civil Justice Council *Report of the Working Party on Damages Based Agreements (Contingency Fees)* 25th July 2012

<<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Pre-action+protocols/contingency-fees-working-party-report1.pdf>> accessed 12 June 2013 22.29

¹⁸⁵ Frequently Asked Questions: *European Commission recommends collective redress principles to Member States* MEMO/13/530 Strasbourg 11/06/2013 <http://europa.eu/rapid/press-release_MEMO-13-530_en.htm?locale=en> accessed 12 June 2013

¹⁸⁶ The Damages-Based Agreements Regulations 2013 (SI 2013/609) Reg 4(2) (b)

were awarded costs, ultimately paid by the funding Union. Had the claim proceeded on a contingency basis with Qualified One-Way Costs Shifting, meaning that even if the defendant had succeeded at trial, it would not have been awarded its costs, the dynamics of settlement would have been entirely different. The claimants would have had a greater incentive to proceed to trial and the defendants would have been under more pressure to settle a claim with no merit so as to avoid further irrecoverable costs.

The closer the UK system comes to the US system (with the introduction of Conditional Fee Agreements and subsequently Damages Based Agreements) the more spurious claims will have to be defended or bought off by defendants. It is noted that in the PL Claims Survey at Appendix 4, half of the cases were abandoned and nuisance value offers were made in approximately a quarter. It is to be expected that with the advent of Qualified One-Way Costs Shifting, fewer cases will be abandoned, because of the decreased risk of having to pay the defendant's costs and potentially more nuisance value offers will be made to avoid further irrecoverable costs being increased. This does not deter the making of bad products: it merely adds a valueless overhead to the manufacturing cost. The unresolved debate over class actions in the US has been described thus:

While there are those who see it as a socially beneficial practice that allows, for example, appropriate redress to small claimants against major corporations, there are those who see class action litigation as socially costly in that it fosters frivolous litigation that threatens to erode business confidence and competitiveness.¹⁸⁷

Thus any benefit as a deterrent must be weighed against this extra cost. It is foreseeable that without serious controls on contingency fees in collective redress this kind of 'frivolous litigation' could multiply.

¹⁸⁷ Thomas S. Ulen, 'An introduction to the law and economics of class action litigation European Journal of Law & Economics' (n. 170)

STRICT LIABILITY FAILS TO DETER

3.3 Strict Liability is a Less Effective Deterrent than Fault Based Liability

Fault based liability is more conducive to deterring accidents than strict liability for two reasons. First, the large damages awards which are supposed to create an indirect deterrent by internalising the costs of accidents, are dependent on fault; and second it is implicit in the concept of fault that the defendant ought by his conduct to be able to prevent or minimise accidents.

3.3.1 Punitive awards are based on fault

The superlative awards reported in US PL cases are not typically based on strict liability. This is because punitive damages are awarded "where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime," or where it indicates "such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton," or "reckless," which means "proceeding with knowledge that the harm is substantially certain to occur."¹⁸⁸

Key differences between the US and the UK are illustrated by the pleadings in the Kudo Case Study. Here the allegations are of breach of section 2 Consumer Protection Act 1987 and simple negligence. In contrast, the Complaint in a dismissed US class action against alcoholic beverage manufacturers included the following allegations: 'deceptive trade practices, unjust enrichment, negligence, public nuisance and fraudulent concealment'.¹⁸⁹ The aim of these proceedings was to persuade a jury that the alcohol industry has cheated the public out of their money and that their 'ill-gotten' gains should be liberated or 'disgorged'. Similarly the California Court of Appeals findings in *Grimshaw* show that strict liability was not the issue. The key findings were of institutional callous indifference to public safety:

¹⁸⁸ William M. Landes and Richard A. Posner, 'New Light on Punitive Damages' (n. 163) p.133 (citing Prosser and Keeton on the Law of Torts ISBN-13: 978-0314748805).

¹⁸⁹ *Jacquelyn L. Tomberlin v Adolph Coors Company, et al* State of Wisconsin, Court of Appeals District IV, Appeal Number 2006AP1302 < <http://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=30706> > accessed 17 June 2015

the conduct of Ford's management was reprehensible in the extreme. It exhibited a conscious and callous disregard of public safety in order to maximize corporate profits.¹⁹⁰

The limited basis of PL in the UK does not give rise to findings of unconscionable conduct worthy of public censure and no such allegations were raised in any of the cases within the PL Claims Survey at Appendix 4.

3.3.2 Direct deterrence is based on fault

Direct deterrence is predicated on the assumption that tort embodies 'the socially valuable principle that, where a person negligently or intentionally caused injuries to another, amends should be made for the consequences of his fault'.¹⁹¹ Liability for fault fosters

a sense of responsibility for the effect of one's actions on others, and a sense that one does have a duty of care towards one's fellow citizens, is an essential element in a civilised community, and a lapse in the discharge of that responsibility is a matter of blame – in other words fault or culpa.¹⁹²

If a person faces paying for the consequences of his fault then he ought to be motivated to take care. Where strict liability is applicable, taking care will not necessarily protect a person from the risk that they will have to pay liability claims. Therefore there is less incentive to take care where the regime of liability is strict as under the PL Directive than when it is fault based.

In the Kudo Case Study there were two key causes of action: first is strict liability for a defect under the PL Directive¹⁹³ and second is negligence in failing to warn after having been aware of a design defect.¹⁹⁴ If it is assumed for the moment that both allegations were proved to be true, Kudo (fearing an onslaught of claims) might be motivated to take extra care to warn customers of the known brake problem. However, as far as

¹⁹⁰ *Grimshaw v. Ford Motor Company* (n. 152) [34]

¹⁹¹ See *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Ch Lord Pearson) (March 1978) Cmnd 7054 Vols I-III p. 362 [1716]

¹⁹² Pearson Commission (n. 191) p. 363 [1717]

¹⁹³ Consumer Protection Act 1987 s 2

¹⁹⁴ *Walton v British Leyland (UK) Ltd, Dutton Forshaw (North East) Ltd and Blue House Lane Garage Ltd* (12 July 1978 unreported PL Casebook 131, ed Stuart Ashworth (1984), Lloyd's of London Press and (brief summary) Law Society Gazette 28 March 1990 and *Alan Carroll and Others v Lundy Fearon and Others; Astrid Barclay and Another v Dunlop Limited and Another* [1998] PIQR P416, CA

strict liability for the defect goes, there is not much that Kudo could have done directly to improve the quality of build of the product as they were merely an importer.¹⁹⁵ Therefore fault is the greater motivator.

3.3.3 So-called strict liability for defective products in the US is not really strict

Goldberg & Zipursky seek to explain strict PL in deontological terms.

In fact, we think that the case for allowing persons injured by defective products to obtain redress is very easy. It rests on the idea that a manufacturer bears a responsibility to avoid causing injury by sending a dangerously defective product into the stream of commerce and is supported by principles grounded in negligence and warranty, even though it extends those principles in certain ways.¹⁹⁶

If this is correct, it provides some basis upon which threats to the defendant could act as a deterrent. The position must be considered for the different bases of PL: defective design; defective manufacture and defective instructions/warnings. In the US the legal position was, at the time of the introduction of the PL Directive in Europe, summarised by the Second Restatement Torts (1965). As for design defect the Second Restatement reads:

402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property...

... dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.¹⁹⁷

It has been argued that this is merely negligence by another name.¹⁹⁸ That is probably overstating the position. At least, whether a product is unreasonably dangerous might

¹⁹⁵ PL Directive Article 3 (2) (n. 2) provides that: 'any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.'

¹⁹⁶ Easy Case (n. 11) page 1944

¹⁹⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965)

¹⁹⁸ Wade, 'Strict Tort Liability of Manufacturers' 19 Sw. L.J. 5, 15-17 (1965) 5

have nothing to do with the conduct of the manufacturer or seller.¹⁹⁹ The test that was applied might be described as the *Consumer Expectation Test*.

The Third Restatement of Torts (1998) puts the issue beyond doubt:

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instruction or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; ...

(b) is defective in design when the foreseeable risks of the harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe...²⁰⁰

So a manufacturing defect gives rise to strict liability but as far as design or warnings are concerned, liability depends on a) foreseeable risks of harm and b) what the seller could have done to avoid these risks. David Owen puts it thus:

The requirements of “foreseeability” and “reasonableness” in subsections 2(b) and 2(c) effectively reconvert the products liability standard for these types of cases to one of negligence - a rather remarkable retreat from section 402A’s explicitly “strict” standard of liability of the Second Restatement that most courts boldly purported to apply to design and warnings cases for thirty years. Thus, . . . subsections 2(b) and 2(c) of the Third Restatement abandon the strict liability concept and employ negligence principles in design and warnings cases.²⁰¹

¹⁹⁹ See Sheila L. Birnbaum, ‘Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence’ 33 Vand. L. Rev. 593 1980

²⁰⁰ Restatement (Third) of Torts §2 PL (1998)

²⁰¹ David Owen, ‘Products Liability Law Restated’ 49 S.C. L. REV. 273, 285 (1998)

Ironically, therefore, in the US, from where strict liability for defective products emanated, there has been a clear retreat from strict liability towards a fault based standard. The contrary is true in the UK.

3.3.4 UK Strict Liability based on the PL Directive is strict

In Europe, the PL Directive adopted the Consumer Expectation Test.

Article 6

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put;
- (c) the time when the product was put into circulation.²⁰²

This translates in the UK, under section 3 of the Consumer Protection Act 1987, as follows:

3. Meaning of “defect”.

(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes “safety”, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.

(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including—

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producer to another;

²⁰² PL Directive Article 6 (n. 2)

and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.²⁰³

3.3.5 The defendant's conduct and avoidability of defect irrelevant

There are two important considerations in deciding whether liability under the PL Directive's consumer expectation test acts as a deterrent. The first is whether the avoidability of the defect is taken into account under the PL Directive in determining liability. If the defendant is liable for unavoidable accidents then imposing liability is not deterring the supply of defective products. The second is whether the potential wrongdoer's conduct is taken into account in assessing liability. If Kudo's conduct is not taken into account in determining its liability then there is no obvious incentive for Kudo to modify its conduct in such a way as to prevent accidents.

The leading UK decision on the consumer expectation test is that of Burton J in *A v National Blood Authority*.²⁰⁴ 114 claimants had been infected with Hepatitis C through blood transfusions with infected donors' blood. It had been known since the 1970s, by blood producers and the medical profession, that a small percentage of blood (thought to be between 1% and 3%) was infected with Hepatitis C. The defendants argued that 'such risks so known, which they allege to be impossible to avoid or prevent, affect the legitimate expectation of the public' so that there was no defect. Burton J held that

The question to be resolved is the safety or the degree or level of safety or safeness which persons generally are entitled to expect... safety is not what is actually expected by the public at large, but what they are entitled to expect.²⁰⁵

He went further, stating

In my judgment it is as inappropriate to propose that the public should not 'expect the unattainable'--in the sense of tests or precautions which are impossible--at least unless it is informed as to what is unattainable or

²⁰³ Consumer Protection Act 1987 CHAPTER 43

²⁰⁴ *A v National Blood Authority* [2001] 3 All E.R. 289 per The Honourable Mr Justice Burton; the case also deals with the 'development risks defence' but this can be ignored in the context of the deterrence of PL. It will be discussed later in relation to strict liability more generally.

²⁰⁵ *A v National Blood Authority* [2001] (n. 204) p. 311

impossible, as it is to reformulate the expectation as one that the producer will not have been negligent or will have taken all reasonable steps.²⁰⁶

Burton J made it clear that the conduct of the producer was irrelevant in determining the expectations of the consumer, demonstrating his ‘commitment to eschewing a negligence-based standard from interpretation of the strict liability standard in the Directive’²⁰⁷ and to realising ‘the reforming purposes intended by the Directive’.²⁰⁸

The claimants argued that the fact that such risks are unavoidable is irrelevant to consumer expectations on the basis that ‘the exercise of considering what could or should have been done by the producer is an impermissible and irrelevant exercise, which lets questions of fault back in by the back door.’²⁰⁹ Burton J found that the objectively assessed legitimate expectation of consumers may ‘accord with actual expectation; but it may be more than the public actually expects, thus imposing a higher standard of safety, or it may be less than the public actually expects. Alternatively the public may have no actual expectation — e.g., in relation to a new product’.²¹⁰ The legitimate expectation is as to safety, not what tests could or could not have been carried out or what those test might reveal. This evinces a clear intention to avoid the terminology and connotations of negligence and fault. He concluded most strikingly: ‘I conclude therefore that avoidability is not one of the circumstances to be taken into account within art 6’.

Mildred observes,

He went on to construe “all circumstances” to be taken into account under Art.6.1 narrowly, holding that avoidability of the defect by the producer, safety precautions taken and the utility of the product to society were all to be left out of account. The first two of these presumably reflect the necessity for focus upon the safety of the product rather than the conduct of the producer.²¹¹

²⁰⁶ *A v National Blood Authority* (n. 204) p. 335

²⁰⁷ Shanti Williamson, ‘COMPENSATION FOR INFECTED BLOOD PRODUCTS: *A and others v National Blood Authority and Another*’ vol 7.5 *Electronic Journal Of Comparative Law*, (December 2003), <<http://www.ejcl.org/ejcl/75/art75-5.html>> accessed 1 June 2013 at page 4

²⁰⁸ Shanti Williamson, ‘COMPENSATION FOR INFECTED BLOOD PRODUCTS: *A and others v National Blood Authority and Another*’ (n. 207) p. 3

²⁰⁹ *A v National Blood Authority* (n. 204) p. 316

²¹⁰ *A v National Blood Authority* (n. 204) p. 311

²¹¹ Mark Mildred, ‘Pitfalls in Product Liability’ *Journal of Personal Injury Law* 2007, 141

On this basis, if the conduct of the producer is not taken into account in determining liability, then imposing PL ought not to induce the producer to alter its conduct.

The position has been confused slightly by the subsequent judgment of Field J in *Sam Bogle v McDonald's*.²¹² The Claimants had suffered burns from spilled hot drinks at McDonald's restaurants. In addition to allegations of negligence it was pleaded that the drinks were defective. Field J stated 'what the court is concerned with is the ultimate safety of the product and not what considerations the producer gave to its safety'. The objectively assessed legitimate expectation test of Burton J was gratefully adopted by Field J in *Bogle*, as he explained 'and whilst those expectations may accord with actual expectation, they may be more than what the public actually expect'. Field J adopted Burton J's distinction between standard and non-standard products. The infected blood in the Hepatitis C litigation was a non-standard product as the standard product was intended not to be infected. On the contrary the hot drinks were a standard product as they were intended to be hot enough to scald: 'This alone, on the face of it is sufficient to explain the different outcome as to what consumers generally are entitled to expect'.²¹³

It might be argued that Field J did in fact take the conduct of McDonald's staff into account because in giving reasons for his finding that the drinks 'met the legitimate expectations of persons generally' at paragraph 77 (*et seq*) he went into considerable detail about the training of the serving staff as to the secure capping of the drinks and the content of the training manual and regular staff appraisals. If McDonald's had failed to train their staff in this way, by implication, the product might not have met the legitimate expectation test: thus the conduct of McDonald's was a material factor in the safety of the product. However the judge, went on, (having set out these details, and having accepted evidence that a risk assessment had been carried out and that this led to the warning in McDonald's Health and Safety Manual), to make it plain that 'even if this step had not been taken, the omission in itself would not be relevant, since in my opinion what the court is concerned with is the ultimate safety of the product and

²¹² *Sam B and Others v McDonald's Restaurants Limited* [2002] EWHC 490 (QB) per The Honourable Mr Justice Field

²¹³ Tony Cherry, 'Case Comment Personal injury - hot drinks - burns & scalds' *Journal of Personal Injury Law* 2002, 3, 327-330 p. 329

not what considerations the producer gave to its safety'.²¹⁴ Field J has served to muddy the water but there are two further points to take into account. First, this was essentially a case alleging numerous counts of negligence with the Consumer Protection Act 1987 pleaded as an alternative. Therefore, the evidence necessarily dealt extensively with the conduct of McDonald's. Field J simply confused matters by giving the conduct of McDonald's in relation to training as a 'reason' for the finding that the product met the legitimate expectation test – and then stating, in terms, that conduct was irrelevant. Second, the nature of this particular product has to be considered. This is not a product bought in a shop and used at home. It is something served to be consumed on the premises. Therefore the actions of the staff in serving it are necessarily a part of the 'presentation of the product'.²¹⁵ Insofar as the conduct of the defendant was relevant to the liability under the PL Directive, it was just as relevant or even more so to the allegations of negligence. Therefore, there is no reason why strict liability should act as a better deterrent than fault based liability.

3.3.6 Warnings

Even where a product is potentially harmful, PL encourages the producer to apply an appropriate warning so that accidents are avoided.²¹⁶ Whilst the definition of defect in the PL Directive does not expressly mention warnings and instructions (merely the 'presentation of the product'),²¹⁷ the Consumer Protection Act 1987 does refer to 'any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product...'.²¹⁸ Situations may readily be envisaged in which the provision of a warning could prevent a product from being defective under the PL Directive. Indeed in *A v National Blood Authority* the position might have been different if the claimants had been informed about the risk. Similarly, the result may have been different in *Sam B v McDonald's* if hot liquid were provided in a container that gave no warning of its hot contents.²¹⁹ However, warnings are not the be all and end all. Clearly

²¹⁴ *Sam B and Others v McDonald's Restaurants Limited* (n. 212) [77] and [78]

²¹⁵ PL Directive Article 6 (1) (a) (n. 2)

²¹⁶ *Worsley v Tambrands Ltd* [2000] P.I.Q.R. P95 (QBD) and similarly by Dutch District Court of Zwolle in *X -v- Johnson and Johnson*, Rb. Zwolle 24 April 2002, *Praktijkids* 2002, 5921 (helpfully summarised in English in Dissertation of Sanne Barbara Pape 'Warnings and PL Lessons learned from cognitive psychology and ergonomics' Erasmus University 2011 ISBN 978-94-90947-42-2 pp. 75 & 76)

²¹⁷ PL Directive Article 6 (1) (a) (n. 2)

²¹⁸ Consumer Protection Act 1987 s 3(2)(a)

²¹⁹ HHJ Field found essentially that in this case no warning was necessary as consumers could be taken to know that coffee or tea served in a polystyrene cup would be hot – and if this was not enough

the consumer expectation test would not be satisfied if a manufacturer supplied bottles of squash with a warning label that the contents may contain broken glass or carbolic acid.²²⁰ Perhaps the best that can be said is that fear of PL may be an incentive to drafting clear warnings. It is certainly true that the Practice has from time to time been asked to review warnings and instructions with a view to the potential for accidents to occur. But it cannot be said here that it would make any difference whether the potential liability were strict or fault based.

DOES PL REGULATE SAFETY?

3.4 PL in the UK is too unstructured and unfocused to affect product safety

3.4.1 The safety debate in the US is inapplicable to the UK

The stated purpose of PL is ‘protection of the consumer’,²²¹ in the sense of improving the safety of products which they consume or use, by deterring the supply of defective products. The important question, therefore, is whether PL improves safety? Whether or not PL leads to enhanced safety is difficult to measure. In the US, where PL has the potential, through the jury system, to act as a super-regulator, the issue is keenly debated by the authors of the *Uneasy Case* and the *Easy Case* respectively.

Easy cites Graham as searching for a correlation between crashworthiness judgments and safety improvements which had concluded that PL law was ‘one of several forces that induce manufacturers to consider making pro-safety decisions in the marketplace’ and also as accelerating pro-safety developments...²²² *Uneasy* cites a number of studies as evidence that PL in particular industries has had no noticeable impact on

‘McDonald’s were entitled to assume after 1995 that the words: “Caution: Contents Hot!” and “Caution: Hot!” would have warned those likely to be buying tea and coffee that a serious burn could be suffered if the drink was spilled onto someone’s skin.’

²²⁰ See *Daniels and Daniels v R White & Sons Ltd and Tarbard* [1938] 4 All ER 258

²²¹ See PL Directive recitals

²²² *Easy Case* (n. 11) p. 1928 citing John D. Graham, ‘PL and Motor Vehicle Safety’, in *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 120 (Peter W. Huber & Robert E. Litan eds., 1991).

product safety.²²³ *Uneasy* further cites papers²²⁴ on the general aviation industry in the US in support of the proposition that safety may in fact have deteriorated as a result of PL. There is no doubt that PL harmed the general aviation manufacturing industry with the consequence that the General Aviation Revitalization Act of 1994 (GARA), was passed to introduce (subject to certain exceptions) an 18 year statute of repose (from first delivery) on actions against aircraft and aviation component manufacturers.²²⁵ An explanation of why PL might actually have increased the accident rate is that 'it depressed sales of new planes and led individuals to fly older and more dangerous planes.'²²⁶ Whatever these studies prove in the US (and clearly it is a matter of debate) no such similar studies exist in the UK. This is no doubt because there are simply too few cases to be able to infer a relationship between PL and a particular improvement in the safety of a particular product or to draw any meaningful conclusions. Out of the 132 cases in the PL Claims Survey at Appendix 4, only 3 went to full trial.

3.4.2 As a deterrent, PL is inapt to regulate

the effectiveness of the tort system as a deterrent depends crucially on the ability of the potential tortfeasor to take steps in advance to prevent the damage or injury occurring.²²⁷

Even if potential liability under the PL directive ought theoretically to discourage manufacture of defective products, there is a practical reason why it might not. The globalisation or *internationalisation* of industry was one of the driving factors leading to the Strasbourg Convention, the predecessor of the PL Directive:

Introduction 1. Industrial development and technological progress have increasingly involved cases of producers' liability and the growth of inter-

²²³ George L. Priest, 'Products Liability Law and the Accident Rate' in *Liability: Perspectives and Policy* 184, 187-94 (Robert E. Litan & Clifford L. Winston eds., 1988)

²²⁴ *Uneasy Case* (n. 1) pp. 18 & 19 n 66-69 [Andrew Craig 'PL and Safety in General Aviation' in *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 456-77 (Peter W. Huber & Robert E. Litan eds., 1991); Robert Martin, 'General Aviation Manufacturing: An Industry Under Siege' in *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 478-99 [Ibid]

²²⁵ For a brief summary of the history of introduction of the Act see Kerry V. Kovarik, 'A Good Idea Stretched Too Far: Amending the General Aviation Revitalization Act to Mitigate Unintended Inequities' *Seattle University Law Review* 2008 Vol. 31:973 p. 975.

²²⁶ Randy A. Nelson & James N. Drews, 'Strict Liability and Product Safety: Evidence from the General Aviation Market' 46 *Econ. Inquiry* 425 (2008)

²²⁷ Peter Cane (ed), *Atiyah's Accidents Compensation and the Law* (n. 72) p. 425

State commercial trade has resulted in the problem of producers' liability acquiring in certain cases, an international aspect.²²⁸

Indeed the two main examples cited in the Explanatory memorandum to the Strasbourg Convention, the Paris DC10 disaster and the Thalidomide/Contergan tragedy, are by their nature paradigms of the internationality of PL. The internationality of products has two important consequences. The first is that international corporations who sell their products in the US will be far more concerned about potential PL in the US than in the UK. If there were a technical problem with the Kudo vehicle, Kudo would be more likely to fear claims in the US where they sell the same vehicle. Thus the potency of UK PL claims as a deterrent would be seriously attenuated.

The second is that for PL to be an effective deterrent, its impact must reach the *decision maker* with the ability to make the necessary changes to products to affect their safety. The PL Directive seeks to impose its uniform standard of liability regardless of whether the product was made within or outside the EU. It achieves this in relation to a product made outside the EU by treating the importer into the EU as the producer.²²⁹ In the Kudo Case Study, the manufacturer of the vehicle was Kudo Japan. The vehicle was imported into the EU by Kudo GB, which is treated as the producer for the purposes of the PL Directive. The logic is that the consumer has a simple right of action in the UK (or the EU) regardless of where the product was made. Where the importer into the EU has assumed liability, it may of course pass that liability on through the contractual chain. That is of no concern to the consumer. If the importer cannot enforce a contractual right to indemnity, this is its own look out - it chose to import the defective product. This is, nonetheless, highly significant in terms of the deterrent value of PL. Kudo GB may have limited input into the manufacturing process. In a multinational corporation, its influence over production changes may be minimal in the absence of a major PL issue. PL may therefore, as in the Kudo case Study, target entirely the wrong person.

²²⁸ Draft Strasbourg Convention (n. 23) p. 134

²²⁹ PL Directive Article 3(2) (n. 2)

3.4.3 PL is unstructured in deterring carelessness

Irrespective of how much care Kudo took or whether exercise of care would have prevented an accident, had there been a defect, Kudo would have been liable. The focus is on compensating consumers rather than preventing accidents. PL only comes into play after an accident has occurred rather than establishing consistent standards to guide manufacturers. It is subject to the uncertainties and fortuities of the litigation process. It would on that basis be remarkable if it had any perceptible positive effect on product safety.

3.4.4 Economic deterrence

The general principle of indirect deterrence is that strict liability achieves its deterrent purpose by placing the cost of accidents on the 'cheapest cost avoider' because if the costs of personal injuries are placed on the cheapest cost avoider, he will have an incentive to prevent similar future losses by taking cost-justified precautions.²³⁰ 'The question for the court reduces to a search for the cheapest cost avoider.'²³¹ The theory has waned in popularity and 'it has very little utility in the real world ...'.²³² It fails on a theoretical and practical level.

a) UK PL fixes the producer as the cheapest cost avoider irrespective of whether it is

As far as the theory is concerned, the PL Directive fixes liability on the 'producer' who is typically the manufacturer or the importer into the EU. This is based on a public policy theory that manufacturers are in the best position to 'control and eliminate risks that might roll off the assembly line' and where a defect slips through without the fault of the manufacturer, that manufacturer can shoulder the burden better than the consumer.²³³ There is no flexibility to accommodate a situation where this party happens not to be the cheapest cost avoider. In the case of Kudo, the importer, it may not be the cheapest cost avoider. As has been indicated above Kudo may have very little control over 'avoidance'.

²³⁰ Jane Stapleton, 'Liability Reform--Real or Illusory?' *Oxford Journal of Legal Studies* Vol. 6, No. 3 (Winter, 1986), 392-422, p. 395.

²³¹ G Calabresi and J Hirschoff 'Toward a Test for Strict Liability In Torts' (n. 80) p. 1060

²³² P.S. Atiyah, *The Damages Lottery* (n. 13)

²³³ Sheila L. Birnbaum, 'Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence' (n. 199) p. 596

b) Insurers pay the compensation

At a practical level, whoever is liable, the reality is that compensation is usually paid by insurers. The role of insurance in PL is paradoxical. It is one of the possible justifications for the imposition of strict liability on the manufacturer. It is argued 'The manufacturer can spread the risk through insurance and price adjustments, whereas the injured individual might suffer a crushing financial blow underwriting the loss himself.'²³⁴ On the other hand, the fact that the manufacturer may have insurance militates against the argument that liability in tort is a deterrent against designing, making and supplying defective products because the manufacturer trades the certainty of a small manageable loss against the risk of a large unmanageable loss. With this comes moral hazard.

The disutility the injurer suffers because of exposure to risk is exactly needed to give him correct incentives for caretaking. If risk is fully removed from the injurer and shifted to the insurer the injurer will indeed miss the incentive for caretaking that was exactly given to him by the deterrent effect of having to pay compensation in case of an accident.²³⁵

Kudo might face the moral dilemma of deciding whether to spend its own money on a recall or (having bought insurance) insurers' money on its estimated number of claims. In this instance it had already made the recall.

c) Internalisation fails with PL insurance

Economic deterrence is supposed to work by internalising the costs of accident avoidance to the industry manufacturing the product. It is argued (by way of example in relation to motor claims) that Liability Insurance does not undermine the internalizing function of tort law because the costs of accidents, although spread widely, are nevertheless borne by motorists as a group.²³⁶

²³⁴ Sheila L. Birnbaum, 'Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence' (n. 199) p. 596

²³⁵ Michael Faure, 'Interdependencies between Tort law and Insurance' *Maastricht University Risk Decision and Policy* 2 (2), 193-210 (1997) p. 195
<<http://arnop.unimaas.nl/show.cgi?fid=7692>> accessed 24 April 2013

²³⁶ Craig Brown, 'Deterrence in Tort and No-Fault: The New Zealand Experience' *California Law Review*, Vol. 73, No. 3, Symposium: Alternative Compensation Schemes and Tort Theory (May, 1985), pp. 976-1002

However, PL can be contrasted with Motor or Employer's Liability Insurance. The latter are compulsory schemes and they generate homogeneous risk pools. Products are heterogeneous. PL insurance is often an adjunct to Public Liability Insurance, purchased voluntarily. The cost cannot be internalised within the specific industry. It is not even possible to calculate the cost of PL premiums in the way that it can be done with Employers' Liability or Motor Liability. Moreover, it has been suggested that that there is little correlation between premiums and 'changes in the content of tort rules' compared with other factors such as

'the levels of damages which the courts are prepared to award, the ease with which claimants are able to operate the machinery of the administration of justice and economic, cultural and social factors that influence accident victims' propensity to claim.'²³⁷

If this is correct, risky activities may not be discouraged. They are in fact subsidised. The more an activity is subsidised, the less deterrence exists. Welfare insurance is the paradigm. It permits absolutely no deterrent qualities. An alcoholic smoker is as entitled to welfare as a teetotal non-smoker. So any deterrence must come from elsewhere. The net result is that the risk is spread through insurance more widely across industry. This may have the beneficial effect for manufacturers of high risk products that their PL is subsidised by manufacturers of all products.

This "subsidy" causes a misallocation of resources. The activity continues without taking its injury costs into account. Since more of the activity will be conducted than its true costs warrant, there is an underincentive to reduce accident costs.²³⁸

The more extensive the insurance coverage, the less the deterrent effect. Ultimately the welfare state removes deterrence to such an extent that people become dependent on it. Lord Pearson wished to see tort's continued existence within a no-fault system as a 'safeguard against a system of total dependence on the state.'²³⁹

²³⁷ Christopher Parsons, Office of Fair Trading, *An Analysis of Current Problems in the UK Liability Insurance Market* (London, OFT659a, 2003) citing W Pfennigstorf & D G Gifford, *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the USA* (1991) pp 134-6.)

²³⁸ Craig Brown, 'Deterrence in Tort and No-Fault: The New Zealand Experience' (n. 236) p. 977

²³⁹ Pearson Commission (n. 191) p. 362 [1716]

Looked at from the perspective of a consumer, it might be considered undesirable that the manufacturer is passing on to him the increased premiums the manufacturer pays to subsidise high risk products that the consumer does not use.

d) The divide between theory and practice

Routine UK PL claims in the real world have little to do with the costs of accidents. The Kudo claim might have settled, pre-action, for less than £10,000. Yet as the judgment showed this would have been paying a claim with no merit, to avoid incurring penal costs. The Kudo case was all about gambling or 'having a go'²⁴⁰ and nothing to do with safety. The claimant had no incentive to drop the case. He had nothing to lose. The claimant's lawyers did not engage in any legal debate because this was typical of volume litigation run by unqualified staff. Whenever any serious legal issue was raised, the file would be passed for action to a qualified member of staff who had no day to day connection with the case, and no doubt it sat in a large pile of similar files. There was little opportunity to agree anything and limit issues. The case was effectively pursued by Martin's expert acting as an advocate. He lacked objectivity. He was evidently not advised on the law and the precise technical questions he needed to answer and so he guessed incorrectly at the relevant law, ignored the relevant Directive and tried to find something else to make the case. This litigation strikes not at unsafe products but simply adds a layer of cost to the manufacturing process with the potential risk of threatening the supply of products.

RISK OF OVERDETERRENCE

3.5 Deterrence lacks subtle control and may lead to loss of choice

Supporters of the theory that strict liability acts as a deterrent will say that where the cost of taking preventative measures is disproportionately high in relation to an activity, the cost will be driven up and fewer people will participate, thus reducing the number of accidents.

Under a full strict liability regime ... the defendant will be forced not only to consider the cost effectiveness of his precautions but also to evaluate the optimum level of his activity, since even with the utmost care he will still

²⁴⁰ See David Arculus and Teresa Graham, *Better Routes to Redress*, Better Regulation Task Force May 2004, ISBN: 0 7115 0457 1 p. 5

incur liability for unpreventable risks, and the cost of his liability will be proportional to the level of his activity.²⁴¹

There are four potential outcomes for Kudo:

- a) They may persuade the manufacturer to improve its process;
- b) They may be completely ignored;
- c) They may decide to stop importing this type of car;
- d) They may decide to stop selling cars altogether.

Only options c) and d) are matters within the control of the importer. It is likely therefore that if PL has a deterrent effect in such a case, the result will simply be to reduce or terminate the activity of selling these products. This leads to a risk of removal of a product that the consumer wants. Field J alluded to this in the *Bogle* judgment:

[Consumers] expect precautions to be taken to guard against this risk but not to the point that they are denied the basic utility of being able to buy hot drinks to be consumed on the premises from a cup with the lid off.²⁴²

There are many products which carry serious health risks, from tobacco to alcohol to transport. It should not be down to sporadic litigation to regulate these industries. This would be entirely contrary to the resurgent²⁴³ constitutional principle of the separation of powers between the legislature and the judiciary. The risk of officious judicial intervention was identified by Lord Nimmo Smith in *McTear v Imperial Tobacco Ltd*

Tobacco and tobacco products have at all material times lawfully been sold to adult members of the population in the United Kingdom. The manufacture and sale of tobacco products support a substantial industry. ITL are a substantial company with numerous employees and their activities no doubt make a substantial contribution to the economy. The demand for their products may be related to the evidence that smoking gives pleasure and may have social benefits... '... primarily in the area of mental health'. ... The government ... have left it to individuals to decide whether or not to smoke cigarettes.²⁴⁴

²⁴¹ Jane Stapleton, 'Products Liability Reform Real or Illusory?' (n. 230) pp. 395-396

²⁴² *Sam B and Others v McDonald's Restaurants Limited* (n. 212) [80]

²⁴³ See N. W. Barber, 'The Separation of Powers and the British Constitution' Legal Research Paper Series Paper No 03/2012 January 2012, Social Science Research Network electronic library at: < <http://ssrn.com/abstract=1995780> > accessed 2 June 2013

²⁴⁴ *McTear v Imperial Tobacco Ltd No1* 31 May 2005 [2005] CSOH 69

The principle is important as any tendency towards overdeterrence could be considered to be socially undesirable. In the US, where PL plainly does have a deterrent effect, Frank comments on the impact of ‘rollover’ litigation (that is litigation arising from road traffic accidents involving four wheel drive ‘Sports Utility Vehicles’ overturning.)

To date, politicians and regulators have elected to permit consumers to choose whether they wish to have an SUV’s off-road features, even though doing so means poorer highway performance and gas mileage. The plaintiffs’ bar, however, has turned to the courts and has sought for years to punish automakers for providing what consumers want.²⁴⁵

3.5.1 Overdeterrence may lead to a ‘pay-off culture’

Overdeterrence may lead to a ‘pay-off culture’. Instead of regulating the safety of products, it simply leads manufacturers to build in the cost of buying off unwarranted claims, ‘to ensure that the class counsel will ‘go away,’ . . . dilut[ing] the deterrent effect of class action litigation.”²⁴⁶ Gilles and Friedman dismiss this argument as ‘overblown’ and suggest that that in fact Class actions are frequently met by summary judgment applications. They argue that there is a risk of *underdeterrence* that prompts ‘plaintiffs’ lawyers to settle for too little, so that defendants are not forced to internalize the full costs of their wrongdoing. This is not a realistic notion in the UK. In the Kudo Case Study, notwithstanding the lack of merit in Martin’s case, as accepted by the judge at trial, several ‘nuisance value’ offers were made to try to dispose of the case. These offers had nothing to do with PL. They were simply based on the nuisance value of incurring costs and the risk of a rogue judgment. Had the case been lost, the overall cost to Kudo would have been in the region of £60,000 when both parties’ costs are added to the agreed damages of £2,000.

²⁴⁵ Ted Frank, ‘Rollover Economics: Arbitrary and Capricious PL Regimes’, (n. 150) p. 5

²⁴⁶ Myriam Gilles and Gary B. Friedman, ‘Exploding the class action agency costs myth: The social utility of entrepreneurial lawyers’ (n. 177) p. 158

3.5.2 The risk of overdeterrence is taken into account in negligence but not strict PL

The risk of overdeterrence was noted in *Tomlinson v Congleton Borough Council*,²⁴⁷ where Tomlinson dived into shallow water at the edge of a lake in the defendant's country park and suffered a catastrophic head injury. Lord Hoffman stated

it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled.²⁴⁸

The Compensation Act 2006²⁴⁹ was specifically amended to take cognisance of this principle in relation to common law duties of care. Hansard records that the motivation for amendment of the Bill was that after a heavy period of snow it was reported that members of the public avoided helping to clear pavements for fear that they might be sued if someone were then to slip over. As Jeremy Wright MP put it, '...legal advertising budgets are spent on persuading us that "Where there's blame, there's a claim", and that there almost always is blame.'²⁵⁰

Whilst this concession applies to actions in negligence it will not apply to PL claims made under the Consumer Protection Act 1987 because such claims do not require a determination of whether the defendant met 'a standard of care'.

²⁴⁷ *Tomlinson v. Congleton Borough Council & Ors* [2003] UKHL 47 (31 July 2003)

²⁴⁸ *Tomlinson v. Congleton Borough Council & Ors* (n. 247) Lord Hobhouse of Woodborough

²⁴⁹ Compensation Act 2006

1 Deterrent effect of potential liability

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

²⁵⁰ Hansard 2 February 2010

<<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100202/debtext/100202-0004.htm>> accessed 10 June 2013

Conclusions

The theory that PL claims act a deterrent against accidents may work in the US, where the combined threats of jury-made awards of punitive damages and class actions hang over producers as a *sword of Damocles*. In the UK, however, damages awards are so much more modest that they have no deterrent effect on any but the smallest manufacturers.²⁵¹ At present PL's only real potential deterrent quality is its nuisance value but this cannot target the control of product quality. Collective redress and the potential for awards to multiple claimants has been unsuccessful and unpopular in the UK but the advent of damages based agreements and Qualified One-Way Costs Shifting may make Group Litigation more attractive. This might herald an increase in such litigation and a heightening of the deterrent effect of PL. The EU Commission has recommended a ban on contingency fees for collective redress but the Civil Justice Council sees contingency fees as a means of achieving access to justice in multi-claimant actions in the UK. There may be a price for this in that producers may face an increase in spurious claims. The Law Commission was misguided in doubting that the introduction of strict liability for defective products would lead to an increase in litigation.

The policy of the law should be to discourage unnecessary litigation: it is not our function in this report to examine this problem in detail but we are persuaded that the competency of a direct action by the injured person against the person ultimately responsible for causing the injury can only serve to keep litigation to a minimum.²⁵²

It is doubtful that even fault based liability has a deterrent effect in the UK.

There may be some areas of activity where the law of negligence has a minor deterrent effect, but in general, it seems unlikely that much of value would be lost if it were got rid of.²⁵³

²⁵¹ Notwithstanding the Commission's position on page 14 of its Green Paper that 'The Directive helps to increase the level of protection against defective products for two reasons: it is a "sword of Damocles" which encourages producers to do their best to produce without unnecessary risks to health (it thus complements the regulatory measures and checks to prevent the marketing of defective products)...', the reality is that the PL Directive adds nothing in terms of product safety.

²⁵² The Law Commission and the Scottish Law Commission (Law Com No 82, Scots Law Com No. 45) *Liability for Defective Products* HMSO Cmnd. 6831 p. 12

²⁵³ P.S. Atiyah, *The Damages Lottery* (n. 13)

There is no sensible reason why strict liability should act as a better deterrent than fault based liability. In fact in the US where PL is recognised to have a deterrent effect, PL is mainly based on fault. In the UK the PL Directive imposes liability that is strict in the sense that the conduct of the producer is not taken into account in determining whether the product is defective. Moreover, the avoidability of the defect is irrelevant in assessing whether the producer is liable. This removes the incentive for the producer to take special care and militates against the deterrence of accidents. PL fails to target the decision makers who can affect product quality where the 'cheapest cost avoider' is fixed by the PL Directive as the importer into the EU who may be unable in a global business to influence quality.

The volume of PL litigation in the UK is insufficient to regulate conduct. The imprecise shadow of potential litigation hanging over a manufacturer is far too vague to create any useful structure of regulation by which the conduct of producers can be directed towards making safe products. The suggestion that tort acts as an economic deterrent, forcing manufacturers to make safe products or stop manufacturing, has no basis in practice where legal liabilities are insured.

In the real world, routine PL claims such as the Kudo Case Study, have little to do with deterrence of defective products. They simply form the basis of an easy gamble with no risk to the claimant. It has been shown that the deterrent qualities of PL are limited because strict liability is less apt to deter than fault based liability.

In any event PL offers no subtlety of control. It either fails to deter or it may overdeter to the extent that a producer will cease making a product thereby denying the consumer his choice. This haphazard regulation of safety is in any event unnecessary because there are far better ways of deterring the circulation of dangerous products.

CHAPTER FOUR - THERE ARE BETTER WAYS OF DETERRING

‘Many Americans consider Europe to have a weak products liability litigation culture, but I gain the impression that there is sometimes a failure to appreciate the depth of the product safety regulatory regimes, which may explain why there is less need for products liability litigation as a means of regulatory control.’

Geraint Howells 2000²⁵⁴

INTRODUCTION

A key aspect of product safety in the UK is the strength of the regulatory culture. Regulation is far more effective than PL as a deterrent against the supply of dangerous products. Regulation also works alongside market forces which act as a natural filter to remove production of dangerous products.

REGULATION WORKS AS A DETERRENT

4.1 Effective regulation removes the need for PL as a deterrent

Goldberg and Zipursky make the point when considering the effect of PL on safety that:

Uneasy next places too much weight on studies of atypical products. Two of its central examples concern airplane and vaccine safety. Neither of these products resembles a standard consumer product, such as an article of clothing, a food item, a home appliance, a power tool, a toy, or a passenger vehicle. Airplane manufacturing is heavily regulated, and — as Polinsky and Shavell seem to recognize — planes are unusual in that there is a complete overlap between the technology that is required for them to perform at all and the technology that is needed to prevent the occurrence of the most significant hazard that they pose. Simply put, it would not be surprising to discover that, even without tort law, plane manufacturers would devote significant efforts to rid planes of the sorts of defects that tend to cause them to crash. Developing new vaccines requires massive up-front development costs, and the number of alternative design options available to manufacturers is limited by human biology, scientific knowledge, and FDA regulations.²⁵⁵

²⁵⁴ Geraint G. Howells, ‘*The Relationship Between PL and Product Safety—Understanding a Necessary Element in European PL Through a Comparison with the U.S. Position*’ 2000 Washburn Law Journal Vol 39 305-346 p. 307

²⁵⁵ Easy Case (n. 11) p. 1932

Ironically, these 'atypical' products were the very ones which prompted the evolution of PL law in Europe.²⁵⁶ Moreover, each of the items listed by Goldberg and Zipursky is heavily regulated in Europe.²⁵⁷ If regulation is successful then there should be no need for PL to fulfil a quasi-regulatory function. It is suggested here that regulation is effective in promoting safety.

4.1.1 Regulation can be seen to improve safety

There is empirical evidence to support the obvious proposition that regulation improves safety. Two notable areas of regulation in the motor industry are the introduction of seat belts and the compulsory wearing of motorcycle crash helmets. In both cases regulation has led to use of these devices becoming the norm and as would be expected both have materially improved safety and survivability from accidents.

The Road Safety Observatory (RSO),²⁵⁸ whose aim is to promulgate independent information and research reviews on road safety matters, has measured the effectiveness of seatbelts by 'the percentage reduction in fatalities or injuries for restrained occupants as compared to those suffered by unrestrained occupants.' RSO concluded on the basis of reviewing several studies in Sweden, the US and the UK from the 1960s to 2012 that

Seat belts are highly effective in protecting vehicle occupants and significantly reducing their risk of being fatally or seriously injured in a crash...Seat belt laws increase seat belt use, and so reduce death and injury. 25 years after the first law requiring seat belts to be used, it was estimated that front seat belts had saved over 60,000 lives in Great Britain.²⁵⁹

²⁵⁶ EEC Draft PL Directive Memorandum (n. 24) p. 153

²⁵⁷ By way of a non-exhaustive list of examples –

Clothing: from the Textile Products (Indication of Fibre Content) Regulations 1986 to the Nightwear (Safety) Regulations 1985;

Food: Food Safety (Fishery Products and Live Shellfish) (Hygiene) Regulations 1998;

A Home Appliance: Waste Electrical and Electrical Equipment Regulations 2006;

A Power Tool: The Supply of Machinery (Safety) Regulations 2008;

A Toy: The Toys (Safety) Regulations 2011; or

A Passenger Vehicle: The Road Vehicles (Construction and Use) Regulations 1986

²⁵⁸ Comprising a number of bodies including the Department of Transport, Road Safety GB, RoSPA, the RAC Foundation and Roadsafe

²⁵⁹ < <http://www.roadsafetyobservatory.com/HowEffective/vehicles/seat-belts> > accessed 15 May 2013

As for crash helmets the Motorcycle Accidents In Depth Study (MAIDS) study was undertaken by the Association of European Motorcycle Manufacturers (ACEM) with the support of the European Commission and other partners to collect data from accidents involving Powered Two Wheelers (motorcycles and mopeds) in Europe. 921 accidents were investigated in detail, with approximately 2000 variables being recorded. Helmets were compulsorily worn in over 90% of cases. The study assessed the effectiveness of the helmet in preventing injury ‘based upon a detailed analysis of the rider kinematics as well as a review of any head injuries reported.’ According to the study:

The data indicates that in 68.7% of all cases, the helmet was capable of preventing or reducing the head injury sustained by the rider...²⁶⁰

4.1.2. In contrast with PL, regulations are focused, and set standards

It is unsurprising that these regulations have been successful, as the regulations are entirely focused on a specific safety goal rather than reacting to accidents, whereas PL deals, on an *ad hoc* basis, only with the failures. PL fails to set standards to be adhered to. At best it merely punishes the failure to adhere to unspecified standards. Regulations impose safety standards that must be designed in from the outset. Thus it was possible to plead with such specificity in the Kudo Case Study:

It is averred that the handbrake design complies with the requirements of COUNCIL DIRECTIVE of 26 July 1971 on the approximation of the laws of the Member States relating to the braking devices of certain categories of motor vehicles and of their trailers (71/320/EEC)²⁶¹ which provides:.

“ANNEX II

Braking Tests and performance of braking systems...

2. PERFORMANCE OF BRAKING SYSTEMS...

2.1. Vehicles of categories M and N...

2.1.3. Parking braking systems

2.1.3.3. If the control is a manual control, the force applied to it shall not exceed 400 N in the case of category M1 vehicles...”

The Directive therefore permits a design which requires up to 400N of input force (equivalent to approximately 40.8 Kgf).

²⁶⁰ ACEM 1040 Brussels < <http://www.maids-study.eu/downloads.php> > accessed 23 April 2015

²⁶¹ COUNCIL DIRECTIVE of 26 July 1971 on the approximation of the laws of the Member States relating to the braking devices of certain categories of motor vehicles and of their trailers (71/320/EEC) (OJ L 202, 6.9.1971, p. 37)

Once the brake was measured to be within this requirement, there was really no case to meet. The claimant's expert's attempt to introduce the Manual Handling Operations Regulations 1992, as amended, was hopeless and inappropriate. It does not apply to the design of parking brake systems. In any event the basis on which forces are handled, lifted and held under the Manual Handling Regulations is entirely different to pulling a brake lever.

4.1.3 The General Product Safety Directive fills any gaps in regulations

The PL Directive runs in parallel with a successful European Product Safety regime. It is notable that in every case in the PL Claims Survey at Appendix 4, the product concerned was subject to safety regulations. Where there are no product specific regulations for consumer products, the General Product Safety Directive 2001/95/EC²⁶² steps in to fill the gap.²⁶³ Initially its predecessor, the General Product Safety Directive 1992²⁶⁴ acknowledged the difficulty in legislating for every product and stressed the need for a horizontal framework to cover lacunae.²⁶⁵ The purpose of the provisions of this Directive is to ensure that products placed on the market are safe.²⁶⁶

Producers shall be obliged to place only safe products on the market.²⁶⁷

The definition of a safe product was any product which, under normal or reasonably foreseeable conditions of use 'does not present any risk or only the minimum risks compatible with the product's use, considered as acceptable and consistent with a high level of protection for the safety and health of persons'. The characteristics of the product, including its composition, packaging, instructions for assembly and maintenance, presentation, labelling, any instructions for its use and disposal were all

²⁶² DIRECTIVE 2001/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 3 December 2001 on general product safety L 11/4 Official Journal of the European Communities 15.1.2002 **(GPSD)**

²⁶³ For a helpful summary of the provisions of the GPSD see Duncan Fairgrieve and Geraint Howells 'General Product Safety: A Revolution through Reform?' *The Modern Law Review*, Vol. 69, No. 1 (Jan., 2006), pp. 59-69 <<http://www.jstor.org/stable/3877210>> Accessed: 14 June 2013

²⁶⁴ COUNCIL DIRECTIVE 92/59/EEC of 29 June 1992 on general product safety No L 228/24 Official Journal of the European Communities 11.8.92 **(GPSD 1992)**

²⁶⁵ GPSD 1992 Recital 3 (n. 264)

²⁶⁶ GPSD 1992 Article 1 (n. 264)

²⁶⁷ GPSD 1992 Article 3 (n. 264)

to be taken into account as were the characteristics of the consumers at serious risk when using the product, in particular children.

The Directive applied to manufacturers and their representative or the importer into the EU and, 'other professionals in the supply chain, insofar as their activities may affect the safety properties of a product placed on the market'.²⁶⁸ The net was cast wide to catch anyone who might affect the safety properties of the product. It is observed in the 1999 Green Paper that liability under the PL Directive ceases ten years after the date on which the product was put into circulation whereas the GPSD 1992 (current at the time) requires that a product is safe for the reasonably foreseeable period of a product's use.²⁶⁹ Member States were empowered to give Authorities power to adopt measures to organise appropriate safety checks, take samples and prohibit supply.²⁷⁰

In 2001, the GPSD 1992 was revamped. It was recognised in the Explanatory Memorandum accompanying the new General Product Safety Regulations 2005²⁷¹ which transposed the GPSD:

The prevailing view among enforcement authorities, consumer groups and business is that subjectively the UK does not have a product safety problem and the Commission is thought to regard the UK as one of the safest countries in the EU.²⁷²

The new GPSD introduced, *inter alia*, most significantly 'new last-resort provisions for the mandatory recall of unsafe products where the voluntary action taken by producers and distributors has not been satisfactory or sufficient and where no other measure can remove the risk to consumers'.²⁷³ This was a major step. Previously the GPSD 1992 had fallen short of recall with a power to force the 'withdrawal'²⁷⁴ of a product.

²⁶⁸ GPSD 1992 Article 2(d) (n. 264)

²⁶⁹ Green Paper (n. 45) p. 27

²⁷⁰ GPSD 1992 Article 6 (n. 264)

²⁷¹ General Product Safety Regulations 2005, 2005 No. 1803

²⁷² Explanatory Memorandum to the General Product Safety Regulations 2005 [7.7]

2005 No. 1803 < http://www.legislation.gov.uk/ukxi/2005/1803/pdfs/ukxiem_20051803_en.pdf > accessed 23 April 2015

²⁷³ The General Product Safety Regulations 2005 Final Regulatory Impact Assessment 1.3 attached to Explanatory Memorandum to the General Product Safety Regulations (n. 272)

²⁷⁴ GPSD 1992 Article 3 (n. 264)

Recall involves calling back a 'product that has already been supplied or made available to consumers by the producer or distributor'.²⁷⁵

The new GPSD provided that 'Producers shall be obliged to place only safe products on the market' taking into account voluntary national standards, Commission recommendations, product safety codes of good practice, the state of the art and technology and reasonable consumer expectations concerning safety.²⁷⁶ The obligations of Producers extend to providing consumers 'with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks', which as a last resort would include product recall.²⁷⁷

The powers given to member States are precisely targeted towards ensuring the safety of the product, rather than being incidental to duties. These include a power to take samples of products and subject them to safety checks; to require the marking of products with warnings; to impose conditions on marketing; to ban products from sale; to force the withdrawal of products; and to 'order or coordinate or, if appropriate, to organise together with producers and distributors its recall from consumers and its destruction in suitable conditions.'²⁷⁸

It was acknowledged in the Impact Assessment by the DTI:

The Department fully recognises that where recall is appropriate producers are generally swift to remove the product from consumers. Nevertheless, the introduction of this power has been the most controversial part of the transposition process, with business concerned that enforcement authorities lack experience in recall and that there could be over or misuse of the power.²⁷⁹

The intention however, is clear that the Member States should have a strong regulatory enforcement regime to 'ensure the effective enforcement of the obligations incumbent on producers and distributors' by ensuring monitoring authorities 'have

²⁷⁵ GPSD Article 2(g) (n. 262)

²⁷⁶ GPSD Article 3 (n. 262)

²⁷⁷ GPSD Article 5 (n. 262)

²⁷⁸ GPSD Article 8 (n. 262)

²⁷⁹ The General Product Safety Regulations 2005 Final Regulatory Impact Assessment 7.2 (n. 272)

powers to take appropriate measures, including the power to impose effective, proportionate and dissuasive penalties'.²⁸⁰

The GPSD provides for producers to put in place surveillance programmes, with consumer complaints procedures.²⁸¹ In conjunction with this, the Commission is to promote the RAPEX system for Europe-wide reporting of unsafe products by national authorities to the Commission and the co-ordination of remedial action.²⁸²

This could only serve to intensify the deterrent effect of the Directive because the costs of a recall can be out of all proportion to the costs of litigation.²⁸³ It is difficult to see that the PL Directive could have added much if anything to this provision in terms of deterring the supply of unsafe products.

The Product Safety Directive is now going through its third iteration.²⁸⁴ The European approach to product safety is seen as a 'good news story' in contrast with the PL Directive, in the sense that 'its objectives are valuable'²⁸⁵ and the latest set of refinements (including enhanced market surveillance) successfully advance the protection of human health and safety for the benefit of society. Key revisions include extending the reach of the Regulations to products 'to which consumers are exposed in the context of a service provided to them'.²⁸⁶ The revision is supplemented by the proposed Market Surveillance Regulation which would produce a 'one tier system in which all market surveillance rules are brought together in a single instrument and in which RAPEX will be the single alert system regarding products presenting a risk'.²⁸⁷

²⁸⁰ GPSD Recital 22 (n. 262)

²⁸¹ GPSD Article 9 (n. 262)

²⁸² GPSD Articles 10 & 11 (n. 262)

²⁸³ See for example 'Toyota takes \$2bn hit from global safety recall'

<<http://www.guardian.co.uk/business/2010/feb/04/toyota-safety-recall-profits>> accessed 16 June 2013

²⁸⁴ Proposal for a Regulation of the European Parliament and of the Council on Consumer Product Safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC Brussels, 13.2.2013 COM(2013) 78 final 2013/0049 (COD) ("Product Safety and Market Surveillance Package")

< http://ec.europa.eu/consumers/archive/safety/psmsp/docs/psmsp-act_en.pdf > accessed 5

February 2015

²⁸⁵ Geraint Howells, *Product safety – A Model for EU Legislation and Reform*. Ch. 25 varieties of European Economic law and Regulation 2014 ISBN 978-3-319-04903-8 pp. 525-538

²⁸⁶ Product Safety and Market Surveillance Package Article 2 1(c) (n. 284)

²⁸⁷ Product Safety and Market Surveillance Package, Explanatory Memorandum (n. 284) p. 5

4.1.4 Regulations are backed by Criminal Law sanctions making them normatively more effective than PL

Those who fail voluntarily to comply with regulatory requirements face criminal sanctions.

Sanctions are an important part of any regulatory system. They provide a deterrent and can act as a catalyst to ensure that regulations are complied with and indicate that non-compliance will not be tolerated.²⁸⁸

Following on from the Hampton Report²⁸⁹ which recommended *inter alia* more effective deterrence in regulatory powers, Macrory recommended a wide range of sanctioning options in addition to criminal prosecution, enabling regulators to respond to individual needs. This led to the enactment of the Regulatory Enforcement and Sanctions Act 2008 which gave the Local Better Regulation Office powers to coordinate regulatory enforcement by local Authorities and provided under Part 3 a range of enforcement tools including fixed and variable monetary penalties; compliance notices; restoration notices; stop notices and enforcement undertakings.

4.1.5 Regulation backed by criminal sanctions but also cultural norms

The criminal law is better placed than tort to influence norms of behaviour. Indeed the roles of criminal sentencing include punishment, reduction of crime (including by its deterrence), reform of offenders and protection of the public.²⁹⁰

It is not necessarily the fines and other enforcement means that make regulation work. The Association of Personal Injury Lawyers (APIL) wrote in their briefing note against

²⁸⁸ Richard B Macrory, *Regulatory Justice: Making Sanctions effective*. Final report November 2006 <http://webarchive.nationalarchives.gov.uk/20070305103615/http://cabinetoffice.gov.uk/regulation/documents/pdf/macrory_penalties.pdf > accessed 5 February 2015

²⁸⁹ Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement* March 2005, ISBN: 1 84532 088 3, p. 6 [16] <<http://webarchive.nationalarchives.gov.uk/20070701131038/http://www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf> > accessed 5 February 2015

²⁹⁰ Criminal Justice Act 2003 s 142

the proposed repeal of strict liability for breaches of health and safety duties²⁹¹ in response to the Löfstedt Report on Health and Safety:²⁹²

Finally, some commentators have said that employers will still face the consequences of criminal breaches of statutory duty in the courts. This completely misses the point that, according to the Health and Safety Executive, in 2011/2012 there were 156,000 accidents at work which led to more than seven days' absence yet in the last year, the HSE, which is the main prosecuting authority, prosecuted just 584 cases.²⁹³

It is submitted that this is irrelevant to whether criminal sanctions work. The potential for criminal prosecution will have deterred many more breaches. It does not always require a prosecution to improve safety. Regulation does not necessarily have to be heavy handed to achieve its goal.

The possibility of fines, sanctions, and inspections acts less as a deterrent threat than as a way to focus management attention on institutionalised expectations that may affect the legitimacy and operation of their enterprises.²⁹⁴

Compliance with regulations is a cultural and behavioural norm. Successful manufacturers want to instil a perception of compliance, safety and legitimacy. The LSE's review of the determinants of compliance with Health and Safety Laws and Regulations for the Health and Safety Executive in 2008 found that compliance is 'more common than might be expected'. Sanctions may not even feature in the minds of the relevant persons and regulators may not need to focus on enforcement. They concluded:

Compliance practices may be better understood by reference to the broad environment and the regulatory context within which those subject to regulation carry out their enterprises. These factors include but are not limited to:

- The design and source of the regulations

²⁹¹ Subsequently enacted as s 69 Enterprise and Regulatory Reform Act 2013 – from 1 October 2013 (Enterprise and Regulatory Reform Act 2013 (Commencement No 3, Transitional Provisions and Savings) Order 2013)

²⁹² Löfstedt Report (n. 62)

²⁹³ A parliamentary briefing from the Association of Personal Injury Lawyers (APIL) for members of the House of Lords ahead of second reading November 2012: < [APIL briefing](#) > accessed 5 June 2013

²⁹⁴ (OECD(2000) Reducing the risk of policy failure: Challenges for regulatory compliance) < <http://www.oecd.org/gov/regulatory-policy/46466287.pdf> > accessed 9 April 2015

- The structure of the regulatory agency and its regulatory mandate;
- The enforcement activities of its staff;
- Business motivations for compliance (including the sanctions imposed and firms' perception of the legitimacy of the regulations) and the structure of the firms being regulated;
- The regulatory environment (including the economic climate, industry size and structure, whether the interests of business converge with those of the regulatory agency, and the role of third party actors).

Variation exists among firms in their response to similar regulatory standards, and some will, contrary to simple economic models, institute compliance measures that go well beyond those required by legal rules.²⁹⁵

What is more important is to promote a culture of compliance. Voluntary Codes of Practice exemplify how this can work. In the field of vehicle safety there is a Code of Practice on Vehicle Safety Defects and Recalls. It has been developed by the Department of Transport in conjunction with the society of Motor Manufacturers and Traders amongst others.²⁹⁶

The Code states:

In the United Kingdom legislation covers the manufacturers, suppliers, distributors responsibilities regarding consumer protection in the form of the General Product Safety Regulations 2005 (GPSR 2005). This legislation was brought about by the introduction of European legislation (The General Product Safety Directive 2001 (Directive 2001/95/EC) and

²⁹⁵ Dr Tola Amodu, 'The determinants of compliance with laws and regulations with special reference to health and safety A literature review' RR638 page vii Department of Law, The London School of Economics and Political Science < <http://www.hse.gov.uk/research/rrpdf/rr638.pdf> > accessed 15 May 2013

²⁹⁶ The full list is:

- Vehicle and Operator Services Agency (VOSA) representing the Secretary of State for Transport
- The Society of Motor Manufacturers and Traders Limited (SMMT)
- The Motor Cycle Industry Association Limited (MCIA)
- The National Caravan Council (NCC)
- Independent Automotive Aftermarket Federation (IAAF)
- Retail Motor Industry Federation (RMIF)
- British Tyre Manufacturers' Association Ltd (BTMA)
- National Tyre Distributors Association (NTDA)
- Imported Tyre Manufacturers' Association (ITMA)
- Retread Manufacturers Association (RMA)
- Agricultural Engineers Association (AEA)
- National Trailer and Towing Association (NTTA)
- British Vehicle Rental and Leasing Association (BVRLA)

subsequent additions (2004/905/EC). These documents encourage Codes of Good Practice.²⁹⁷

The Code 'concerns cases where manufacturers, concessionaires or official/independent importers become aware of the existence of potential safety defects in units that are available for supply in the UK in respect of; passenger cars...'. Significantly, there have been 6,540 motor recall campaigns since January 2000.²⁹⁸ During the same period there has only been one motor manufacture PL group action.²⁹⁹ This suggests that there is a culture of compliance. This is not surprising as generally manufacturers want the 'seal of approval' that compliance gives them.

Compliance is not universal. A search of the European Commission's RAPEX site³⁰⁰ shows that of the 6,046 European product recalls registered from 2010 to June 2013, 3,444 are for products originating in China. If this signifies a trend of importing cheap unregulated goods, the question will reasonably be asked whether punishments are sufficient to act as a deterrent. Goldberg and Zipursky make the argument in relation to the US regulations that, even when enforced, they tend to generate penalties 'that are not correlated with the losses actually caused by the violations'.³⁰¹ It is true that prosecutions under the Consumer Protection Act 1987 tend to attract small fines. A visit to the Trading Standards Institute website³⁰² is illuminating in this regard. A recent prosecution is illustrative:³⁰³

The director of Star One International Limited, Mr Guldip Singh Dang, pleaded guilty to six offences relating to the supply of toys that failed to meet the essential requirements of The Toys (Safety) Regulations 1995 and one offence of supplying a toy that contained a banned substance, contrary to The REACH Enforcement Regulations 2008. Mr Dang, of

²⁹⁷ *Code of Practice on Vehicle Safety Defects and Recalls* Document Reference: VSBCOP001 Issue: 1 (03/07) Origin: VSB1, < <https://www.gov.uk/government/publications/code-of-practice-on-vehicle-safety-defects-and-recalls/code-of-practice-on-vehicle-safety-defects-and-recalls> > accessed 9 April 2015

²⁹⁸ < <http://www.dft.gov.uk/vosa/apps/recalls/searches/search.asp> > 23 April 2015

²⁹⁹ See < <http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders> > accessed 23 April 2015

³⁰⁰ The Rapid Alert System for Non-food Dangerous Products (RAPEX) is a searchable database maintained by the European Commission.

< <http://ec.europa.eu/consumers/safety/rapex/alerts/main/index.cfm?event=main.listNotifications> > accessed 23 April 2015

³⁰¹ Easy Case (n. 11) p.1930

³⁰² < <http://www.tradingstandards.gov.uk/> > accessed 23 April 2015

³⁰³ < <http://www.tradingstandards.gov.uk/extra/news-item.cfm/newsid/1111> > 27 April 2013

Grange Farm Close, Harrow, was fined a total of £1,000 and ordered to pay £3,000 costs

...

The safety failures of the toys included:

- scooters with sharp edges, points, and entrapment/crushing hazards
- toy buggies that collapsed and whose packaging presented a hazard
- toy planes with no importer details applied for traceability
- dolls with sharp points and small parts that were a choking hazard
- rattles that were poorly constructed and could pose a choking hazard
- dolls with ten times the permitted level of a harmful chemical

It may be argued with some force that fines of such a small scale fail to deter. However, the simple response is that fines can be made larger if necessary. There is a huge variation in criminal sanctions across the EU. This is another area for harmonisation. In a recent product recall handled by the Practice, advice was received on the potential sanctions for failing to notify the recall in Czech Republic, Slovakia, Hungary and Poland. Potential penalties ranged from €332 per product type in Slovakia to up to €24,000 in Poland; to a possible fine up to as much as €6.6m for failure to comply with a recall order in Hungary and up to €2m for failure to notify in Czech Republic.³⁰⁴

4.1.6 Health and Safety Fines lead the way

If, in principle, regulation improves the safety of products, then legislation can empower the judiciary to set the fines accordingly. This has happened noticeably in the field of Health and Safety. For example, after the Hatfield train crash on 17 October 2000, Balfour Beatty was prosecuted under section 3(1) of the Health and Safety at Work Act 1974 for failing to discharge its duty, as an employer, to persons not in its employment. The crash happened when a broken rail caused the derailment of an express train travelling at 117mph. The faulty rail had been spotted 21 months earlier but left unrepaired. A replacement rail had been delivered and left alongside it for six months. The breach of duty in question was a cause of the accident in which 102 passengers were injured and 4 lost their lives. At trial Balfour Beatty pleaded guilty and Mackay J sentenced it to a fine of £10m plus costs. The fine was reduced on appeal to £7.5m, still a substantial fine, carrying a clear deterrent message.³⁰⁵

³⁰⁴ The helpful advice of CMS Cameron McKenna is gratefully acknowledged in this regard. It is not within the scope of this thesis to investigate the range of punishments in other EU states or how frequently and at what level such statutory fines are actually ordered – but it would make an interesting project for the future.

³⁰⁵ *R. v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586; see also

MARKET FORCES ACT AS A DETERRENT

4.2 Market forces act as a natural deterrent

Polinsky and Shavell make the point that firms are often motivated by market forces to enhance product safety because their sales may fall if their products harm consumers.³⁰⁶ Market forces act as a natural deterrent against supplying unsafe products. It was acknowledged in the Impact Assessment for the introduction of the General Product Safety Regulations 2005 (implementing the GPSD 2001)

13.3 In the main we believe observance to be high in the UK because of the potential damaging brand impact that leaving an unsafe product on the market can have, though we accept that there may be a small number of less scrupulous traders for which this 'brand image effect' is not a sufficient deterrent.³⁰⁷

Polinsky and Shavell concede 'For products that are not widely sold, however, market forces and regulation will usually be less effective and, as a consequence, PL is more likely to be socially advantageous.'³⁰⁸ They cite drugs and automobiles as examples of widely sold products.

4.2.1 Market forces affect contracting parties and third parties, and all products whether widely or narrowly sold

Polinsky and Shavell make two illogical concessions. First, they accept that market forces do not operate to penalise firms for harm they do to third parties (strangers) because the victims of harm are not their customers. This is incorrect. The negative publicity does not only affect the owner of a product made by the particular manufacturer. In fact *potential buyers* are more affected than existing owners as they may be put off making a purchase. Uneasy provides examples: Tylenol contaminated with cyanide in 1982 led to a fall in market share from 37% to 7%. Audi's 'sudden acceleration' crisis in the US led to a drop in sales of 69%. In recent experience, Toyota has gone through a wave of such bad publicity arising from a worldwide recall

<<http://news.bbc.co.uk/1/hi/uk/5149732.stm> > accessed 16 January 2013

³⁰⁶ Uneasy Case (n. 1) p. 6

³⁰⁷ The General Product Safety Regulations 2005 Final Regulatory Impact Assessment 13.3 (n. 273)

³⁰⁸ Uneasy Case (n. 1) p. 5

arising from an alleged uncontrollable acceleration incident.³⁰⁹ It is not the recall itself (although that is not to say that a series of recalls would not of itself become so newsworthy as to damage a brand) but the alarming accident reported that does reputational damage. In the Kudo Case Study, Kudo had already carried out a recall campaign before the incident. It attracted no adverse publicity. In fact recalls may be presented to the public in a positive light. Polinsky and Shavell point out that Volvo has made a safety a selling point.³¹⁰ In the UK, the car manufacturer MG's slogan as long ago as the 1930s, was 'Safety Fast'.³¹¹

However, put succinctly by Mr Justice Willis in *Walton v British Leyland*, bad publicity is 'bad for sales'.³¹² The degree to which consumers punish manufacturers for unsafe products is dependent on the information they have.³¹³ That information may come from the media or the internet as the most prevalent sources. It may be 'mis-information'. Good news is often not newsworthy and so one may expect that if there is news about a product it is most likely to be bad – a recall or a horrific accident. Uneasy points out the cognitive bias factor.³¹⁴ Audi's sudden acceleration experience in the 1980s demonstrates how great the effect of public perception can be, whether soundly based or not.³¹⁵ According to the Department of Transportation Report:

...we cannot identify any single malfunction in the Audi 5000 which could simultaneously produce sudden acceleration and brake failure and which would leave no readily observable evidence of its occurrence.³¹⁶

The consumer may not properly understand or evaluate the information about the product risks. The Practice sees this regularly with airbag cases. In almost all airbag cases handled by the Practice (in excess of 20) the airbag has functioned normally.

³⁰⁹ Daily Mail 20/02/2010 << <http://www.dailymail.co.uk/news/article-1248177/Toyota-recall-Last-words-father-family-died-Lexus-crash.html> >> last accessed 23/10/12

³¹⁰ < <http://www.wired.com/2008/05/volvo-promises> > accessed 23 April 2015

³¹¹ See Pathé advertising film for MG called 'Safety Fast' < <http://www.britishpathe.com/video/safety-fast> > accessed 15 May 2013

³¹² *Walton v British Leyland* (n. 194)

³¹³ Uneasy Case (n. 1) p. 8

³¹⁴ Uneasy Case (n. 1) p. 11

³¹⁵ <<http://www.nytimes.com/1988/07/24/business/a-hard-sell-for-audi.html?scp=14&sq=audi%20sudden%20acceleration&st=cse>> accessed 27 April 2013

³¹⁶ Gary Carr John Pollard Don Sussman Robert Walter Herbert Weinstock, (U.S. Department of Transportation Research and Special Programs Administration Transportation Systems Center Cambridge, MA), *Study of Mechanical and Driver – Related Systems of the Audi 5000 Capable of Producing Uncontrolled Sudden Acceleration Incidents* Final Report DOT-TSC-NHTSA-88-4 September, 1988

However the claimant has misunderstood or been misinformed about the function and purpose of the airbag. In some of these cases the airbag very probably saved the claimant's life (see for example cases 13 and 130 in the PL Claims Survey at Appendix 4.)

The second concession is that market forces are most influential for widely sold products because large volume companies have more to lose if their products are dangerous and more to gain if they are safe.³¹⁷ They therefore have a 'greater incentive to invest in product safety because they often offer multiple product lines and have long time horizons.'³¹⁸ But smaller companies and companies with limited product ranges and limited market places have proportionately as much to lose. A steel fabricator in a small town will suffer hugely if it gains a reputation (justly or otherwise) for having had a major building collapse due to defective parts that it manufactured. So market forces are critically important to a manufacturer regardless of whether his market place is large or small.

Conclusions

The UK has an extensive regulatory regime for product safety and the GPSD, parallel to the PL directive, to fill any gaps, backed by criminal sanctions. It works well in fostering a culture of compliance through voluntary codes, such as the VOSA Code of Conduct on Vehicle Safety Defects and Recalls which had already prompted recall action before misguided litigation was commenced against Kudo. Where sanctions are thought inadequate to enforce the regulatory regime, the lead of Health and Safety legislation should be followed in increasing fines. Targeted fines are far more effective in regulating safety than arbitrary awards of damages. By way of contrast, in the US, over-reliance on PL law has arguably led to under-regulation.

Above all, I conclude, thalidomide teaches that toxic risks call for stringent regulation and an expansion of social insurance.³¹⁹

³¹⁷ Uneasy Case (n. 1) p. 12

³¹⁸ Uneasy Case (n. 1) p. 12

³¹⁹ Anita Bernstein, 'Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure' Columbia Law Review, Vol. 97, No. 7, (Nov., 1997), 2153-2176 p. 2156

Irrespective of regulation and PL, market forces act as a filter to deter the supply of defective products. Information channels are so wide and so instantaneous that any bad news about a product translates rapidly into depressed sales whether, the product is sold globally or parochially.

The economic theory of tort based on targeting the source of accidents and internalising the costs of accident avoidance was explained in Chapter Two as a way of ‘persuading [manufacturers] to spend the appropriate levels of money on safety...’³²⁰ According to this theory, the greater the number of ‘Martins’ making claims against Kudo, the more it can be said that PL is working as an indirect deterrent. This leads to a moral conundrum. If there is no correlation between the merits of PL claims and the deterrent effect of PL claims, then it is difficult to justify PL as a deterrent. Kudo is a classic ‘have a go’³²¹ case as identified by the Better Regulation Task Force. The injuries were overstated and insignificant. At worst they amounted to minor aches and pains and it was pure opportunism that led to them generating a PL claim. Had the same injuries or discomfort been suffered in a village football match, the claimant might have been expected to ‘grin and bear it’.³²² Whilst the burden of proof was squarely on the claimant to show that there was a defect in the product and that this caused his injury, Kudo could not simply sit back and do nothing in reply, in the hope that Martin’s expert would disintegrate on cross-examination (which he did). Thus it can be said that on the facts and findings, Kudo were put to expense even though they were not liable. There was no defect. The cost to Kudo centred not on the merits of the claim but the inconvenience of litigation, the wasted cost of defending a bad claim and most significantly the cost of the potential bad publicity which might arise from the claim: the nuisance value of litigation. The easier it is for claimants to bring nuisance claims, the more claims of this nature Kudo can expect to face. Only then does the scale of the overall cost begin to become significant. But this does not constitute a satisfactory normative basis for deterrence. It has been suggested that ‘Members of the public’ may be excused for ‘having a go’ as they are merely following the moral

³²⁰ P.S. Atiyah, *The Damages Lottery* (n. 13) pp. 165 & 167

³²¹ See David Arculus and Teresa Graham, *Better Routes to Redress* (n. 240) p. 5

³²² Richard Mullender, ‘Negligence law and blame culture: a critical response to a possible problem’ *Professional Negligence* 2006, 22(1), 2-31 p. 4 citing J.A Weir, ‘Governmental Liability’ [1989] *Public Law* 40, p. 55

code laid down for them by the legal profession.³²³ It ill behoves the legal profession to inculcate a perverse moral code in the public.

³²³ Richard Mullender, 'Negligence law and blame culture: a critical response to a possible problem' (n. 322)

Case Study 2 : Corrective Justice

Vaughan v Cranwell³²⁴

Summary

Mr Vaughan was a successful company director. His hobby was flying and he owned a light aircraft and was a member of a flying club. Cranwell was a member of small syndicate of likeminded enthusiasts which owned and flew a Russian ex-military training aircraft from a rural airfield close to the airport from which Vaughan flew his own aircraft.

A surprise party was arranged at Vaughan's flying club for his birthday. As part of the celebrations, his friends arranged for Cranwell to take Vaughan for a pleasure flight in the syndicate's aircraft. Vaughan and Cranwell were acquainted through the local flying community but had not flown together.

The aircraft was built in the 1970s in the Eastern Bloc and was used as a military training aircraft. To an enthusiast it looked and sounded awesome, looking more like an aircraft from the 1950s, which in reality was the age of the technology, with a powerful radial engine on the front. It was a simple rugged design: open control wires ran along the floor of the cockpit between the pilots' feet from the joystick to the wings and tail. It is an aircraft type used for breath-taking aerobatic displays in the hands of expert pilots³²⁵.

It has two cockpits in line and can be flown from either.

Cranwell was an experienced pilot with some aerobatic experience but was known to be conservative with his aerobatic flying. He was not an expert. Cranwell flew to the airfield where the party was in full swing. He offered to take Vaughan for a flight.

³²⁴ See Appendix 2 for verbatim extracts from the key documents in the case. The only alteration is to the parties' names for anonymity

³²⁵ For an example see the following video made by the expert used by the Practice in the case:
< https://www.youtube.com/watch?v=UyG5RvMz3xE&feature=player_embedded#t=13 > accessed 23 April 2015

Vaughan happily accepted and they discussed flying around the area without any aerobatics. The parachutes normally kept on the seats in case of emergency during aerobatics had been taken out and cushions put on the seats.

Vaughan's family were gathered at the club house which looks out onto the runway. Vaughan climbed into the rear cockpit and Cranwell briefed him. The seven point safety harness was complicated. Two straps came around the waist from each side of the seat. One more came over each shoulder and finally an anti-gravity strap came up from the floor to hold the occupant in his seat if the aircraft flew inverted. All the straps met in the middle on two locking buckles.

The original safety harness had been replaced, as is common practice, with a modern equivalent from the USA. Original harnesses would be perished and unsafe and new ones of the original type are no longer available.

Cranwell was seen leaning into the cockpit and presumably assisting Vaughan with the harness. They spoke for a few minutes. Vaughan was photographed in the cockpit. He was happy and relaxed. His harness was fitted securely over his shoulders.

Cranwell climbed into the front cockpit and, once settled, he attempted to start the engine. It would not start. The particular design of starter requires it to be charged with compressed air from a special cylinder. The cylinder had to be collected from the aircraft's home base. Cranwell flew back there in another aircraft and returned with the cylinder.

The two then re-boarded. A friend of Vaughan noticed that he had not secured his shoulder straps and offered to assist. Vaughan declined. The aircraft then took off successfully, flew low for a short accelerating run and then made a steep roaring climb out before banking to the right and disappearing off into the distance. It returned a short time later and Cranwell asked Air Traffic Control for permission to make a low approach and go round before turning to the right to join the circuit to land.

The aircraft approached at speed and flew past the club house. It then climbed rapidly and turned to the right as it had done on take-off. This time, however, when the aircraft

banked to the right it continued to roll until it was inverted. Air Traffic Control heard a short transmission from the pilot from which he clearly appreciated the imminent danger. The aircraft continued to roll and crashed nose first into the ground at high speed, erupting in a fireball. Both occupants were killed instantly in the full gaze of Vaughan's family.

The accident was investigated by the Air Accident Investigation Branch of the Department of Transport in accordance with the Chicago Convention.³²⁶

AAIB Draft Bulletin

The AAIB submits its draft report (Bulletin) to interested parties to enable them to make any representations in accordance with the Investigation of Accidents Regulations.³²⁷

The draft AAIB bulletin concluded that in the absence of a pre-existing technical defect being found, the following causal factors could not be dismissed:

- Inadvertent interference with the controls by the passenger as a result his shoulder and crotch straps being unsecured;
- Incapacitation of the pilot or passenger due to g-force;
- Mis-handling of a low level aerobatic manoeuvre.

The Practice had the benefit of expert advice from an experienced aerobatic ex-military pilot who ran a display team using this aircraft type. He had also flown with Cranwell to check him out in some aerobatic manoeuvres.

The expert experimented with one of his own identical aircraft to see what would happen if the harnesses were not fastened. He found that the buckle of the rear cockpit

³²⁶ Convention on International Civil Aviation as amended July 1994 Annex 13

³²⁷ Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996, S I No 2798 of 1996 Regulation 12

anti-gravity (crotch) strap could fall into a gap created when the joystick was pushed hard to the right and prevent the stick from returning from that position. This would cause the aircraft to continue to roll and behave exactly as the subject aircraft had done.

He was certain that it was not in the pilot's nature to carry out aerobatics at low level: so certain that he asked the AAIB for permission to inspect the wreckage of the aircraft. This had completely disintegrated forward of the rear cockpit. However, from the wings back, the strongest structural part, the fuselage floor was intact although badly deformed.



Figure 9
View of structure beneath rear seat position of a similar aircraft to [redacted] showing controls with right roll applied



Figure 11
Crotch strap from [redacted] positioned in a similar manner to that shown in Figure 10. Paint damage was present to the upper and lower edges of the longitudinal structural member and on the upper section of the flap actuator casing. (Pitch control rod omitted)



Figure 10
View showing crotch strap buckle jammed between the pitch control rod and fixed structure on a similar aircraft to [redacted] with left roll being demanded but with the control stick positioned to the right



Figure 12
Paint damage to the pitch control rod in the area co-incident with the buckle location shown in Figure 11

Figure 3 Extract from original AAIB Report

On examining the wreckage he found clear evidence that the buckle had indeed fallen into the hole with scrape marks in the paint (highlighted by the red circle) where the pilot had wrestled in vain with the jammed control.

AAIB Revised Bulletin

After representations were made to the AAIB, the conclusion was amended to state that the most likely cause of a restriction of the controls was that a buckle on the passenger's unsecured crotch strap had become jammed in the flight controls.

Inquest

A jury at a Coroner's Inquest into the deaths found

Mr Cranwell was the pilot of a [...] aircraft with dual controls. The passenger in the rear seat had not secured his shoulder or crotch straps. It is not known whether the pilot was aware of this. Mr Cranwell requested permission for a low approach and go around. Permission was given. The aircraft was seen to come in at high speed, following which it climbed to about 200 feet and started to loop round, at which point the aircraft went inverted and struck the ground. It caught fire and the pilot and passenger were both killed. Subsequent investigations show that the rear seat strap could become trapped in the controls so as to prevent the pilot from controlling the aircraft.

Further Investigations

Further research showed that the original Russian harness design could not fall into the hole as it was too large. The modern harness, however, was by pure chance a perfect fit.

Pleaded case

The case against Cranwell was based in negligence. Allegations included

- Ignoring Vaughan's request for a flight without aerobatics and performing aerobatics or abrupt flight manoeuvres at low altitude
- Failing to give a proper briefing
- Failing to carry out a suitable pre-flight check and the ensure loose seatbelt straps were secured
- Ignoring CAA safety advice in playing to an audience

Mediation

After expert evidence was exchanged the parties agreed to mediate. The principal problem for the defendant was that the Air Navigation Order in force at that time imposes heavy obligations on the commander of an aircraft. This includes ensuring passengers understand how to use the harnesses and checking the cockpit for loose objects. A substantial settlement was agreed to reflect the dependency claim.

CHAPTER FIVE - CORRECTIVE JUSTICE

Strict liability is difficult to harmonise with the moral theory, even though in some circumstances a man might feel himself under a moral obligation to make reparation for harm that was not his fault

Glanville Williams 1951³²⁸

INTRODUCTION

5.1 Corrective justice is at the centre of tort

Corrective justice is considered by many (most notably in recent times Coleman,³²⁹ Weinrib³³⁰ – and not least Goldberg and Zipursky³³¹) to form the basis of tort law. There are varied and conflicting interpretations as to the detail of the conditions of responsibility; whether there must be wrong or wrongful loss; and what makes conduct wrongful.³³²

Corrective Justice is not merely one of many theories upon which tort is based: in Cane's search for a 'general law' of tort (by analogy with the general laws of crime or contract), corrective justice emerges as the most promising candidate.³³³ It is not universally accepted as such. Sheinman argues that primary tort duties have nothing to do with corrective justice because they exist before the breach that leads to the need for correction.³³⁴ Whether it is a primary or secondary duty that gives rise to corrective justice it will be assumed that corrective justice is a recognised aim of tort. It does seem, however, that much of the academic debate revolves around the dangers of trying to fit all of tort into a single theory.³³⁵ Out of these debates a common

³²⁸ Glanville Williams, 'The Aims of the Law of Tort' 4 *Current Legal Probs.* 137 (1951) pp.156/157

³²⁹ J Coleman, *Risks and Wrongs* Cambridge University press 1992 ISBN 0-521-42861-0

³³⁰ Ernest J Weinrib, *The Idea of Private Law* (n. 115)

³³¹ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' April, 2010 88 *Tex. L. Rev.* 917

³³² Jules L. Coleman, 'The Practice of Corrective Justice' 37 *Ariz. L. Rev.* 15 1995 p.19

³³³ Peter Cane, 'The General/Special Distinction in Criminal Law, Tort Law and Legal Theory' *Law and Philosophy*, Vol. 26, No. 5 (Sep., 2007), 465-500, p. 484

³³⁴ Hanoeh Sheinman, 'Tort Law and Corrective Justice' *Law and Philosophy* Vol. 22, No. 1 (2003), 21-73

³³⁵ See Richard A. Epstein, 'A Theory of Strict Liability' 2 *J. Legal Stud.* 151 (1973); John Borgo, 'Causal Paradigms in Tort Law' *The Journal of Legal Studies*, Vol. 8, No. 3 (Jun., 1979), pp. 419-455; also Richard A Epstein, 'Causation and Corrective Justice: a Reply to Two Critics' 8 *J legal studies* 477 1979

theme of corrective justice must first be extracted: namely that tort corrects the damage caused by wrongs. Once a workable model of corrective justice is decided on, the next step is to consider whether strict liability for defective products is compatible with it.

This chapter considers whether PL, based on strict liability, is consistent with corrective justice and thereby furthers a key socially desirable aspect of tort.

5.2 There has to be a 'Wrong' to be corrected

A civil-recourse theory that predicates rights of action on wrongs, not losses, comfortably shows how tort law hangs together.³³⁶ Corrective justice may be understood as redressing the balance where one party has bettered his position, whether by accident, negligence, intent or fraud, at the expense of another.³³⁷ It is a matter of rectifying 'an injustice that the defendant has inflicted on the plaintiff'.³³⁸

Coleman agrees that there is a need to annul wrongful gains and losses³³⁹ but the focus must be on the wrongful loss,³⁴⁰ although his theory later broadened to encompass a correlativity dimension,³⁴¹ then agency, rectification and correlativity.³⁴² He dismisses as 'local distributive justice'³⁴³ Perry's theory of outcome responsibility,³⁴⁴ a term coined by Tony Honoré,³⁴⁵ explaining that those who causally contribute to a harmful interaction in a sufficiently proximate way have, simply for that reason, a special responsibility with respect to the outcome that other people do not have. It is not just a question of wrongs but of rectifying wrongful losses. 'Corrective justice imposes a duty to repair the wrongful losses for which one is responsible'.³⁴⁶

³³⁶ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n.331) 986

³³⁷ Aristotle, *The Nichomachean Ethics of Aristotle* (n. 89) p. 152

³³⁸ Ernest Weinrib, 'Tort Law as Corrective Justice' (n. 85)

³³⁹ Jules Coleman, 'Corrective Justice and Wrongful Gain' (n. 84) p. 442 footnote 5

³⁴⁰ Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' 67 Ind. L.J. 349 1991-1992 p. 358

³⁴¹ Jules L. Coleman, 'The Practice of Corrective Justice' 37 Ariz. L. Rev. 15 1995 p. 27

³⁴² Jules L. Coleman 'The Practice of Corrective Justice' (n.341) p. 30

³⁴³ Jules L. Coleman, 'The Practice of Corrective Justice' (n.341) p. 27

³⁴⁴ Stephen R. Perry, 'Comment on Coleman: Corrective Justice' 67 Ind. L.J. 381 1991-1992 p. 399 note 71

³⁴⁵ Tony Honoré, 'Responsibility and Luck' (n. 134)

³⁴⁶ Jules L Coleman, 'Risks and Wrongs' 15 Harv. J. L. & Pub. Pol'y 637 1992 p. 645

It is widely accepted that morally culpable behaviour is a sufficient (if not necessary) basis for corrective justice.³⁴⁷ It is argued strongly that ‘fault is central both to the institution of tort law and ... to its ultimate moral defensibility’.³⁴⁸ It is intuitive (at least to a deontologist if not to a consequentialist)³⁴⁹ that if Kudo had fitted a defective brake to Martin’s car and this had caused the vehicle to run over his child, Kudo would be responsible for the accident and liable to compensate Martin’s child. But moral responsibility alone is not sufficient to ground liability. A Doctor may feel ‘responsible’ if his patient dies, or a lawyer ‘responsible’ if his client loses a case but neither will necessarily be legally liable. Moral responsibility has to be translated into moral wrong before society requires a correction to take place, by making it a legal wrong.

5.2.1 The Wrong must give rise to gain and loss

A moral wrong in itself may not lead to any loss requiring compensation. According to Aristotle’s conception of corrective justice there must be a loss on the part of the plaintiff and a concomitant gain on the part of the defendant.³⁵⁰ Where material property is concerned, the concept of gain and loss may be straightforward. An example given by Epstein³⁵¹ (in the context of strict liability and absence of blameworthy conduct, which will be discussed shortly) illustrates the point. In *Vincent v Lake Erie Transportation*³⁵² the defendant saved his ship in a storm by tying it to the plaintiff’s dock and causing damage to the dock. The gain and loss are clear and there is no obvious reason why, as between the plaintiff and defendant, the plaintiff should bear the loss.

A loss of property *per se*, however, does not explain the concept of loss and gain. In Case Study 2, *Vaughan v Cranwell*, if the aircraft had struck and destroyed a building when it crashed, there would be a loss to the owner of the building but what gain would

³⁴⁷ Dewees, Duff and Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* Oxford University Press (1996) ISBN 0-19-508797-6, p. 8

³⁴⁸ Jules L. Coleman, ‘Tort Law and the Demands of Corrective Justice’ (n.340) p. 351

³⁴⁹ Richard A. Epstein, ‘Toward a General Theory of Tort Law: Strict Liability in Context’ *Journal of Tort Law*, Vol. 3 [2010], Iss. 1, Art. 6 p.4

³⁵⁰ Aristotle, *The Nichomachean Ethics of Aristotle* (n. 89) p. 149

³⁵¹ Richard A. Epstein, ‘A Theory of Strict Liability’ (n.335)

³⁵² *Vincent v Lake Erie Transportation* 109 Minn. 456, 124 N.W. 221 (1910)

there be to the manufacturer of the passenger's harness – or to the pilot, the aircraft certification authority, the air traffic controllers who permitted the fly past, the passenger himself, who failed to secure his straps or any other party who could become involved in the chain of causation in tort?

In the context of a PL claim, the question is whether there has been an unjust gain on the part of the manufacturer correlative to the loss of the injured plaintiff.³⁵³ The only material gain the manufacturer has made is the purchase price. This is not necessarily an unjust gain. Gain is to be understood, however, in terms of violation of another's rights: a 'normative' gain - a gain in rights at the expense of the plaintiff.³⁵⁴

Aristotle makes clear that when he refers to gain and loss he is not speaking literally:

For in such cases, though the terms are not always quite appropriate, we generally talk of the doer's "gain" (e.g. the striker's) and the sufferer's "loss;" but when the suffering has been assessed by the court, what the doer gets is called "loss" or penalty, and what the sufferer gets is called "gain."³⁵⁵

According to Weinrib, 'Aristotle's notion of correlativity must be understood as referring to the Kantian rights and correlative duties that govern the interactions of free agents.'³⁵⁶

In other words, the nexus between the plaintiff and defendant is the correlative nature of right and duty 'because the content of the right is the object of the duty'.³⁵⁷ These are initially in balance. Immediately before the accident, the parties each have what is 'rightfully theirs'. The status quo is one of 'equality' and 'a defendant who breaches that equality realizes a gain solely in the sense of having more than he or she ought to have as a matter of corrective justice, and similarly, *mutatis mutandis*, with the plaintiff's loss.'³⁵⁸

³⁵³ See Ernest Weinrib, 'The Gains and Losses of Corrective Justice' Duke Law Journal, Vol. 44, No. 2 (Nov., 1994), 277-297

³⁵⁴ Ernest J. Weinrib, 'Corrective Justice in a Nutshell' The University of Toronto Law Journal, Vol. 52, No. 4 (Autumn, 2002), 349-356 p. 354; see also Peter Cane, 'Corrective Justice and Correlativity in Private Law: The Idea of Private Law by Ernest J Weinrib, Review' (n. 116) p. 474

³⁵⁵ See Aristotle, *The Nichomachean Ethics of Aristotle* (n. 89) p. 152

³⁵⁶ Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (n. 353) p. 280

³⁵⁷ Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (n. 353/353) p. 291

³⁵⁸ Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (n.354) pp. 354/355

Society becomes concerned when the balance of individual's rights is interfered with and corrective justice steps in to restore equilibrium. Where a person is injured and thereby suffers a wrongful loss, but the injurer does not thereby gain, 'he has secured no gain which would be the concern of corrective justice to rectify'.³⁵⁹

5.3 It is difficult to define what conduct constitutes a wrong

Coleman separates the questions of liability and recovery.³⁶⁰ He sees wrongfulness as a 'rights invasion'.³⁶¹ There has to be an underlying theory of rights as an antecedent to determining when causation of harm is a wrong.³⁶² Goldberg and Zipursky would argue in PL cases that that this normative element (that which makes the defendant's conduct wrong) is satisfied by connecting liability with the consumer expectations test.³⁶³

However, it is argued above³⁶⁴ that the consumer expectations test, as applied under the PL Directive, is not a true barometer of right and wrong because an objectively assessed expectation may be different from actual expectations, which could be greater, lesser or non-existent. Schwartz argues that it is used as a substitute for contributory negligence where that defence is unavailable, or as a mechanism to allow juries to hold a defendant liable 'when all other bases are absent' and calls for the test to be abolished.³⁶⁵ Those objectively assessed expectations may be more than the public at large actually expect.³⁶⁶ Theories upon which the disposition of rights can be founded include basic Kantian morality;³⁶⁷ correlativity based on fairness between the

³⁵⁹ Jules Coleman, 'Corrective Justice and Wrongful Gain' (n. 84) p. 426

³⁶⁰ Jules Coleman, 'Corrective Justice and Wrongful Gain'(n. 84) p. 422 *et seq*

³⁶¹ Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' (n.340)

³⁶² Jane Stapleton, *Product Liability* (n. 9) p. 171

³⁶³ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n.331) p. 983

³⁶⁴ 3.3.5 page 77

³⁶⁵ Alan Schwartz, 'Proposals for Products Liability Reform: A Theoretical Synthesis' *The Yale Law Journal*, Vol. 97, No. 3 (Feb., 1988), 353-419 p. 384

³⁶⁶ PL Directive Article 6 (n. 2): *Sam B and Others v McDonald's Restaurants Limited* (n. 212) per The Honourable Mr Justice Field [74]

³⁶⁷ Allan Beever, 'Corrective Justice and Personal Responsibility in Tort Law' *Oxford Journal of Legal Studies*, Vol. 28, No. 3 (2008), 475–500 p. 492 citing A Burrows (ed.), 'In Defence of Tort' *in Understanding the Law of Obligations* (Hart Publishing, Oxford 1998) 10

parties;³⁶⁸ justice and propriety;³⁶⁹ mathematical imbalance;³⁷⁰ reciprocity;³⁷¹ simple causation.³⁷² A leading theory in the context of PL is that of 'enterprise liability'.³⁷³

5.3.1 Enterprise liability

Stapleton's version of causation based liability is 'enterprise liability'. She bases liability on morality, citing the moral outrage sparked by the Thalidomide disaster.

There does seem to be strong anecdotal evidence that when a bad outcome is seen as due to commercial operations, the resultant resentment and social discredit is often greater than it might otherwise be.³⁷⁴

There are problems with this theory. Linking moral grounds for product liability with profit motive is as random as linking it with bare causation. Every manufacturer is trying to make a profit, as is every service provider and every artisan. The law does not require everyone to work on a charitable or not-for-profit basis. As Stapleton acknowledges, profit-making is approved of in Western economies. Everyone who works seeks profit. Pensions are dependent on the profits of commerce. Employees' own financial security depends on the financial security of their employers. If manufacturers are making losses, they will sooner or later go out of business. Along the way employees will lose their jobs and the scarcity of money may impact on safety. Of course, outright greed at the expense of safety would be an egregious wrong – but while this may be a factor in fault based liability, it would be completely irrelevant to investigate the nature of profits in strict liability.

There is nothing intrinsically wrong with making profits. As Fleming says, commenting on Stapleton:

³⁶⁸ Ernest J. Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice', 2 *Theoretical Inq. L.* 107, 120 (2001); Ernest Weinrib, 'Tort Law as Corrective Justice' (n. 85); Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (n.353) p.280

³⁶⁹ Richard A. Epstein, 'Toward a General Theory of Tort Law: Strict Liability in Context' (n. 349)

³⁷⁰ Aristotle, *The Nichomachean Ethics of Aristotle* Book V (n. 89)

³⁷¹ George P. Fletcher, 'Fairness and Utility in Tort Theory' (n. 67) pp. 537-573

³⁷² Richard A. Epstein, 'A Theory of Strict Liability' (n.335) p. 152

³⁷³ Jane Stapleton, *Product Liability* (n. 9), Chapter 8 page 184 'A new theory of strict moral enterprise liability'

³⁷⁴ Jane Stapleton, *Product Liability* (n. 9), Chapter 8 page 187

What is it about the profit motive that would justify such discrimination? And moral at that? Are we not all, consumers no less than producers, pursuing self-interest, another name for profit? What is so special about financial profit?³⁷⁵

Furthermore the enterprise liability theory does not explain why it should be preferable to fault. The danger is that those who have sought to define a monistic theory of corrective justice may end up like Saxe's six wise men, all of them being partly in the right but all of them being in the wrong. Epstein does concede, understandably, that 'No one theory of "wrong" can therefore cover all cases'.³⁷⁶ For all these theories, intuition does provide a reasonable basis for determining whether a wrong has been committed.

Goldberg and Zipursky, defenders of PL, maintain that 'torts is a law of wrongs and recourse'.³⁷⁷ First order duties are based on legal rather than moral wrongs.³⁷⁸ Because the legal norms that set out wrongs are always wrongs as to a particular person or classes of persons, those legal norms go hand in hand with a set of potential victims who will be entitled, in principle, to recourse against their wrongdoers.³⁷⁹

Goldberg and Zipursky say that the lack of independent content to the concept of wrongfulness³⁸⁰ leads to a random catalogue or 'hodgepodge' of acts which, if they cause loss, will form the basis of liability. This is not necessarily the problem it is made out to be. Tort is, historically, an area of common law that has grown iteratively over hundreds of years. Duties have developed by extension and analogy through judicial refinement. In this way, it is part of the national conscience to understand what constitutes a wrong – difficult to define but easier to recognise.

³⁷⁵ John G. Fleming, 'Product Liability De-Constructed: Review of Product Liability by Jane Stapleton' *Oxford Journal of Legal Studies*, Vol. 16, No. 1 (Spring, 1996), pp. 185-190 p. 186

³⁷⁶ Richard A. Epstein, 'The Contextualization of Tort Law' *Texas Law Review* 2009 Vol. 88 105

³⁷⁷ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n. 331) p. 918

³⁷⁸ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n. 331) p. 919

³⁷⁹ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n. 331) p. 986

³⁸⁰ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n. 331) p. 932

Most individuals do not have lawyers for their daily lives, and most decisions of businesspersons and professionals are made without the advice of lawyers, of course. Yet individuals and businesses know a great deal about what they may and may not do and what they can and cannot reasonably expect others to refrain from doing to them ... Companies know that if there is a latent defect in a product that injures someone and that their sale of the product caused the injury, they can be held responsible for the injuring.³⁸¹

Notwithstanding the lack of definition, it might be concluded that corrective justice redresses a wrong when the pre-existing balance of rights between Claimant and Defendant is disrupted to the unfair loss of the Claimant (and correlative theoretical unjust gain by the Defendant), as a result of morally culpable or non-reciprocal risky conduct by the Defendant.

There is a heavy emphasis on moral right as a precursor to legal right. Morality, whilst being an underlying basis of law, is constantly in a state of flux and is defined by hazy boundaries. In determining what constitutes a legal wrong, society is attempting to corral the morality of the day and sharpen up the boundaries. However hazy these boundaries may be, liability for defective products based upon moral wrong is capable of satisfying the requirements of corrective justice. The question this raises is whether PL, based as it is on strict liability, is compatible with corrective justice.

5.4 Strict liability is incompatible with corrective justice

5.4.1 Strict liability is retrograde

Epstein acknowledges in his theory of strict liability that resorting to strict liability is retrograde.³⁸² It is true that the earliest written legal codes were based predominantly on strict liability.³⁸³ This is not in itself a reason to reject strict liability. However, the flexibility built into negligence reflects the maturity of a legal system.

³⁸¹ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n. 331) pp. 975/976

³⁸² Richard A. Epstein, 'A Theory of Strict Liability' (n.335) p. 153

³⁸³ Ur-Nammu (ca. 2050 BC and Lipit-Ishtar (ca. 1870 BC)

There has never been a completely satisfactory monistic comprehensive theory of right whether as a constituent of corrective justice or as a separate gateway into corrective justice. That is because there are too many variables in play. Whatever rights are given to one person must be subject to the rights of everyone else in accordance with their Hobbesian social contract. Since the rights of different persons compete with one another, the theoretical models become tangled. Aristotle knew this.

... every law is laid down in general terms, while there are matters about which it is impossible to speak correctly in general terms. Where, then, it is necessary to speak in general terms, but impossible to do so correctly, the legislator lays down that which holds good for the majority of cases, being quite aware that it does not hold good for all. The law, indeed, is none the less correctly laid down because of this defect; for the defect lies not in the law, nor in the lawgiver, but in the nature of the subject-matter, being necessarily involved in the very conditions of human action.³⁸⁴

The law of negligence has built in flexibility. Strict liability, *ex hypothesi*, has none.

5.4.2 Bare 'but for' causation is unable to take context into account.

Epstein holds that there is a presumption that a person may act without having to account for his actions subject to not causing harm to another person. The invasion of that second person's rights by the first person is, *prima facie*, sufficient to found a right to compensation.³⁸⁵ Borgo explains Epstein's theory as starting with the concept that where one man harms another, the victim has a *prima facie* moral right to compensation as a matter of corrective justice subject to a number of excuses and justifications which he may plead in answer.³⁸⁶ Epstein's theory puts strict liability at the ground floor³⁸⁷ but equally he acknowledges 'the impossibility of strict liability'³⁸⁸ as a complete theory of tort. Liability is founded on any 'physical invasion triggered by the defendant'.³⁸⁹ He sums up his case for strict liability, as against negligence, thus:

³⁸⁴ Aristotle, *The Nichomachean Ethics of Aristotle* (n. 89) p. 175

³⁸⁵ Richard Epstein, 'Causation and Corrective Justice: a Reply to Two Critics' 8 J. Legal Stud. 477 1979 pp. 479/480 and Richard A. Epstein, 'A Theory of Strict Liability' (n.351) pp. 151-204

³⁸⁶ John Borgo, 'Causal Paradigms in Tort Law' (n. 335) pp. 419/420

³⁸⁷ Richard A. Epstein, 'Toward a General Theory of Tort Law: Strict Liability in Context' (n. 349)

³⁸⁸ Stephen R. Perry, 'The Impossibility of General Strict Liability' 1 Can. J. L. & Jurisprudence 147 1988. Perry also observes (at p. 169) that Epstein's espousal of strict liability is in a sense more a rejection of the learned Hand (or risk/utility) test for negligence.

³⁸⁹ Richard A. Epstein, 'Toward a General Theory of Tort Law: Strict Liability in Context' (n. 349)

To say that simply killing another person does not create liability is, in effect, to say that the defendant is no worse for having killed the plaintiff than if he had not done anything at all. The “innocent” killing is treated for legal purposes as though it were an Act of God. At this point, the supposed moral superiority of the negligence theory becomes suspect. The line between killing and not killing seems a lot more durable and powerful than the line between killing and killing negligently, where the former is not actionable even though the latter is. The reason why the usual notions of “corrective” justice resonate so well under strict liability is that it puts the line between culpable and non-culpable in the right place.³⁹⁰

The principal objection to this argument is that it elevates bare ‘but for’ causation to legal causation. The difference can be illustrated by considering the harness in the aircraft in Case Study 2. Imagine that the aircraft had accidentally burst a tyre and run off the runway colliding with a wall, and that the pilot had been retained in his seat by the harness exactly as it was intended – but that as a result of the collision the harness straps broke his collar bones. There is no doubt that as a matter of ‘but for’ causation the harness was one of the operative causes of his injury. But it was not the legal cause because it functioned as it was intended, probably saving the pilot from worse injuries. The answer to this simple conundrum is context.³⁹¹ There is causation but no ‘wrong’. Compare this with a situation in which the design or manufacture of the harness makes it likely to become lodged in the controls thus causing the pilot to lose control in flight. Here it is not difficult to find a wrong (even if there were other contributory causes). Even in these latter circumstances the full context will determine whether there has been a wrong requiring correction. If the harness had come with instructions that it was unsuitable for a particular type of aircraft, or the installer had modified it in some way so that it became prone to entrapment in the controls, or simply fitted it incorrectly, there would be no wrong (on the part of the manufacturer).

In other words for strict liability under the PL Directive to achieve corrective justice in the way Epstein envisages, the wrong must have been clearly established *ex ante*, and the Directive introduced to provide the cure.

³⁹⁰ Richard A. Epstein, ‘Toward a General Theory of Tort Law: Strict Liability in Context’ (n. 349)

³⁹¹ See generally Jane Stapleton, *Product Liability* (n. 9) pp. 167/168

5.5 Fault must be presumed *ex ante*

If the goal of tort is 'obliging a person whose morally culpable behaviour has violated another's autonomy to restore the latter as nearly as possible to his or her pre-injury status',³⁹² then imposition of strict PL implies *morally culpable behaviour* on the part of the manufacturer. It is argued that Epstein's conception of strict liability 'incorporates ... a distinctive conception of fault'.³⁹³

In other words it is based on presumed fault. Strict liability fails to allow room for context to override the presumption of fault. If A pushes B out of the way of a car which he has seen mount the pavement, unnoticed by B, common sense would suggest that A should not be liable for B's resultant injuries. A saved B's life. A's conduct is reasonable and justified. A preordained truly strict liability regime would not permit the defendant's noble conduct to override the presumption of fault.

5.5.1 Fault is inherent in *in personam* cases

Epstein's position is that there is a relatively scalable pre-existing duty of forbearance against interference with another's person or property.³⁹⁴ In such 'entitlement' cases, that a person should pay for loss he has caused, as a matter of corrective justice, is a 'moral primitive'.³⁹⁵ However, '*in personam* cases' have a different character:

The kind of care and concern involved here is no pale insistence that people take care to avoid running down others. Rather, it is that they take care of patients, customers, pupils, wards, or visitors by tending to their needs with a wide range of actions, often at great personal expense ... This high range of variation explains why no single strict liability formula could hope to succeed in all these cases, even if a strict liability standard might turn out to be appropriate...³⁹⁶

³⁹² Dewees, Duff and Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (n. 347) p. 8

³⁹³ Stephen R. Perry, 'The Impossibility of General Strict Liability' (n. 388) p. 169

³⁹⁴ Richard A. Epstein, 'Toward a General Theory of Tort Law: Strict Liability in Context' (n. 349)

³⁹⁵ Larry Alexander, 'Causation and Corrective Justice: Does Tort Law Make Sense?' *Law and Philosophy*, Vol. 6, No. 1 (Apr., 1987), 1-23

³⁹⁶ Richard A. Epstein, 'Toward a General Theory of Tort Law: Strict Liability in Context' (n. 349)

5.5.2 There is no logical reason to treat products specially

It is difficult to see how there is a difference between Epstein's examples and PL given the wide range of objects encompassed by the term 'product'. In reply to the general critique of PL, that it lacks defining criteria or doctrinal content extrinsic to contract and tort, it has been argued that products have a special place in social culture: they define civilisations such as the Stone Age or the Bronze Age. Notwithstanding doctrinal confusion, the defining common essence of PL is that the product holds a special role in society and this is its basis for a special code of liability transcending traditional concepts of tort and contract:

Products help to form ourselves; products order the lives of human beings long before human beings order the law of products liability.³⁹⁷

Alluring as this romantic notion may be, there is no rational basis for it. The contrary argument is that there are so many ways in which a given product can harm – and many have no bearing on the producer. Imbuing products with anthropomorphic qualities fails to take into account the fact that in order to harm, products have to interact in some way with humans. For the producer to be liable there must be a defect in design, manufacture or instructions. However, a product related accident might in practice arise out of any of the following causes: error in the specification of the product required; error in integration of the product in another product; accident involving impact with the product but not arising from any defect; misuse or abuse of the product; accidental mis-operation of the product; using the wrong instructions; wear and tear of the product; time expiry of a perishable product; incorrect assembly of the product; mistake in installation; intervening error of supplier/dealer; or inherent danger in the product.

If the mere exposure of the plaintiff to risk justifies imposition of strict liability, there is no obvious reason why this theory should apply to products only. If corrective justice is the overriding goal, it makes no sense for an aircraft or pharmaceutical manufacturer to be strictly liable but a pilot flying the aircraft or doctor prescribing or administering the drug to be liable only if he is negligent.

³⁹⁷ Anita Bernstein, 'How Can a Product Be Liable?' Duke Law Journal, Vol. 45, No. 1 (Oct., 1995), 1-83. p. 82

5.5.3 Other areas of strict liability predetermine criteria which define the wrong

Coleman posits three bases upon which compensation may be payable. First, simple fault (justified conduct precludes recovery and fault is a necessary condition for compensation to be recoverable); second, where justifiable conduct causes loss but the justifiability is no bar to either liability or recovery; and third where conduct causing loss is justifiable only if the injurer pays compensation. Coleman sees the first two situations as fitting the corrective justice model but the third, strict liability, as being a special case.³⁹⁸ Coleman cites blasting as an example of the third. An option is to permit blasting provided that the person blasting compensates anyone injured, whether as a result of fault or not. Compensation *ex post* might be considered to be justificatory in the same way as consent *ex ante*. Whilst voluntary allocation of risk *ex ante* would have been preferable, compensation *ex post* is second best.

Abnormally dangerous activities

Weinrib says that in relation to abnormally dangerous activities (such as Coleman's blasting example), the lack of a need to prove fault is an extension of negligence: the degree of care required is proportionate to the magnitude of the risk and in such cases 'fault can be imputed'.³⁹⁹ The issue for Weinrib is whether the activity is 'sufficiently risky that the lack of care can be imputed from the very materialization of the risk. Strict liability for abnormally dangerous activities represents the law's judgment that such activities are at that point.'⁴⁰⁰

The manufacture of products *per se* cannot be categorised as abnormally dangerous. There may of course be types of product that could be so described. The Practice handles numerous cases arising out of the supply of fireworks for example. Equally, the majority of products might be considered neutral in this context (clothing, furniture or toys for example). There are also products which are designed specifically to enhance safety – such as fire extinguishers, airbags, pharmaceuticals or safety harnesses. That is not to say that they may not be inherently dangerous. A fire

³⁹⁸ Jules L. Coleman, 'Tort Law and the Demands of Corrective Justice' (n. 340) pp. 356/7

³⁹⁹ Ernest J Weinrib, *The Idea of Private Law* (n. 330) p. 189

⁴⁰⁰ Ernest J Weinrib, *The Idea of Private Law* (n. 330) pp. 188/189

extinguisher is a pressure vessel – if it contains a metallurgical flaw it might explode; airbags and seat belts have a built in pyrotechnic device; many therapeutic drugs will kill if not handled and administered under closely controlled conditions. This merely serves to emphasise the inappropriateness of grouping such diverse products and subjecting them to a liability regime lacking in flexibility or based on uninformed consumer expectation.

Rylands v Fletcher

Ryland v Fletcher is often cited as a paradigm of strict liability. Lord Cranworth summed up the principle:

If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.⁴⁰¹

Bringing the dangerous item onto one's land satisfies the moral element. It is prejudged that this is a wrong. There is no need to look at the precise circumstances of each case to see whether there is some justification or partial excuse. The *Ryland v Fletcher* principle reflects the self-serving non-reciprocal risk taking of the defendant. The risk entails no potential benefit to any third party. This is in strict contra-distinction with typical products. The basis of PL is that (defective) products are *supplied*. If not the claimant then someone else, other than the defendant manufacturer, is supposed to benefit from the supply of the product. The risk is not simply for the defendant's benefit at the third party's expense. The intended benefit extends beyond the manufacturer. In Case Study 1, the Kudo vehicle was sold, in this instance to the claimant. The claimant was intended to benefit from the use of the vehicle. It would have to be insured and so insurers and brokers would benefit. The distributor would have benefited. It would need regular maintenance and so the garage which maintained the vehicle would have benefited. It would also be to the advantage of the whole Kudo family. In all of the cases within the PL Claims Survey at Appendix 4 it could be said that the product had some social benefit beyond simply benefiting the manufacturer.

⁴⁰¹ *John Rylands and Jehu Horrocks v Thomas Fletcher* (1868) L.R. 3 H.L. 330 p. 340

International conventions

Typically, strict liability is used to protect a particular class needful of protection. It is used for example in international conventions such as the Warsaw or Athens Conventions⁴⁰² where the nature of the 'wrong' has been established *ex ante* and the legislation imposing strict liability is brought in to deal pragmatically with a specific problem: in these cases the difficulties inherent in bringing claims arising from international carriage, in foreign jurisdictions with different laws and procedures. Each strict liability situation has been pre-designated.

Defining a wrong in a specific statute has the advantage of establishing a reference point but the disadvantage of re-inventing the wheel, in the sense that whatever words are used, they may be open to new interpretation. Thus regardless of any statutory rules or regulations dealing with the design of aircraft harnesses, most bystanders would consider it wrong of the manufacturer, in Case Study 2, if it had failed to provide fitting instructions (considering the risks of interference with controls) or provided the harness for a specific aircraft without testing the fitment. Similarly, if Kudo had designed a brake which was incapable of holding the vehicle on a gentle incline, intuition would suggest that it was guilty of a wrong. Having a statute that required the product to be safe or reasonably safe would add very little to the definition of a wrong in either of these cases.

Protection

Imposition of strict liability to situations in which the act or omission causing the harm is not intuitively a wrong, would mean defining a specific set of circumstance as a wrong. This might be done where a societal group needed particular protection. Take for example the Unfair Terms in Consumer Contracts Regulations 1998. Here it has been decided legislatively that it is wrong to put certain terms in contracts with consumers and so to protect them, certain types of clause will be unenforceable

⁴⁰² Eg the original Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, 1929; or the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974

against a consumer. The principle is straightforward enough and makes eminent sense.

How, then, does it work in relation to defective products? According to the PL Directive 'protection of the consumer requires that the injured person should be able to claim full compensation for the damage...'⁴⁰³ If a manufacturer places a defective product into circulation, this is automatically a wrong. So supplying a harness which is vulnerable to falling into the controls would be a wrong (subject to the specific defence at Art 7(f) '... in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product'.) But similarly producing a shoe on which the heel broke off, injuring the consumer, due (unbeknownst to the manufacturer) to defective glue,⁴⁰⁴ would also be a wrong. Do consumers need the same protection from defective shoes as they do from defective aircraft or vehicles? The PL Directive says:

Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.⁴⁰⁵

From the perspective of 'technicality' it would be churlish to suggest that a process of fixing heels on shoes is analogous to the manufacture of aircraft. It is also more likely that a person injured by a defective shoe will have a contractual right of action. Shoes are less likely to injure bystanders than defective vehicles. This illustrates again the danger of treating all products the same.

Goldberg and Zipursky cite the 'familiar refrain from consumer-protection advocates' that the ordinary individual needs protection against the 'predations' of large organisations.⁴⁰⁶ The original context of the predatory manufacturer sentiment⁴⁰⁷ is with respect to the asbestos and tobacco industries and in relation to punitive damages

⁴⁰³ PL Directive Recital 5 (n. 2)

⁴⁰⁴ Such were the facts of another routine case of the Practice.

⁴⁰⁵ PL Directive Recital 2 (n. 2)

⁴⁰⁶ Easy Case (n. 11) p. 1947

⁴⁰⁷ The citation is by Goldberg and Zipursky is of Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law 2* (2001) New York University Press ISBN 0-8147-4757-4.

– essentially in the sense of covering up past mistakes. Whether it is a justified comment or not, it cannot be levelled as a criticism of manufacturers *generally* so as to justify the imposition of strict liability, based on presumed moral culpability. Insofar as it may be considered, by these ‘advocates’, that this is an embodiment of the implied fault or wrong upon which strict liability should be founded, the argument is weak. It would be difficult to imagine that international car, aircraft or pharmaceutical manufacturers are all institutionally ‘predatory’. Logic would suggest that if an aircraft manufacturer deliberately sold unsafe aircraft and tried to conceal this, it would not be long before someone noticed a stream of similar aircraft dropping out of the sky. None of the 132 cases in the PL Claims Survey in Appendix 4 contained allegations of manufacturers preying on vulnerable consumers. As Coleman says: ‘The impact of the current system for compensating consumers for harm done by manufactured goods extends far beyond such celebrated cases as those facing cigarette manufacturers or asbestos suppliers.’⁴⁰⁸

Whilst strict liability may have a place in the protection of classes within society, this has nothing to do with corrective justice and is more obviously aligned with allocative justice.

5.6 Correction (no more nor less)

Rectifying an injured person’s loss may impose a cost on the injurer greater than the injurer’s wrongful gain.

If justice requires that no more nor less than the injurer's wrongful gain and the victim's wrongful loss be annulled, then tort law, which more often than not imposes costs on injurers in excess of the gain they secure by their mischief, is indefensible as a matter of justice.⁴⁰⁹

There will always be transactional costs in making a recovery under a legal system. These potentially include court costs, legal fees, medical expenses, and expert witness fees. The smaller the claim, the more these transactional costs threaten to be disproportionate. If Coleman’s argument were taken to its logical conclusion, it must mean that no damages claim satisfies the requirements of corrective justice because

⁴⁰⁸ J Coleman, *Risks and Wrongs* (n. 329) p. 407

⁴⁰⁹ Jules L Coleman, ‘Tort Law and the Demands of Corrective Justice’ (n. 340) p. 353

the cost to the injurer will always be greater than the injured person's loss. In Case Study 1, if the handbrake had been defective, payment by Kudo of damages of £2,000 and costs of about £30,000 to the Practice plus assessed costs of the claimant at £20,000, would not reflect the correction of equal gain and loss. In 90% of the cases within the PL Claims Survey at Appendix 4 the overall legal costs exceeded the eventual value of the claim itself.

5.7 The better conclusion is that PL falls outside corrective justice

It is significant that both Weinrib and Coleman consider strict liability to fall outside their respective general theses of tort as corrective justice.⁴¹⁰ In *The Idea of Private Law*, Weinrib's chapter on strict liability makes clear that 'to view negligence liability as corrective justice, ... implies the rejection of strict liability.'⁴¹¹ Weinrib holds that strict liability is incompatible with corrective justice on two bases. First, he says that strict liability is theoretically inadequate: Epstein's attempt to equate strict liability with corrective justice is in Weinrib's view flawed as it is inconsistent with corrective justice's equality, agency and correlativity of right and duty.⁴¹² Second, he explains away established strict liability doctrines such as *respondeat superior*, liability for dangerous activities and nuisance, as extensions of fault liability or common law regulation of property in accordance with corrective justice. He rejects Epstein's justification of strict liability as corrective justice, based on the thesis that a person should bear the cost of injuries he causes to another as though they were injuries he suffered himself, on the ground that this is equally a justification for saying that the loss should lie where it falls.⁴¹³

Coleman, on the other hand in *Risks and Wrongs* says that he separates the law of PL from the general discussion of accident law.

corrective justice may explain those strict liability cases that can adequately be modeled on the idea of a taking. Corrective justice might

⁴¹⁰ Ernest J Weinrib, *The Idea of Private Law* (n. 115) and J Coleman, *Risks and Wrongs* (n. 329); Jules Coleman, 'Corrective Justice and Wrongful Gain' (n. 84) pp. 421-440

⁴¹¹ Ernest J Weinrib, *The Idea of Private Law* (n. 115) p. 171

⁴¹² Ernest J Weinrib, *The Idea of Private Law* (n. 115) p. 172

⁴¹³ Ernest J Weinrib, *The Idea of Private Law* (n. 115) p. 174; see also Stephen R. Perry, 'The Impossibility of General Strict Liability' (n. 388) p. 153

therefore explain *Vincent v. Lake Erie*, but probably not strict liability for either ultrahazardous activities or defective products.⁴¹⁴

First, it is difficult to extract PL's underlying normative commitments from the unsettled doctrine which underpins it; second the American Law Institute had 'recommended separating products liability from the body of tort law'.⁴¹⁵ Coleman's preferred approach is to treat PL law as if liability were based on a theoretical rational contract between injurer and injured.⁴¹⁶

Fletcher also excludes PL from his theory of fairness and utility in tort:

It is important to distinguish the cases of strict liability discussed here from strict products liability, a necessary element of which is an unreasonably dangerous defect in the product. ... Because of the market relationship between the manufacturer and the consumer, loss-shifting in products-liability cases becomes a mechanism of insurance, changing the question of fairness posed by imposing liability.⁴¹⁷

Goldberg and Zipursky in postulating a theory of torts as wrongs give scant treatment to strict liability, explaining *Rylands v Fletcher* as *sui generis* and not counting 'as evidence against our general interpretive account' and sitting 'at the margin of tort law'⁴¹⁸

Conclusion

A simple conclusion may be drawn from the discussion above. It is the conclusion Glanville Williams reached over 60 years ago, before the resurgence of academic work on corrective justice, in response to the economic theory of tort. Strict liability is not compatible with corrective justice.

If it is said that a person who has been damaged by another ought to be compensated, we readily assent, moved as we are by sympathy for the victim's loss. But what has to be shown is not merely that the sufferer ought to be compensated, but that he ought to be compensated by the defendant. In the absence of any moral blame of the defendant, how is this

⁴¹⁴ Jules Coleman, 'Corrective Justice and Wrongful Gain' (n. 84) p. 427

⁴¹⁵ J Coleman, *Risks and Wrongs* (n. 329) p. 407

⁴¹⁶ J Coleman, *Risks and Wrongs* (n. 329) pp. 418/419

⁴¹⁷ George P. Fletcher, 'Fairness and Utility in Tort Theory' (n. 67) p. 544 footnote 24

⁴¹⁸ John C.P. Goldberg & Benjamin C. Zipursky, 'Torts as Wrongs' (n. 336) pp. 952/953

demonstration possible? It is fashionable to say that the question is simply one of who ought to bear the risk. This, however, is a restatement of the problem rather than a solution of it...

... However, the actual rules of strict liability are so haphazard that they can hardly be fitted into any rational pattern.⁴¹⁹

PL based on strict liability fails to achieve social desirability through the delivery of corrective justice. The elements of corrective justice are the redressing of a wrong; the disruption of the equilibrium of rights between claimant and defendant; unfair loss and correlative unjust gain; and morally culpable or unfair or non-reciprocal risky conduct. These elements point intuitively to fault based liability.

Strict liability is more appropriately allied to allocative justice, where it is inserted to remedy a specific problem such as the protection of a class. It is highly questionable whether such protection is needed across the wide spectrum of products to which the PL Directive applies. Strict liability fails to allow the flexibility that is required where products are concerned.

Products do not harm. People do. People design, manufacture, instruct, warn, install, modify, incorporate, maintain, sell, operate, or otherwise interact with products. There are too many permutations and combinations for a single simple principle such as corrective justice based on the strict liability of the manufacturer to apply. Strict liability fails to take account of context. The social value of the injurer's conduct may be a factor in deciding whether the causation of injury is a wrong.⁴²⁰ Thus in determining the social desirability of PL by reference to corrective justice, the social value or '*sozialadäquat*'⁴²¹ of the product itself should be taken into account. For example, if as in case 13 in the PL Claims Survey at Appendix 4, a manufacturer installs an airbag which causes relatively minor burns in the course of saving the driver's life in a serious head on collision, that minor injury may be excusable.

In Case Study 2 it was seen that there is no doubt that this was an accident. Indeed this was the verdict of a jury at the Coroner's Inquest. It is submitted that it would be

⁴¹⁹ Glanville Williams, 'The Aims of the Law of Tort' (n. 328) pp. 151/152

⁴²⁰ Jane Stapleton, *Product Liability* (n. 9) p. 171

⁴²¹ *A v National Blood Authority* (n. 204) p. 339

incorrect to label this as an injustice 'inflicted'⁴²² on the deceased by the manufacturer of the harness. The term 'inflict' has a scent of dealing out some form of punishment and is inapposite to the context.

In determining whether there was morally culpable behaviour on the part of the manufacturer, questions arise instinctively as to what the manufacturer knew or ought to have known about the purpose to which the harness was to be put; what testing they ought reasonably to have done; what instructions or warnings were given with the harness as to safe fitting; what regulations should have been complied with in the design or supply of the harness. All of these questions go to the root of whether the manufacturer should be held responsible. These questions are fundamental to determining whether there was fault on the part of the manufacturer.

A fault based system of PL, with an innate conception of moral wrong at the heart of it, is more predictable, fairer and a clearer guide as to what conduct is expected of the manufacturer. Case Study 2 exemplifies how fault based liability found a result for the claimants, (and arguably thereby satisfied the requirements of corrective justice), where strict PL would have failed (or been inappropriate) as a foundation for a claim.

Regardless of the inappropriateness of strict liability, there remains a procedural problem with PL as a vehicle for corrective justice. The cost of litigation is so disproportionate that claims rarely conform to the principle that the claimant's loss must not impose a cost on the injurer greater than the injurer's wrongful gain.

⁴²² See note 338 above

CHAPTER SIX - VINDICATION AND RETRIBUTION

This is a vindication for us and all those wonderful people who have supported us when they had nothing to gain by doing so

Captain John Cook⁴²³ 2000

6.1 Defining vindication

The first part of this chapter discusses the vindicatory role of PL. As foreshadowed in Chapter 2, there are two related strands of vindication. The first is in having a right affirmed⁴²⁴ and the second in obtaining public recognition of a breach of one's rights:⁴²⁵ there is a benefit in not only having justice done but in justice being seen to be done.

It is explained that whilst recognition of rights may have a minor role to play in PL it is more likely to be on the part of the manufacturer intent on protecting its reputation. It is suggested that private law remedies are inappropriate for public recognition of rights. Society has developed other means of achieving such recognition, from Inquests to Public Inquiries.

6.1.1 Affirmation

The first strand of vindication, affirmation, is of importance in the sense of establishing legal precedents. Had *McTear*⁴²⁶ succeeded, the right to compensation of a smoker who had not been adequately warned would have been 'vindicated'. This is of less interest than the latter for the purposes of this thesis. It is accepted that legal judgments vindicate rights as a matter of general law, and set precedents. This function is not doubted. The social value of those precedents is a separate issue. It does not automatically follow that a right vindicated by the court is of social benefit. It

⁴²³ Father of one of the pilots of the Chinook Helicopter which crashed on the Mull of Kintyre in 1994 , after a Review eventually clear his son, Flt Lt Richard Cook, and Flt Lt Jonathan Tapper of any responsibility for the accident which killed 29.

⁴²⁴ *Chester v Afshar* (n. 96) [87] (Lord Hope of Craighead): 'The function of the law is to enable rights to be vindicated'

⁴²⁵ *Rackham v Sandy* [2005] EWHC 482 (QB) Gray J at paragraphs 124 and 125 'To the extent that Mr Rackham seeks and is entitled to vindicate his reputation, that will be largely achieved by a reasoned judgment...'

⁴²⁶ *McTear v Imperial Tobacco Ltd* (n. 244)

depends on the subject matter of the right concerned. Insofar as PL rights are in question, this is the wider subject matter of this thesis. It is hoped that the answer is found in reading the thesis in the round.

It should be added here that the very fact of a judgment being given (in open court) provides the finality which potentiates vindication. However, in practice, Claimants are almost always happy to settle out of court and agree to a confidentiality clause (for what it is worth). Not a single claimant within the PL Claims Survey at Appendix 4 refused to sign a confidentiality clause. This tends to suggest that vindication of rights by a judgment is not typically the driver in PL claims.

6.1.2 Recognition

The second sense of vindication is of greater interest as it poses the question as to whether claimants injured by defective products sue merely for compensation or to obtain public recognition that they have been so injured and that they have suffered a wrong.

Personal vindication may be important but the experience of the Practice has been that claimants are usually in search of damages. In only 21 cases (16%) from within the PL Claims Survey at Appendix 4 did the initial notification letter to the manufacturer not mention damages (or a synonym for it). It might be argued that the award of damages itself constitutes or contains an element of vindication for the claimant. For example it has been argued in relation to defamation that damages 'actually "repair" the reputation by reversing the harm done to it, and thus restore the status quo in a real sense rather than providing the "next best" position as damages in tort generally do.'⁴²⁷ If vindication were a serious motivating factor in the bringing of PL claims, one might expect some claimants to seek a declaration instead of or in conjunction with damages. The Practice has never experienced a claimant seeking a declaration rather than damages in a PL claim.

⁴²⁷ Jenny Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' *The Cambridge Law Journal*, Vol. 67, No. 3 (Nov., 2008), 606-634 at p. 607

Even if vindication is a legitimate goal of PL, deliberate or negligent harmful acts and omissions would seem more likely to give rise to a need for vindication than an act or omission which carries no fault but gives rise to strict liability. Technically, if liability is strict, there is no need to sanction the behaviour of any individual.

6.1.3 Vindication of the defendant

In PL claims, it is often the defendant (though not invariably) who has a greater need for vindication by dismissal of the claim. Large companies and their Insurers do of course buy off small claims after taking into account the economic realities. Now that Qualified One-Way Costs Shifting⁴²⁸ prevents the defendant from recovering costs in most injury cases, defendants are under even greater economic pressure to settle cases regardless of the merits. If a defendant does decide to defend a case, bearing in mind that it is unlikely to recover the costs of doing so even if it wins, it follows that vindication must be a significant factor in the decision. However, this only arises if a claimant brings the action in the first place. It would be as difficult to imagine circumstances in which a defendant might seek a declaration that it was not liable for an accident, as to contemplate an injured claimant seeking only a declaration. However, in *Loveday v Renton and Wellcome Foundation*⁴²⁹ the High Court considered as a preliminary issue 'Can or could pertussis vaccine used in the United Kingdom and administered intramuscularly in normal dosage cause permanent brain damage or death in young children?' It was alleged that the claimant's injuries were caused by the vaccine and that the person who administered the vaccine was negligent in administering it despite certain contra-indications. Wellcome Foundation was not known to be the manufacturer of the vaccine in this case. However, as it was the only manufacturer still making pertussis vaccine in the UK, it applied to be joined as a defendant. Stuart-Smith LJ found that it could not be shown on a balance of probabilities that pertussis vaccine could cause permanent brain damage in young children. Thus it could be said that Wellcome Foundation intervened in these proceedings to obtain vindication.

⁴²⁸ CPR 44.13

⁴²⁹ *Loveday v Renton and Wellcome Foundation Ltd* [1990] 1 Med LR 117

Fraud

In case number 99 in the PL Claims Survey at Appendix 4, a claimant alleged that the seat in his vehicle had collapsed while he was driving, causing him to injure his back. The claimant made various demands for damages. The manufacturer examined the vehicle and found that a nut had fallen off the end of the seat back adjuster. However, this could not cause the seat to collapse because the adjuster was geared rather than 'direct drive'. Thus in the event of a complete failure of the adjustment mechanism the seat would simply stay locked in the position to which it was last adjusted. The manufacturer became concerned that the claim might be fraudulent. This concern was enhanced by a letter submitted in support of the claim purportedly from the claimant's GP. Investigations showed that that GP did not exist, the address of the surgery was not a surgery but a house on a run-down estate, and the letterhead of the GP had been fabricated – by cutting and pasting an NHS logo from the internet. The claimant subsequently died of causes unrelated to the alleged accident but his parents assiduously pursued the case even in the days immediately following his death. When the fraud was revealed to the claimant's parents' solicitors, the claim was swiftly dropped. The manufacturer could have settled the case for £3,000 but took the position that it should be defended to trial if necessary. Whilst fraudulent claims are relatively frequently mentioned by the media, because they are newsworthy,⁴³⁰ this was one of only a handful of overtly provable fraudulent PL claims with which the Practice has dealt. Within the PL Claims Survey at Appendix 4 there was only one provable fraud (case 99) and there were two cases in which an element of fraud was suspected (cases 16 and 62).

Reputation

The Practice has more frequently been instructed to defend claims that threaten the reputation of a 'flagship' product. In case Study 1, *Martin v Kudo*, the defendant would have paid a nuisance value settlement to dispose of what was clearly an unmeritorious claim but not one that was likely to lead to repeat claims. The claimant could not accept

⁴³⁰ E.g. Sheffield 'crash-for-cash ringleaders jailed'
<<http://www.bbc.co.uk/news/uk-england-south-yorkshire-25886347>> accessed 6 March 2014

the nuisance value settlement offer (if he wanted to) because of his liability for his solicitor's fees under a Conditional Fee Agreement.

The importance of defendant vindication in PL claims was highlighted in *Eli Lilly v James*,⁴³¹ an appeal against an interlocutory cost capping order. The claimant sued Eli Lilly, the manufacturer of the drug Zyprexa, which she was taking for her bi-polar disorder, claiming that it had caused her to suffer from Type 1 diabetes. The claimant sought an order capping the defendant's recoverable costs at £100,000 on the basis that

there is a real and substantial risk that the Defendant has incurred and intends to incur costs which are disproportionate to the claim and which may be deliberately pitched at such an extortionate level to prevent the Claimant having access to justice. The figures are clearly designed to ensure that this litigation is not conducted on a level playing field.⁴³²

Eli Lilly had submitted that the case would have far reaching ramifications if the claimant succeeded. It would be sued by 'a significant number of people'. Therefore Eli Lilly should not be fettered in its defence. The Master ordered the costs cap on the basis that this was a 'David and Goliath' situation and it would be unjust for the claimant to be liable for the costs occasioned by the defendants fully defending the claim. The High Court set aside the order. One of the requirements for cost capping was that it was 'just to make such an order'.⁴³³ The Master had found, inter alia, that 'it would be quite unjust, were Mrs James to lose, for her to be liable for all the costs expended by Eli Lilly Limited in attempting to and in these circumstances successfully attempting to vindicate their reputation.' The High Court found ultimately that the claimant would not necessarily be responsible for those costs as the court would control costs in the usual way. However, it recognised the potential importance of vindication to the defendant in PL cases.

Theorists recognise as a goal of tort 'vindicating a plaintiff for a wrong when compensation is not entirely satisfactory in situations where irreparable injury has

⁴³¹ *Eli Lilly & Company Limited v James* [2009] EWHC 198 (QB)

⁴³² *Eli Lilly & Company Limited v James* (n. 431) [6]

⁴³³ *Smart v. East Cheshire National Health Service Trust* [2003] EWHC 2063

occurred'.⁴³⁴ In PL cases the injuries are not likely to be irreparable in the sense that damages are the usual remedy. However, there is an argument that vindication may be an important factor in 'big issue' or political PL actions such as Group Actions against whole industrial sectors – e.g. the tobacco or alcoholic drinks industries. Sometimes the individual claims are too small on their own to justify the cost of litigation and it requires aggregation of claims with others to enable a route to satisfying a class or group of affected claimants. Montague comments:

'It is to Mrs McTear's credit that she did not give up under these pressures long before the end of the case - in the circumstances, Cameron Fyfe, her solicitor, could be excused the hyperbole in his comment that the case "pitted a lonely woman against a multi-national giant."⁴³⁵

She comments that there were another 120 potential pursuers waiting in the background. While there is a real possibility in group litigation that a critical mass will be generated, the court may still find the claim to be ill-founded. This was the position in the Scania Group Action. Hundreds of claimants all complaining of aches and pains added weight credibility and momentum to the claim but as discussed in Chapter 9 on Compensation, each claimant still had to satisfy the criterion of having an actionable injury. It was always the defendant's suspicion that the real motivation for the claim was not vindication but money and that the case was promoted by lawyers and the claimants' Trades Union, which funded the litigation. Had there been no canvassing of potential claimants, it seems highly unlikely that most of the claimants would ever have contemplated the need for a personal injury claim to be made.

It was also the case in *McTear* that the judge suspected strongly that McTear was simply motivated by money. He was according to Lord Nimmo Smith 'a profoundly dishonest man who readily lied in order to obtain advantage for himself'.⁴³⁶

⁴³⁴ Blomquist, 'Goals, Means, and Problems for Modern Tort Law: A Reply to Professor Priest' 22 VAL. U.L. REV. 621 (1988) pp. 629/630 citing G. White, *Tort Law In America: An Intellectual History* 223 (1980) [now Oxford University Press, USA; Expanded Edition (26 Feb 2003) ISBN-10: 0195139658 ISBN-13: 978-0195139655]

⁴³⁵ Janice Elliott Montague, 'Cigarette, but?...The failure of tobacco litigation in the United Kingdom' Cov. L.J. 2005, 10(2), 24-28

⁴³⁶ *McTear v Imperial Tobacco Ltd* (n. 244) Lord Nimmo Smith p. 133 [4.222]

6.1.4 Private law revenge is not in society's interest

It is questionable whether a private law remedy between two parties should have such potentially major consequences for society as a whole. The UK has democratically developed ways of delegating authority to regulate and control product safety. It is submitted that the winning and losing of individual PL claims should not be permitted to subvert the rational legislative process. If *McTear* had succeeded against Imperial Tobacco, the consequences would have been far reaching not merely for Imperial Tobacco but for all tobacco manufacturers. Regardless of one's views on smoking, the legal effect of such a judgment is undesirable in principle. Other manufacturers would effectively be bound by a judgment in a case in which they had no standing or opportunity to participate; from the perspective of the anti-smoking lobby it might equally be argued that *McTear* losing the case has set back the opportunity for other smokers to make claims against the tobacco industry. These are matters better dealt with by legislation, rather than leaving industry to the arbitrary fate of private claims. The danger of allowing private litigation to shape society's rights is illustrated by experience in the US. During the US insurance crisis of the 1980s it was found that whilst accident rates had declined, PL claims had numerous consequences including: increases in product prices; withdrawal of large numbers of products from sale; and the withdrawal of municipalities, doctors, manufacturers and others from the commercial insurance market and their retreat into mutual insurance pools, leaving the commercial insurance market fragile due to insufficient volume.⁴³⁷

An interesting comparison may be made between UK tobacco litigation and tobacco litigation in the US. Private revenge may legitimately be satisfied by an award of punitive damages in some states. However the US Supreme Court has ruled⁴³⁸ that punitive damages may not be awarded to punish a defendant for injuries to persons not party to the litigation. This is a matter for public law not private litigation. The importance of the distinction is that punishment in respect of public wrongs is for the criminal law which has inbuilt procedural safeguards.⁴³⁹

⁴³⁷ George L Priest, 'Satisfying the Multiple Goals of Tort' 22 (3) Val. U. L. Rev. 643 (1988)

⁴³⁸ *Philip Morris USA v Williams* 127 S. Ct. 1057 (2007)

⁴³⁹ Colby, 'Clearing the Smoke from *Philip Morris v Williams*: The Past, Present, and Future of Punitive Damages' Yale Law Journal, Vol. 118, 392-479, 2009

6.1.5 There are better ways to achieve vindication

More importantly, there are better ways to achieve vindication than by pursuing PL claims. These include Coroners' Inquests, Public Inquiries, and Reports of Government Agencies (such as the Air Accident Investigation Branch or the Marine Accident Investigation Branch of the Department of Transport).

Public Inquiries

In *AB v Wyeth*⁴⁴⁰ some 5000 claimants sued the manufacturers of Benzodiazepine tranquilisers. The vast majority of plaintiffs were legally aided. In a small number of cases they also joined the prescribers of the drugs on the basis that they would only be pursued if the claims against the manufacturer failed, in which case the damages would be consumed by the legal aid charges for the costs of the failed claims against the manufacturers. The prescribers sought to strike the claim out as vexatious and an abuse of process. At first instance the order sought was granted on the basis that the prescribers' costs were out of proportion to the potential benefit to the plaintiffs. The Court of Appeal agreed and dismissed the appeal. The plaintiffs' case was that the court should not strike the case out as disclosing no cause of action where there was indeed a valid cause, merely because the benefit to the plaintiff would be small compared with the costs of pursuing the claim. To do so would interfere with 'the citizens' constitutional right of access to the courts'. They submitted that it was really a matter for the Legal Aid Board to decide whether it would fund the litigation. The Board would take in to account how the costs compared with the amount at stake. Stuart-Smith LJ disagreed. The court's power is to 'prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation'. Stuart-Smith LJ stated:

One can see at a glance that the prescriber defendants will be put to astronomical expense in defending these contingent claims. And to what end? If the plaintiffs stood to obtain a substantial benefit, the position might well be different. But here the benefit is at best extremely modest, and in

⁴⁴⁰ *A.B. & Others v John Wyeth & Brother Ltd. & Others* [1994] P.I.Q.R 109

all probability nothing. That involves great injustice to the defendants. It is no answer that there are public authorities or insurance associations that are footing the bill. The National Health Service has better things to spend its money on than lawyers' fees, and the cost of medical insurance is a matter of public concern. Group actions involve great advantage to plaintiffs, who are able to join together to bring actions which, on their own, would never be possible. But they must be conducted in such a way that they do not involve injustice to other parties.⁴⁴¹

The Scottish Law Commission in its 1996 report on Multi-Party Actions put it thus (referring to Stuart-Smith LJ's judgment):

... it may be argued that ... there is a public element in the litigation which requires, or permits, the court to adopt the aim of "behaviour modification" or punishment. We reject this view of a public element in multi-party actions. It has been said by the English Court of Appeal that a claim for damages should not be used as a pretext for what essentially amounts to a public inquiry; the sole proper object of such claims is to obtain compensation...⁴⁴²

The Public Inquiry⁴⁴³ is the appropriate vehicle for investigating an issue of wide public importance. Inquiries may be held under the Inquiries Act 2005.⁴⁴⁴ Non-statutory Inquiries may also be ordered outside the Act. In addition 'private' Public Inquiries may be ordered – funded privately.⁴⁴⁵ There have been 40 major inquiries since 1990 typically covering widespread loss of life, threats to public health or safety, failure by the state in its duty to protect, failure in regulation or shocking events.⁴⁴⁶

On 2 June 1994 an RAF Chinook Helicopter ZD576 crashed on the Mull of Kintyre killing all 29 occupants. A military Board of Inquiry Report (itself a potential vehicle for vindication) concluded that the most probable cause was the selection by the crew of

⁴⁴¹ *A.B. & Others v John Wyeth & Brother Ltd. & Others* (n. 440) per Stuart-Smith LJ p. 116

⁴⁴² Scottish Law Commission *Multi-Party Actions* Report on a reference under section 3(1)(e) of the Law Commissions Act 1965 Presented to Parliament by the Lord Advocate by Command of Her Majesty July, 1996

Edinburgh: HMSO (Scot Law Com No 154) p. 12 [2.23]

⁴⁴³ See < <http://www.nationalarchives.gov.uk/webarchive/public-inquiries-inquests.htm> > accessed 23 April 2015

⁴⁴⁴ Under the section 1 Inquiries Act 2005

(1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that –

(a) particular events have caused, or are capable of causing, public concern, or

(b) there is public concern that particular events may have occurred.

⁴⁴⁵ E.g. Independent Public Inquiry into Contaminated Blood and Blood Products by Lord Archer of Sandwell QC < <http://www.archercbbp.com/> > accessed 23 April 2015

⁴⁴⁶ < http://www.publicinquiries.org/determining_the_need_for_an_inquiry > accessed 5 March 2014 00.20

an inappropriate rate of climb, insufficient to overfly the high ground of the Mull. It found that both pilots were 'negligent to a gross degree'.⁴⁴⁷

The parents of the pilots sought to clear their names. They could have pursued a PL claim against the manufacturers of the aircraft or any component they could prove was defective. This would face major obstacles of proof and funding would have been an issue. If they did in fact pursue a claim, there is no public information on whether they succeeded but more importantly no public vindication of the pilots as a result.

However, a Public Inquiry⁴⁴⁸ was ordered by the Secretary of State for Defence to examine the evidence relating to the Board of Inquiry Report. The published Review states:

The continuing debate is naturally distressing for the families involved. The relatives of the pilots feel that the finding of negligence is a stain on the characters of their loved ones, and the families of the passengers wish that the controversy surrounding the accident be brought to an end.⁴⁴⁹

It was ultimately found

1.4.32 Having completed our review we are led to make the following recommendations:

- (i) We recommend that the finding that Flt Lt Tapper and Flt Lt Cook were negligent to a gross degree should be set aside.
- (ii) We recommend that the Ministry of Defence should consider offering an apology to the families of Flt Lt Tapper and Flt Lt Cook.⁴⁵⁰

On 13 July 2011, the Secretary of State for Defence publicly apologised to the families of the deceased pilots.⁴⁵¹

⁴⁴⁷ See *The Mull of Kintyre Review: An Independent Review to examine all available evidence relating to the findings of the Board of Inquiry into the fatal accident at the Mull of Kintyre on 2 June 1994*, Ordered by the House of Commons to be printed 13th July 2011, HC 1348 Edinburgh: The Stationery Office ISBN: 9780102952377 [available for download at <http://www.mullofkintyrereview.org.uk/review-report>] p. 2 [1.1.4] - Since 1997, Boards of Inquiry are not permitted to attribute blame or negligence in cases of unnatural death or serious injury. Similarly verdicts of Coroners' Inquests and Findings of Air Accident Investigation Reports must not apportion blame.

⁴⁴⁸ *The Mull of Kintyre Review* (n. 447)

⁴⁴⁹ *The Mull of Kintyre Review* (n. 447) p. 3 [1.1.6]

⁴⁵⁰ *The Mull of Kintyre Review* (n. 447) p. 10 [1.4.32]

⁴⁵¹ < <http://www.independent.co.uk/news/uk/home-news/after-17year-fight-for-justice-families-of-chinook-pilots-win-mod-apology-2313163.html> > accessed 10 February 2015

Coroners' Inquests

Whilst verdicts at Coroners' Inquests must not be framed in such a way as to appear to determine any question of criminal or civil liability, this is an important forum for vindication in fatal accidents.⁴⁵² The Coroner has the duty where an Inquest has revealed a risk of future deaths, to make a report to any person with power to eliminate or reduce that risk.⁴⁵³ Coroners' Inquests are held before a Jury where the accident involves a death in Police Custody⁴⁵⁴ or a death reportable to a government department.⁴⁵⁵

Accident Investigation Reports

Accident Investigation Reports are produced by the relevant branches of the Department of Transport. There is an inbuilt safety valve by which representations may be made by a person whose reputation may be adversely affected.⁴⁵⁶ In Case Study 2 – Vaughan v Cranwell, this procedure was used to overturn the AAIB's draft finding that suggested that a reckless aerobatic manoeuvre by Cranwell might have been the cause of the accident. Cranwell's reputation was vindicated both in the AAIB Report and at the Inquest.

Conclusion

There is a balance between the individual's need for vindication and the public benefit. Litigation in the post Legal Aid Board era is essentially a private affair. Thus there should be no real concern about misuse of public funds. However, that is to ignore the reality of the provenance of funding for litigation. Indirectly, private litigation is publicly funded as it is paid for by insurance costs passed on to the public at large. It is submitted that there has to be a system of control over individuals' rights to vindication. Human rights are already protected by the European Convention on Human Rights.⁴⁵⁷ Thus any other rights requiring vindication should be on a lower tier. The costs must be taken objectively into consideration before claimants are allowed to call upon the

⁴⁵² Coroners and Justice Act 2009 s 10(2)

⁴⁵³ Coroners and Justice Act 2009 Schedule 5 paragraph 7

⁴⁵⁴ Coroners and Justice Act 2009 s 7(2)(a)

⁴⁵⁵ Coroners and Justice Act 2009 s 7(2)(c)

⁴⁵⁶ The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 Regulation 12

⁴⁵⁷ As embodied in the Human Rights Act 1998

full armoury of litigation to seek vindication in cases where the issues, viewed impartially, are minor. The majority of PL claims handled by the Practice are minor in nature, about 80% of the claims within the PL Claims Survey at Appendix 4 being valued at less than £10,000. It is submitted that not every bump, bruise and scrape should entitle claimants to indulge themselves with PL litigation, at Society's expense, simply because they feel subjectively that they require vindication.

6.2 Retribution

You will achieve more in this world through acts of mercy than you will through acts of retribution.

Nelson Mandela 2000

6.2.1 Introduction

The second part of this chapter argues that there are both doctrinal and practical reasons to dismiss retribution as a desirable benefit of PL.

Retribution is an element of punishment. The key role of punishment in relation to defective products is deterrence as discussed in Chapter 3. Retribution has nothing to do with deterrence or prevention of the defendant's wrongful conduct. It is little more than *ex post facto* private satisfaction for the wronged claimant satisfying a base need. It is argued below that such a need is outmoded, out of kilter with the mores of civilised society and of no tangible benefit to society. It is, in any event, redundant in a binary system of civil law and criminal law in which the criminal law satisfies any vestigial need for private and public retribution with built-in systemic protection against abuse. Even if retribution is considered an acceptable basis for punishing morally culpable torts, wrongful behaviour is not always morally culpable. Therefore not every tort is deserving of punishment.

Punishment is particularly unsuited to strict liability because liability may be incurred without the defendant's fault. Where damages are expressly awarded to punish, these are separate from compensatory tortious damages. This is an acknowledgement that punishment can only be a very limited factor in awarding general damages. Private punishments are not encouraged by society because they are inconsistent and more likely to lead to an escalation of private hostilities than to an effective resolution.

It is argued here that the idea of a claimant wanting his day in court to punish the defendant is, in practice, a myth, unsupported by empirical evidence. Cases reaching court are exceptional. It will be demonstrated that even if a claimant has retribution in mind, the practical reality is that compensation falls short of punishing for a number of reasons. These include that the measure of damages is intended to equate to actual

loss; the cost of compensation is not necessarily borne by the tortfeasor direct; and the punishment does not fit the crime in the sense that the relationship between the wrong and the loss is stochastic. Compared to the position in the US, it is concluded that tort based punishment plays no role in UK life.

6.3 Doctrinal shortcomings

Retribution is not a synonym for punishment. Punishment is 'not a purpose but a mechanism ... it may have various purposes, such as retribution, deterrence appeasement of the victim, incapacitation of the wrongdoer, and education.'⁴⁵⁸ Before considering whether the 'mechanism' of punishment is effective or necessary within tort, it is helpful to focus first on the role of retribution specifically.

6.3.1 Retribution satisfies a base need no longer relevant to modern society.

It has been argued that the primary reaction to harm, caused by carelessness, is a desire for compensation. Where intentional harm is concerned, the desire is for retribution. Where recklessness is involved, reactions provoked involve elements of both careless and intentional harm. These reactions contain both cognitive interpretations of the event and emotional reactions to it.⁴⁵⁹

Research suggests that the primary determinant lies in judgments about the perpetrator's state of mind. If perpetrators are judged to have committed the harm unintentionally, naive psychological thinking focuses on compensating the victim for the damage done to his or her property or person, presuming that restoration is judged to be appropriate. However, when harm is thought to have been committed intentionally, people see punishment as necessary.⁴⁶⁰

If it is correct that retribution is thus reserved for cases involving intentional harm, then it is out of place in cases of mere negligence, and, *a fortiori*, in cases of strict liability without fault.

⁴⁵⁸ Ronen Perry, 'The Role of Retributive Justice' (n. 102) pp. 226-227

⁴⁵⁹ John M. Darley and Thane S. Pittman, 'The Psychology of Compensatory and Retributive Justice' *Pers Soc Psychol Rev* 2003; 7; 324

⁴⁶⁰ John M. Darley and Thane S. Pittman, 'The Psychology of Compensatory and Retributive Justice' (n. 459) p. 326

As explained in Chapter 2.6, compensation is rooted in Talionic punishment, which itself contains a significant element of retribution. However, Talionic punishment is no longer acceptable in the Western World because the 'use of punishment for retribution is no longer representative of a civilised society'.⁴⁶¹ Laws must keep pace with shifting boundaries of mores. Two hundred years ago there were in excess of two hundred statutes in force imposing the death penalty for crimes ranging from the most serious down to petty theft.⁴⁶² Criminal sentencing has moved on to reflect the changing views of society with the emphasis less on retribution and more on restoration. For example the Criminal Justice Act 2003 introduced the Community Order which contains a range of more sophisticated punishments that are tailored to the offender.⁴⁶³

This reflects the more enlightened views of society towards crime and punishment. The Howard League for Penal reform commented in its response to the Green Paper 'Breaking the Cycle'⁴⁶⁴

⁴⁶¹ See Jon Yorke, 'The right to life and abolition of the death penalty in the Council of Europe' 2009 *European Law Review* 205 recording the 'renunciation of retribution and the lex talionis'.

⁴⁶² P. R Glazebrook, *Criminal Law Reform: England* [Encyclopedia of Crime and Justice](http://www.encyclopedia.com/doc/1G2-3403000073.html) | 2002 < <http://www.encyclopedia.com/doc/1G2-3403000073.html> > Accessed 21 December 2011

⁴⁶³ Civil Justice Act 2003 s 177

Community orders

(1) Where a person aged 18 or over is convicted of an offence, the court by or before which he is convicted may make an order (in this Part referred to as a "community order") imposing on him any one or more of the following requirements—

- (a) an unpaid work requirement (as defined by section 199),
- (b) an activity requirement (as defined by section 201),
- (c) a programme requirement (as defined by section 202),
- (d) a prohibited activity requirement (as defined by section 203),
- (e) a curfew requirement (as defined by section 204),
- (f) an exclusion requirement (as defined by section 205),
- (g) a residence requirement (as defined by section 206),
- (h) a mental health treatment requirement (as defined by section 207),
- (i) a drug rehabilitation requirement (as defined by section 209),
- (j) an alcohol treatment requirement (as defined by section 212),
- (k) a supervision requirement (as defined by section 213), and
- (l) in a case where the offender is aged under 25, an attendance centre requirement (as defined by section 214).

⁴⁶⁴ Ministry of Justice (2010d), *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, London: The Stationery Office December 2010 Cm 7972 ISBN 978-0-10-179722-1

Community payback and community intervention have a vital role to play in reducing crime, however it is important that such programmes focus not on retribution but on community outcomes.⁴⁶⁵

6.3.2 Punishment is the domain of the criminal law

Irrespective of retribution's quondam role within punishment, there is no *necessity* for tort to perform a punitive role. It is superfluous in a system with a clear division between criminal and civil laws in which the criminal law satisfies any need for punishment (and any private and public retribution), whilst preserving the systemic protections of the criminal law: not least jury trial for serious offences and the higher standard of proof.

Primitive law knew no distinction between crime and tort. Mueller has reviewed primitive laws of the Babylonians, Jews, Romans, Hindus, Germanic Peoples, Incas, North American Indians, Inner African Peoples and Pacific Insular Peoples and with the benefit of retrospection considered whether the 'community reaction' to various wrongs was '...in the form of or for the purpose of retaliation, deterrence, resocialisation or neutralisation' – in which case the wrong could be categorised as a crime; whereas, if the reaction to the wrong was merely to exact compensation, then it was a tort.⁴⁶⁶ For example under the Germanic *Leges Barbarorum*, murder gives rise to capital punishment (clearly a crime), whereas, accidentally causing injury is merely a tort.⁴⁶⁷ The Anglo Saxons distinguished between *wite* (a fine: clearly criminal) and *wergild* and *bot* (purely compensatory: tortious).⁴⁶⁸

Mueller cites Mommsen's conclusion that penal law started with the reaction to wrongs against the security of society, with the private law of compensation growing in parallel. So, for example, under Babylonian and Mosaic Laws the gravest crimes involved witchcraft, offences against the administration of justice itself and religion, as well as sexual offences. Offences against the person or property could either be a 'tort-crime hybrid' or a mere tort.⁴⁶⁹

⁴⁶⁵ Howard League for Penal Reform *Response to Breaking the Cycle* p 8, 2011 ISBN 978-1-905994-31-1

⁴⁶⁶ Gerhard Mueller, 'Tort Crime and the Primitive' the Journal of Criminal Law, Criminology, and Police Science Vol 46 No 3 (Sep-Oct 1955, 303-332)

⁴⁶⁷ Sec 49 Lex Thuringorum: 'Who not wilfully but by some accident kills a human being or wounds him, shall pay lawful compensation'

⁴⁶⁸ Gerhard Mueller, 'Tort Crime and the Primitive' (n. 466) p. 311

⁴⁶⁹ Mommsen's Romisches Strafrecht, Leipzig 1899

Duff argues that in modern times there are two factors that identify conduct as falling into the criminal domain rather than being merely tortious. First, tort concentrates on the loss and fault is relevant to determining who pays for it. Second, criminal law focuses on the nature of the wrong, which explains why inchoate offences are nevertheless offences.⁴⁷⁰

6.3.3 Exemplary and aggravated damages are distinguishable from PL compensation

Notwithstanding the separation of tort and crime, the existing law does allow for retributive damages in limited circumstances. The question is whether such damages may be awarded in PL cases.

The primary object of an award of damages is to compensate the claimant for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like.⁴⁷¹

The leading judgment on exemplary damages is that of Lord Devlin in *Rookes v Barnard* in which he held that

... that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal.⁴⁷²

The categories were 'oppressive, arbitrary or unconstitutional action by the servants of the government' and cases in which the 'defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.'

⁴⁷⁰ RA Duff, *Restoration and Retribution* (in von Hirsch et al., *Restorative Justice and Criminal Justice* (Hart Publishing 2003), 43-59)

⁴⁷¹ Harvey McGregor, *McGregor on Damages* (n. 132) [13-001]

⁴⁷² *Rookes v Barnard* [1964] AC 1129

Aggravated Damages are perhaps an even rarer species than exemplary damages. They are awarded for ‘an injury to the victim's moral dignity that results from the defendant's denial that the victim is entitled to respect as a moral person’.⁴⁷³

‘On the one hand there are those who believe that “aggravated damages are effectively indistinguishable from punitive damages”; while on the other there are those who side with the Law Commission's view that aggravated damages are no more than a particular species of compensatory damages which are sometimes awarded to claimants in respect of mental distress. The difference in function -- punishment versus compensation -- could hardly be more pronounced.’⁴⁷⁴

Murphy concludes ‘insofar as it is possible to commit both the tort of negligence and a breach of contract in high-handed and malicious ways, there seems no good reason to exclude aggravated damages from those contexts.’⁴⁷⁵

On this basis it is theoretically possible to award both exemplary and aggravated damages in a PL claim. Any such claim would be a rarity (and has never been experienced by the Practice). However, insofar as either or both of exemplary or aggravated damages are punitive in nature, it tends to indicate that ordinary general damages do not perform this function.

The Law Commission reviewed exemplary and aggravated damages as part of its ‘Sixth Programme of Law Reform: Damages Aggravated, Exemplary and Restitutionary Damages’. It reported to the then Lord Chancellor, Lord Irvine of Lairg⁴⁷⁶ that whilst they are an ‘anomalous’ civil remedy, and must be limited as far as precedents permit, they should continue to be part of UK law.⁴⁷⁷ The Law Commission prepared a draft Bill to enact its recommendations which included:

- (1) Aggravated damages should be retained to compensate for mental distress but not to punish;⁴⁷⁸
- (2) Restitutionary damages should be available for torts and civil wrongs where the defendant's conduct ‘showed a deliberate and outrageous disregard of the plaintiff's rights’;⁴⁷⁹

⁴⁷³ A Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 O.J.L.S. 87

⁴⁷⁴ Murphy, ‘The nature and domain of aggravated damages’ C.L.J. 2010, 69(2), 353-377

⁴⁷⁵ Murphy, ‘The nature and domain of aggravated damages’ (n. 474) p. 376

⁴⁷⁶ Law Commission 247 (n. 161)

⁴⁷⁷ Law Commission 247 (n. 161) p. 183-188

⁴⁷⁸ Law Commission 247 (n. 161) Draft Bill, clause 13

⁴⁷⁹ Law Commission 247 (n. 161) Draft Bill, clause 12(1) – 12(3)

(3) Exemplary damages should be retained but renamed 'punitive damages'.⁴⁸⁰ They must only be awarded by a judge (not a jury) where the defendant 'deliberately and outrageously disregarded the plaintiff's rights'.

The Law Commission's proposals on exemplary damages were rejected:

In November 1999, the Government accepted other recommendations from the report but rejected the proposals on exemplary damages on the grounds that: "The purpose of the civil law on damages is to provide compensation for loss, and not to punish. The function of exemplary damages is more appropriate to the criminal law, and their availability in civil proceedings blurs the distinctions between the civil and criminal law. The Government does not intend any further statutory extension of their availability."⁴⁸¹

6.3.4 Not all wrongful behaviour is morally culpable

Coleman explains, descriptively:

To say that a harm is an actor's fault is to say that he is to blame for it. If an actor is to blame for a harm then he is blameworthy in some sense of that term. The fault system, then, by exacting reparation from those at fault guarantees that blameworthy conduct receives its due. This suggests that the fault system is required by the traditional retributivist principle.⁴⁸²

Kotler argues that tort is based on punishing 'conduct which violates certain core values that comprise the underlying basis of moral intuition' as a 'means of exacting revenge or retribution'.⁴⁸³ He claims support from the fact that US courts balk at excessive jury awards of punitive damages, arguing that the retributivist insists on proportionality of punishment.⁴⁸⁴ In other words tort punishes fairly and so punitive damages are unnecessary. The argument is a non sequitur. Abhorrence of excessive awards of punitive damages seems an equally reasonable response for one who considers damages to contain no punitive element. Kotler extends his argument to claim that 'the culpability factor is critical to an understanding of the fierce popular

⁴⁸⁰ Law Commission 247 (n. 161) Draft Bill, clause 1 (2)

⁴⁸¹ Draft Civil Law Reform Bill: pre-legislative scrutiny - Justice Committee

< <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/30006.htm#note162> >
accessed 23 March 2014

⁴⁸² Jules L. Coleman, 'On the Moral Argument for the Fault System' The Journal of Philosophy, Vol. 71, No. 14, Some Problems in Ethics (Aug. 15, 1974), 473-490 p. 474

⁴⁸³ Martin A. Kotler 'Utility, Autonomy and Motive: a Descriptive Model of the Development of Tort Doctrine' Cincinnati Law Review Vol. 58 1990 1231 p. 1232

⁴⁸⁴ Martin A. Kotler 'Utility, Autonomy and Motive: a Descriptive Model of the Development of Tort Doctrine' (n. 483) p. 1235

resistance to the adoption of strict liability principles'.⁴⁸⁵ Again, whilst that is in itself correct, Kotler is guilty of assuming the proposition that he seeks to prove, namely that culpability deserves punishment. Coleman, on the other hand, argues that tort does not have to be based on moral culpability which puts a 'dent' the argument that fault is based on retributivism.⁴⁸⁶

There is some historical support for the retributivist view from Lord Atkin who, when enunciating his famous neighbour principle, began:

The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.⁴⁸⁷

However, it is submitted that this does not reflect the true position. Coleman observes that 'we cannot presume that all individuals who are at fault in causing automobile accidents are morally culpable'.⁴⁸⁸ The same applies in PL. One of the factors considered in the PL Claims survey at Appendix 4 was whether there was a 'wrong'. However it is difficult to define what exactly constitutes a wrong for the purposes of a PL claim. The criterion used when reviewing the files was whether there was evidence of moral culpability. Given that the claim may have involved allegations of fault which were never tested, answering the question categorically would involve a high degree of subjectivity. It can be said objectively that the manufacturers in the settled cases cannot be presumed to have been morally culpable. For example, there were four cases (44, 64, 74 and 111) in which the claimant was injured by the unintended deployment of an airbag. Liability was indisputable in these cases yet there was nothing the defendant importer of the vehicle did or failed to do that contributed to the accident to which moral culpability can be attached.

⁴⁸⁵ Martin A. Kotler 'Utility, Autonomy and Motive: a Descriptive Model of the Development of Tort Doctrine' (n. 483) p. 1235

⁴⁸⁶ Jules L. Coleman 'On the Moral Argument for the Fault System' (n. 482) p. 477

⁴⁸⁷ *Donoghue v. Stevenson*, 1932 App. Cas. 562, p. 580

⁴⁸⁸ Jules L. Coleman 'On the Moral Argument for the Fault System' (n. 482) p. 477; see also Ronen Perry, 'The Role of Retributive Justice' (n. 102) p. 189 '... tort law often imposes liability for conduct that cannot be deemed morally wrong. This is done especially under rules of faultless liability, such as strict and vicarious liability. Strict liability is imposed for begetting harm. It is independent of moral wrongfulness unless one considers causation of harm to be wrongful *per se*.'

Darley and Pittman say:

Intuitively, the following example will clarify the difference between punishment and compensation. If a thief, eventually caught, were to compensate the victim immediately for the full monetary costs of the theft, people would not consider that this was a sufficient infliction on the perpetrator to close the matter.⁴⁸⁹

This is an example of moral culpability equating to the commission of a criminal offence, deserving punishment, together with a tortious wrong, for which repayment or compensation is the appropriate remedy. The same would apply if for example a disgruntled employee in a car factory had been deliberately sabotaging car braking systems. To contrast Darley and Pittman's example, if A accidentally opens a door into B causing B to spill a tray of drinks and A immediately offers to pay for the drinks, most would intuitively feel that justice has been done without the need for further recrimination.

6.3.5 Tort only intervenes where there is a loss

Whilst the criminal law responds to inchoate offences, tort has no role in attempts or acts and omissions that lead to no loss or damage.

The notion of retribution may play a significant role in the laymen's understanding of tort law; perhaps this understanding has even been endorsed by one or two judicial opinions. But it is a total misconception of tort law from a theoretical standpoint. First, the law of negligence, which is currently the most significant division of tort law, does not penalize wrongful conduct unless damage ensues; whereas, from a retributive perspective, wrongful conduct must yield the same sanction regardless of the fortuitous occurrence of harm. Whether harm occurs or not is a fortuity that does not alter the gravity of the conduct; hence it should have no effect on the severity of the sanction...⁴⁹⁰

Coleman observes that 'retributivism requires that all wrongdoers get their comeuppance, and not only those wrongdoers who may be to blame for particular accidents.'⁴⁹¹

⁴⁸⁹ John M. Darley and Thane S. Pittman 'The Psychology of Compensatory and Retributive Justice' (n. 459) p. 326

⁴⁹⁰ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p. 189

⁴⁹¹ Jules L. Coleman, 'On the Moral Argument for the Fault System' (n. 482) p. 484

6.3.6 Punishment is not suited to strict liability – but may be suited to fault

It is submitted here that strict liability lies uneasily with retributive justice. Punishment makes more sense where liability is based on fault. However, on closer inspection it is seen that the nexus between civil fault and punishment is illusory.

Kotler equates the movement away from the strict liability basis of §402A of the Restatement (Second) Torts towards a fault based regime, with punishment forming the normative foundation of tort. In other words the need to punish for a wrong explains a general discomfort with strict liability, imposed regardless of fault.⁴⁹² Kotler inducts Weinrib into the retributivist fold because Weinrib's philosophy of tort is plainly based on fault. However, Weinrib does not mention punishment or retribution in his theory. He distances himself from those who ascribe to tort 'independently desirable goals (such as ... punishment)'.⁴⁹³ Indeed there is nothing of this nature to be found anywhere in Weinrib's writings.⁴⁹⁴ Kotler is equating retribution with correction. The two are quite different concepts, the latter focusing on the wrong and the former on the wrongdoer. As Kotler acknowledges,⁴⁹⁵ Weinrib considers strict PL to be anomalous: falling outside his corrective justice model.

The prevailing view is that the perception that retribution underlies tort is wrong.⁴⁹⁶ First, negligence requires damage. A near miss does not give rise to damages – although this is a common misperception amongst cases dealt with by the Practice. It is not unusual for a claim to be made where there is simply no loss or damage. And where there is loss or damage, it is not uncommon for the claimant to try to explain how much worse the situation could have been but for chance – as if this in some way

⁴⁹² Martin A. Kotler, 'Utility, Autonomy and Motive: a Descriptive Model of the Development of Tort Doctrine' (n. 483) p. 1239

⁴⁹³ Ernest Weinrib, *Tort Law as Corrective Justice* (n. 85)

⁴⁹⁴ Weinrib, Ernest J. (1987), 'Causation and Wrongdoing,' Chicago-Kent Law Review: Vol. 63: Iss. 3, Article 3; Ernest J. Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (n.368); Ernest J. Weinrib, 'The Gains and Losses of Corrective Justice' (n. 353) pp. 277-297; Ernest J. Weinrib, 'Right and Advantage in Private Law' Cardozo Law Review vol. 10 1283; Ernest J. Weinrib, 'The Insurance Justification and Private Law' *The Journal of Legal Studies* Vol. 14, No. 3, Critical Issues in Tort Law Reform: A Search for Principles (Dec., 1985), 681-687; Ernest J. Weinrib, 'The Monsanto Lectures: Understanding Tort Law', 23 Val. U. L. Rev. 485 (1989); Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (n. 354)

⁴⁹⁵ Martin A. Kotler 'Utility, Autonomy and Motive: a Descriptive Model of the Development of Tort Doctrine' (n. 483) p. 1231

⁴⁹⁶ Ronen Perry, 'The Role of Retributive Justice' (n. 102)

enhances or intensifies the wrong and the entitlement to damages. See for example Case 90 in the PL Claim Survey at Appendix 4 in which the claimant sought compensation for 'trauma, stress and distress caused to my three young children who all witnessed the fire and who only through luck were not seriously injured.'

Second, tort sometimes imposes liability where there is no moral wrong – e.g. strict or absolute liability (although this could be in places where there is a presumption of moral wrong).

Third, the severity of sanction depends not on the culpability of the defendant but on the fortuity of loss, which may be a poor measure of the defendant's wrongdoing.⁴⁹⁷ As Perry points out, a minor lack of attention could cause an accident with huge financial consequences and a serious departure from the standard of care can result in mere minor consequences. This outcome violates the retributive principles of cardinal and ordinal proportionality.⁴⁹⁸ The principle of cardinal proportionality requires that 'the sanction should not be too harsh or lenient with respect to the absolute gravity of the wrong'.⁴⁹⁹ Ordinal proportionality on the other hand requires that 'the sanction must reflect the relative gravity of the wrong'.⁵⁰⁰

6.3.7 Where damages are expressly awarded to punish, these are separate from compensatory tortious damages

In the US, where punitive damages are expressly designed to punish a defendant's tort, it is helpful to examine more closely the basis on which such awards are made. PL claims in the US are typically based on wider causes of action than UK PL, such as: 'deceptive trade practices, unjust enrichment, negligence, public nuisance and fraudulent concealment'.⁵⁰¹

⁴⁹⁷ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p. 191

⁴⁹⁸ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p.191

⁴⁹⁹ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p.228

⁵⁰⁰ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p. 182

⁵⁰¹ See note 189 above

once the plaintiff has established the right to compensatory damages, she also can receive punitive damages by proving that the defendant acted with fraud, malice or in wanton disregard of the plaintiff's tort rights.⁵⁰²

It has been suggested that a significant difference between the US and the UK is that American juries can only criticise the defendant's conduct by awarding punitive damages⁵⁰³ as, unlike a judge, they do not have an opportunity to write an excoriating judgment.⁵⁰⁴

Geistfeld cites a striking example of an award of \$28 billion (this is not a misprint) by a California jury to a single smoker who contracted lung cancer.

no rational justice system could possibly mete out that kind of penalty for harming a single person, no matter how severe the suffering and how reprehensible the wrongdoing. But it was not necessarily unreasonable as punishment for the harm done to the literally millions of smokers who were injured or killed by the defendant's fraud (if one concludes, as did the jury, that the tobacco company was guilty of maliciousness in knowingly causing those countless deaths and injuries).⁵⁰⁵

The implication is that this is a matter of public law rather than mere private justice. Darley and Pittman suggest that whilst such punitive damages are conceived as fulfilling deterrent purposes, 'ordinary people' display their moral outrage by punishing 'for reasons of just deserts'.⁵⁰⁶ Whether or not the award in that case can be justified, it can be seen that the award is not punishing the tort. It is punishing accompanying criminal conduct. Contrast this with the Scottish case of *McTear* in which the material allegations were of lack of care rather than fraudulent concealment:

(6) it was the duty of the defenders before and after 1964 to warn smokers of the facts that smoking was addictive and could cause fatal diseases and the defenders were in breach of that duty;
(7) it was the duty of the defenders to take reasonable care not to manufacture tobacco products for sale to members of the public or sell to them; and

⁵⁰² Mark A. Geistfeld, *Principles of Products Liability*, Foundation Press New York 2006 ISBN-13 978-1-58778-974-8, ISBN-10: 1-58778-974-4 p. 217

⁵⁰³ See generally on the role of the jury: Mark P. Gergen, 'The Jury's Role in Deciding Normative Issues in the American Common Law', 68 *Fordham L. Rev.* 407 (1999)

⁵⁰⁴ P. S. Atiyah, 'Tort Law and the Alternatives: Some Anglo-American Comparisons', 1987 *Duke Law Journal* 1002-1044

⁵⁰⁵ Mark A. Geistfeld, *Principles of Products Liability* (n. 502) p. 217

⁵⁰⁶ John M. Darley and Thane S. Pittman, 'The Psychology of Compensatory and Retributive Justice' (n. 489) p. 328

(8) M's lung cancer was caused by the fault and negligence of the defenders.⁵⁰⁷

Geistfeld points out that early common law awards of punitive damages involved intentional torts⁵⁰⁸ - thus punitive damages are ill-suited to PL cases of defective product design. Punitive damages could become relevant in PL if there were a risk/utility test for defectiveness. Geistfeld offers the well-known Ford Pinto case⁵⁰⁹ as an example, in which it was held that Ford had deliberately decided not to introduce a modification to improve the Pinto's poor resistance to bursting into flames when struck from the rear, on the basis that the cost of modification would exceed the cost of claims. However, the test for *defect* in the UK is not based on risk/utility. It is based on consumer expectation. Liability arises regardless of fault or risk/utility decisions, however deliberate they might be found to have been. Ironically, the notable PL decision in the UK on risk/utility pre-dates the PL Directive. In *Walton v BL*,⁵¹⁰ Mrs Walton was catastrophically injured when a rear wheel of the Austin Allegro in which she was a passenger came off while the car was travelling at 50-60 mph along the M1 motorway. British Leyland was aware of a problem involving bearing failures on Austin Allegro cars which could lead to the loss of a wheel. It introduced a modification which prevented the wheel coming adrift but decided not to instigate a recall campaign at a cost of £300,000. Willis J held:

the duty of care owed by Leyland to the public was to make a clean breast of the problem and recall all cars which they could, in order that the safety washers could be fitted ... The duty seems to me to be the higher when they can palliate the worst effects of a failure which, if Leyland's view is right, they could never decisively guard against. They knew the full facts; they saw to it that no one else did. They seriously considered recall and made an estimate of the cost at a figure which seems to me to have been in no way out of proportion to the risks involved. It was decided not to follow this course for commercial reasons ...⁵¹¹

The limited report on the case does not deal with damages. It is, therefore, not known whether damages were agreed or tried or whether any form of exemplary or aggravated damages were sought.

⁵⁰⁷ *McTear v Imperial Tobacco Ltd* (n. 244) p. 1

⁵⁰⁸ Mark A. Geistfeld, *Principles of Products Liability*, (n. 502) p. 221

⁵⁰⁹ *Grimshaw v. Ford Motor Company* (n. 152)

⁵¹⁰ *Walton v British Leyland* (n. 194)

⁵¹¹ *Walton v British Leyland* (n. 194) p. 136

6.3.8 Private punishment is anti-societal

Punishment falls squarely within the domain of criminal law in the UK. Society does not condone individuals punishing individuals. Retribution is by its nature private punishment: ‘...retribution focuses on the moral desert of a single person, and does not distribute a benefit or a burden among two or more persons.’⁵¹² Individuals should not ‘take the law into their own hands’, as children are instructed at an early age. The reason for this is that judgement as to whether there has been a wrong (and if so how serious it is) will be subjective and there will be no control over the level of punishment. Whereas compensation seeks an end to a disruption of the fortuitous relationship between injurer and injured, retribution may lead to an escalation of hostilities. Crimes offend not merely against the individual victim but against society and its values. Therefore it is society that should punish. The system has its own checks and balances, which, whilst not infallible, require a wrong to be proved beyond reasonable doubt, to the satisfaction of a jury (in any serious case) and subject to standardised penalties. An individual cannot manipulate the system for his own gain at the expense of another.

Parisi explains how, in ancient legal systems, punishment evolved into compensation. At that point in the evolutionary process the state took control of punishment and private retaliation was no longer permissible.⁵¹³

Once the punitive role of the law is monopolistically absorbed by the state, retaliation or self-administered punishment is regarded as illicit, and the unpunished injurer who suffers retaliation perceives such punishment as a wrongful act and is consequently regarded as a victim himself.⁵¹⁴

Colby distinguishes punitive damages awarded against the tobacco industry from punishment of public wrongs, and argues that if they became a substitute for the criminal law, then they would make an ‘intolerable end run around the Bill of Rights’.⁵¹⁵

⁵¹² Ronen Perry, ‘The Role of Retributive Justice’ (n. 102) p. 186

⁵¹³ Francesco Parisi, ‘The Genesis of Liability in Ancient Law’ (n. 138) p. 41-42

⁵¹⁴ Francesco Parisi, ‘The Genesis of Liability in Ancient Law’ (n. 138) p. 46

⁵¹⁵ Colby ‘Clearing the Smoke from *Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages’ (n. 439) p. 392

6.4 Empirical evidence of the practical role of a retributivist's conception of tort

6.4.1 The day in court myth

An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have day on court in order to see the perpetrator of their suffering squirming under cross-examination.⁵¹⁶

Any suggestion that PL claimants want their day in court is entirely unsupported by empirical evidence within the PL Claims Survey at Appendix 4. Cases reaching court are the exception rather than the rule. Out of the 132 sample cases only three reached court. The first, case 57, which was used as Case Study 1, *Martin v Kudo*, went to trial because the claimant's solicitor would not permit the claimant to accept an offer which left them with less than their full costs and success fee. If the claimant had accepted the offer, he would have had to make up the shortfall in his solicitors' costs himself. Thus he had no choice but to go to trial. The decision was taken out of his hands. In case 45 the claimant believed he would win and had supporting expert evidence. Ultimately the defendant's expert evidence was preferred. There was no suggestion of retribution. In case 50 the claimants' solicitors' and counsel's costs hindered successful mediation and so the case went to trial. In the event they won, although the Court of Appeal gave unconditional leave to appeal, which then paved the way for a mediated settlement. It is a certainty, from seeing the claimants in and around the court room that they had no desire to be in court. Such anomalous cases generally fail to settle for reasons ranging from bad legal advice, intransigence and costs issues to (rarely) vindictiveness. But such cases are such an insignificant proportion of all claims that they should be discounted in the search for consistent theories.

6.4.2 Civil liability may fail to reach the person who is culpable

Tort law—as a bipolar rectificatory mechanism—cannot attain retributive justice, nor can it be expected to. It frequently imposes sanctions on non-culpable parties; it does not impose sanctions on all wrongdoers; the extent of a sanction is usually determined by the magnitude of actual loss and cannot be adjusted to fit the gravity of the respective wrong, and in the end, the burden is not necessarily borne by the actual wrongdoer.⁵¹⁷

⁵¹⁶ Vivienne Harpwood, *Principles of Tort Law* 4th edition, p14 Cavendish Publishing 2000, ISBN 1 85941 467 2

⁵¹⁷ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p. 236

Damages are rarely paid by the tortfeasor. The majority of injury claims arise from road traffic accidents (approximately 75% in 2013-14).⁵¹⁸ Road traffic accidents are subject to compulsory insurance,⁵¹⁹ as is Employers Liability.⁵²⁰ In cases of vicarious liability it is unheard of in the experience of the Practice for a claimant to pursue the liable employee as the prospects of recovery against the employer are usually likely to be so much better (even if there is no insurance).

6.4.3 Tort based 'punishment' fails to fit the crime

One moral position traditionally referred to as "retributivist" requires that a measure of pain, suffering, or deprivation befit the morally blameworthy actor to an extent proportionate to the nature and magnitude of the evil he has done: penalties which, so to speak, fit the crime.⁵²¹

Punishments that are proportionate to the scale of the crime are 'fairer than punishments that are not'.⁵²² Punishments should meet the principles of both cardinal and ordinal proportionality.⁵²³ Fines should be commensurate with the defendant's wealth, because of the principle of the diminishing marginal utility of income for optimal deterrence.⁵²⁴ However, damages have no relationship with the degree of moral turpitude, the conduct of the tortfeasor (although this may be taken into account in determining the responsibility of the defendant as against a joint tortfeasor)⁵²⁵ or the wealth or ability of the defendant to pay.

Conclusions

It is evident that tort and criminal law share some elements and exhibit some common factors. Damages are capable of punishing an uninsured defendant in the same way

⁵¹⁸ Compensation Recovery Unit data on cases registered, settlements recorded and recoveries made <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306064/cases-registered-cru-2013-14.csv/preview > accessed 23 April 2015

⁵¹⁹ Road Traffic Act 1988 s 143

⁵²⁰ Employers' Liability (Compulsory Insurance) Act 1969

⁵²¹ Jules L. Coleman, 'On the Moral Argument for the Fault System' (n. 482) p. 474

⁵²² Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' *Crime and Justice*, Vol. 16 (1992), 55-98

⁵²³ Ronen Perry, 'The Role of Retributive Justice' (n. 102) p. 191

⁵²⁴ Emily Gold Waldman and F. Patrick Hubbard, 'In Honor of Walter O. Weyrauch: Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?' 60 *Fla. L. Rev.* 349 (2008)

⁵²⁵ Civil Liability (Contribution) Act 1978 s 2(1): 'the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'.

as a fine. Take the example of a manufacturer of roller skates which have inadequate warnings⁵²⁶ leading to a consumer breaking a leg. A prosecution under the Consumer Protection Act 1987 for breach of the Toys (Safety) Regulations 2011/1881 could lead to a maximum fine of £5,000.⁵²⁷ An action for damages could result in an award of damages and costs in the tens of thousands of pounds – depending not on the tortfeasor’s circumstances but entirely on the fortuity of the circumstances of the injured person. Criminal law punishments are measured. Punishments do not merely fit the crime but take into account the circumstances of the criminal.⁵²⁸ A claimant could theoretically exact retribution by pursuing a civil claim. But this does not mean that tort, still less strict liability PL, satisfies a ‘need’ for retributive justice. To argue otherwise, as Kotler does, is a classical syllogistic fallacy.

As Coleman argues,⁵²⁹ retributivism fails to provide a satisfactory foundation for fault based liability. The random repercussions of civil liability are inconsistent with an underlying intention to punish fairly and proportionately. Civil liability is instrumental and functional, whereas retribution has the non-utilitarian purpose of giving culprits their just deserts.⁵³⁰

⁵²⁶ In contravention of Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys

⁵²⁷ Consumer Protection Act 1987 s 12; Criminal Justice Act 1982 s 37

⁵²⁸ Criminal Justice Act 2003 s 164 (1) ‘Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.’

⁵²⁹ Jules L. Coleman, ‘On the Moral Argument for the Fault System’ (n. 482) 473-490

⁵³⁰ John M. Darley and Thane S. Pittman, ‘The Psychology of Compensatory and Retributive Justice’ (n. 459)

CHAPTER SEVEN

DISTRIBUTIVE JUSTICE: SUBSTANTIVE LAW - FLAWS IN ADOPTING STRICT LIABILITY UNDER THE PL DIRECTIVE

strict liability is one area of tort law in which a page of history can be at least as relevant as a page of logic⁵³¹

American Law Institute, 2005

INTRODUCTION

This chapter asks whether PL claims fulfil the needs of distributive justice. Whether or not tort is intended as an engine of distributive Justice, tort has distributive effects. Both the substantive law of tort and the procedural law implementing it distribute rights because rulemaking is by its very nature distributive of rights. Rulemaking reflects political choices that are ostensibly socially desirable. The focus in this chapter is on whether the distributive role of PL law is socially desirable in the sense that it meets a criterion of fairness. Fairness is inevitably highly subjective and does not easily lend itself to an objective formulation. However, this chapter identifies a number of incorrect assumptions and generalisations which militate against the fair distribution of substantive rights under the PL Directive.

7.1 The PL Directive's distributive intent

Notwithstanding Goldberg's and Zipursky's assertion that they are 'not arguing for recognition of liability for defective products on the ground that it will serve distributive justice'⁵³² there is no doubt that the PL Directive had a distributive intent in that it was designed to protect a class of society: injured consumers. It does this by approximating PL law so as to prevent the 'divergences that may distort competition' and the 'differing degree of protection of the consumer against damage caused by a defective product'.⁵³³ It seeks to achieve these goals by imposing a form of strict liability.

⁵³¹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM Ch. 4 scope note (Proposed Final Draft No. 1, 2005). American Law Institute ISBN: 978-0-314-23194-3

< http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=61 > accessed 17 June 2015

⁵³² Easy Case (n. 11) p. 1944 note 96

⁵³³ PL Directive Recital 1

This chapter argues that strict liability was selected as the standard for PL for the wrong reasons. It was not soundly based on doctrine with a view to achieving a specific goal – but arose through following a perceived trend started in the US. It was based on emotive reasons rather than practical needs – the difficulties of proof in complex cases. However, concerns in the US about the social desirability of strict liability were ignored. More significantly this explains why liability under the PL Directive is inappropriate for the types of cases which led to its introduction (the Thalidomide tragedy and the 1974 Paris Air disaster). However well-intentioned the introduction of strict liability for defective products may have been, it is submitted that the concept is flawed substantively, leading to unfairness.

7.2 The inappropriate factors making strict liability an illogical choice

Strict liability was an illogical choice resulting from inappropriate influences. Furthermore the very principle of strict liability for defective products relies on generalisations and assumptions that do not stand up to close scrutiny:

Part I: Inappropriate influences for Strict Liability

1. The authors followed a perceived international ‘trend’ leaning towards strict liability, lacking in normative clarity;
2. Strict liability was seen as a simple convenient way to avoid lengthy complex multinational litigation but most PL litigation bears no resemblance to this model.
3. The choice of strict liability was inspired by (and sought to emulate) the development of strict liability for defective products in the US. Although in 1978 it was one of the stated objectives of the Economic and Social Committee of the EU, in its opinion on the Draft PL Directive, to follow developments in international PL law,⁵³⁴ the empirical evidence suggests that a paradigm shift in the US went unnoticed in Europe. By the time of the introduction of strict PL in Europe, the US had rejected strict liability and turned back to fault based liability for defective products.

⁵³⁴ Opinion of the Economic and Social Committee (161st plenary session, Brussels 12 and 13 July 1978) Official Journal of the European Communities No C 114/16 7.5.79

Part II: Why Strict Liability is an illogical choice

4. The need for legislation was predicated more upon emotional reasons than practical needs following two disasters of unprecedented proportions involving highly technical products – in relation to which ‘victims’ needed compensation.

5. It is a leap from these accidents to treat all ‘products’ as warranting a distinct legal classification justifying the imposition of a *sui generis* form of liability because:

a) the types of product fomenting the debate were unrepresentative of the majority of products; and

b) the arguments used to justify the imposition of strict liability for defective products could equally be applied to other forms of liability.

6. Strict liability was perceived to overcome difficulties of proof of negligence and causation. It is a fallacy that taking fault out of the equation overcomes the problem of causation.

Part III: The arguments lead more naturally to ‘No-fault’

7. The factors directing legislators towards strict liability point more accurately towards no-fault liability.

PART I: INAPPROPRIATE INFLUENCES FOR STRICT LIABILITY

7.3 The authors followed a perceived international trend lacking in normative clarity

The authors of the PL Directive followed a perceived international trend towards strict liability but this trend lacks any real normative substance and fails to explain the need for strict liability. The Strasbourg Draft Convention Draft Explanatory Report stated:

... the growth of inter-State commercial trade has resulted in the problem of producers' liability acquiring in certain cases, an international aspect.⁵³⁵

The context suggests that the underlying concern was about differential treatment of PL depending on the particular jurisdiction and the lack of PL specific rules in any of the jurisdictions investigated. This led to the conclusion that special rules were required at European level 'since the question of products liability could no longer be confined within national frontiers.'⁵³⁶ It would therefore be convenient for Member States to share a basis of legal liability through international convention. The Hague Convention⁵³⁷ already dealt with choice of law in international PL claims.⁵³⁸ What was needed was a convention that dealt with liability.

Internationality *per se* does not explain or justify strict liability. A strict liability based international convention only makes sense if the products envisaged are multinational in nature and liable to cause large scale injury or death of individuals spread throughout different jurisdictions – such as aircraft and pharmaceuticals. According to the Draft EU PL Directive Memorandum

⁵³⁵ Strasbourg Draft Convention Article 3 (n. 23) p. 134

⁵³⁶ Strasbourg Draft Convention, Draft Explanatory Report (n. 23) p. 135

⁵³⁷ Hague Convention on the Law Applicable to PL of 2 October 1973, applicable in 6 Member States since 1977

< http://www.hcch.net/index_en.php?act=conventions.text&cid=84 > accessed 17 December 2013; now REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

< <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0040:en:PDF> > accessed 17 December 2013

⁵³⁸ See generally Thomas Kadner Graziano, 'The Rome II Regulation and the Hague Conventions on Traffic Accidents and PL – Interaction, conflicts and future perspectives.' *Nederlands Internationaal Privaatrecht (NIPR)* 2008, 425-429 < http://www.biicl.org/files/5200_graziano_27-09-10_biicl_1.pdf > accessed 27 January 2014

... special problems of these cases again lie, as distinct from those of previous eras, in the possible extent of the damages which such defects can cause to the health or financial position of the user. For example, 50 million US-dollars in the case of the above mentioned [Paris] aircraft disaster, 110 million DM compensation in the Contergan [Thalidomide] case. These losses bear no relation to the value of the article used or the benefits sought by the user.⁵³⁹

7.4 Avoidance of complex multinational litigation

The conclusion that special rules were required at European level, because PL could no longer be confined within national frontiers, follows the logic of international transport conventions such as the Warsaw Convention of 1929.⁵⁴⁰

it would be worth considering a provision that the manufacturer of a defective product should be deemed to be liable for failing to exercise reasonable care unless he were to prove that the defect arose after it had left his control or that it arose whilst within his control but without lack of reasonable care on his part. This would treat the liability of the manufacturer for defects in his products in much the same way as ... the liability of the carrier to passengers involved in an air crash... [and] ... go some distance to meet one of the principal arguments for the imposition of strict liability ...⁵⁴¹

However, international air travel cannot be considered on even terms with products generally or even dangerous products. In 1929 commercial air travel was in its infancy. It was a considerably higher risk enterprise than today. International air crashes involve wide scale injury and death. Passengers might find themselves injured in foreign countries or in the air above unascertained territory. There were concerns about difficult questions of applicable law⁵⁴² and the need to develop a consistent and uniform body of world-wide law.⁵⁴³

⁵³⁹ Draft PL Directive Explanatory Memorandum (n. 24) p. 81

⁵⁴⁰ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (enacted in the UK by the Carriage by Air Act 1961 and cited by the Law Commission as an example of 'channelling' – see Law Commission Working Paper No 64; The Scottish Law Commission Memorandum No 20 *Liability for Defective Products* Printed in England for Her Majesty's Stationery Office by Oyez Press Limited Dd 506997 K24 6/75 page 49)

⁵⁴¹ Law Commission Working Paper No 64 (n. 23) pp. 41/42

⁵⁴² *Grein v Imperial Airways, Limited* [1937] 1 K.B. 50 Greene LJ pp. 74-76

⁵⁴³ Alona E. Evans, *Reed v. Wiser* 555 F.2d 1079 *The American Journal of International Law*, Vol. 72, No. 1 (Jan., 1978), pp. 147-149

7.4.1 Strict liability was intended to avoid forum shopping

There is an obvious attraction in a simple system of strict liability to avoid forum shopping and the air carrier being exposed to concurrent litigation in multiple jurisdictions. The *quid pro quo*, in the case of the Warsaw Convention, was a system of limitation of liability. Lord Steyn explained in *re Deep Vein Thrombosis and Air Travel Group Litigation*:

... The purpose of the Warsaw Convention, following the precedent of the earlier Hague Rules governing carriage by sea, was to bring some order to a fragmented international aviation system by a partial harmonisation of the applicable law. The Warsaw Convention is an exclusive code of limited liability of carriers to passengers. On the other hand, it enables passengers to recover damages even though, in the absence of the Convention and the Act, they might have no cause of action which would entitle them to succeed.⁵⁴⁴

Whilst many products are imported, many others are produced and sold domestically. If the need for a simplified form of liability is based on the difficulties of access to foreign producers, then then it might be argued that claims against domestic producers should be exempt. By analogy, the Warsaw Convention only applied to carefully defined 'international carriage'.⁵⁴⁵

Moreover, even though a product may be imported, this does not automatically increase the likelihood of consumers being injured abroad. Consumers are most likely to be injured where they use products: in their own domicile. Whilst a consumer may be injured by a product abroad, he is in no worse position in this respect than anyone who has an accident abroad.

⁵⁴⁴ *In re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 A.C. 495 per Lord Steyn p. 507

⁵⁴⁵ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929: 'Article 1 (2). For the purposes of this Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty ... of another Power...'

7.4.2 The PL Directive does not prevent forum shopping

One of the principal concerns for a lawyer advising a claimant, who has a choice of jurisdictions, is to bring the claim where the damages will be highest. Geddes noted as an example (in 1992 figures)

A 40 year old male doctor who is married with two children and who suffers serious brain injury, if he brings his proceedings in Ireland he would be likely to receive something in the region of \$2 million. If he brings his proceedings in Spain on the other hand he would be lucky to receive \$250,000.⁵⁴⁶

The PL Directive will not prevent forum shopping as it is a substantive law and is not concerned with damages. It was acknowledged in the commentary on the Draft Strasbourg Convention:

Article 3 does not define damage, leaving it to national law to stipulate the heads of damage (for example pain and suffering etc.) which can be claimed under the Convention and the measure of damages. The Committee was aware that this solution might give rise to undesirable "forum shopping", but it believed that this disadvantage was acceptable in view of the fact that any attempt to harmonise national law on this subject would raise considerable difficulty which might jeopardise the success of the Convention.⁵⁴⁷

The same applies to the PL Directive:

We note in this connection that neither the Strasbourg Convention nor the EEC Directive contains any provision which would significantly reduce the divergences in levels of awards of damages which at present exist in the member States.⁵⁴⁸

The harmonisation of liability regimes is an ineffective tool in preventing forum shopping so long as damages awards remain a 'lottery' across Europe.

While harmonisation of almost every area of the law in Europe continues apace, personal injury legislation remains stubbornly national, strictly tied to national social values and the country-specific administration of justice. The enormous disparity between compensation systems and awards

⁵⁴⁶ Andrew C Geddes, 'Difficulties relating to the recoverability of damages for personal injury' 1992 *European Law Review* 408 (referencing David McIntosh, and Marjorie Holmes, *Personal Injury Awards in E.C. Countries*, 1991, Lloyd's of London Press)

⁵⁴⁷ Strasbourg Draft Convention, Commentary on Article 3, (n. 23) p. 146

⁵⁴⁸ Law Com. No. 82 *Liability for Defective Products* (n. 252) p. 46

across the member states leads to confusion, artificial forum shopping, unfair competitive advantages and unpredictable insurance risk.⁵⁴⁹

If there were concerns about having to sue a foreign manufacturer, application of foreign law, or difficulties of discharging the burden of proof against a manufacturer based abroad, these were not paramount at the time of initial drafting of the PL Directive. The draft PL Directive defined a producer as ‘any person by whom the defective article is manufactured and put into circulation in the form in which it is intended to be used’.⁵⁵⁰ There was no reference to importers or those who put their name, trademark or brand on the product, as in the Strasbourg Draft Convention.⁵⁵¹

7.4.3 Pursuit of a foreign producer fails to explain strict liability

Notwithstanding the lack of importance given to this in the Preliminary Draft PL Directive, the real question is whether an injured third party will have difficulty pursuing a foreign manufacturer. In Case Study 1, *Martin v Kudo*, assuming that Mr Martin was not the purchaser of the vehicle, and that the vehicle was manufactured in Japan, he would have had to obtain leave to serve outside the jurisdiction. Circumventing horizontal or even vertical privity of contract and allowing Martin to sue the importer has an obvious convenience.

Imported goods present a problem. The producer, being resident abroad, is sometimes hard to find; even then, it may not be possible to obtain jurisdiction against him. It is likely to be inconvenient and expensive to litigate in the producer’s own country and the outcome of litigation depends to a large extent on the law of that country. It would be entirely unsatisfactory, however, if the remedies of a person injured by a defective product should depend on whether or not the product is an imported one. However, in our view, the importer of goods should answer for the quality of these goods not only to persons with whom he is in a contractual relationship, but to any person who may be injured by them. He creates the risk by importing the product into the jurisdiction for commercial purposes. This was the preponderant view of a great number of commentators.⁵⁵²

⁵⁴⁹ Kelly Parsons, ‘The European personal injury lottery’ 2003 *Euro Law* 42

⁵⁵⁰ Draft EU PL Directive Article 3 (n. 24)

⁵⁵¹ Strasbourg Draft Convention Article 3 (n. 23) p. 128

⁵⁵² Law Com. No. 82 *Liability for Defective Products* (n. 252) p. 30

However, making the importer answerable for defects does not explain the need for strict liability. Privity of contract could be circumvented or leapfrogged by statutory intervention regardless of whether the basis of liability is strict or fault based.

It may be argued that there is sense in basing the law on strict liability as this avoids difficulty of proof (causation aside) and puts the burden on the importer to seek indemnity from its foreign contractual partner. But the other side of this argument is that it might discourage international trade or place a disproportionately onerous burden on the importer and drive up the cost to the consumer. Moreover, even if it could be concluded that internationality is the justification for strict liability, then it would only justify strict liability in respect of imported products - not all products.

7.4.4 PL was mistakenly treated as synonymous with collective redress

The focus on disaster litigation can be better understood by considering Epstein's analysis of mass tort litigation. Epstein explains that the emphasis on strict liability in the US reflects a change in legal thinking from the two party issues to 'cases with large numbers of individual plaintiffs and multiple institutional defendants'.

The distinctive problem in the law of mass torts is how to control the transaction costs, which on any view increase exponentially as the number of parties increases.⁵⁵³

He explains that there is a mistaken assumption that the more parties that can be drawn into a dispute, the more likely it is that substantive justice will be reached. The transactional costs of litigation rise exponentially with multiple parties. He concludes that the number of parties to litigation should be reduced and the rules of liability should be made simple and easy to determine: hence the trend toward strict liability – in multiparty actions. Therefore, subliminally, the real subject matter of the PL Directive was not defective products but '*collective redress*'. The focus should not have been on substantive liability law but on the procedure of collective redress and it is only latterly that legal thinking has developed in Europe to give this topic separate status.⁵⁵⁴ Only recently has the European Commission issued its policy on Collective Redress. Rather

⁵⁵³ Richard A. Epstein, 'The Legal and Insurance Dynamics of Mass Tort Litigation' *The Journal of Legal Studies*, Vol. 13, No. 3, Catastrophic Personal Injuries (Aug. 1984), 475-506

⁵⁵⁴ See 3.2.5 and 3.2.6 above.

than propose any legislation, it has simply issued a 'Recommendation'. The tenor of the Commission's comments suggests strongly that it is now beginning to see the potential for systemic abuse, against which it puts the onus on national legislations to introduce procedural safeguards. More significantly it warns against aspects of the US procedural systems which it sees as a catalyst for such abuse.

The collective redress mechanisms established at national level should be accompanied by important procedural safeguards aimed at protecting the procedural rights of the parties and avoiding incentives to abuse the collective redress systems. For instance it should be verified at the earliest possible stage of litigation that manifestly unfounded cases are not continued. Member States should also avoid lawyers' fees calculated as a percentage of the compensation awarded (contingency fees) and punitive damages (awarded in excess of actual damage or loss suffered by the claimants). As such, the European approach to collective redress clearly rejects the US style system of "class actions".⁵⁵⁵

Hodges has closely monitored the development of policy in this area and concludes:

The current empirical evidence suggests that the package will not deliver much increase in redress for consumers or businesses. ... While respecting the rights of all parties involved, it provides some robust safeguards against abusive litigation and limits (but does not avoid) economic incentives to bring speculative claims ...⁵⁵⁶

7.5 Europe followed the US, ignorant of its subsequent transformation

The choice of strict liability in Europe was inspired by, and sought to emulate, the development of strict liability for defective products in the US. Strict Liability had developed as an extension to consumers (including extra-contractual consumers) of the contractual warranty.

Strict Liability in the US, under the Second Restatement,⁵⁵⁷ was limited. Most significantly, it did not apply to drugs nor was it designed to confer rights on mere bystanders. When Europe came to adopt strict liability, the US had amassed almost

⁵⁵⁵ Frequently Asked Questions: European Commission recommends collective redress principles to Member States MEMO/13/530 Strasbourg 11/06/2013 <http://europa.eu/rapid/press-release_MEMO-13-530_en.htm?locale=en> accessed 12 June 2013

⁵⁵⁶ See Christopher Hodges, 'Collective Redress in Europe: The New Model' 2010 29 CJK Issue 3; Christopher Hodges, 'Collective Redress: A Breakthrough or a Damp Sqibb?' J Consum Policy DOI 10.1007/s10603-013-9242-0; see also 3.2.6 above.

⁵⁵⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965):
http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=120

30 years of practical experience and had radically changed its approach. By the mid-1960s an element of reasonableness had already been injected into the test of safety. By the end of the 1980s the US had rejected strict liability and turned back to fault based liability for defective products. Nevertheless, the European Commission and the Law Commission disregarded warning signs about how strict liability had developed and problems it had caused in the US.

7.5.1 Europe followed the US lead on strict liability for defective products

Weinrib observed in 1985 that 'in the common-law world, only the United States has witnessed the judicial creation of a regime of strict products liability. Unlike so many American ideas, this one has not inspired imitation.'⁵⁵⁸ On the contrary, this was the year in which Europe was to embark on the sincerest form of flattery by introducing the PL Directive. PL as a concept originated in the US and became the inspiration for European scholars and courts.⁵⁵⁹ As Howells and Mildred commented 'European tort lawyers historically have looked to the United States for inspiration and direction in the field of products liability'.⁵⁶⁰

It cannot be said that US law was uniform, as it varies from State to State, but the Second Restatement, Torts⁵⁶¹ is an attempt to extract the common essence of the law in the US. The PL Directive goes a stage further in formally codifying the law in Europe. Reimann explains that the European and US models are alike in many respects: supply by the manufacturer of defective products; causation of harm other than to the product itself; strict liability for manufacturing defects; and similar defences. The European 'quasi-statutory' model then formed a template for a global spread of PL law: not merely throughout Europe but to the future members of the expanded EU and beyond to the Asia Pacific region, Latin America and Australia.⁵⁶²

⁵⁵⁸ Ernest J. Weinrib, 'The Insurance Justification and Private Law' (n. 494) p. 681

⁵⁵⁹ Mathias Reimann, 'Product Liability in a Global Context: the Hollow Victory of the European Model' 11 *Eur. Rev. Private L.* 128 2003 p. 129

⁵⁶⁰ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' 65 *Tenn. L. Rev.* 985 1997-1998 p. 988

⁵⁶¹ Restatement Second of Torts 1965 (n. 557)

⁵⁶² Mathias Reimann, 'Product Liability in a Global Context: the Hollow Victory of the European Model' (n. 559) p. 134

As explained in Chapter 1, European lawyers had been observing PL in the US since the 1970s, leading to the Strasbourg Convention in 1977. In the UK, the Law Commission, in its 1975 Working Paper on Liability for Defective Products, referred extensively to the law on PL in the US.⁵⁶³ P N Legh-Jones, one of the members of the Law Commission's working party, had studied the workings of the US system of PL and published a paper on the subject⁵⁶⁴ identifying the numerous legal bases of PL used in the US. These included actions for breach of express or implied warranty (by retailer or manufacturer); and tort liability under §402A Second Restatement (Special Liability of Seller of Products for Physical Harm to User or Consumer). He commented that the latter is strict in the sense of not depending upon proof of fault rather than making the manufacturer an insurer, obliging the manufacturer 'to satisfy the reasonable expectations of the buying public'.⁵⁶⁵

Legh-Jones concluded that under PL law in the US there were several distinct and overlapping legal doctrines and that countries wishing to impose strict liability for defective products should create a liability in tort rather than straining contract law. He noted, however, that he had not explored the underlying arguments used to justify strict liability and there are 'as many arguments as legal doctrines'⁵⁶⁶ including improved quality, prevention of accidents and that the manufacturer has a 'moral obligation to compensate any consumer injured by his product'.⁵⁶⁷

7.5.2 The PL Directive followed the US model of tortious strict liability

In the US, the leading case of *Greenman v Yuba Power*⁵⁶⁸ had introduced the concept of the tortious warranty under which a manufacturer could be held strictly liable in tort for a defect in his product which injured a consumer. Here the plaintiff was given a 'Shopsmith' tool (a combined saw, drill and lathe) for Christmas by his wife and so he had no contractual relationship with the seller. A piece of wood flew out of the machine and injured him while he was using it. He was therefore a consumer *qua* user of the

⁵⁶³ Law Commission Working Paper No 64 (n. 23)

⁵⁶⁴ See P. N. Legh-Jones, 'Products Liability: Consumer Protection in America' The Cambridge Law Journal, Vol. 27, No. 1 (Apr., 1969), pp. 54-80

⁵⁶⁵ P. N. Legh-Jones, 'Products Liability: Consumer Protection in America' (n. 564)

⁵⁶⁶ P. N. Legh-Jones, 'Products Liability: Consumer Protection in America' (n. 564) p. 80

⁵⁶⁷ P. N. Legh-Jones, 'Products Liability: Consumer Protection in America' (n. 564) p. 80

⁵⁶⁸ *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57

machine, using it for the purpose for which it was designed. The manufacturer was held liable to the plaintiff in negligence. The manufacturer appealed. Traynor J held:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.⁵⁶⁹

Traynor J held, without rehearsing the reasons for imposing strict liability, that the authorities⁵⁷⁰ make clear that the liability is not one governed by the law of contractual warranties but by the law of strict liability in tort.⁵⁷¹ It is evident that Traynor J's words flowed through into the PL Directive:

Table 5 Comparison between US and European bases of PL

1963	1965	1977	1985
Greenman v Yuba	Restatement Second of Tort	Draft Strasbourg Convention	PL Directive
'A manufacturer is strictly liable in tort when an article he places on the market ... proved to have a defect that causes injury to a human being.' (Traynor J)	§402A. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm ...	Article 3 1. The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product. [Article 2 ... c. a product has a "defect" when it does not provide the safety which a person is entitled to expect...]	Article 1 The producer shall be liable for damage caused by a defect in his product [Article 6 1. A product is defective when it does not provide the safety which a person is entitled to expect ...]

⁵⁶⁹ *Greenman v. Yuba Power Products, Inc.* (n. 568) Traynor J [6]

⁵⁷⁰ Cited by Traynor J as: '*Graham v. Bottenfield's, Inc.*, 176 Kan. 68 [269 P.2d 413, 418]; *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244 [147 N.E. 2d 612, 614, 75 A.L.R. 2d 103]; *Decker & Sons v. Capps*, 139 Tex. 609, 617 [164 S.W. 2d 828, 142 A.L.R. 1479]), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 [161 A. 2d 69, 84-96, 75 A.L.R. 2d 1]; *General Motors Corp. v. Dodson*, 47 Tenn. App. 438 [338 S.W. 2d 655, 658-661]; *State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289 [110 N.W. 2d 449, 455-456]; *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476 [164 A. 2d 773, 778]; *Linn v. Radio Center Delicatessen*, 169 Misc. 879 [6 N.Y.S. 2d 110, 112]'

⁵⁷¹ *Greenman v. Yuba Power Products, Inc.* (n. 568)

It is a simple evolutionary step to extend the contractual warranty by finding the manufacturer liable in a case where it sold the product for the use to which it was being put by the person for whom it was purchased. It makes as little difference that the plaintiff's wife had purchased the tool as the question of who purchased air-tickets for a family carried by an aircraft that crashes.

Stapleton argues that US lawyers 'promoted an overambitious and ultimately unworkable rule that caught all product flaws, not merely those due to manufacturing errors.'⁵⁷² She points out the naivety of those who assume that the US legal system was more mature than the European system and should therefore be followed.⁵⁷³ In response, Howells and Mildred say that even if the implications of strict liability for design defects and failure to warn claims were not fully appreciated, 'it does not necessarily mean that the United States adopted an inappropriate solution.'⁵⁷⁴

7.5.3 Europe adopted the 'channelling' solution

The Law Commission noted the transition in the US from a contractual basis of liability to liability in tort,⁵⁷⁵ as illustrated by *Greenman* and concluded, following the logic of Traynor J, that the appropriate way forward in Europe was that loss should be 'channelled' to the risk creators; those best able to exercise control over the quality and safety of the product; those best placed to insure; those who advertised and promoted their products; those with knowledge of the production process; and those who could be identified and sued most efficiently.⁵⁷⁶

The emulation of channelling has two undesirable effects more relevant to Europe than to the US. First, this purely doctrinal approach offers a more limited protection to consumers than the wider pragmatic approach of European safety legislation, the GPSD, which imposes the primary obligation upon the producer to place 'only safe

⁵⁷² Jane Stapleton, 'Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective' Washburn Law Journal Vol. 39 [2000] 363-403 p. 367

⁵⁷³ Jane Stapleton, 'Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective' (n. 572) p. 367

⁵⁷⁴ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 989

⁵⁷⁵ Law Commission 82 (n. 548) p. 10

⁵⁷⁶ *Greenman v. Yuba Power Products Inc.* (n. 568)

products on the market'.⁵⁷⁷ The producer is defined more widely under the GPSD than under the PL Directive to include:

- (i) the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product;
- (ii) the manufacturer's representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, the importer of the product;
- (iii) other professionals in the supply chain, insofar as their activities may affect the safety properties of a product;⁵⁷⁸

The GPSD recognises that persons other than the manufacturer may affect the safety properties of the product. There are lesser obligations on distributors whose activities do not affect the safety of the product. In practical terms, unless a distributor is nothing more than a 'paper' middleman it may be difficult to argue that his activities would not affect the product's safety. For example, a car importer who takes temporary possession of the vehicle will typically carry out a pre-delivery inspection which arguably affects the safety properties of the vehicle not least because it extends to the steering and brakes. In *Relph v Yamaha and Burtonwood*,⁵⁷⁹ an English company imported a bulk consignment of three wheeled All-Terrain Vehicles from the US. They arrived in crates, part assembled with an owner's manual in the crate. Yamaha Japan manufactured the ATVs. Yamaha USA was a distributor in the USA. After a number of accidents these ATVs were effectively banned in the USA. Yamaha USA sold its excess stock to a dealer on condition that they would not be sold in countries where Yamaha had a distributor. Some found their way to the UK in May and June 1988. The supply by Yamaha Japan pre-dated the coming into force of the Consumer Protection Act 1987. One of the questions for the court was whether the supply by Yamaha USA which post-dated the coming into force of the Consumer Protection Act 1987 was a supply by a 'producer'. Pearl explains:

this turned on [Yamaha US's] role in testing the machine for the American market place, its ownership of the owner's manual and the provision of a warranty to US customers.⁵⁸⁰

⁵⁷⁷ GPSD Article 3 (n. 262)

⁵⁷⁸ GPSD Article 2 (n. 262)

⁵⁷⁹ *Relph v Yamaha Motor Company, Yamaha Motor Corporation USA and Burtonwood Developments*, QB Division July 1996 Douglas Brown J (unreported)

⁵⁸⁰ Simon Pearl, 'As The Law Develops' 18 PL International 121 (1996)

It was argued that the overall manufacturing process was spread out between different subsidiaries in different countries, with the result that there could be more than one producer. The judge impliedly accepted the principle that there could be co-producers but on the facts all design decisions were taken by Yamaha Japan. Yamaha US's involvement was minimal. It is submitted, by way of contrast, that if the test applied by the GPSD had to be applied, Yamaha US might well have been found to be a professional in the supply chain whose 'activities may affect the safety properties of a product'.⁵⁸¹

Even a person who imports in bulk and merely re-boxes a product could affect its safety. For example a bulk importer of fireworks who then breaks down the load into smaller boxes has to handle the product – which in itself could arguably affect its safety (see case 45 of the PL Claims Survey at Appendix 4). The net effect is that the GPSD has a wide reach in its goal of improving safety. By comparison, the PL Directive has a much narrower compass in imposing strict liability for defects. Given that the stated objective of the PL Directive is protection of the consumer,⁵⁸² a pragmatic approach would be to extend liability to the widest range of potential defendants. That would mean not merely channelling liability towards producers but also, following the GPSD model, fixing liability upon other professionals whose activities affect the safety properties of the product.

Second, enforceability is dependent upon on where the product is made, for the following reason. Many products are supplied through a distributor or even a chain of distributors.

any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.⁵⁸³

If the distributor is the first importer into the EU, he may be treated as the producer. However, if the product was made in Europe, the distributor who imports from one

⁵⁸¹ GPSD Article 2 (n. 262)

⁵⁸² PL Directive Recital 4 (n. 2)

⁵⁸³ PL Directive Article 3 (n. 2)

Member State to another is not considered a producer. In the latter case, the injured person's remedy is against the actual manufacturer, wherever in Europe he may be. Under the recast Judgments Regulation he must sue a producer from another Member State in that Member State or where the accident occurred.⁵⁸⁴ This means that the simplification of action, which strict liability is supposed to introduce, is not uniform throughout Europe. Injured persons will face different challenges in seeking a remedy depending whether the product was made in their own country, another EU Member State or outside the EU.

7.5.4 The Law Commission disregarded concerns about adopting the US model

The Law Commission was cautious about US PL experience:

We are not overlooking the recent escalation in insurance premiums for products liability cover in the United States of America. This was much discussed at the First World Congress on PL, which was held in London between 19 and 21, January 1977.⁵⁸⁵

However, this did not deter them from recommending a strict liability regime as they felt that contingency fees, higher medical expenses and jury awards of damages in the US all combined to construct a very different landscape from that existing in the UK. They conceded:

It should not however be left out of account that the introduction of strict liability in a context of increasing awards of damages could in due course have a significant effect on insurance costs.⁵⁸⁶

The Government of the day also considered whether there were warning signs to be heeded.

I return also to the burden of costs and who shall bear them. No one knows precisely what the costs will be ... However, international companies exporting to or operating in the United States already know what premiums they pay... the premiums occasioned by the directive will be much less than those paid in relation to the American market, first, because the draft directive, even as it stands, does not propose a regime like the disastrous American experience—I hope that we have all learnt lessons from that experience—and, secondly, because our courts are very different from the

⁵⁸⁴ REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 20 December 2012, L 351/1.

⁵⁸⁵ Law Commission 82 (n. 252) p. 14

⁵⁸⁶ Law Commission 82 (n. 252) p. 15

American courts in the absence of punitive damages and the scale of damages awarded, and our legal profession is very different from the American legal profession, where lawyers sometimes share in the benefits of the damages won.

... these increased costs are bound to be passed on to consumers in increased prices to a greater or lesser extent ... Therefore, all consumers will be contributing through the prices that they pay for the compensation to a few unfortunate injured victims. I do not think that anyone would quarrel with that concept.⁵⁸⁷

This seems naïve when viewed in the current climate of injury litigation. The thought may have been, at that time, of a few unfortunate victims but the reality in the 21st century within the Practice has been that claims are not confined to a small number of seriously injured and suffering claimants. The majority of claims are minor in nature. Two thirds of all the cases in the PL Claims Survey at Appendix 4 were valued at under £5,000. As discussed in Chapters 9 and 10 on Compensation, if society's expectation was that the cost of claims would be passed by the few injured claimants to the many consumers, then in the light of the 'have a go' culture that developed in the early years of the 21st century, it is axiomatic that the cost to consumers must have been greater than expected.

Whilst the UK has not followed the US by awarding punitive damages in PL cases, the UK has nevertheless edged closer to the US regime distinguished by Sally Oppenheim MP. As a consequence of the Jackson Reforms, two important procedural changes have been instigated: a 10% increase in general damages⁵⁸⁸ and Damages Based Agreements⁵⁸⁹ (Contingency Fee Agreements) where the lawyer takes a percentage of the claimant's 'winnings'.

The Scottish Law Commission also observed that the insurance crisis in the US could not be attributed solely to developments in PL law because there had been an equally remarkable rise in professional negligence and medical malpractice premiums where liability was fault based.⁵⁹⁰ This may have been an over-simplification as professional

⁵⁸⁷ Mrs Sally Oppenheim, Minister for Consumer Affairs (n. 117) [1111/2]

⁵⁸⁸ See *Simmons v Castle* [2012] EWCA Civ 1288: 10% increase in 'the proper level of general damages in all civil claims' for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress, (unless the claimant had entered into a CFA before that date).

⁵⁸⁹ The Damages-Based Agreements Regulations 2013 No: 609

⁵⁹⁰ Law Commission 82 (n. 252) p. 15

negligence and medical malpractice suits in the US might equally be based on contract, which could incorporate elements of strict liability. However, it is a valid point that must be borne in mind when reviewing the current position in the UK. The boom in litigation over the past 15 years since the Woolf Reforms were implemented by the Access to Justice Act 1999 cannot be attributed to strict liability under the PL Directive. It has been apparent in all areas of litigation and, therefore, is more likely to be attributable to procedural reforms that apply across the board. The influence of the PL Directive is likely to be more subtle.

7.5.5 The PL Directive took the strict liability concept much further than the US model.

a. the restatement was limited in application and excluded drugs

In Legh-Jones review of the bases of PL in the US he commented on the inapplicability of §402A to unavoidably dangerous drugs, referring to ‘comment k’.⁵⁹¹ Over the next 30 years in the US, §402A and comment k fuelled a debate over the applicability of strict liability to ‘drugs, cosmetics, food, cigarettes, and alcoholic beverages’ in addition to blood products, and led to the conclusion that ‘drugs were a special product, not to be subjected to the usual rule of strict liability’.⁵⁹² This represents a retreat from the all-embracing concept of strict liability for defective products which shaped the PL Directive.

⁵⁹¹ Comment k reads:

‘Unavoidably unsafe products

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.’

⁵⁹² George W. Conk, ‘Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?’ *The Yale Law Journal*, Vol. 109, No. 5 (Mar., 2000), 1087-1133 p. 1093

b. PL in tort under the Second Restatement did not apply to bystanders

A further limitation in the US model of strict liability was its inapplicability to bystanders, at the time of the Law Commission's review.⁵⁹³ The American Law Institute's position on bystanders was that they did not require the same protection as consumers but the Institute expressed 'neither approval nor disapproval of expansion of the rule to permit recovery by such persons'.⁵⁹⁴ By contrast, the PL Directive applied to bystanders from the start. Art 1 provides simply that the 'producer shall be liable for damage' without limiting the class of claimant, notwithstanding the conceptual difficulties with the application of a consumer expectation test to a bystander.⁵⁹⁵ Ironically, again, although the recitals in the PL Directive suggest that the intention is to protect the 'consumer', that is the person using, consuming or in some way benefiting from the product, the victims of Thalidomide were not in any sense consumers: they were the paradigmatic bystander.

7.5.6 Europe failed to heed the changes occurring in US PL

PL law in the US did not stand still. The Law Commission was well aware of §402A and reproduced the section in its Report.

§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property...⁵⁹⁶

It can be seen that by 1965 the principle of strict liability based on a defect had already been diluted to 'in a defective condition unreasonably dangerous'. The notion of reasonableness is the antithesis of strict liability. 'Thus, the section's strict-liability rule

⁵⁹³ Law Commission Working Paper No 64 (n. 23) p. 69. See 'Strict Products Liability to the Bystander: A Study in Common Law Determinism' The University of Chicago Law Review, Vol. 38, No. 3 (Spring, 1971), pp. 625-646 (author unspecified) on the subsequent extension of the tortious warranty doctrine to bystanders.

⁵⁹⁴ Restatement (Second) of Torts §402A, caveat (n. 557)

⁵⁹⁵ Alistair Clark, 'The Conceptual Basis of PL' The Modern Law Review, Vol. 48, No. 3 (May, 1985), 325-339, p. 335

⁵⁹⁶ Law Commission Working Paper No 64 (n. 23) p. 45

was tempered by a negligence-based concept of defect.⁵⁹⁷ Legh-Jones recognised the potential for fault to ‘creep back into a strict liability action through a side door’.⁵⁹⁸

In the 25 years following the introduction of the Restatement (approximately up to the time of the PL Directive being given effect nationally across the EU Member States) there were ‘literally thousands upon thousands of products liability decisions’ in the US courts developing and refining the law.⁵⁹⁹ One of the goals of the PL Directive, expounded by the Economic and Social Committee in July 1978, was to follow ‘developments in the field of liability for defective products in both international law and national law...’⁶⁰⁰ However, there was a rush to adopt a basis of liability that was even stricter than that prevailing in the US.⁶⁰¹ There is no evidence that any developments in the law in the US were noted: still less that they were taken into account in shaping European Law.

Coleman wrote in 1992 that ‘strict liability in conjunction with the design defect tests have wreaked havoc within the manufacturing sector of the economy’.⁶⁰² He set out a list of ‘striking’ figures to prove his contention, including the decimation of the aviation industry⁶⁰³ and, most significantly:

In 1985–6, nearly half (47 percent) of all product manufacturers in the United States removed product lines from the market place, 25 percent discontinued product research and 39 percent decided against introducing new products, all as the result of increased exposure to liability.⁶⁰⁴

In 1986 the US Department of Justice Tort Policy Working Group reported on the insurance crisis faced at the time. The Report identified and discussed four problem areas:

⁵⁹⁷ George W. Conk, ‘Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?’ (n. 592) p. 1092

⁵⁹⁸ P. N. Legh-Jones, ‘Products Liability: Consumer Protection in America’ (n. 564) p. 75

⁵⁹⁹ James A. Henderson, Jr. & Aaron D. Twerski, ‘A Proposed Revision of Section 402A of the Restatement (Second) of Torts’ 77 CORNELL L. REV. 1512, 1545 (1992)

⁶⁰⁰ *Opinion of the Economic and Social Committee* (161st plenary session, Brussels 12 and 13 July 1978) Official Journal of the European Communities No C 114/16 7.5.79

⁶⁰¹ Mathias Reimann, ‘Product Liability in a Global Context: the Hollow Victory of the European Model’ (n. 559) p. 142; see also Geraint G. Howells & Mark Mildred, ‘Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?’ (n. 574) p. 987; and William Boger, ‘The Harmonization of European Products’ Liability Law Fordham International Law Journal Volume 7, Issue 1 1983 Article 1

⁶⁰² J Coleman, *Risks and Wrongs* (n. 329) p. 414

⁶⁰³ J Coleman, *Risks and Wrongs* (n. 329) p. 408

⁶⁰⁴ J Coleman, *Risks and Wrongs* (n. 329) p. 407: citing the Report of the United States Conference Board, 1987

- the movement towards no-fault liability increasingly resulting in companies and individuals being found liable even in the absence of any wrongdoing on their part;
- causation being undermined by 'questionable practices' shifting liability to deep pocket defendants who did not cause the injury;
- the explosive growth in damages awards; and
- excessive transaction costs leading to two thirds of money paid out going to lawyers and litigation expenses.⁶⁰⁵

The Report noted that 'between 1974 and 1985 there has been a 758% increase in the number of PL lawsuits filed in federal district court'.⁶⁰⁶ Notably, the Report recommended a return to a fault-based standard for liability.⁶⁰⁷ The Working Group considered the move towards no-fault liability disturbing, having replaced deterrence and compensation with economic theory, leading to a devastating challenge to fault or wrongdoing 'as a moral and doctrinal justification for and limitation on tort liability'.⁶⁰⁸ The removal of this limitation has resulted in 'compensation often awarded merely for the sake of compensation'.⁶⁰⁹ Fault had not been entirely rejected and courts would often go to 'amazing distortions' to find fault because 'fault remains the only vehicle in tort law capable of distinguishing wrongful (or undesirable) from beneficial (or desirable) conduct'.⁶¹⁰

The Report also rejected the consumer expectation test as 'undesirable because it is not really a defect test at all'. It provokes a debate about what safety expectations are reasonable – which requires the application of 'other tests'. For example, in determining whether a vehicle meets the consumer expectation test of crashworthiness, it is necessary to apply a cost/benefit test or a risk/utility test. The consumer expectation test is also used in practice, it is said, as a substitute for contributory negligence where it does not exist or as a ground for juries 'to hold manufacturers liable when other bases for liability are absent and the jury wants to

⁶⁰⁵ U.S. Department of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (1986) p. 2 < <http://files.eric.ed.gov/fulltext/ED274437.pdf> > accessed 28 September 2012

⁶⁰⁶ U.S. Dep't of Justice, Report of the Tort Policy Working Group (n. 605) p. 2

⁶⁰⁷ U.S. Dep't of Justice, Report of the Tort Policy Working Group (n. 605) p. 4

⁶⁰⁸ U.S. Dep't of Justice, Report of the Tort Policy Working Group (n. 605) p. 31

⁶⁰⁹ U.S. Dep't of Justice, Report of the Tort Policy Working Group (n. 605) p. 31

⁶¹⁰ U.S. Dep't of Justice, Report of the Tort Policy Working Group (n. 605) p. 32

compensate the plaintiff'. Concerns were also expressed about the value of the consumer expectation test, founded as it was in contract rather than tort, because it replaces objective risk/utility considerations with 'emotion and culture as the foundation for determining liability'.⁶¹¹ The Working Party recommended abolition of the Consumer Expectation test – the test forming the basis of the definition of safety in the PL Directive.⁶¹²

The consumer expectation test in Europe is curtailed by the requirement that the expectation should be 'legitimate' or 'entitled'.⁶¹³ Whilst this may limit the number of cases that reach court, there are still many claims in which a purely subjective test of consumer expectation is applied by the claimant or his lawyer so that consumer expectations are not tempered by any requirement of reasonableness – see page 107 above in relation to airbag cases.

It has been argued, based on empirical evidence, that the mid 1980s saw a quiet pro-defendant revolution in judicial attitudes to PL in the US which, perhaps goes some way towards explaining why in Europe (let alone in the US) this trend had 'gone all but unnoticed'.⁶¹⁴

In the early 1990s it was argued that strict liability should be abandoned on the grounds that the justification for strict liability was weak and that 'few worthy cases today could not be brought successfully under negligence'.⁶¹⁵ 1998 heralded the Third Restatement with a specific section for PL. When the Third Restatement was to be drafted, Henderson and Twerski were appointed as the reporters. They were opposed

⁶¹¹ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 995

⁶¹² Alan Schwartz, 'Proposals for Products Liability Reform: A Theoretical Synthesis' *The Yale Law Journal*, Vol. 97, No. 3 (Feb., 1988), 353-419 p. 384/5

⁶¹³ *A v National Blood Authority* (n. 204) p. 311

⁶¹⁴ Henderson, James A. Jr. and Eisenberg, Theodore, 'The Quiet Revolution in Products Liability: An Empirical Study of Legal Change' (1990). Cornell Law Faculty Publications. Paper 338. < <http://scholarship.law.cornell.edu/facpub/338> > accessed 17 June 2015 and Eisenberg, Theodore and Henderson, James A. Jr., 'Inside the Quiet Revolution in Products Liability' (1992). Cornell Law Faculty Publications. Paper 396.< <http://scholarship.law.cornell.edu/facpub/396> > accessed 17 June 2015

⁶¹⁵ William Powers, Jr. 'A Modest Proposal to Abandon Strict Products Liability' 1991 U. Ill. L. Rev. 639 p. 6482

to liability without fault and 'enthusiastically embraced what they viewed as a judicial trend towards reshaping strict products liability into negligence-based liability.'⁶¹⁶

Whilst the Third Restatement retained strict liability for manufacturing defects, liability for design defects or inadequate instructions or warnings is subject to a foreseeability test, which constitutes a reversion to a fault based theory of liability.⁶¹⁷ Mildred and Howells lamented that the tide was turning in favour of defendants since the high water mark for plaintiffs in the early 1980s.⁶¹⁸

As for prescription drugs, the Third Restatement treats them as a 'very special genre of cases', the unintelligible case law being incapable of intelligent restatement and in need of reformulation.⁶¹⁹

A prescription drug . . . is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug . . . are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug . . . for any class of patients.⁶²⁰

The rule applies a *sozialadäquat* test and 'the manufacturer need persuade the fact finder only that, on balance, the product does more good than harm for at least one

⁶¹⁶ Ellen Wertheimer, 'The Biter Bit: Unknowable Dangers, The Third Restatement, and the Reinstatement of Liability without Fault' 70 Brooklyn L. Rev. 889 (2005) p. 915

⁶¹⁷ The Restatement (Third) of Torts §2 (1998) now provides

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instruction or warnings. A product:

...

(b) is defective in design when the foreseeable risks of the harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe...

⁶¹⁸ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560)

⁶¹⁹ James A. Henderson, Jr. & Aaron D. Twerski, 'A Proposed Revision of Section 402A of the Restatement (Second) of Torts' (n. 599) p. 1512

⁶²⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(c) (1998)

class of users'.⁶²¹ Thalidomide would pass this test as it is now licensed by the MHRA for multiple myeloma in over 65 year old males.⁶²²

Conk, in complaining that the Third Restatement excludes blood products entirely and exempts makers of prescription drugs, vaccines and mechanical devices such as cardiac pacemakers from the 'alternative-safer-design standard', argues that it 'reverses thirty-five years of safety-advancing products-liability law'.⁶²³ The justification put forward by the Third Restatement for its position on drugs is partly that they are provided via a 'learned intermediary'. It is argued that prescription pharmaceuticals are unlike other consumer products as physicians may have to try different doses, or combinations. Also, patients may be refractory to the drug of choice and other secondary or tertiary choices are required, possibly reverting to more dangerous options.⁶²⁴ A further justification tendered by the Third Restatement is the development risks argument, that strict liability would inhibit innovative research and development. It also states that strict liability for these products is unnecessary because of the stringent regulatory regime imposed by the FDA. This argument underscores Chapter 3 on Deterrence, above, and extends to many other products in more heavily regulated Europe.

The Third Restatement probably marks a shift from grand theory to pragmatism whereas the PL 'Directive does seem to be more influenced by grand theory.'⁶²⁵ It must not be forgotten that this grand theory was born in the USA against the backdrop of 'jury trials, widely available punitive damages, the need for awards to cover the whole cost of injury (including health costs), and inflation of awards to compensate for the known deduction of contingency fees',⁶²⁶ in addition to 'lack of liability for the

⁶²¹ George W. Conk, 'Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?' (n. 592) pp. 1087-1133 at pages 1088 and 1089, who argues that 'drugs, vaccines, biological products, and medical devices can and should be tested for defect by the same measures as all other products'.

⁶²² <http://www.mhra.gov.uk/Safetyinformation/DrugSafetyUpdate/CON085195>

⁶²³ George W. Conk, 'Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?' (n. 592) pp. 1088 and 1089.

⁶²⁴ Lars Noah, 'This is your products liability Restatement on Drugs' Brooklyn Law Review 2009 Vol 74:3 p. 18

⁶²⁵ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 1026

⁶²⁶ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 993

prevailing party's costs'.⁶²⁷ It was concluded that whilst the PL Directive provides a more protective environment than the Third Restatement, the lower levels of damages in Europe and poorer access to justice prevent PL having a major impact.⁶²⁸

It has been suggested that US law may have turned yet again towards strict liability. Wertheimer argues that the introduction of the Third Restatement forced courts to confront the erosion of strict liability or 'provided courts with a view of strict products liability in contrast to the current one in place.'⁶²⁹ This interpretation is sternly rebutted by Henderson and Twerski who describe the claimed judicial backlash against the erosion of strict liability as 'fiction ... rejected by the overwhelming majority of courts and scholars.'⁶³⁰ It matters not whether US law was against strict liability or for it – or whether in fact the approach of the courts has been sinusoidal. In fairness to both protagonists, being asked to define a uniform version of US case law is an invidious task because 'it is not possible to speak of a single criterion for PL in operation in the United States'.⁶³¹ The volume of decisions in different states is out of all proportion to the number of PL cases in Europe. The point for present purposes is not to try to determine who is right but to demonstrate that insofar as the choice of strict liability for the PL Directive was based on the US model, then this was a flawed strategy because it relies on questionable assumptions:

- That Strict liability applied uniformly to PL in the US;
- That the US law would work effectively with UK procedure;
- That excesses and abuses prevalent in the US would not be replicated in the UK because of procedural differences.

⁶²⁷ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 1030

⁶²⁸ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 1029

⁶²⁹ Ellen Wertheimer, 'The Biter Bit: Unknowable Dangers, The Third Restatement, and the Reinstatement of Liability without Fault' (n. 616) pp. 934/935

⁶³⁰ James A Henderson, Jr and Aaron D Twerski, 'A Fictional tale of Unintended Consequences: A response to Professor Wertheimer' 70 Brooklyn L. Rev. 939 (2005)

⁶³¹ Jane Stapleton, 'Products Liability Reform Real or Illusory?' (n. 230) pp. 414/415

The underlying tort theory in the US in which PL litigation fulfils a regulatory function to protect consumers is absent in the UK.⁶³² When the PL Directive was transposed into UK law under the Consumer Protection Act 1987, it contained an entirely separate regulatory section, Part II of the Act on Consumer Safety, which imposed the General Safety Requirement and contained criminal sanctions for breach.⁶³³ This has now been replaced by the General Product Safety Regulations.⁶³⁴

Howells and Mildred consider it unfortunate that substantive law was used to modify aspects of the American legal system 'such as damages and contingency fees', which ought properly to be dealt with by procedural reform rather than undermining the 'grand theory of products liability'. They consider strict liability to be 'a more moral and efficient basis of liability than assignment of fault'.⁶³⁵ This is not a universally accepted

⁶³² The Lovells Report (n. 51) p. 62 - It would have been difficult at the time of the PL Directive to impose regulation through liability law throughout separate states with separate economies, separate currencies, different tax regimes, different healthcare systems and different national insurance schemes.

⁶³³ Consumer Protection Act 1987: 'PART II CONSUMER SAFETY The general safety requirement.

10 (1) A person shall be guilty of an offence if he— (a) supplies any consumer goods which fail to comply with the general safety requirement;...

(2) For the purposes of this section consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances, including—

(a) the manner in which, and purposes for which, the goods are being or would be marketed, the get-up of the goods, the use of any mark in relation to the goods and any instructions or warnings which are given or would be given with respect to the keeping, use or consumption of the goods;

(b) any standards of safety published by any person either for goods of a description which applies to the goods in question or for matters relating to goods of that description; and

(c) the existence of any means by which it would have been reasonable (taking into account the cost, likelihood and extent of any improvement) for the goods to have been made safer.'

⁶³⁴ General Product Safety Regulations 2005: '**General safety requirement 5.**—(1) No producer shall place a product on the market unless the product is a safe product.' And this is defined as follows:

"safe product" means a product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons. In determining the foregoing, the following shall be taken into account in particular—

(a) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, instructions for installation and maintenance,

(b) the effect of the product on other products, where it is reasonably foreseeable that it will be used with other products,

(c) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product, and

(d) the categories of consumers at risk when using the product, in particular children and the elderly.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be a dangerous product;'

⁶³⁵ Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 987

view. It is argued to the contrary that the utility approach 'best serves fairness and efficiency, and adopting and clarifying the majority position best serves consistency'.⁶³⁶

It is ironic that, in the UK, LASPO⁶³⁷ has introduced significant changes to procedural law, including a 10% increase in general damages and contingency fees (Damages Based Agreements) as a strategy to contain the explosion of personal injury litigation (facilitated in the case of PL by substantive protective legislation such as the PL Directive).

⁶³⁶ Chun, 'The New Citadel: A Reasonably Designed Products Liability Restatement' Cornell Law Review 1994 vol 79 1654 p. 1679

⁶³⁷ The Legal Aid, Sentencing and Punishment of Offenders Act 2012

PART II: WHY STRICT LIABILITY IS AN ILLOGICAL CHOICE

7.6 Following a trend for emotive reasons lacks normative authority

The Strasbourg Convention Committee of Experts had observed how liability for defective products was being treated internationally. Ultimately, they had adopted strict liability not on the basis of any ideological rationale but because this is what had become 'manifest in many States.'⁶³⁸ As the Strasbourg Draft Convention, Draft Explanatory Report had explained:

there was an almost general trend towards stricter liability of producers apparently caused by a desire to protect consumers from the effects of new techniques and marketing and sales methods⁶³⁹

That led to the resolution that:

Concerning ... the legal basis of the system of liability ... the majority of the Committee agreed that the notion of "fault" - whether the burden of proof lay with the person suffering damage or with the producer - no longer constituted a satisfactory basis for the system of products liability in an era of mass-production, where technical developments, advertising and sales methods had created special risks...⁶⁴⁰

Similarly the Memorandum to the Draft EU Directive states:

In all Member States, the courts and academic opinion generally have tended towards establishing stricter criteria of liability, towards holding the producer responsible.⁶⁴¹

In the UK, the Law Commissioners opined:

that the trend in Europe is towards imposing strict liability on manufacturers, at least where defects in their products lead to personal injuries, and thereby providing the injured person with rights of redress that are, in theory at least, an improvement on the rights provided by our present laws.⁶⁴²

⁶³⁸ Strasbourg Draft Convention, Draft Explanatory Report (n. 23) p. 136

⁶³⁹ Strasbourg Draft Convention, Draft Explanatory Report page (n. 23) p. 135

⁶⁴⁰ Law Commission Working Paper No 64 (n. 23) p. 136

⁶⁴¹ Law Commission Working Paper No 64 (n. 23) p. 154

⁶⁴² Law Commission Working Paper No 64 (n. 23) p. 33

It is, no doubt, the case that a trend towards strict liability could be observed but a trend lacks any normative authority. It is merely an observation of the basis of liability in other countries without explaining why strict liability was chosen, the context in which it operates or why it is perceived to be advantageous to society. Insofar as it is possible to discern any normative basis from the above, it is that consumers needed protection from modern technical products.

7.6.1 The normative basis was the need for protection from 'modern industrial products'

The Law Commission quoted consumer organisations as 'pressing for an improvement in the legal position of the consumer to protect him from the risks of modern industrial products.'⁶⁴³ The question of whether imposition of strict liability 'protects' has been addressed in Chapter 3 on Deterrence. Putting this to one side, the question for consideration in this Chapter is what is meant by the risks of modern industrial products. It is suggested that what was envisaged is essentially aircraft and pharmaceuticals. However, on a proper analysis, a number of the influences which shaped the trend towards strict liability are inappropriate to a Directive governing products in general because they treat all persons injured by products as 'victims' without considering the impact on claims relating to minor injuries or injuries caused by less complex products.

7.6.2 Injured persons are perceived as victims

The thought processes underlying the original Strasbourg Convention are revealed by the language of the Explanatory Memorandum. This contains ten references to the injured person as 'the victim', which term even appears once in the Convention itself.⁶⁴⁴ It appears 20 times in the Law Commission's Report on Liability for Defective Products.⁶⁴⁵ Whilst the range of meanings is broad, the usual context would envisage someone who has been seriously injured or killed.⁶⁴⁶

⁶⁴³ Law Commission Working Paper No 64 (n. 23) Appendix C p. 155

⁶⁴⁴ Draft Strasbourg Convention Article 10 (n. 23) – 'Contracting States shall not adopt rules derogating from this Convention, even if these rules are more favourable to the victim'

⁶⁴⁵ Law Commission Working Paper No 64 (n. 23)

⁶⁴⁶ The term comes from *victima* the Latin for a sacrificial offering: Collins English Dictionary – Complete and Unabridged © HarperCollins Publishers 1991, 1994, 1998, 2000

A survivor of a major air disaster or a pharmaceutical tragedy such as Thalidomide might be considered an accident victim but it hardly applies to a person suffering from blisters from a badly made shoe or a person who suffers whiplash due to a low speed collision arising from defective brakes. Whilst it is a subjective matter, it is suggested that most of the claimants in the PL Claims Survey at Appendix 4 should not readily be described in common parlance as victims. The Strasbourg Convention Committee of Experts plainly had products such as pharmaceuticals and aircraft in mind rather than everyday products not inherently dangerous but which could nevertheless injure.

There is clear evidence that this thinking has continued to colour the PL Directive. The EU 1999 Green Paper on Defective Products⁶⁴⁷ also refers to victims, even though this term is used nowhere in the PL Directive or even in the Consumer Protection Act 1987,⁶⁴⁸ when it proposes a number of elements of the PL Directive for possible reform. The first of these is the burden of proof.⁶⁴⁹

It has perhaps become conventionally acceptable to refer to accident sufferers as victims. The term is used consistently by most of the leading academic commentators on PL cited in this thesis.⁶⁵⁰ By contrast, McKenna & Co's 1994 report⁶⁵¹ to the Commission on the application of the PL Directive (under Article 21) uses the word 'victim' only once, as does the Lovells' Report.⁶⁵²

7.6.3 Thalidomide victims were at the forefront in Parliamentary debate

The proposed PL Directive was debated in Parliament in 1980. The Conservative Government and Labour Opposition were both broadly in favour of the legislation. Sally Oppenheim MP was the Conservative Minister for Consumer Affairs of the Conservative Government of the time, striving to achieve 'a proper balance between

⁶⁴⁷ Green Paper (n. 45)

⁶⁴⁸ Cf s3 Compensation Act 2006 which describes mesothelioma sufferers as victims

⁶⁴⁹ Green Paper (n. 45) p. 20

⁶⁵⁰ Including Stapleton, Cane, Atiyah, Mildred, Howells, Jolowicz, Powers, Birnbaum, Faure, Bernstein, Shavell and Polinsky, Goldberg and Zipursky, Geistfeld, *inter alios*

⁶⁵¹ McKenna Report (n. 44) p. 22 [57]

⁶⁵² The Lovells Report (n. 51) p. 48 – McKenna and Lovells might reasonably be described as 'defendant' firms, which may go some way to explaining the difference in terminology.

the interests of injured victims and the interests of producers'.⁶⁵³ John Smith MP, later Leader of the Labour Party, in opposition, stated:

If injury arises from a defect in a product, on whom should the loss fall? Who should bear the loss? Should it be the person who manufactured the product, who put it into circulation and who presumably gained some profit by so doing? Should he bear the loss and share the loss, as it were, by taking out insurance, the cost of which would no doubt be reflected in the price that consumers would pay for the product, or should the person who suffered the injury alone bear the loss?

I find little difficulty in answering that social and political question. It seems manifestly unfair that the Thalidomide children should bear uniquely the loss that they sustained and not those who manufactured the product that gave rise to their injuries.⁶⁵⁴

This is ultimately an issue of distributive justice, and therefore a political issue, but it would be difficult to imagine anyone arguing that the Thalidomide children should 'bear uniquely the loss they sustained.' However, this does not explain who should bear the loss. The possibilities for bearing loss could include first party insurance; liability insurance; or social welfare; or a combination of these. All that Smith does is rule out first party insurance by unborn children as an option. That much is uncontroversial, if only from the practical point of view. Smith merely contemplates the single alternative of the manufacturer internalising the cost (rather than society as a whole). Even if it is accepted that internalisation is the correct approach for Thalidomide, it does not justify imposition of strict liability on producers of all products – because there had been no consideration of whether different products and different accident circumstances should require the same treatment as a Thalidomide disaster.

Consideration of the development risks (state of the art) defence, too, focused on Thalidomide:

John Smith MP: ... it is difficult for people to establish a liability based upon fault. In this situation, we ought to consider whether we ought to reform the law. In my opinion, we ought to do so. ... It is a strong argument for introducing strict liability in the manufacture of defective products. That example also illustrates problems about having a state of the art defence.

⁶⁵³ Mrs Sally Oppenheim, Minister for Consumer Affairs (n. 117) [1115]

⁶⁵⁴ Mr John Smith MP, *HC Deb 04 November 1980 vol 991 cc 1106-200*, <http://hansard.millbanksystems.com/commons/1980/nov/04/european-community-product-liability> [1118]

If the company had said in an action based on strict liability that it was a defect that it could not reasonably have known about at the time—it is highly likely that that is what it would have pleaded in its defence ... In that situation, and at first sight, strict liability would seem to offer a remedy to the Thalidomide children, but that remedy would be snatched from them by the application of the state of the art defence.⁶⁵⁵

The debate did not touch on the consumer who burns her leg with a heat pad (case 53 of the PL Claims Survey at Appendix 4), as she might equally have done using a hot water bottle, or a person who catches their shin on the door of a car (case 73), as he might on the edge of a coffee table. This may be unsurprising but more importantly there was no consideration of how a strict liability regime might impact on cases other than mass disasters. Similarly there was no assessment of the statistical frequency of disasters that would require strict liability to provide a remedy. This is fundamentally important in considering a change of law for distributive purposes. Only then could alternatives be considered.

7.7 Products as a special class

7.7.1 Pharmaceutical products are unrepresentative

The types of product fomenting the PL debate were high technology items which do not represent the majority of products. Pharmaceutical products are unique in that they interact by design with the body. Different patients react in different ways and require different doses. Many are administered by highly trained specialists. Some are used even at an experimental stage. Others cause harm that would not be tolerated but for the desperate circumstances of their users. 'Pharmaceutical products are to a certain and limited extent "unavoidably unsafe" in that they cause adverse drug reactions.'⁶⁵⁶

To the PL lawyer, pharmaceutical products stand out from other products for a number of reasons:

(1) Healthcare in the UK is predominantly public. This means that patients do not typically have contractual rights against the doctor prescribing drugs for them (as they

⁶⁵⁵ Mr John Smith MP (n. 654) [1117]

⁶⁵⁶ Johannes Klose, 'A Snapshot of the Pharmaceutical Industry and Future Trends', < http://www.imc-seminars.com/uploads/papers/Johannes_Klose.pdf > accessed 29 September 2012

usually do in the US). Therefore there is a particular need either to provide a vertical right of action against the manufacturer or a means of circumventing horizontal privity by introducing a quasi-contractual basis of liability on prescribers. This was the most significant complaint referred to in the Parliamentary debate:

For years, consumers in this country have had the benefit of strict liability against the supplier under the Sale of Goods Act, recently strengthened by the Unfair Contract Terms Act, under which there is no state of the art defence. This right, however, does not extend to third parties—those who are injured by goods but who did not purchase them in the first place.⁶⁵⁷

(2) The typical injured party is the patient. This is the person for whom the product was intended but through a quirk of the UK system they have no contractual relationship with the prescriber. It is less likely that a bystander would suffer injury as they might with, for example, a vehicle. However, pharmaceuticals can give rise to the unique subset of birth defect sufferers, who are bystanders, as in the Thalidomide case.

(3) Causation is possibly the most complicated and difficult to prove in pharmaceutical cases not least because the link may be a matter of epidemiological evidence.

The Law Commission in its 1977 review of the law of 'Liability for Defective Products'⁶⁵⁸ acknowledged that highly technical products such as pharmaceuticals and aircraft needed special consideration as the cost of insuring against the consequences of a catastrophe might be prohibitive.⁶⁵⁹ It anticipated that special schemes might have to deal with such anomalous losses and there might even have to be an exclusion from strict liability. Such products included:

...pharmaceuticals, natural products (including human blood), nuclear materials and so on, due to a defect in the product for which the producer might be held strictly liable, while large multiple claims could arise from aircraft, shipping, oil-rig, road and rail accidents caused by a defect in a finished product or in one of its components.⁶⁶⁰

⁶⁵⁷ Mrs Sally Oppenheim, Minister for Consumer Affairs (n. 117) [1109]

⁶⁵⁸ Law Commission Working Paper No 64 (n. 23) p. 60

⁶⁵⁹ The correctness of this proposition is seriously doubted. The insurance market has coped with '9/11' a loss of close to \$40bn according to a report of the Insurance Information Institute 'Terrorism Risk: A Reemergent Threat, Impacts for Property/Casualty Insurers April 2010: < http://insurancemarketreport.com/Portals/131/TerrorismThreat_042010.pdf > (accessed 30 January 2014) and many other disasters of enormous proportions.

⁶⁶⁰ Law Commission Working Paper No 64 (n. 23) p. 60

The Pearson Commission⁶⁶¹ took the contrary view when considering prescription medicines. It acknowledged that proof of causation would be a real issue for claimants and that responsibility for safety of drugs rests not only on manufacturers but also on the Committee on Safety of Medicines⁶⁶² and on prescribing doctors. Nevertheless 'no special treatment could be justified'.⁶⁶³

The demand for fuller and surer compensation for injuries caused by drugs is now an international phenomenon.⁶⁶⁴

The position taken in the House of Lords when debating the development risks defence was similarly limited to the application of strict liability to pharmaceuticals:

Lord Lucas of Chilworth: My Lords, the noble Lord, Lord Allen of Abbeydale, is quite correct in reminding the House that the Germans do, in fact, treat drugs separately. While I recognise that they may be seen as perhaps different to other manufactured products, I believe that the system of strict liability which is in the current proposals more than adequately deals with this type of product.⁶⁶⁵

In Germany where the Contergan/Thalidomide tragedy began, a specific PL law for pharmaceuticals, *das Arzneimittelgesetz* (Medicinal Products Act), was introduced in 1978.⁶⁶⁶ This treats pharmaceuticals differently from other products. In fact liability is even stricter. In its current form the Medicinal Products Act provides for absolute liability.⁶⁶⁷

⁶⁶¹ Pearson Commission (n. 191) pp. 1272-1275

⁶⁶² Since 30 October 2005: the Commission on Human Medicines

⁶⁶³ Pearson Commission (n. 191) p. 273 [1275]

⁶⁶⁴ Pearson Commission (n. 191) p. 273 [1275]

⁶⁶⁵ Lord Lucas of Chilworth, *HL Deb 04 July 1985 vol 465 cc1303-5*,

< <http://hansard.millbanksystems.com/lords/1985/jul/04/ec-consumer-affairs> > [1304] accessed 17 June 2015

⁶⁶⁶ Richard Best, 'A Comparison of Civil Liability for Defective Products in the United Kingdom and Germany', 3 *German Law Journal* (2002), available at

< <http://www.germanlawjournal.com/index.php?pageID=11&artID=144> > accessed 17 June 2015

⁶⁶⁷ *Arzneimittelgesetz* s 84 Absolute liability

(1) If, as a result of the administration of a medicinal product intended for human use, which was distributed to the consumer within the purview of the present Act and which is subject to compulsory marketing authorisation or is exempted by ordinance from the need for a marketing authorisation, a person is killed, or the body or the health of a person is substantially damaged, the pharmaceutical entrepreneur who placed the medicinal product on the market within the purview of the present Act shall be obliged to compensate the injured party for the damage caused. The liability to compensate shall only exist if:

1. when used in accordance with its intended purpose, the medicinal product has harmful effects which exceed the limits considered tolerable in the light of current medical knowledge, or
2. the damage has occurred as a result of labelling, expert information or instructions for use which do not comply with current medical knowledge.

Some tragedies transcend blame or doctrinal attribution of strict liability. The Thalidomide tragedy was probably the best known and most public pharmaceutical disaster. There are many victims: those who suffered directly from disability; their families; their carers. Few would deny that they need some form of compensation to assist in normalising their lives by meeting extraordinary needs in so far as that is at all possible. To rely on the finances of the manufacturer of the product could leave these genuine victims in a precarious position. It might not have sufficient funds. It might have no insurance or there might be a breach of the terms of its insurance or an operative exclusion preventing it from claiming an indemnity.⁶⁶⁸ In case 72 in the PL Claims Survey at Appendix 4, two claimants were struck by defective rocket fireworks. They obtained an uncontested judgment against the defendant importer of the fireworks but it was unenforceable as the defendant carried a substantial insurance deductible and was in insolvent Liquidation.

There is an argument that a tragedy on the scale of Thalidomide is such a special case that the cost should be borne by the broader shoulders of society as a whole in order to avoid the financial risk, in the same way that the Government might bear the cost of natural disasters. In case 92 in the PL Claims Survey at Appendix 4, a claimant was rendered paraplegic in a motorcycle accident but failed to prove that his accident was caused by a defect rather than a handling error. This claimant was left with no remedy. He had to discontinue his claim in the face of insuperable difficulties with expert evidence and his ATE insurer paid the defendant's considerable costs of an advanced case. The claimant had been through two years of unsuccessful litigation. In the post Jackson era, the only material difference would be that the claimant would not have to pay the defendant's costs. This might encourage him to take his chance in court with the expert evidence, if his lawyers were prepared to risk their time on a conditional fee basis. The outcome is likely to be the same other than that the defendant would not recover its costs. The claimant would still fail to recover and would face years of

Translation provided by the Language Service of the Federal Ministry of Health (Bundesministerium der Justiz) < http://www.gesetze-im-internet.de/englisch_amg/englisch_amg.html#p1702 > accessed 17 June 2015

⁶⁶⁸ See for example *John Wyeth & Brother Ltd v Cigna Insurance Co of Europe SA-NV & Ors.* [2001] CLC 970, a dispute over whether J Wyeth's costs of some £17.34 million incurred in successfully defending the Benzodiazepine litigation were recoverable from insurers. In this case they were.

unsuccessful litigation with his hopes being raised and then crushed. What remains clear is that this claimant was genuinely a victim of an accident and he recovered nothing.

A regime designed for highly technical products such as pharmaceuticals and aircraft components might not be appropriate for other more mundane products whether or not mass produced. What is more concerning is that whilst theory is based on the pharmaceutical industry or blood products, approximately 75% of injury cases registered with the Compensation Recovery Unit in 2013-2014 involved motor claims.⁶⁶⁹ Whilst the percentage attributable to alleged PL rather than collisions or other driving related accidents is unknown, common sense suggests that the car is probably a product responsible for a significant percentage of PL claims.

7.7.2 Products are not homogeneous

Even if the above arguments justify strict liability for pharmaceutical products, it ignores the contrary question as to whether less sophisticated products require strict liability. Nothing obviously singles out products as warranting a distinct legal classification justifying a *sui generis* form of liability. The term 'product liability' is a comparatively recent invention. It does not appear at all in the leading PL negligence case of *Donoghue v Stevenson*.⁶⁷⁰ As recently as 1980 it was stated

Although the term "product liability" is by now well understood, it is still the fact that it is not the subject of special legislation in any Western European country.⁶⁷¹

Yet in the neologism 'product liability' there is an implicit premise that product cases are substantially homogeneous. In fact, product cases differ more among themselves than they differ from other personal injury cases.⁶⁷² Differences between 'products' include their complexity of design, complexity of function, level of skill to operate, combination with other products, interaction with people, complexity of manufacturing process, perceptibility of potential defect, and most importantly social utility (whether

⁶⁶⁹ Compensation Recovery Unit data (n. 518)

⁶⁷⁰ *Donoghue v Stevenson* (n. 487)

⁶⁷¹ J. A. Jolowicz, 'Product Liability. The E.E.C. and the House of Lords' *The Cambridge Law Journal*, Vol. 39, No. 2 (Nov., 1980), 263-269.

⁶⁷² William Powers, Jr 'A Modest Proposal to Abandon Strict Products Liability' (n. 615)

a product is socially acceptable – or ‘*sozialadäquat*’). Burton J held in *A v National Blood Authority*⁶⁷³ that if the public had sufficient knowledge of a risk and it was socially accepted, then it may not constitute a defect as it would be *sozialadäquat*. The infected blood failed this test. However, it is a commonly applied test. Examples would include at one end of the spectrum ‘chemotherapy drugs which are known to cause harmful side effects but whose curative benefits render the drugs socially accepted’,⁶⁷⁴ and airbags which might cause friction burns or hearing problems in their normal life-saving operation. At the other end of the spectrum, products such as cigarettes have been held to be *sozialadäquat* notwithstanding their recognised potential to cause harm to health (see page 88 above). There is no justification for imposing the same liability regime to different products exhibiting such varied characteristics.

It is not merely the concept of the product that is difficult to circumscribe. Howells points out that PL itself overlaps with other areas of law, such as sale of Goods Law, which vary from state to state and may not specifically be subject to European harmonisation, so that trying to create a uniform European regime is impracticable.⁶⁷⁵ Reimann takes the view that the PL Directive has been ineffectual in practice as it fails to engage properly with ‘existing regimes, and of the overall environment in which they will be employed, i.e., of the incentives, mechanisms, and chances to enforce’.⁶⁷⁶

7.7.3 There is nothing special about products

Stapleton notes:

it is worth remembering how accidental it was that injuries caused by products supplied in the course of business should have been separated out for separate doctrinal treatment. Looked at afresh, there does not seem to be any particular moral, economic, or social reason why the victims of such injuries should have been accorded any more special treatment than, say the victims, of medical misadventures or

⁶⁷³ *A v National Blood Authority* (n. 204)

⁶⁷⁴ Christopher Johnston QC, ‘A personal (and selective) introduction to PL law’ 2012 J.P.I. Law 1 pp. 8/9

⁶⁷⁵ Geraint Howells, ‘PL – A History of Harmonisation’ Chapter 35 Electronic copy available at: < <http://ssrn.com/abstract=1537180> > accessed 17 June 2015

⁶⁷⁶ Mathias Reimann, ‘Product Liability in a Global Context: the Hollow Victory of the European Model’ (n. 559) pp. 153/154

environmental pollution— both areas in which plaintiffs find it difficult to establish liability under traditional causes of action.⁶⁷⁷

Powers argues that most of the general arguments favouring strict liability fail to explain why product cases are special.⁶⁷⁸ Product cases are not significantly different from other types of personal injury cases.⁶⁷⁹ Rationales used to support strict liability for defective products do not distinguish PL from any other kind of liability. Powers identifies the following reasons typically cited for imposing strict PL:

- (1) it promotes product safety by requiring manufacturers to bear accident costs.
- (2) it helps internalize accident costs into the price of products, thereby spreading a victim's loss among an entire group of consumers.
- (3) defective products frustrate consumer expectations.
- (4) it places the burden of injuries on manufacturers who are in a better position to prevent injury.
- (5) plaintiffs face an unduly difficult burden of proving specific acts of negligence in product cases.

Case Study 2 provides a useful example to test Powers' proposition as it involves a potential product defect, allegedly defective installation and potential pilot negligence:

(1) Promotion of safety.

Notwithstanding the doubts expressed in Chapter 3 as to the ability of strict liability to promote safety or its need in the face of heavy regulation, the argument is that strict liability forces the manufacturer to spend money on safety. If that is correct then by the same argument an aero-engineer who installs a modified part ought to spend more on training and testing if he faces strict liability. Similarly the pilot would spend more money on training. In fact all three are heavily regulated. They all have to be highly trained, tested and audited on a regular basis.

⁶⁷⁷ Jane Stapleton, 'Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective' (n. 572) p. 366

⁶⁷⁸ William Powers, Jr 'A Modest Proposal to Abandon Strict Products Liability' (n. 615) p. 640

⁶⁷⁹ William Powers, Jr 'A Modest Proposal to Abandon Strict Products Liability' (n. 615) p. 639

(2) Internalisation leads to spreading the loss across a group of consumers.

Again disregarding whether such spreading is efficient and beneficial, internalising risk to the installer or pilot would spread risk (both through prices paid⁶⁸⁰ and insurance).

(3) Frustration of consumer expectations.

The passenger's expectations are frustrated not only in relation to the possible failure of the product but equally the failure of the pilot or installation engineer.

(4) Transferring burden of injuries to the producer who is better placed to prevent injury

If it is accepted that the producer is better placed than the injured person to prevent injury, then the same applies to the pilot and the installation engineer.

(5) Unduly difficult burden of proving specific acts of negligence in product cases.

In an English court it would be as difficult to prove negligence against the pilot or installer as the manufacturer. If proof of negligence were required against the manufacturer, the claimant would need evidence as to the propensity of the buckle to fall into the gap - straightforward factual evidence obtained by photographing an identical aircraft; the failure to test or inadequate testing - disclosure of design documents would be sought and those documents submitted to an expert aviation engineer. Disclosure would also need to be obtained as to any warnings and instructions provided both in relation to installation and use.

Next, considering the position of the installer, similar evidence would need to be obtained as to the likelihood of the buckle fouling the controls. Disclosure would also be needed as to the fitting instructions and evidence from an expert aviation engineer as to what testing and investigation would be carried out by a competent engineer.

As for the pilot, a flying expert with experience of this aircraft type and understanding of the particular handling characteristics would be required to consider the effect of the control jam on the controllability of the aircraft, the pre-flight preparations required to

⁶⁸⁰ In fact the pilot was not acting as a professional in this instance although he was a qualified commercial pilot.

be taken by the pilot, and the extent to which the pilot could be expected to foresee a control problem.

In practice the burden of proof in negligence is equally onerous against all three potential defendants. The onus is not great, however. Disclosure is a routine procedural step. There are aviation engineering and flying experts available. Cases involving specialised areas such as aviation and pharmaceuticals or clinical negligence would tend to be run by lawyers with specialised skill and experience in these areas, just as the defendants will be represented by specialists in the field. Both sides will have ready access to experts. The same would apply to other technical fields.

Proof of negligence in the design of a product might typically be the most difficult area. However, this is no different from any complex professional indemnity case. By comparison, in *L v B* the Practice acted in the defence of a naval architect who provided plans for the self-build of a trawler. The plans were executed carefully and the workmanship was excellent except in one respect. The design was for a stern trawler but the builder decided to modify it to a beam trawler. A trawler with nets slung over each side is inherently less stable than one trailing its nets. It capsized on its maiden voyage drowning a crew member. Expert evidence in the case was highly complicated (and disputed) as to stability calculations, test procedures, sea trials, and what advice should have accompanied the plans. Certainly this was no less complicated than a PL claim. By contrast one of the earliest cases dealt with by the author involved an air crash caused by a baggage door of an aircraft coming adrift in flight and breaking off the vertical stabiliser (the tail). On reviewing potential discovery it was found that there had been over 40 known incidents of the door on this aircraft type coming unlatched, some leading to loss of the door. The case was settled.

7.7.4 Fallacy that modern products are more defect prone than hand made products

According to the Explanatory Memorandum to the Draft Directive, modern products were considered to be ‘technically complicated and specialised’ and ‘therefore involve

the risk of defects more than the simple hand-made products of past eras'.⁶⁸¹ It is not explained why technical products are more prone to defects than hand made products. At the high technology end of the spectrum it would be reasonable to think that it is not only the production methods that have improved but also the quality control. Indeed quality control is audited in any high technology manufacturing process and manufacturers in many fields require accreditation, such as ISO 9000.⁶⁸²

There is no obvious reason to assume that a mass produced item of furniture is more likely to be defective than for example a hand-made item of furniture. In *Piper v JRI*,⁶⁸³ a claim arising out of the failure of an implanted hip replacement, the Court of Appeal supported the trial judge's finding that no defect existed when the product was supplied by the manufacturer. The trial judge had held:

I have absolutely no doubt that this product was subject to vigorous and meticulous process of work and inspection of the highest quality. I appreciate that with human error or even pure negligence nobody can pretend that a mistake could not be made, but if a defect of such significance had slipped through the net it would have required, in my view, mistakes or negligence by a number of individuals. On this evidence I am simply not prepared to accept that such a mistake was made with the product. An ultimate failure rate of 5 in some 80,000 supports this point.⁶⁸⁴

The technically complex process may be less vulnerable to criticism than human intervention. In two PL cases involving the manufacture of tyres (which involved a significant human input) even though the Consumer Protection Act was not applicable on the facts, the court readily inferred negligence from the existence of a defect.⁶⁸⁵ In *Divya v Toy o Tire*⁶⁸⁶ Mackay J found 'this is a labour intensive process controlled by people' and was able to conclude 'what can be said as a matter of probability is that

⁶⁸¹ to the Draft EU PL Directive, Explanatory Memorandum (n. 24) p. 153

⁶⁸² The International Organization for Standardization claims: The ISO 9000 family addresses various aspects of quality management and contains some of ISO's best known standards. The standards provide guidance and tools for companies and organizations who want to ensure that their products and services consistently meet customer's requirements, and that quality is consistently improved. See International Organization for Standardization < http://www.iso.org/iso/iso_9000 > accessed 2 January 2014

⁶⁸³ *Piper v JRI (Manufacturing) Ltd* [2006] EWCA Civ 1344

⁶⁸⁴ *Piper v JRI (Manufacturing) Limited* (n. 683) [22]

⁶⁸⁵ *Carroll & Others v Fearon & Others & Dunlop*, High Court QB Sitting at Oxford ref 950001/1 4th/5th March 1996, Wilson-Mellor J upheld on this point on appeal in *Alan Carroll and Others v Lundy Fearon and Others; Astrid Barclay and Another v Dunlop Limited and Another* [1999] E.C.C. 73

⁶⁸⁶ *Divya & Others v Toyo Tire and Rubber Co Ltd (t/a Toyo Tires of Japan)* [2011] EWHC 1993 (QB), MacKay J (unconditional leave to appeal was granted by Court of Appeal and the matter subsequently settled before hearing).

at some stage of the manufacturing process ... the human side of the process has failed to detect such failure or failures’.

At the other end of the spectrum, hand-made products have not been completely replaced by machine-made products. If the rationale for the regime anticipated by the PL Directive is that mass produced goods are more prone to defect, then it would make no sense to apply the same regime to goods with a significant human manufacturing element. Yet no such distinction was ever anticipated. It might be argued that by defining a defect by reference to the safety that persons generally are entitled to expect, the Directive provides for a different level of expectation in relation to goods with a significant man-made element. In practice however, there have been no reported cases where such an argument has been used and it is submitted that it would receive short shrift from the courts in the light of the *Dunlop* and *Toyo* cases.

Equally, natural products may by their nature be susceptible to failure for reasons that might not be detected. The Practice handled an EL claim, *C v K*, (not falling within the PL Claims Survey) in which a scaffolder put his foot through a wooden scaffolding board which suddenly split under his weight. As a consequence he suffered such a serious injury that his leg had to be amputated. Following *Stark v Post Office*⁶⁸⁷ liability was accepted on behalf of the employer for breaches of PUWER,⁶⁸⁸ notwithstanding evidence that the boards were checked thoroughly for damage before stowing, to see whether they would be re-usable. PUWER imposed strict liability.⁶⁸⁹

Even if the proposition were correct that highly technical products are more prone to defects, it is obvious that the cases which so strongly influenced the proponents of the PL Directive were exceptions rather than the norm. Tailoring the law to these products ignores the fact that most products are not so complicated.

⁶⁸⁷ *Stark v Post Office* (n. 65) p. 105

⁶⁸⁸ The Provision and Use of Work Equipment Regulations 1998, breach of which, prior to s 69 Enterprise and Regulatory Reform Act 2013, imposed a strict liability on the employer: Suitability of work equipment ‘4. (1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.’

⁶⁸⁹ The Provision and Use of Work Equipment Regulations 1998, Regulation 4. (Before s 69 Enterprise and Regulatory Reform Act 2013 which has abolished strict civil liability for a breach of the Regulations)

Highly technical products such as aircraft and pharmaceuticals are of course tightly regulated. The effect of such regulation is that errors are less likely to occur. Aircraft parts will be subject to type approval and the designers and manufacturers themselves must be certified.⁶⁹⁰ Additionally, if a manufacturer or overhaul facility is in breach of regulations, it is considerably easier to demonstrate this. For example in *N v D* the Practice acted in the defence of a case based in negligence arising from the failure of an aircraft tyre on take-off in South Africa. The tyre had been retreaded (as is normal practice in the aviation industry). The carcass was certified for a number of 'retread lives'. After the accident it was possible to trace the paperwork that accompanied the tyre as it arrived at the retreading plant and followed it through the factory until shipment to the airline. The records included shearographic records of the tyre at the stage at which it was assessed for damage or excessive wear that might take it outside the parameters certified for 'retreadability'. The raw materials were audited; the process was certified; each stage was signed off by the individual identifying stamp of a specially trained engineer. That is not to say that accidents cannot happen but it certainly makes proof more straightforward if a process has accidentally been left out. Ultimately, in that particular case, the documentary record provided sufficient proof to a court that there was no negligence in the process and the most likely cause of the accident was impact with a metal object on the runway.

Similarly the homologation process provided a clear basis to prove in Case Study 1, *Martin v Kudo*, that the braking system was not defective. It is a defence under Article 7(d) of the PL Directive 'that the defect is due to compliance of the product with mandatory regulations ...' (author's emphasis). Whilst, this falls short of a defence of compliance with regulations, it would have more easily enabled proof of defect if the braking system had not complied with the regulatory requirements.

⁶⁹⁰ European Aviation Safety Agency EASA Part 21J Design Organisations; part 21G Production Organisations

7.8 Strict Liability was introduced to overcome proof of fault

Strict liability was presumed to be the sole means of solving the problem of fair apportionment of the risks inherent in modern technological production.⁶⁹¹ The Explanatory Memorandum of the Strasbourg Convention explains

...the majority of the Committee' agreed that the notion of "fault" - whether the burden of proof lay with the person suffering damage or with the producer - no longer constituted a satisfactory basis for the system of products' liability in an era of mass-production, where technical developments, advertising and sales methods had created special risks, which the consumer could not be expected to accept.⁶⁹²

7.8.1 Fallacy that fault is always difficult to prove

The recitals to the PL Directive explain that 'liability without fault ... is the sole means of solving the problem peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.'⁶⁹³

This led to the conclusion that

If it is impossible for [the producer] to avoid a manufacturing defect despite careful checks, it does not seem unfair that he should also bear the burden of the consequences of unavoidable defects in order to protect the consumer.⁶⁹⁴

The Law Commission noted a concern that proving fault against a manufacturer could be problematic.

This burden of proof can be particularly difficult to discharge in products liability cases where the injured person is extraneous to the process of production and may have difficulty in establishing by technical and other evidence that there was a design defect or negligence on the part of an employee.⁶⁹⁵

Greville Janner MP interjected in the Parliamentary debate on the Draft Directive:

... the trouble with suing in tort or in negligence is that one has to prove fault. That is almost impossible for the ordinary person who cannot

⁶⁹¹ PL Directive 1985 Recital 3

⁶⁹² Strasbourg Draft Convention Article 3. (n. 23) p. 136

⁶⁹³ PL Directive 1985 Recital 3

⁶⁹⁴ Draft European Directive Explanatory Memorandum (n. 24) p. 157

⁶⁹⁵ Law Commission Working Paper No 64 (n. 23) p. 31

command either legal aid or a vast amount of money and who, therefore, cannot get justice without strict liability.⁶⁹⁶

The context is that of Thalidomide and mass disasters. As John Smith MP had put it, focusing on Thalidomide:

If it were open for people to take an action on the basis of tort, that would be fine, but in this area we are talking of cases in which it is difficult for people to establish a liability based upon fault.⁶⁹⁷

7.8.2 Difficulty of proof of fault is overstated

The simple proposition is that to equalise competition, the burden of proof the claimant faces must be equal in all Member States.⁶⁹⁸ Since fault based liability requires more complex proof, the lowest common denominator across the Member States is achieved by imposing strict liability. Therefore it is necessary to examine the premises that proof is difficult and that it is made easier by strict liability.

It is as much a generalisation to say that difficulty of proof is overstated as it is to say that proof of negligence is almost impossible. There will be difficult cases and easy cases. There will also be the *cause célèbre* that demands media attention with less rigorous attention to the precise legal reasons for its success or failure. Lannetti lists 'oft cited' judicial explanations for strict PL, including that the burden of proof is 'almost insurmountable':⁶⁹⁹

... (6) That because of the complexity of present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible. (7) That the consumer does not have the ability to investigate for himself the soundness of the product ...⁷⁰⁰

⁶⁹⁶ Greville Janner MP, *HC Deb 04 November 1980 vol 991 cc1106-200*
<<http://hansard.millbanksystems.com/commons/1980/nov/04/european-community-product-liability>>
[1116] accessed 17 June 2015

⁶⁹⁷ Mr John Smith MP (n. 654) [1118]

⁶⁹⁸ Law Commission 82 (n. 252) p. 81

⁶⁹⁹ David W. Lannetti, 'Toward a Revised Definition of "Product" Under the Restatement (Third) of Torts: Products Liability' *The Business Lawyer*, Vol. 55, No. 2 (February 2000), 799-844

⁷⁰⁰ David W. Lannetti, 'Toward a Revised Definition of "Product" Under the Restatement (Third) of Torts: Products Liability' (n. 699) citing Arizona appellate court in *Lechuga, Inc. v. Montgomery*, 467 P.2d 256, 261-62 (Ariz. Ct. App. 1970) (Jacobson, J., concurring)

A claimant would have to show negligence in manufacture, information or design. The first two are less likely to be a problem. It is not 'almost impossible' to prove negligence in manufacturing cases. Negligence is often presumed in manufacturing cases regardless of strict liability.⁷⁰¹ The Law Commission acknowledged:

Certainly there are few reported cases since *Daniels v. White*, which was decided in 1938, in which an injured person has proved the existence of a manufacturing defect but has failed to prove a lack of reasonable care on the part of the manufacturer.⁷⁰²

In a recent case handled by the Practice *R v M*, not yet in the archives forming the basis of the PL Claims Survey, a vehicle was delivered to a dealer on a transporter truck. When the truck driver removed the stays, it slipped its handbrake and rolled off the transporter knocking the driver off the side of the top deck and causing serious injury. The brake was inspected and it was found that the handbrake cable had not been seated correctly in its detent. The brake had operated normally at first until the cable worked its way out of the detent and released the brake. Any competent engineer inspecting the brake after the accident would have identified the defect. As the cable had not been seated properly there would have been no defence to a claim in negligence. Plainly the factory operative fell below the standard of care expected. In that case liability was promptly admitted. In a more complex technical product such as pharmaceuticals and medical or aerospace products, proof of negligent production would be assisted by regulatory requirements to retain production and batch records and samples.

The appropriateness of warnings, or whether warnings should have been given, may be straightforward matters for a judge to determine. In *Walton v British Leyland*,⁷⁰³ after numerous wheel bearing failures, British Leyland introduced a modification to prevent the risk of a wheel coming off the axle which is precisely what happened to the Waltons, with catastrophic consequences for Mrs Walton who was left quadriplegic. Instructions to dealers on when to fit a safety washer were unclear. Willis

⁷⁰¹ See *Carroll & Others v Fearon & Others & Dunlop*, (n. 685), Wilson-Mellor J upheld on this point on appeal in *Alan Carroll and Others v Lundy Fearon and Others; Astrid Barclay and Another v Dunlop Limited and Another* [1999] E.C.C. 73 and *Divya & Others v Toyo Tire and Rubber Co Ltd* (n. 686), MacKay J (unconditional leave to appeal granted by Court of Appeal and matter subsequently settled before hearing).

⁷⁰² Law Commission Working Paper No 64 (n. 23) p. 35

⁷⁰³ *Walton v British Leyland* (n. 194) p. 131

J held that it would have been 'simplicity itself' for the manufacturer of a car to warn dealers to replace the wheel bearings on both hubs and that they should have recalled the affected cars.⁷⁰⁴

*McTear v Imperial Tobacco*⁷⁰⁵ was a *cause célèbre*. It was the first and only major UK case against the cigarette industry in the UK to reach trial. This was a claim by the widow of Alfred McTear, who died aged 48 in 1993 from lung cancer. It was claimed that the deceased started smoking in 1964 and was at that time unaware that smoking could cause fatal diseases. Health warnings started appearing on packets of cigarettes in 1971, by which time he was 'addicted' and could not stop smoking.

It is a Scottish case but the principles are identical for present purposes to English law. The supply pre-dated the Consumer Protection Act 1987 and so, although this is a relatively recent case, it deals with proof of negligence. Mrs McTear lost on all counts. She failed to prove either negligence or causation. Montague writes that

... the Scottish Court of Session held that Imperial Tobacco (IT) was not legally responsible for the death of Mr McTear at the age of 48 from lung cancer, despite Mr McTear having smoked up to 60 cigarettes a day since the age of 17 in 1964, two years after the Royal College of Physicians gave its first warning to the government about the link between tobacco and lung cancer... Perhaps the most surprising (and from the anti-tobacco lobby's viewpoint, probably the most damaging) part of the judgment was that IT was absolved of its duty of care to customers because his Lordship found that even as early as 1964, consumers were aware of the risks associated with smoking, even though this was seven years before warnings began to appear on packets.⁷⁰⁶

Proof of fault in complex cases will be complicated but it is easy to fall into the trap of assuming such *causes célèbres* were lost because of some technical difficulty in the proof of negligence.

The totally uneven playing field this produced when the case came to trial was perhaps at the heart of why the learned judge, Lord Nimmo Smith, came to such a poor decision. He found against Mrs McTear on almost every point before him.⁷⁰⁷

⁷⁰⁴ *Walton v British Leyland* (n. 194) p. 136

⁷⁰⁵ *McTear v Imperial Tobacco Ltd* (n. 244)

⁷⁰⁶ Janice Elliott Montague, 'Cigarette, but?...The failure of tobacco litigation in the United Kingdom' (n. 435)

⁷⁰⁷ Martyn Day, 'Tobacco litigation' 2006 *Journal of Personal Injury Law* 1, 3

Martyn Day notes

In 1999, at the end of the group action here in London, I was forced, along with John Pickering and other colleagues at Irwin Mitchell and Leigh Day and Co to agree not to take on further claims against the tobacco companies. This came about because the premium offered by insurers to protect the 50 claimants against the defendants' costs orders was some £4 million. They, unsurprisingly, did not have that sort of money--so the claimants went into the case without any cover. When the case was lost and the tobacco companies obtained the normal costs order, the only way of ensuring that the claimants were not bankrupted, was for our two firms, as the lawyers representing the claimants, to give undertakings not to act in such cases for a number of years.⁷⁰⁸

This might have a tendency to colour his view of the case. One must not neglect the simple fact that there may have been no fault. Mr McTear's evidence had been taken on Commission shortly before he died, several years before trial. The judge assessed from evidence as to his credibility, that the deceased was a 'profoundly dishonest man who readily lied in order to obtain advantage for himself'.⁷⁰⁹ He knew the risks and made an informed choice.

Mildred acknowledges

Mr McTear, in common with the general public, was held to have been aware of the association between cigarette smoking and lung cancer before he started to smoke Imperial Tobacco's products in 1971. He was accordingly in a position to make an informed choice about whether to smoke.

The conclusion was that there had been no lack of reasonable care by Imperial Tobacco Ltd.⁷¹⁰

On this basis the negligence claim was bound to fail regardless of causation difficulties. If the public is aware of the harm of tobacco or alcohol yet still chooses to buy it (and by comparison with, for example, cocaine, it has not been made illegal) then no liability will attach to the producer. It passes the consumer expectation test. The same considerations would apply under the PL Directive. In *A v National Blood Authority* Burton J noted

⁷⁰⁸ Martyn Day, 'Tobacco litigation' (n. 707) 4

⁷⁰⁹ *McTear v Imperial Tobacco Ltd* (n. 244) p. 132 [4.222]

⁷¹⁰ Mark Mildred, 'Case Comment Personal Injury – death – liability' 2005 *Journal of Personal Injury Law* 141 p. 142

The Commission agreed with the Honourable Member that nobody can expect from a product a degree of safety from risks which are, because of its particular nature, inherent in that product and generally known, e.g., the risk of damage to health caused by alcoholic beverages. Such a product is not defective within the meaning of ... the ... Directive.⁷¹¹

Social policy should not be governed by the uncertainties and variables inherent in a single piece of private law litigation: including competence of the parties' legal teams, experts and of a judge; the finances available to the parties; and access to evidence. Whether smoking tobacco or drinking alcohol should be permissible are matters for the legislative process. A sustained legislative and regulatory presence is required to ensure meaningful policy changes.⁷¹²

To this extent strict liability under the PL Directive has not added much. However in design cases proof certainly relies on accessibility of evidence to the claimant. The assumption is that claimants have a difficult burden because there is usually a lack of balance regarding access to information. This may be correct but as discussed above the position is not necessarily different from professional negligence litigation. Indeed it is difficult to justify a dividing line between pharmaceutical PL and clinical negligence.

7.8.3 Causation remains the real issue

The problem of proof in PL cases is not one of negligence but of causation. The causation issues are often insurmountable. But even if these issues are put to one side, if the definition of defect entails a cost/benefit analysis at the time of circulation of the product, involving consideration of warnings and instructions, risk assessment and the state of the art, it is likely that establishing liability against the producer of a highly technical product such as Thalidomide would be difficult under the regime of the PL Directive.⁷¹³ That is because

⁷¹¹ *A v National Blood Authority* (n. 204) p. 14

⁷¹² Peter D Jacobson and Kenneth E Warner, 'Litigation and Public Health Policy Making: The Case of Tobacco Control' *Journal of Health Politics, Policy and Law* 24.4 (1999) 769-804

⁷¹³ Jane Stapleton, 'Products Liability Reform Real or Illusory?' (n. 230) see also Mr John Smith MP 'at first sight, strict liability would seem to offer a remedy to the Thalidomide children, but that remedy would be snatched from them by the application of the state of the art defence.' (n. 654) [1117]

- a) causation is often so complex in cases involving bioactive products, that it is difficult to discharge the burden of proof: ‘Where the product is a drug or medical device the problem is exacerbated since it is trite that all bioactive substances can produce undesirable just as desirable effects and that none can produce a unique effect’;⁷¹⁴ and
- b) where products are subject to a sophisticated regulatory regime, there is the possibility of relying on the development risks defence⁷¹⁵ if a completely unforeseen complication arises.

Causation is ultimately a matter of evidence. In *McTear v Imperial Tobacco*⁷¹⁶ Mrs McTear, the Pursuer, had to prove that ‘smoking can cause lung cancer’ (not a matter of *judicial knowledge*) and that it caused the deceased’s lung cancer. Lord Nimmo Smith’s judgment is 567 pages long and the bibliography of texts referred to stretches to over 10 pages. He concluded:

no scientist with appropriate expertise who studied the relevant literature would conclude that it had been established that cigarette smoking could cause lung cancer, let alone that it caused Mr McTear’s lung cancer.⁷¹⁷

Mildred says Lord Nimmo Smith took a ‘highly literal approach to the standard and method of proof.’⁷¹⁸ Broadbent argues

When no other evidence is available to a fact finder, it is legitimate to be guided by the epidemiological evidence (assuming it is of a sufficiently high quality to warrant a causal inference at the general level...)⁷¹⁹

His Lordship explained that he had not been sufficiently instructed by the expert evidence to form his own judgment on the epidemiological evidence. As Goldberg explains, ‘a failure to take the court to the primary literature showing causation and to teach it how to do the epidemiology to a sufficient extent is likely to be fatal to the

⁷¹⁴ Mildred, ‘Pitfalls in Product Liability’ (n. 211) p. 142

⁷¹⁵ PL Directive Article 7(e) ‘that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered’

⁷¹⁶ *McTear v Imperial Tobacco Ltd* (n. 244)

⁷¹⁷ *McTear v Imperial Tobacco Ltd* (n. 244) p. 473 [6.153]

⁷¹⁸ Mark Mildred, ‘Case Comment Personal Injury – death – liability’ (n. 710) p. 143

⁷¹⁹ Alex Broadbent, ‘Epidemiological evidence in proof of specific causation’ 2011 Legal Theory 237

prospects of success.⁷²⁰ Montague admits: 'With hindsight, therefore, maybe *McTear* was not the ideal 'test case' which the anti-tobacco lobby required.'⁷²¹

Causation remains a major issue in complex pharmaceutical litigation. It has been the stumbling block in numerous Group Litigation attempts.⁷²² Two cases typify the problems: *Loveday v Renton*⁷²³ and *XYZ v Schering*.⁷²⁴

In *Loveday v Renton*⁷²⁵ the plaintiff was one of about 200 children who made claims that they suffered brain damage following pertussis vaccination. The court heard the preliminary issue: 'Can or could pertussis vaccine used in the United Kingdom and administered intramuscularly in normal dosage cause permanent brain damage or death in young children?' Lord Justice Stuart-Smith found that it could not be shown on a balance of probabilities that pertussis vaccine could cause permanent brain damage in young children.

The plaintiff's counsel argued that what he had to prove was what the preponderance or confluence of medical opinion was, but not whether that medical opinion was right or wrong. The judge held that this confused negligence with causation. The question of whether a doctor acted in accordance with a respectable body of medical opinion was relevant to determining whether he was negligent (the Bolam test).⁷²⁶ The factual issue of causation had to be determined by weighing all the medical evidence. Opinions of experts not called to give evidence were only admissible if adopted by an expert in the case as supporting or reinforcing his own opinion. In this case the evidence merely raised a hypothesis whether pertussis vaccine could cause brain damage where the onset of serious neurological illness occurred within 72 hours (or more commonly 24 hours) of vaccination.

⁷²⁰ Richard Goldberg, 'Causation, idiopathic conditions and the limits of epidemiology' Edin. L.R. 2009, 13(2), 282-286

⁷²¹ Janice Elliott Montague, 'Cigarette, but?...The failure of tobacco litigation in the United Kingdom' (n. 435) p. 26

⁷²² See Mildred, 'Pitfalls in Product Liability' (n. 211) p.142 for a summary of failures and rare successes.

⁷²³ *Loveday v Renton and Wellcome Foundation Ltd* (n. 429)

⁷²⁴ *XYZ & Others v Schering Health Care Limited, Organon Laboratories Limited, John Wyeth & Brother Limited* [2002] EWHC 1420(QB); 70 BMLR 88

⁷²⁵ *Loveday v Renton and Wellcome Foundation Ltd* (n. 429)

⁷²⁶ *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 p. 121 per McNair J 'I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art'

Whilst the requirement to prove fault was replaced under the PL Directive with the requirement to prove defect, the need for proof of causation has not changed.

In *XYZ v Schering*⁷²⁷ claims were brought under the Consumer Protection Act/PL Directive by 7 lead claimants against Combined Oral Contraceptive pill manufacturers. The issues included whether the subject pill carries an increased risk of venous-thromboembolism of twice that of the previous generation of pill; if so was the product defective taking into account warnings and instructions, and does the development risks defence apply?

The case turned entirely on the expert evidence which included three transnational studies. The third of these was commissioned by one of the defendants Organon. It comprised data from 502 cases and 1864 controls with full or lifetime exposure to the third generation combined oral contraceptive for over 90% of the subjects – ‘based on the pill calendars whose form and content were specified at the outset’. The quality of the data was particularly good as subjects were identified as taking this pill exclusively from the beginning of contraception. The study found no association between third generation combined oral contraceptives and any increased risk of venous thromboembolism compared with predecessor pills – ‘if anything the reverse’.⁷²⁸

The judge perceived his role not as ‘super-scientist’ but to evaluate the witnesses and decide what evidence is sound and reliable, following Stuart Smith J in *Loveday v Renton*,⁷²⁹ examining the reasons for the expert opinion and the extent they are supported by the evidence; weight and internal consistency of logic; care with which the expert has considered the subject; precision and accuracy of thought; handling of cross-examination and concessions in the light of further evidence and demeanour. It is apparent that the judge had been taken through the evidence of the various studies and the epidemiological techniques in great detail. In Lord Nimmo Smith’s terms, in *McTear*⁷³⁰ he had been ‘taught how to do epidemiology to a sufficient extent’.

⁷²⁷ *XYZ & Others v Schering* (n. 724)

⁷²⁸ *XYZ & Others v Schering* (n. 724) MacKay J [123]

⁷²⁹ *Loveday v. Renton and another* (n. 429) p. 125

⁷³⁰ *McTear v Imperial Tobacco Ltd* (n. 244) [6.155]

MacKay J found that as a matter of probability there is no relative risk of venous thromboembolism attaching to the third generation combined oral contraceptive as against the second generation.

Whilst these complicated cases are of jurisprudential interest they do not necessarily reflect a problem with PL law. Dissatisfaction experienced by particular claimants in failed PL litigation in relation to tobacco, or contraceptive pills or vaccines does not mean that there is something wrong with the law. The law may have come to the right decision in those cases. In the PL Claims Survey at Appendix 4 causation was in issue in 95 cases (72%). The intention of the PL Directive was, at its simplest, to provide remedies to consumers where they were injured by a defective product. If a court holds in a given case that a product was not defective or that there was no causal link, is this a problem? If the purpose of the PL Directive was to provide an automatic right to recovery in a Thalidomide situation then it would be naïve to assume that imposition of strict liability would achieve this. It would still be necessary that the drug in question caused the birth defect in question. Causation is at the essence of any liability based system of compensation. If causation is taken out of the equation the logical conclusion is to turn to no-fault compensation, in which case there is no basis upon which to find a particular manufacturer responsible for the claimant's injury.

PART III: NO-FAULT

7.9 No-fault would be a fairer system of distribution

Calabresi's internalisation of risk justification for strict liability was that the costs of injury should be borne by the activity that created the risks.⁷³¹ This connects cost with risky activity. It has been observed⁷³² that this is a strikingly similar approach to the justification for no-fault schemes cited in the Woodhouse Report⁷³³ which led to the pioneering New Zealand no-fault scheme – the socialisation of risk. The point being made by Woodhouse was, put simply, that communities encourage activities that create risk of injury and so the community should carry the risk and bear the cost of injury.

The later refinement of economic theory based on enterprise liability similarly relies on arguments that tend to justify absolute liability.⁷³⁴ If making manufacturers strictly liable encourages them to embark on safety programmes thus reducing risk, then imposing State funded absolute liability would, a fortiori, encourage even better funded, State initiated, safety schemes.

Thus rather than making Kudo strictly liable to Martin, Martin's injuries would be compensated by the State. Whilst Kudo might be encouraged to improve safety, State sponsored initiatives are likely to have more chance of success because the State is not trammelled by commercial considerations such as competition on prices.

Strict liability, like no-fault liability, fails to discriminate between the type of product or types of victim. A Thalidomide victim is treated same as Mr Martin, in the sense that drugs and cars are both products and so trigger the PL Directive. Manufacturers will be strictly liable for defects whether the products generally benefit society,

⁷³¹ Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts', 70 Yale LJ. 499, 533 (1961)

⁷³² Stephen R Perry, 'The Moral Foundations of Tort Law' 77 Iowa L. Rev. 449 (1991-1992) 471 p. 467 note 70

⁷³³ Woodhouse Report, Report of the Royal Commission of Inquiry December 1967 By Authority: R. E. Owen. Government Printer, Wellington. New Zealand—1967 pp. 164/165 [441]
<<http://www.library.auckland.ac.nz/data/woodhouse/>> accessed 18 April 2014

⁷³⁴ George L. Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law', 14 J. Legal Stud. 461, 462-64 (1985)

(pharmaceuticals), or whether ultimately they lead to costs for society with limited communal benefits (for example a drink that turns out to have carcinogenic properties). The justification for this is that compensation should concentrate on the injured person's needs and PL is simply a mechanism for providing, and allocating the cost. In no sense is the Thalidomide victim treated as more deserving. The only difference is in the measure of damages. If this is so, the best option is to spread the risk as widely as possible to ensure there are funds available and that efforts are not wasted trying to identify a suitable defendant: this leads logically to no-fault liability rather than strict liability. The question for consideration therefore is whether a no-fault scheme would distribute rights of those injured by products more fairly than under the PL Directive.

There is some evidence that no-fault is already having to fill the gaps left by the inadequacies of tort. In the field of clinical trials of Investigational Medical Products the Clinical Trials Directive⁷³⁵ Article 3 sets out provisions for the protection of clinical trial subjects and requires that

(f) provision has been made for insurance or indemnity to cover the liability of the investigator and sponsor.

This is given force of law in the UK by the Medicines for Human Use (Clinical Trials) Regulations 2004.⁷³⁶ But what is the basis of liability to a clinical trial subject? As has been explained by Pharmaceutical Industry Guidelines⁷³⁷

⁷³⁵ DIRECTIVE 2001/20/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use

⁷³⁶ The Medicines for Human Use (Clinical Trials) Regulations 2004. PART 2 CONDITIONS AND PRINCIPLES WHICH APPLY TO ALL CLINICAL TRIALS
Conditions based on Article 3 of the Directive

....

16. Provision has been made for insurance or indemnity to cover the liability of the investigator and sponsor which may arise in relation to the clinical trial.'

⁷³⁷ *Insurance and compensation in the event of injury in Phase I clinical trials* Guidance developed by the Association for the British Pharmaceutical Industry, the Bio Industry Association and the Clinical Contract Research Association in consultation with the Department of Health and the National Research Ethics Service,

<<http://www.abpi.org.uk/our-work/library/guidelines/Documents/Phase%20I%20Clinical%20Trials%20Insurance%20Guidance.pdf>>
> accessed 13 October 2014

2.1 Clinical Research takes place on the boundaries of scientific knowledge and, therefore, if a healthy volunteer suffers injury as a result of participation in the study of a new medicine, the volunteer will not find it easy to establish an entitlement to compensation under general principles of the law. A claim for damages based upon negligence or (for producers) based upon strict liability under the Consumer Protection Act 1987 are the likely bases for asserting a right to compensation.

However, injury can arise in research studies without evidence of fault by either Sponsor or Investigator. Moreover, a volunteer will find it hard to establish strict liability against the producer of the medicine because the safety that the volunteer is entitled to expect (the focus in strict liability) will ordinarily have been heavily qualified by the informed consent process and the producer may also be able to rely upon the development risks defence.

Thus it is acknowledged that the PL Directive is unlikely to protect an injured clinical trial subject⁷³⁸ and therefore the compulsory insurance would seem to be redundant. Hence the industry has created its own special no-fault scheme to fill the need for compensation.

7.9.1 No-fault spreads the risk efficiently

No-fault compensation is 'fairer' than strict liability in terms of risk spreading,⁷³⁹ efficiency,⁷⁴⁰ ensuring compensation is paid to the widest cross section of deserving people compared with the privileged few favoured by tort⁷⁴¹ with the flexibility to treat different types of accident or disability differently⁷⁴² without wasting money overcompensating minor injuries⁷⁴³ and failing to compensate those who need it.⁷⁴⁴

Ison lists the criticisms of tort:

... (1) that the fault principle is irrelevant to social needs, (2) that problems of evidence and causation frequently make the result of a claim dependent on fortuitous circumstances, (3) that the assessment of damages is largely

⁷³⁸ The guidelines oversimplify the law and may well be inaccurate in that the test is not what the subject consented to or expected but what 'persons generally are entitled to expect'. Nevertheless an injured subject may face significant difficulty in proving causation.

⁷³⁹ G Calabresi and J Hirschoff, 'Toward a Test for Strict Liability In Torts' (n. 80) p. 1056

⁷⁴⁰ P. S. Atiyah, 'No-Fault Compensation: A Question That Will Not Go Away' 1980 Ins. L.J. 625 p. 639

⁷⁴¹ John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice' (n. 109) p. 10

⁷⁴² P. S. Atiyah, 'No-Fault Compensation: A Question That Will Not Go Away' (n. 740) p. 640

⁷⁴³ Lewis, 'Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room' [2005] J.P.I.L. ISSUE 1/05 p. 6

⁷⁴⁴ Geoffrey Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years on' The University of Toronto Law Journal, Vol. 44, No. 3 (Summer, 1994), 223-273 p. 272

intuitive, (4) that minor injuries tend to be over-compensated and serious injuries under-compensated, (5) that compensation depends less on the conduct of the parties than on the availability of liability insurance or a prosperous defendant, (6) that the processing of claims involves inordinate delay, (7) that the system compensates only a minority of injury victims and rarely compensates at all those who are disabled by disease, and (8) that only about half of the income of the system is actually devoted to compensation, the remainder being absorbed by the costs of administration... The aim, it is submitted, should be a system of personal injury compensation that is quick, comprehensive, adequate in amount, automatic, and with a reasonably low cost of administration. By automatic, it is meant that neither the entitlement to compensation nor the determination of quantum should depend on a purely intuitive judgment in each case. To achieve these goals, a switch is required from liability insurance to some type of accident insurance cover.⁷⁴⁵

To this list there may be added the criticism that deterrence is blunted by the incidence of insurance and that insurance costs stifle social activity.⁷⁴⁶

The requirement to find an identifiable tortfeasor, or the cause of a disability, militate against just distribution of resources according to equality of treatment based on need.⁷⁴⁷

Luck and luck alone separates the negligent who cause injury from the negligent who do not. It is fairer to neutralize the arbitrary effects of luck than to let it wreak havoc with people's lives.⁷⁴⁸

The Woodhouse Report, in New Zealand, recommended no fault compensation as a fair distribution of risk:

compensation for all injuries, irrespective of fault and regardless of cause... level of compensation must be entirely adequate and it must be assessed fairly as between groups and as between individuals within those groups.⁷⁴⁹

The intention was to replace individual responsibility with collective 'national responsibility'⁷⁵⁰ a vision of State paternalism, in which there was no place for

⁷⁴⁵ Terence G. Ison, 'Tort Liability and Social Insurance' *The University of Toronto Law Journal*, Vol. 19, No. 4 (Autumn, 1969), 614-622 pp. 614-615

⁷⁴⁶ Alan Clayton, 'Some Reflections on the Woodhouse and ACC Legacy' (2003) 34 *VUWLR* 449 – 464 p. 461

⁷⁴⁷ Jane Stapleton, *Disease and the Compensation Debate* Clarendon press Oxford 1986 ISBN 0-19-825552-7 p. 115

⁷⁴⁸ Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (n. 112) p. 225

⁷⁴⁹ Woodhouse Report (n. 733) p. 179 [488]

⁷⁵⁰ Woodhouse Report (n. 733) p.180 [489 (5) & 490 (2)]

commercial insurers.⁷⁵¹ Woodhouse felt that insurers could offer no impetus in the areas of accident prevention or rehabilitation,⁷⁵² the State being in a better position to foster these ideals, with the power to regulate.⁷⁵³

Woodhouse concluded that the adversarial system of tort hinders rehabilitation; fault is 'erratic and capricious in operation'; it favours the fortunate few and leaves many uncompensated; and it is 'cumbersome and inefficient' with administrative costs absorbing up to \$40 of every \$60 paid out.⁷⁵⁴

Woodhouse set out five goals for the scheme:

- national responsibility for those who are injured;
- compensation for all injured persons, irrespective of causation, uniformly assessed;
- rehabilitation in addition to financial compensation;
- income related whole period benefits; and
- no delays or administrative wastage.⁷⁵⁵

The scheme is governed by the Accident Compensation Act 2001 which carries (in Rawlsian terms), to a 'higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant ... that is Kantian in nature.'⁷⁵⁶ In other words a contract theory underpinned by a moral imperative (rather than a purely utilitarian system) regulating the 'distribution of social and economic advantages.'⁷⁵⁷

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs).⁷⁵⁸

⁷⁵¹ Woodhouse Report (n. 733) p.180[491 (1)]

⁷⁵² Woodhouse Report (n.733) p. 180 [491 (3)]

⁷⁵³ Woodhouse Report (n. 733) p.140 [353]

⁷⁵⁴ Woodhouse Report (n. 733) p.77 [171]

⁷⁵⁵ Woodhouse Report (n. 733) p. 177 [484]

⁷⁵⁶ Rawls, *A Theory of Justice* Revised Ed, The Belknap Press of Harvard University Press, Cambridge, Massachusetts 1999 ISBN 0-674-00077-3 p. xviii

⁷⁵⁷ John Rawls, *A Theory of Justice* (n. 756) p. 53

⁷⁵⁸ Accident Compensation Act 2001 s 3 see

7.9.2 Success of the NZ Scheme

The New Zealand scheme has served as a working trial and has generally been judged successful. It optimises the 'social goal of equal and comprehensive benefit to New Zealand residents (and visitors) and the goal of economic efficiency, particularly compared to the transaction costs and other fiscal inefficiencies of the tort system...'⁷⁵⁹ Its blame neutrality encourages transparency in situations where potential tortfeasors would tend to be defensive,⁷⁶⁰ 'offering accountability mechanisms focused on ensuring safer care rather than assigning individual blame'.⁷⁶¹ The three principal achievements of the scheme have been identified thus:

- Compensation is extended beyond those injured by fault to those injured by accident and it thereby constitutes less of a lottery than tort;
- The scheme is more economically efficient than tort with costs running at 12% as opposed to 85% of damages in the UK in tort;
- The ACC scheme reflects community responsibility for accidents and redress.⁷⁶²

Commentators typically praise the economic efficiency of the scheme compared with tort: '5 per cent to 10 per cent of the net amount distributed' compared to estimates of the cost of tort ranging from '60 per cent to 140 per cent of the net amount distributed'.⁷⁶³ A review of the scheme by PriceWaterhouseCoopers reportedly found that it 'adds considerable value to New Zealand society and economy, and performs very well in comparison to alternative schemes in operation internationally'.⁷⁶⁴ The New Zealand no-fault compensation scheme is said to be a success on the basis that

<<http://www.legislation.govt.nz/act/public/2001/0049/latest/whole.html#DLM100100>> accessed 15 September 2014

⁷⁵⁹ Alan Clayton, 'Some Reflections on the Woodhouse and ACC Legacy' (n. 746) pp. 456/7

⁷⁶⁰ Bronwyn Croxson, 'Fundamental similarities between tort and administrative systems for managing health care accidents' *J Health Serv Res Policy* 2008 13: 193 p. 194

⁷⁶¹ Marie Bismark and Ron Paterson, 'No-Fault Compensation In New Zealand: Harmonizing Injury Compensation, Provider Accountability, And Patient Safety' *Health Affairs*, 25, no.1 (2006):278-283 at p. 278

⁷⁶² Ken Oliphant, 'Accident Compensation in New Zealand' pp. 16 & 17 [34-36]

< http://www.courdecassation.fr/IMG/File/pdf_2006/05-12-2006_assurance/05-12-06_ken_oliphant-en.pdf > accessed 12 October 2014

⁷⁶³ Terence G. Ison, 'Tort Liability and Social Insurance' (n. 745) p. 621

⁷⁶⁴ Hazel Armstrong *Blood on the Coal The origins and future of New Zealand's Accident Compensation Scheme* Trade Union History Project 2008 ISBN 978-0-473-13461-7 p. 6

- compensation is reasonably generous;⁷⁶⁵
- claims are processed with a minimum of formality;
- it is efficient;
- there is little evidence that barring tort claims has compromised safety standards;
- the requirement for accountability of wrongdoers can be dealt with by alternative means; and
- costs can compare favourably with a tort based system.⁷⁶⁶

Physical and vocational rehabilitation is a cornerstone of Woodhouse.⁷⁶⁷ Recognition of the importance of rehabilitation is not confined to no-fault. In the UK there is a Rehabilitation Code that should be followed as part of pre-action conduct 'to promote the use of rehabilitation and early intervention in the compensation process so that the injured person makes the best and quickest possible medical, social and psychological recovery.'⁷⁶⁸

Nowadays it is common to see the code mentioned in letters before action.⁷⁶⁹ However, in practice, pre-action letters often simply pay lip service to the requirement to invite the potential defendant to cooperate with rehabilitation, in order to avoid criticism by the court for failure to do so.

⁷⁶⁵ This is endorsed by a two year study of injured people conducted by the Department of Preventive and Social Medicine, University of Otago, Dunedin: 'Most of the reported financial costs associated with injury in New Zealand are paid for by ACC rather than by the injured individuals themselves, and this result is consistent across injury types, injury severities and whether or not people were hospitalised. This suggests that ACC is performing well with respect to supporting injured people financially.' Wilson R, Derrett S, Hansen P, et al. 'Costs of injury in New Zealand: Accident Compensation Corporation spending, personal spending and quality-adjusted life years lost' Injury Prevention (2012). Downloaded from < injuryprevention.bmj.com > on April 25, 2014

⁷⁶⁶ Stephen Todd, *Treatment Injury in New Zealand*, 86 Chi.-Kent. L. Rev. (2011). Available at: < <http://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss3/8> > accessed 12 October 2014 p. 1216

⁷⁶⁷ Woodhouse Report (n. 733) p. 26 [18]

⁷⁶⁸ The 2007 Rehabilitation Code:

<http://www.justice.gov.uk/courts/procedure-rules/civil/contents/form_section_images/pre-action_protocol/injury_claims_pdf_-_eps/prot_injury_anx_d.pdf> accessed 12 July 2014

⁷⁶⁹ It was not referred to in the letter of claim in *Martin v Kudo*.

7.9.3 No-fault is not without problems

Notwithstanding the general praise, no-fault is not without problems, the most striking of which is financial. Even though the scheme might be more efficient in delivering compensation, its huge breadth means that the overall cost is substantial. The latest claims summary of the ACC states that there were 1,742,223 new claims in 12 months⁷⁷⁰ as against the total New Zealand population of 4.471 million in 2013⁷⁷¹ (around 7% of the population of the UK).⁷⁷² This figure needs to be looked at in context. '85% of accepted claims are for treatment only, without any payment of compensation or rehabilitation assistance'.⁷⁷³ Oliphant goes on to say that only 150,000 claims each year (fewer than 9%) are classified as entitlement claims i.e. giving rise to entitlement to compensation or rehabilitation.

In the UK, the Pearson Commission in its heterogeneous collection of recommendations⁷⁷⁴ considered, as possible options in relation to PL, a no-fault scheme, alteration to the law of contract, reversal of the burden of proof and strict liability for defective products.⁷⁷⁵ No-fault was discounted, on the grounds of difficulty in financing and the disproportionality of introducing compulsory insurance, in favour of strict liability.⁷⁷⁶ This was in contrast with:

- no-fault schemes recommended for work related injury and disease combined with tort;
- no-fault for motor vehicles injuries; and
- negligence liability for medical injuries and ante-natal injuries.⁷⁷⁷

⁷⁷⁰ ACC Annual report 2013

<http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_communications/documents/reports_results/annual_report_2013.pdf> accessed 12 October 2014

⁷⁷¹ < <http://data.worldbank.org/country/new-zealand> > accessed 12 October 2014

⁷⁷² 64.10 million 2013 < <http://data.worldbank.org/country/united-kingdom> > accessed 12 October 2014

⁷⁷³ Ken Oliphant, 'Accident Compensation in New Zealand' (n. 762) p. 13 [29]

⁷⁷⁴ Described by Stapleton as a '(notorious?) collection of *ad hoc* justifications' (Jane Stapleton *Disease and the Compensation Debate* (n. 747) p. 109).

⁷⁷⁵ Pearson Commission (n. 191) p. 260 *et seq* [1221] *et seq*

⁷⁷⁶ Pearson Commission (n. 191) p. 263 [1236]; p. 288 [1347]; and p. 307 [1464]

⁷⁷⁷ *Quaere* whether motor, medical and ante-natal PL were intended to fall within or without PL. Certainly the inference in the conclusions on the PL section of the Report is that it is intended to apply to future disasters of the dimensions of the Thalidomide tragedy (p. 274 [1278]) but this does not square with the recommendation that 'a child born alive suffering from the effects of ante-natal injury caused by the fault of another person should continue to have a right of action for damages against that person' (p. 307 [1464]).

Long term cost was a concern for the Scottish Government's No Fault Compensation Review Group.⁷⁷⁸ The Chief Medical Officer for England also rejected no-fault on costs grounds when considering establishment of a scheme for clinical negligence.⁷⁷⁹ The UK Government's response to the Health Select Committee Report on patient safety states:

"No fault" compensation was considered as part of the Making Amends (2003) consultation and more recently during the passage of the NHS Redress Act 2006. The Department rejected the introduction of a "no fault" scheme for a number of reasons, including: overall costs are expected to be higher than the current tort system because more claims would fall within the scheme; there is no clear definition of "no fault", and we would argue that none of the schemes we examined are genuinely "no fault"; a high minimum level of injury or hospitalisation that a patient has to meet to qualify may be necessary to make a scheme cost-effective; there is still a need to establish causation, leading to arguments about "fault" being replaced by ones about "cause"; explanations and apologies are not necessarily provided in a system which focuses on financial recompense alone; a "no fault" scheme, in itself, does not improve accountability or ensure learning from adverse events. Ministers in Scotland have already announced that they are going to consider the benefits to patients of introducing a "no fault" compensation scheme in Scotland. We maintain an interest in the review and, rather than duplicating, we will await its outcome in order to inform further thinking.⁷⁸⁰

The Woodhouse recommendations were based on extensive financial planning and sickness and disease were specifically left out of the scheme due to the 'virtual absence of the statistical signposting which alone can demonstrate the feasibility of the further move'⁷⁸¹

However, no-fault does not automatically lead to excessive costs. It depends on the compensation criteria. Woodhouse expressed the sentiment that 'New Zealanders are not so dependent that they must have maximum outside assistance for every minor

⁷⁷⁸ *No Fault Compensation Review Group Report and Recommendations Volume I* Commissioned by the Scottish Government St Andrews House Regent Road Edinburgh EH1 3DG <www.scotland.gov.uk> accessed 12 October 2014

⁷⁷⁹ Sir Liam Donaldson, CMO *Making amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS.*; Department of Health Publications <http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/PublicationsandStatistics/Publications/PublicationsPolicyandGuidance/DH_4010641> accessed 12 October 2014

⁷⁸⁰ *Government response to the Health Select Committee Report 'Patient Safety'* 13 October 2009 ISBN: 978-0-10-1770927

⁷⁸¹ Woodhouse Report (n. 733) p.2 [10] & p. 26 [17]

setback.⁷⁸² Such remarks might appear as naïve and outmoded in today's compensation climate as Sally Oppenheim MP's comment that 'all consumers will be contributing through the prices that they pay for the compensation to a few unfortunate injured victims. I do not think that anyone would quarrel with that concept.'⁷⁸³ The cost issue is not restricted to no-fault. Richard Mullender⁷⁸⁴ asks, in relation to tort, whether society wants to compensate everyone for every injury citing Weir⁷⁸⁵ and Atiyah⁷⁸⁶ as critical of the judicial expansion of the boundaries of negligence for setting society on the 'slippery slope' towards 'blame culture'.

It is reported that the New Zealand scheme was never fully 'funded' in a pure actuarial sense,⁷⁸⁷ meaning that funds collected in a given year were insufficient to meet outgoings without the benefit of accumulated reserves from early years before claims started to build up. There was a costs crisis in 1986 due to 'compensation expenditures rising more rapidly than levy incomes'.⁷⁸⁸ This was met by an increase in the levy on average of 192% (265% for self-employed and over 500% in some cases.)⁷⁸⁹ The scheme was partially privatised in 1999⁷⁹⁰ but then this was reversed the following year.⁷⁹¹

Four factors make the NZ ACC scheme affordable:

- a strong social security system – free hospital care and subsidized pharmaceuticals;
- awards are generally lower and more consistent than under a malpractice equivalent;
- It has been estimated that the ratio of potentially compensable events to successful claims is around thirty to one;

⁷⁸² Woodhouse Report (n. 733) p. 23 [11]

⁷⁸³ Mrs Sally Oppenheim, Minister for Consumer Affairs (n. 117) [1111/2]

⁷⁸⁴ Richard Mullender, 'Negligence law and blame culture: a critical response to a possible problem' (n. 322)

⁷⁸⁵ Weir, J A, 'Governmental Liability' [1989] Public Law 40

⁷⁸⁶ Atiyah, P S, *The Damages Lottery* (n. 13) Chs. 2, 3.

⁷⁸⁷ Geoffrey Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years on' (n. 744) p. 231

⁷⁸⁸ Ken Oliphant, 'Accident Compensation in New Zealand' (n. 762) p. 8

⁷⁸⁹ Ken Oliphant, 'Accident Compensation in New Zealand' Ken Oliphant 'Accident Compensation in New Zealand' (n. 762) p. 8 [18]

⁷⁹⁰ Accident Insurance Act 1998 [NZ]

⁷⁹¹ Injury Prevention Rehabilitation and Compensation Act 2001 [NZ]

- The system has been very cost-effective, with administrative costs absorbing only 10 percent of the ACC's expenditures compared with 50–60 percent among malpractice systems in other countries.⁷⁹²

In addition many believe compensation is inadequate particularly for those unable to claim earnings related compensation and there is a tension between payments from health and welfare systems for disease and payments by ACC for injury – the latter typically being more generous.⁷⁹³

Deweese Duff and Trebilcock, reviewing the arguments for no-fault in relation to PL, find that any such scheme would be ill conceived. Attempting to define a causation trigger is 'impractical, if not impossible' and the scheme would by default amount to absolute liability for every injury 'in which a product was involved'.⁷⁹⁴ That would impliedly be too costly. Whilst they ultimately recommend no-fault schemes for automobile and medical misadventure accidents they prefer tort for PL on the grounds of deterrence capability.⁷⁹⁵

The economics of such a scheme require limitations on cover. Treatment injury presents some difficulty. There is still a requirement in New Zealand to prove causation in this field. Whilst there is no formal need to show any kind of mishap or error, the difficulties of causation and medical injury have not entirely been overcome by an 'outcomes-focused' no-fault compensation scheme.⁷⁹⁶ An example is *Atkinson v ACC*⁷⁹⁷ in which a child who suffered brain damage failed in his claim against the ACC on the basis that hypoxia could not be causatively linked to the brain damage.⁷⁹⁸ The

⁷⁹² Marie Bismark and Ron Paterson, 'No-Fault Compensation In New Zealand: Harmonizing Injury Compensation, Provider Accountability, And Patient Safety' (n. 761) p. 281

⁷⁹³ Marie Bismark and Ron Paterson, 'No-Fault Compensation In New Zealand: Harmonizing Injury Compensation, Provider Accountability, And Patient Safety' (n. 761) p. 282; see also Jane Stapleton 'Compensating Victims of Diseases' Oxford Journal of Legal Studies, Vol. 5, No. 2 (Summer, 1985), 248-268 p. 268 complaining that no fault schemes are biased towards accident sufferers rather than disease sufferers (who are in the majority).

⁷⁹⁴ Dewees, Duff and Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (n. 347) p. 245

⁷⁹⁵ Dewees, Duff and Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (n. 347) pp. 436/437

⁷⁹⁶ Stephen Todd, 'Treatment Injury in New Zealand' (n. 766) p. 1186 *et seq*

⁷⁹⁷ *Atkinson v Accident Rehabilitation Compensation and Insurance Corporation* [2002] 1 NZLR 374 (CA) [19]-[26]

⁷⁹⁸ Stephen Todd, 'Treatment Injury in New Zealand' (n. 766) p. 1190

New Zealand courts have not applied the modifications and manipulations of causation rules introduced in the UK, which Todd lists.⁷⁹⁹ He suggests that the difficulties in establishing causation arguably lead to the conclusion that ‘while negligence is not formally required, all of these points suggest that it necessarily reappears in deciding whether treatment injury can be shown to exist.’⁸⁰⁰

In expanding her arguments in *Disease and the Compensation Debate*,⁸⁰¹ Stapleton notes that there has been a proliferation of special non-tort compensation schemes for specific diseases but that ‘whilst these provide better compensation for certain victims there are still both practical demarcation problems and policy objections to these ad hoc schemes.’⁸⁰² Criticisms include medical causation and remoteness, lump sum benefits, loss of individualisation, lack of coverage of non-pecuniary loss, lack of public scrutiny of adequacy of benefits, failure to cater for particular needs or susceptibilities and ‘a growing tendency to treat compensation issues separately and preferentially according to the medical cause of disability, an apparent illogicality not present in the tort system.’⁸⁰³ Stapleton concedes that some schemes work well – such as the Thalidomide Trust. However, this is the *exemplar* case in which a special scheme should be merited whatever the underlying general scheme for compensation of those suffering accidents or injuries. This is merely articulating the truism that Thalidomide is a special case.

Woodhouse anticipated the need to impose some kind of franchise, excess or threshold, observing that ‘those absent from work for less than a fortnight are about 30 times as numerous as those absent for three months or longer’.⁸⁰⁴ The goal is “real” rather than “full” compensation, including:

- Weekly compensation 80% pre-accident earnings capped at 2.5 x average weekly income for paid employee from second week of absence (also paid to those losing financial support)

⁷⁹⁹ Stephen Todd, ‘Treatment Injury in New Zealand’ (n. 766) p. 1190

⁸⁰⁰ Stephen Todd, ‘Treatment Injury in New Zealand’ (n. 766) p. 1199

⁸⁰¹ Jane Stapleton *Disease and the Compensation Debate* (n. 747)

⁸⁰² Jane Stapleton *Disease and the Compensation Debate* (n. 747) p. 88

⁸⁰³ Jane Stapleton *Disease and the Compensation Debate* (n. 747) p. 108

⁸⁰⁴ Woodhouse Report (n. 733) p. 163 [435]

- A lump sum for economic loss NZ\$2,500 to NZ\$100,000 if permanent impairment over 10%
- Medical and rehabilitation expenses such as care in home or adjustments to vehicle/home and mobility aids.⁸⁰⁵

Notwithstanding these issues, the overall picture above is that no-fault is successful. The question is whether it could be introduced in the UK as an efficient replacement for tort.

7.9.4 No fault in UK

Atiyah writing in 1980 found tort archaic and predicted its demise within 50 years. He considered no-fault schemes to be the way forward. But no-fault schemes have already been in contemplation for a considerable time in the UK. William Beveridge, architect of the welfare state, wrote in 1942

If a workman loses his leg in an accident, his needs are the same whether the accident occurred in a factory or in the street; if he is killed the needs of the widow and other dependents are the same, however the death occurred. Acceptance of this argument and adoption of a flat rate of compensation for disability, however caused, would avoid the anomaly of treating equal needs differently and the administrative and legal difficulties of defining just what injuries were to be treated as arising out of and in the course of employment A complete solution is to be found only in a completely unified scheme for disability without demarcation by the cause of disability.⁸⁰⁶

In the UK there have been numerous legislative proposals since 1932 which are summarised by Bartrip.⁸⁰⁷ None of these is comprehensive. The principal area for proposers of such schemes is road traffic, presumably because these accidents cause the greatest proportion of injuries. However, Bartrip explains that opposition has focused on the question of why motorists should be singled out for preferential treatment. Of course they already are as they are subject to compulsory third party

⁸⁰⁵ Ken Oliphant 'Accident Compensation in New Zealand' (n. 762) p. 7 & 8

⁸⁰⁶ Sir William Beveridge *Social Insurance and Allied Services* 1942 Cmnd 6404

< <http://www.sochealth.co.uk/resources/public-health-and-wellbeing/beveridge-report/beveridge-workmens-compensation-change-4/>> paragraph 80 accessed 29 June 2014

⁸⁰⁷ Peter Bartrip 'No-fault compensation on the roads in twentieth century Britain' C.L.J. 2010, 69(2), 263-286

insurance. It might be argued that the special nature of road traffic accidents is that most of the population use motor vehicles or roads or benefit from them in one-way or another. Taxation by way of a targeted levy can practically be charged through fuel prices. However, as Bartrip mentions, a case can be made out for preferential treatment of other groups such as those in the armed forces. By extension a case for special treatment might be made for most people in public service: firemen, police, health workers and teachers.

Moreover, there are already special no-fault schemes⁸⁰⁸ in place covering:

- criminal injuries;⁸⁰⁹
- severe disablement resulting from vaccination against one of a list of diseases;⁸¹⁰
- those injured or made ill as a result of service in the armed force;⁸¹¹ and
- individuals suffering from asbestos related disease.⁸¹²

These schemes reflect society taking responsibility for compensation in circumstances where blame is simply irrelevant. The schemes benefit society as a whole and are best paid for by taxes. This reasoning is, however, reminiscent of the thought processes discussed earlier in this Chapter, which led to strict liability.

A relatively recent attempt at a scheme is the NHS Redress Act 2006, which was enacted to enable regulations to be made for a no fault scheme with compensation mirroring tort damages (limited to £20,000) in addition to the giving of an explanation or the making of an apology.⁸¹³ However, this was merely enabling legislation, which has apparently been abandoned without any regulations ever having been made.

⁸⁰⁸ For a helpful summary see *No Fault Compensation Review Group Report and Recommendations* (n. 778) p. 23

⁸⁰⁹ Criminal Injuries Compensation Act 2008

⁸¹⁰ Vaccine Damage Payments Act 1979 as amended

⁸¹¹ Armed Forces Compensation Scheme, The Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (SI 2011/517) see < <http://www.infolaw.co.uk/mod/afcsandspo.htm> > accessed 1 September 2014

⁸¹² Diffuse Mesothelioma Payments Scheme Regulations 2014 and Pneumoconiosis etc. (Workers' Compensation) Act 1979

⁸¹³ NHS Redress Act 2006 s 3 (2)(a), (b), and (c).

The No Fault Compensation Review Group Report⁸¹⁴ identified the following advantages of no-fault schemes:

- A community response to injury;
- Greater access to justice than tort affords;
- A less defensive attitude to accidents in the medical profession;
- Rehabilitation;
- Easing of financial pressure on health professionals due to insurance premiums;
- Greater efficiency in compensation administration.

Against these the Group identified:

- cost;
- lesser compensatory sums;
- potential promotion of compensation culture; and
- causation issues.

The problem with previous proposals in the UK is that they have been piecemeal. As explained above, Pearson's recommendations were multi-stranded and lacked uniformity or coherence. The real challenge now would be to make a system universal so that it catered for any injuries, worked in tandem with the National Health Service and benefits in respect of illness, paid for itself, and was capable of being administered. If these obstacles could be overcome to achieve a fairer embodiment of distributive justice than under tort litigation, the next problem would be EU legislation such as the PL Directive. The detail of such a scheme would have to provide a remedy that is no narrower than that provided by the PL Directive. No-fault might otherwise have to be adopted at EU level in place of existing legislation.

No-fault satisfies tests of fairness and distributive justice in a way that Tort does not. However, the real question is whether it could be achieved practically. That is largely a matter of economics. No economic study has been published on a proposed comprehensive system. The study would have to take into account how such a scheme would dovetail with the NHS and it would evidently be that case that there

⁸¹⁴ No Fault Compensation Review Group Report and Recommendations (n. 778) pp. 25-27

would have to be thresholds and limits applied procedurally to make the scheme viable.

Conclusions

It is unsurprising that the PL Directive might be unsatisfactory from the points of view of claimants and defendants alike. The underlying hypotheses upon which the PL Directive was based were flawed in several respects. The promoters of the PL Directive were confused about the problem society faced and the reasons for introducing strict liability as a solution to that problem. The problem was a unique set of circumstances under which third parties, foetuses *in utero*, were seriously injured by a complex pharmaceutical product, Thalidomide. The special circumstances of these genuine victims of a tragedy confounded the legal remedies available at the time and led to the adoption of a completely new ill-fitting set of legal rights that neither aided the victims of Thalidomide nor would they aid the victims of a future tragedy of a similar nature.

This chapter has explored the underlying misperceptions that led to this illogical choice: wrong assumptions about the difficulties of proof of fault and how strict liability would resolve this; categorising society's need as a problem relating to products without understanding how products differed from each other from a legal perspective and how the justifications for strict liability in respect of products applied equally to many other forms of liability; blindly following a trend towards strict liability without understanding the theory as to how strict liability is supposed to work; failing to appreciate how compromising the grand theory of strict liability meant that it would not work in the very cases that had created the clamour for a strict liability remedy; copying strict liability from the US whilst ignorant of the fact that the US had moved on from this failed experiment having experienced disastrous economic consequences. As a result every claimant is treated as a victim; claimants see themselves as victims; consumer expectations of products have lost touch with reality. As such the imposition of a strict liability regime for products was destined to fail to serve society's needs.

The arguments which led to strict liability point more logically to no-fault. No-fault is fairer than strict liability but the cost has to be controlled. It is time to review the possibility of an all embracing no-fault scheme.

CHAPTER EIGHT

DISTRIBUTIVE JUSTICE - THE FLAWED PROCEDURAL FRAMEWORK

Most economic fallacies derive from the tendency to assume that there is a fixed pie, that one party can gain only at the expense of another.

Milton Friedman 1980⁸¹⁵

INTRODUCTION

This chapter examines the distributive effect of the most significant Jackson Reforms on PL claims. Inevitably much of the commentary applies to injury claims generally. The particular relevance to the PL debate is that in the pursuit of harmonisation it is pointless agreeing a common basis for liability when the local procedure by which claims are brought has the effect of introducing a system of virtual absolute liability for small claims.

These reforms⁸¹⁶ are an attempt at redistributing rights, as between notional claimants and defendants. The Cumulative Jackson Impact Assessment⁸¹⁷ confirms that the reforms are likely to 'shift the balance considerably in favour of claimants' and explains that 'this distributional impact may constitute a cost to society, depending upon society's preferences.' It is argued here that the procedure introduced to give effect to the reforms is ideologically flawed and gives rise to potential unfairness to some defendants and particular unfairness to product manufacturers. Moreover the concentration on redistributive procedure is at the expense of ignoring whether the underlying litigation is beneficial.

It is argued that the Jackson Reforms were precipitated by the failure of the Woolf Reforms, the key goal being to make litigation more proportionate. However, this ignored the quasi-substantive effect that rigid procedures may have in forcing results that have no correlation with the particular merits. This chapter concentrates on Qualified One-Way Costs Shifting (QOCS) and considers how the role of insurance (essential to QOCS) fails to fit Jackson's superficial model. It is also shown that the

⁸¹⁵ Milton Friedman, *Free to Choose* Thomson Learning ISBN –10: 0156334607

⁸¹⁶ Which term includes reforms made in his name although not necessarily precisely as recommended by him (see p. 250 below).

⁸¹⁷ Impact Assessment *Cumulative Jackson Proposals* IA No: MoJ 40 29/06/2012 [2.13]

rules introduced to implement the Jackson reforms ignored the qualification that Jackson intended to ameliorate the potential unfair effects of QOCS.

8.1 The Woolf reforms failed to achieve access to justice and urgently needed overhauling

It is widely acknowledged that the Woolf Reforms that led to the Civil Procedure Rules 1998 misfired.⁸¹⁸ What was intended as a vehicle for 'access to justice' became a litigation bandwagon because of the procedural weighting in favour of claimants and the disproportionate costs recoverable by claimants' lawyers on winning. Case 109 in the PL Claims Survey at Appendix 4 is typical of this generation of claims. Here the claimant alleged a steering defect causing a minor injury. Liability was admitted early on. The claim settled for £7,262. The claimant's solicitor then served a bill of costs claiming £31,245.26. Whilst there was undoubtedly greater access to justice for claimants and the litigation process became more streamlined, the cost of litigation lacked proportionality.⁸¹⁹ Such disproportionate costs rules had a 'chilling effect' on defendants' access to justice.⁸²⁰ It has been argued that such a dysfunctional system leads to increased costs, typically paid for by insurers and then passed on to consumers. To remedy the situation costs must be predictable, proportionate to the amount at stake and recoverable.⁸²¹

8.1.1 The new goal of proportionality introduced

The stated goal of the Jackson reforms was to redistribute the cost of litigation to achieve access to justice at proportionate cost.

The terms of reference require me to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. They also require me to review case management procedures; to have regard to research

⁸¹⁸ Winky So, 'A brief history of the law of costs - lessons for the Jackson reforms and Beyond' C.J.Q. 2013, 32(3), 333-348 p. 7

⁸¹⁹ Lord Neuberger of Abbotsbury, Master of The Rolls Proportionate Costs Fifteenth Lecture in the Implementation Programme the Law Society 29 May 2012

⁸²⁰ Adrian Zuckerman, 'The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system' C.J.Q. 2010, 29(3), 263-283 p. 264

⁸²¹ Adrian Zuckerman, 'The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system' (n. 820) p. 264

into costs and funding; to consult widely; to compare our costs regime with those of other jurisdictions ...⁸²²

'Proportionality' is the litmus test of success of the reforms according to the Impact Assessment.⁸²³ There is little doubt that there will be a significant benefit to some insurers in respect of attritional claims because of the saving in costs over a wide book of claims. However, this says nothing about whether the underlying litigation is beneficial to society. Cost is merely one factor. It may be that if Martin had won his case, the overall cost to Kudo under the old costs regime would have been around £30,000 and under the new regime perhaps £15,000. This does not provide a robust normative basis for allowing such claims to be made.

8.1.2 Procedural Reforms have quasi-substantive effects

Howells and Mildred were critical of the US for making substantive changes to the law of PL when they felt the problems could be addressed procedurally.⁸²⁴ It is respectfully submitted that the US approach (irrespective of the rights or wrongs of the particular changes) was correct in that the starting point in the distribution of rights is the substantive law. Substantive law is the means by which society determines the distribution of rights. Procedural law should then enable the exercise of those rights. That includes imposing procedural limits on when those rights may be exercised and when they may be forfeited, such as limitation periods and time limits.

However, one cannot ignore the consequences of procedural distributive changes. 'In devising and choosing between social arrangements we should have regard for the total effect.'⁸²⁵ This chapter shows that procedural changes may have quasi-substantive effects.

⁸²² The Jackson Report (n. 6) p. xvi

⁸²³ Impact Assessment *Cumulative Jackson Proposals* (n. 817); and The Parliamentary Under-Secretary of State, Ministry of Justice (Jonathan Djanogly) *Written Ministerial Statement* Tuesday 17 July 2012 Ministry Of Justice

⁸²⁴ Geraint G. Howells & Mark Mildred 'Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?' (n. 560) p. 1030

⁸²⁵ Ronald Coase 'The Problem of Social Cost' *Journal of Law and Economics*, Vol. 3 (Oct., 1960), 1-44

8.1.3 The key changes

The key provisions of the Jackson reforms for present purposes include:

- The abolition of recovery of CFA success fees (other than by way of deduction from damages awarded).⁸²⁶
- The prohibition on recovery of ATE premiums.⁸²⁷
- The introduction of Qualified One-Way Costs Shifting.⁸²⁸
- Implementation of a modified Pre-action Protocol for Low Value Road Traffic Accident Claims (the RTA Protocol) and a parallel protocol for low value 'Employers' Liability and Public Liability' Claims⁸²⁹ (the EL/PL Protocol) coupled with their associated Ministry of Justice Portal and staged fixed costs.⁸³⁰
- Modification of the Part 36 rules to award an additional scale based sum up to £75,000.⁸³¹
- Introduction of Damages Based Agreements.⁸³²
- The requirement for Cost budgeting.⁸³³
- A 10% increase in the level of general damages.⁸³⁴

The most significant of these changes was the introduction of Qualified One-Way Cost Shifting, in that it is manifestly intended to redistribute rights. CPR 44.14 now provides:

Effect of qualified one-way costs shifting
44.14

(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.

⁸²⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 44 (4)

⁸²⁷ Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 46 (1)

⁸²⁸ CPR 44 (13) – (16)

⁸²⁹ Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013:

<https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013> accessed 28 September 2014

and

Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims:

<https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims> accessed 28 September 2014

⁸³⁰ CPR 45 (16) *et seq*

⁸³¹ CPR 36.14 (3) (d)

⁸³² Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 45

⁸³³ CPR 3.13

⁸³⁴ *Simmons v Castle* (n. 588)

However the basis for this redistribution is suspect.

8.2 Underlying foundations of Qualified One-way Costs Shifting

Jackson made two fundamental assumptions that shaped his reforms. First, he asserted that ‘Claimants are successful in the majority of personal injury claims’,⁸³⁵ with the consequence that ‘Defendants seldom recover costs, so they derive little benefit from two way costs shifting.’ Second, he claimed that ‘the defendant is almost invariably either insured or self insured’. These assumptions are broad generalisations requiring closer attention.

8.2.1 Claimants usually succeed

Jackson’s first assumption relies on a circular argument. The reason why claimants are so often successful needs examining. Jackson pointed out in his introduction

2.3 ...it must be acknowledged that one of the benefits of the current CFA regime is that it is geared towards ensuring that claimants receive proper compensation. This, however, comes at a heavy price for defendants, who often have to bear a disproportionate costs burden.⁸³⁶

The Impact Assessment on Conditional Fee Agreements had summarised the problems with CFAs:

Under the existing CFA arrangements, clients with a CFA carry no financial risk ...This has led to costs that are often disproportionate to the value of the claim, and can lead to non-meritorious cases being pursued. CFA funding is more commonly used by claimants. High legal costs therefore impact disproportionately on defendants, and as a result defendants are more likely to settle otherwise weak claims due to the risk of being liable for high costs if they lose.⁸³⁷

The burden on defendants had translated into intense pressure to settle rather than face the ‘chilling’ consequences of losing. It is no surprise then that claimants were usually successful in making a recovery. This does not necessarily mean that all claims *should be* successful. If it was unfair that claimants were overwhelmingly

⁸³⁵ The Jackson Report (n. 6) pp. 184/185

⁸³⁶ The Jackson Report (n. 6) pp. xvi-xvii

⁸³⁷ Impact Assessment IA No: MoJ 43 15/11/2010

successful, then a new regime that favours claimants will perpetuate an injustice. As Zuckerman says:

If the present system that shifts the claimant's litigation risk to defendants is absurd, there can be no merit in its substitution by a different method which also results in shifting the same burden to defendants.⁸³⁸

Furthermore, even if claimants do usually win, exposure to a costs risk would dampen the enthusiasm for pursuing weak cases.

The merits had become irrelevant

Case Study 1, *Martin v Kudo*, is a prime example of the potential for claimants to succeed irrespective of the merits. Before the claim eventually went to trial, Kudo made various nuisance offers, on the basis that whilst they were reasonably confident of winning at trial, and were subsequently proved right, it could not be a foregone conclusion. If Martin had succeeded at trial, Kudo would have faced a bill of over £60,000 comprising damages, Martin's costs and its own costs. Had Martin accepted an offer, this would have been a case in which the claimant succeeded – yet as was proved at trial, the case was without merit. As it was, the case was incapable of settlement because of Martin's exposure to the costs of his own solicitors, unless Kudo was prepared to include these in a settlement. This brings into the spotlight the tension between facilitating the enforcement of claimants' rights and the encouragement of gambling on litigation outcomes. The Impact Assessment recognises that nothing has changed in this regard:

This proposal might also encourage claimants to make more claims, especially lower value claims, which defendants might be inclined to settle given that the defendant would still incur legal costs if they win the case.⁸³⁹

8.2.2 Defendants are almost invariably insured

Jackson also assumed that the defendant is 'almost invariably' insured. Had there remained any doubt that tort and insurance are ineluctably connected, such doubt must by now have evaporated completely. Jackson's thesis gives insurance a

⁸³⁸ Adrian Zuckerman, 'The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system' (n. 820) p. 267

⁸³⁹ Impact Assessment *Cumulative Jackson Proposals* (n. 817) [2.40]

normative role in the distribution of rights, notwithstanding the traditional argument that insurability is an unsound criterion, for the reason that

because most risks are insurable, at least at some price, the criterion would nearly always support liability.⁸⁴⁰

Tort's confused 'symbiotic relationship with insurance'⁸⁴¹

To understand why Jackson's reliance on insurance is unsound, it is necessary to consider the relationship between tort and insurance and the inconsistencies that exist. Stapleton explains the historic view that insurance is irrelevant to the issue of whether liability should be imposed. The 1960s and 1970s brought about a change of focus to the 'realities of insurance' argument, leading to the conclusion that 'it now seems almost axiomatic that in real life tort claims are only worth bringing and are therefore virtually only ever brought against insured defendants.'⁸⁴² Whilst this surely overstates the position, it rightly recognises the reality that tort and insurance are umbilically connected. Insurance is at the very least the mechanism by which tort distributes rights to compensation. With this interrelationship comes the paradox that by spreading risk, insurance denudes tort of its normative force in promoting risk averse behaviour and deterrence, limiting moral hazard and ameliorating adverse selection⁸⁴³ although pooling of risks should not 'threaten the liability criterion so long as the pool contains like risk-takers.'⁸⁴⁴

Insurance is not a normative basis for liability

Stapleton also notes that the urge to expand tort judicially, where the risk could be covered by insurance, may have had the attractions of ensuring compensation and spreading risk but she questioned whether it was right 'to promote that effect as an appropriate goal of the liability rule such that it should independently influence the incidence of that rule'.⁸⁴⁵ Merkin objects to Stapleton's assessment that insurance 'seeks to convert tort from a mechanism for restorative justice to a system of

⁸⁴⁰ Jane Stapleton, 'Tort, Insurance and Ideology' *The Modern Law Review* Vol. 58 No. 6 (Nov 1995) pp. 820-845, 828

⁸⁴¹ Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (n. 133) p308

⁸⁴² Jane Stapleton, 'Tort, Insurance and Ideology: The Modern Law Review' (n. 840) p 824

⁸⁴³ Richard A. Epstein, 'Products Liability as an Insurance Market', 14 *J. LEGAL STUD.* 645, 648- 53 (1985)

⁸⁴⁴ Jane Stapleton, 'Tort, Insurance and Ideology' (n. 840) p. 843

⁸⁴⁵ Jane Stapleton, 'Tort, Insurance and Ideology' (n. 840) p. 828

distributive justice,' in cases where the insurance position is known.⁸⁴⁶ Merkin expands the 'realities of insurance' argument in the twenty-first century with After the Event Insurance shaping which claims are brought, and compulsory insurance following employers' liability and motor liability, suggesting that 'in personal injury claims the true claimant is the victim and the true defendant is the wrongdoer's liability insurer, whereas in property and other claims the true parties are the claimant or the claimant's first party insurer, if any, and (almost certainly) the defendant's liability insurer.'⁸⁴⁷

Merkin identifies thirteen areas of liability backed by compulsory insurance (to which clinical trials can be added) and cases where insurance has overtly been taken into account by the courts in attributing liability. For example, in *Vowles v Evans*, Morland J in holding that a rugby referee owed a duty of care to a player (upheld by the Court of Appeal)⁸⁴⁸ stated

23. In my judgment when rugby is funded not only by gate receipts but also by lucrative television contracts I can see no reason why the Welsh Rugby Union should not insure itself and its referees against claims and the risk of a finding of a breach of duty of care by a referee where 'the threshold of liability is a high one which will not easily be crossed'. Amateur rugby players will be young men mostly with very limited income. Insurance cover for referees would be a cost spread across the whole game...⁸⁴⁹

However, there is still an element of inconsistency: Merkin points out that in *Jones V Kaney*⁸⁵⁰ on experts' duties, the various judges had differing views on the role of insurance ranging from assuming there would be insurance in place for experts' professional indemnity to disregarding insurance entirely.

Merkin sees insurance as inextricably linked with tort in typical cases.⁸⁵¹ Lewis goes further in suggesting that tort is driven by the insurance industry when it should be the vehicle through which tort meets the needs of society in allocating liability.⁸⁵² He suggests that the system is so dependent on insurance that the results are arbitrary

⁸⁴⁶ Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (n. 133) p. 322

⁸⁴⁷ Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (n. 133) p. 303

⁸⁴⁸ *Vowles v Evans* [2003] 1 W.L.R. 1607.

⁸⁴⁹ *Vowles v Evans* (n. 848)

⁸⁵⁰ *Jones v Kaney* [2011] UKSC 13; [2011] 2 All ER 671.

⁸⁵¹ Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (n. 133) p. 323

⁸⁵² Lewis, 'Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room' (n. 743) p. 6.

and bear only a limited relationship with textbook tort. He is to a degree correct in this assessment. Certainly during the golden years of ATE insurance, when premiums were recoverable by successful claimants and losing claimants' premiums were waived by insurers, cases were effectively run by the ATE insurers and the merits were irrelevant. In case 51 in the PL Claims Survey at Appendix 4, the claim became almost impossible to settle because the ATE insurer insisted that in any settlement, it was entitled to its premium of around £400,000. The claimant was prepared to accept £300,000 in damages.

He is only partly correct because the insurance industry is merely a subset of the larger *litigation industry* which also includes lawyers, medico legal service providers, loss adjusters, experts, and the court system. Moreover, Insurers can be viewed as a middleman. Damages are paid by insurers; Insurers' funds come from invested premiums; premiums are paid by manufacturers; and manufacturers' funds come from consumers, in the purchase price. So indirectly, consumers pay.⁸⁵³

Pooling of risks

The risk of loss is distributed by insurance across a risk pool. Keating observes that 'the size of the distributive group and the amount of the benefit or burden to be distributed will ordinarily be determined by independent, contingent factors.'⁸⁵⁴ It is instructive first to look at motor claims to see how the system of distribution works as motor claims are the paradigm risk pool - because motorists are all exposed to the risk of injuring each other and being injured by each other.⁸⁵⁵ Liability is typically fault based (negligence) and insurance to meet such liability is compulsory.

Since the huge majority of personal injury claims are motor claims, this model is representative (numerically) of the 'majority' of injury claims. Motorists contribute to and stand to benefit from the spread of risk across the risk pool. The relationship between a particular injurer and injured is irrelevant.⁸⁵⁶

⁸⁵³ Atiyah, P S, *The Damages Lottery* (n. 13) p. 21

⁸⁵⁴ Stephen R Perry, 'The Moral Foundations of Tort Law' (n. 732) p. 471

⁸⁵⁵ Jane Stapleton, 'Tort, Insurance and Ideology' (n. 840) p. 842

⁸⁵⁶ Stephen R Perry, 'The Moral Foundations of Tort Law' (n. 732) p. 471

PL, however, does not fit the motorists' distributive model, in which risks and benefits are shared equitably. Whilst a driver may at the same time be a creator and a victim of risk, a consumer is not a manufacturer (or vice versa). It has been argued that fairness demands that strict liability should be spread amongst creators of similar risks 'just as much as it favors dispersing the costs of accidents precipitated by wrongdoing among lucky and unlucky wrongdoers'.⁸⁵⁷ Coleman sees strict liability as serving a 'private social insurance function':

in standard strict liability, risk is distributed in two steps. The cost of insuring against risk is imposed on the manufacturer. The manufacturer then passes those costs to consumers, spreading the costs over persons and time.⁸⁵⁸

In practice this does not happen consistently. The pool, amongst which the risk is spread, through premiums paid for in the purchase price, varies from product to product. In respect of some products, the risk is spread widely. In the first case study, *Martin v Kudo*, Kudo buys PL insurance, which it pays for out of the price of its products. It may build only cars. It may on the other hand also build motorcycles, fork lift trucks, power tools or other products unrelated to any of these. Thus the risk is spread first among consumers of the brand rather than the product. Second, one must consider the insurer's position. It may specialise in PL insurance or it may write PL as an adjunct to Employer's Liability and Public Liability. So the risk may be spread to consumers of other products underwritten by the insurers, or other policy holders of the insurer who do not even buy PL insurance. In the second Case Study, *Vaughan v Cranwell*, the harness manufacturer will have purchased specialist aviation PL insurance. This is written in the aviation insurance market. Therefore the risk is internalised in this sector. Passengers buy tickets from airlines; airlines buy aircraft from aviation manufacturers; aviation manufacturers buy specialist aviation insurance. Thus the pool is funded by passengers of airlines.

Pharmaceuticals present yet another variation. Medicines consumed in the UK will include both over the counter drugs and prescribed drugs. Prescription drugs are

⁸⁵⁷ Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (n. 112) p. 226
⁸⁵⁸ J Coleman, *Risks and Wrongs* (n. 329) p. 420

funded by taxpayers through Primary Care Trusts⁸⁵⁹ and so there is a large element of socialisation of risk in this sector.

In other words, some PL risks are internalised whilst others are externalised. There is no single risk pool for PL. It cannot properly be said that there are necessarily homogeneous risk pools.⁸⁶⁰ The consequence of this is that the way PL is paid for by society is arbitrary and the distribution of rights does not work uniformly and consistently. This potentially causes unfairness.⁸⁶¹ Insurance has grown in a seemingly dendritic manner at the same time both meeting and creating needs: sometimes compulsory sometimes not; sometimes first party; sometimes third party; sometimes permitting excesses and other times not.

Insurance works inconsistently across the field of tort

In compulsory insurance fields such as motor and employer's liability, the legal liability will be backed by a compulsory policy of insurance thus guaranteeing payment of the injured party. The claimant must identify the tortfeasor and generally prove fault. In areas where insurance is not compulsory, the injured party must go further. He must find the tortfeasor but he may not be able to establish the insurance position and may have to invest considerable funds in pursuing a claim without the security of knowing that a judgment will be worth having.

In other cases such as PL where strict liability is imposed under the normative banner of consumer protection, there is no compulsory insurance and therefore no guarantee that a successful action will lead to real compensation.

⁸⁵⁹ See generally National Prescribing Centre (NPC) *Supporting rational local decision-making about medicines (and treatments)* < http://www.npc.co.uk/local_decision_making/resources/handbook_complete.pdf > accessed 13 September 2014

⁸⁶⁰ Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (n. 133) p. 306

⁸⁶¹ Michael J. Trebilcock, 'The Role of Insurance Considerations in the Choice of Efficient Civil Liability Rules' *Journal of Law, Economics, & Organization*, Vol. 4, No. 2 (Autumn, 1988), 243-265 p. 262

Insurers are not necessarily in control in PL

Lewis suggests that

‘in nine out of ten cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies ... policyholders cede control over their case to their insurer and thereafter usually play little or no part in the litigation process.’⁸⁶²

The experience of the Practice is that whilst liability policies typically cede the power to Insurers to control the defence and settlement of claims, there is no consistency in how that power is used. Insurers typically run RTA claims. However, PL claims in the motor sector are handled differently. The norm is for the manufacturers to have a significant element of control and involvement in any litigation. It is their product at risk and they have their reputation at stake. The fact that a product may be mass-produced means that a single small claim can have repercussions for many other vehicles. In Case Study One, *Martin v Kudo*, even though it was a small claim, Kudo wanted the action fought and Kudo’s in-house Counsel attended the trial. Similar principles apply to a major air crash or a pharmaceutical disaster. The size and significance of the claim would be an important factor. In none of the claims within the PL Claims Survey at Appendix 4, could it be said that the insurer took control of the defence without the Insured’s input.

Inconsistent treatment where lack of insurance cover

The enforceability of awards is dependent on the defendant’s means or the insurance position. It is submitted that the fairness of tort with insurance as a distributive mechanism is undermined by inconsistent rules on claimants’ rights against insurers. The outcome can be dependent on something as unconnected with the claimant as whether the defendant notifies the claim in time. EL Insurers may not rely on late notice.⁸⁶³ However, the regulations make no provision for Insurers to make any direct payment to the claimant. Thus a claimant would have to obtain a judgment against the

⁸⁶² Lewis, ‘Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room’ (n. 862) p. 6

⁸⁶³ Employers Liability (Compulsory Insurance) Regulations 1998, Reg 2. (1) (a)

defendant, put the defendant into liquidation and then pursue a claim under the Third Party (Rights Against Insurers) Act 1930.⁸⁶⁴ Similarly motor insurers may not rely on late notice.⁸⁶⁵ The claimant can enforce a judgment, obtained against a driver, direct against the driver's Insurer under s 151 (5) Road Traffic Act 1988. The claimant's position is even more secure by virtue of Regulation 3 of The European Communities (Rights against Insurers) Regulations 2002,⁸⁶⁶ permitting the Claimant to proceed direct against the motor insurer. In addition, insurers fund the Motor Insurers Bureau which deals with claims against uninsured and untraced drivers.⁸⁶⁷ Public and PL insurers may rely on breach of condition precedent leaving the claimant unable to secure damages against a bankrupt defendant.⁸⁶⁸

Thus broad assumptions about the role of insurance may be misleading in the field of PL. There is no sensible reason why motorists and employees enjoy secure enforcement but fault based liability, whereas 'victims' of defective products, deemed worthy of special protection by strict liability, do not have the security of direct rights against insurers.

The uninsured defendant

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.⁸⁶⁹

⁸⁶⁴ At the time of writing the Third Party (Rights Against Insurers) Act 2010 has not yet come into force. When it does, a significant change would be that the Claimant would not have to obtain a judgment against the Insured before pursuing the insurer

⁸⁶⁵ Road Traffic Act 1988 s 148 (5)

⁸⁶⁶ Enforcing DIRECTIVE 2009/103/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version) 'Article 18 Direct right of action: Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in Article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability.'

⁸⁶⁷ See MIB website < <http://www.mib.org.uk/Home/en/default.htm> > accessed 12 October 2014

⁸⁶⁸ The Insurance Act 2015 is not in force at the time of writing and the operation of the Financial Ombudsman Service is ignored for present purposes, whilst accepting that it will ameliorate the effects of breaches of condition by insured consumers and micro-enterprises.

⁸⁶⁹ Rawls, *A Theory of Justice* (n. 756)

Jackson LJ's statement that the defendant is 'almost' invariably insured acknowledges by implication that the defendant is not invariably insured. There will be defendants who are not insured. Indeed Kudo bore a deductible within which the claim would have fallen, had its settlement offer been accepted. Jackson LJ was concerned that if claimants were liable for a successful defendant's costs, they would be exposed to the risk of ruinous costs orders. Equally, if uninsured defendants were liable for claimants' costs, they could potentially face ruinous costs orders, (albeit that Kudo would not have fallen into this category).

Jackson LJ did, to a degree, take this into account in his proposed formulation:

Costs ordered against the claimant in any claim for personal injuries or clinical negligence shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate.⁸⁷⁰

This is why the system was termed 'Qualified'.

2.6 The system would be 'qualified' so that a costs order could still be granted against the claimant in cases where the claimant is judged to have acted unreasonably in relation to the claim; is sufficiently wealthy, and/or the defendant is an uninsured individual or otherwise of limited means.⁸⁷¹

Jackson LJ saw one-way cost shifting as 'the only sensible way' to give effect to social policy: the targeting of only those who need costs protection.⁸⁷²

8.2.3 The merits no longer determine the outcome

The one-sidedness of the arrangement was partially justified by referring back to pre-Woolf Legal Aid funding in which plaintiffs rarely recovered any costs: the legal aid shield.⁸⁷³ In fact this worked differently to QOCS. Legal Aid was administered by the Legal Aid Board which was an independent body. Applicants were subject to a means

⁸⁷⁰ The Jackson Report (n. 6) p. 190 [4.8]

⁸⁷¹ Impact Assessment Qualified One-Way Cost Shifting IA no: MoJ 40 15/11/2010 [punctuation as original].

⁸⁷² The Jackson Report (n. 6) p. 5.1 p. 88 [5.1]

⁸⁷³ The Jackson Report (n. 6) p. 184 [1.3]

test and a merits test. This was a genuine merits test, in that a plaintiff had to persuade the Board that he had a good case. Moreover, the Board could recover a contribution to costs from the recipient of Legal Aid, subject to means, and impose a statutory charge on a successful plaintiff's property.⁸⁷⁴ The difference after the Woolf reforms is that the only merits test was with an After The Event (ATE) Insurer. However, if claimants usually win, regardless of the true merits, then the threshold for gaining the support needed from an ATE Insurer will consequently be very low. Indeed, the fact that ATE insurers do not impose excesses or deductibles, or even charge premiums if the case is lost, suggests that they have no need to limit moral hazard. There are no statutory restrictions on denying cover or avoiding policies. Their investment in litigation was secure and profitable.

The motivation for the Woolf reforms had essentially been the spiralling cost to the Legal Aid Budget.⁸⁷⁵ As with the Jackson reforms, subsequently, there was no consideration of why litigation was booming. The issue for discussion was the cost, not whether all the litigation was beneficial to society. This would have involved questioning the substantive law in addition to the procedure. Ultimately, all that was done was to change the procedure to redistribute the cost of litigation. The process has been repeated by Jackson.

The merits of the claim continue to be as irrelevant, since the substitution of QOCS for recoverable ATE insurance, as they were before the Jackson reforms. All that is required is to persuade a lawyer to take the case. As there is no costs risk for a claimant, the pressure should be so great on defendants to settle, that the risk taken on by the claimant's lawyer should be minimal. The claimant's lawyer gambles that the particular defendant is willing and able to spend over the odds to achieve a nuisance settlement rather than risk incurring irrecoverable costs in disputing the claim. The commercial choice for Kudo, had QOCS applied, would have been whether to pay £30,000 to defend the case successfully to trial or something less than £30,000 to

⁸⁷⁴ See Legal Aid Act 1988 s 16

⁸⁷⁵ Michael E. Stamp, 'Are the Woolf Reforms an Antidote for the Cost Disease--The Problem of the Increasing Cost of Litigation and English Attempts at a Solution', *Journal of International Law*, Vol. 22, Iss. 2, Art. 4 p. 351

settle the case regardless of its merits. There seems to be no difference in the practical outcome of a given case to the outcome under the system that Jackson was criticising:

The Jackson Review criticised the recoverability of CFA success fees and ATE premiums because the regime produced unfortunate unintended consequences, namely (a) litigants with CFAs had little interest in controlling the costs which were being incurred on their behalf and (b) opposing litigants faced a massively increased costs liability. The same was true of legal aid cases where claimants who were not liable to make contributions, since all legally aided claimants were effectively insulated from adverse costs orders: the result was referred to as 'legal aid blackmail' by defendants.⁸⁷⁶

By contrast the 'loser pays' system of costs apportionment (favoured by Demolin, Brulard, Barthelemy in their report to the European Commission on the transparency of costs)⁸⁷⁷ was introduced as long ago as the 12th Century to 'put a check on litigation', although by the 16th Century one-way cost shifting operated for most personal injury.⁸⁷⁸ Jackson later appears to have recognised the importance of the claimant having a stake in the risks of litigation:

A regime in which both parties have some responsibility for costs is necessary to encourage reasonable litigation behaviour and to promote control over the costs being incurred on both sides.⁸⁷⁹

Jackson reported the concern of some respondents to his consultation, that one-way cost shifting would encourage bad claims.⁸⁸⁰ In expressing his own view he simply said that there are 'sound policy reasons' to continue the costs protection of claimants – impliedly access to litigation. Without insulation against costs, claimants could not afford to pursue claims. Yet this is inconsistent with his acknowledgement that:

⁸⁷⁶ Christopher Hodges, John Peysner and Angus Nurse Research Report, *Litigation Funding: Status and Issues* January 2012 < <http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf> > accessed 12 October 2014

⁸⁷⁷ Demolin, Brulard, Barthelemy, *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union* Final Report to the European Commission: Contract JLS/2006/C4/007-30-CE-0097604/00-36 pp. 330/331 <[Demolin Transparency of Costs](#)> accessed 21 July 2014

⁸⁷⁸ Winky So, 'A brief history of the law of costs - lessons for the Jackson reforms and Beyond' (n. 818)

⁸⁷⁹ Rupert Jackson: *Sir Rupert Jackson's brief reply to Professor Oliphant's Report* 16th May 2011 < <http://ectil.org/etl/getdoc/774d731d-d399-4f12-9899-fb77f58686bd/responsetooliphant3.aspx> > p. 6 [6.2] accessed 18 July 2014

⁸⁸⁰ The Jackson Report (n. 6) p. 188 [3.5]

A regime under which one party – win or lose – pays nothing in costs, while the other party is exposed to substantially increased costs liability is hopelessly lopsided.⁸⁸¹

But it is not necessarily correct that the claimant needs insulation from costs exposure. Solutions such as ATE insurance in which the claimant pays no premium even if he loses, or QOCS, which renders a costs award against the claimant unenforceable if he loses, cannot be justified by claiming that they allow those with successful claims to risk pursuing them. Those with successful claims will win back their costs. QOCS is protecting those who lose: those who do not have a valid claim. Without any stake in the outcome, a claimant, who is not responsible for the ATE insurance premium⁸⁸² and has no excess or deductible to meet if a claim has to be paid, has what amounts to free bet.

This debases the justice system and mirrors a problem that has plagued the US system:

The American rule makes the civil justice system as a whole unnecessarily costly by encouraging the filing of such lawsuits, which defendants must either settle quickly or defend against at significant cost. Such low-merit legal cases clog the American legal system and raise the cost of goods and services to consumers by forcing businesses that are sued to cover their legal expenses by raising prices.⁸⁸³

Lewis makes the valid point that the niceties of tort law books become irrelevant where smaller claims are concerned.⁸⁸⁴ Defendants substitute rules of thumb for strict rules of tort. It is too expensive to instruct experts to analyse accident circumstances and cases are dealt with by paperwork alone. This is certainly the experience of the Practice with regard to non-PL small claims. The position is different for PL claims

⁸⁸¹ Rupert Jackson: *Sir Rupert Jackson's brief reply to Professor Oliphant's Report* (n. 879) p.6 [6.2]

⁸⁸² Typically premiums were self-insured so that they only became payable if the Claimant won (and were then paid out of the recovery from the defendant). This remains the case, see for example Box Legal's website < http://www.boxlegal.co.uk/paying_the_premium/ > accessed 3 October 2014

'How is the ATE Insurance Premium Paid if a Personal Injury Claim is Unsuccessful?

It is normally part of the After the Event Insurance policy that the ATE Insurance premium does not need to be paid if the case is lost or abandoned, and this is true with all ClaimSafe ATE Insurance policies.'

⁸⁸³ Marie Gryphon, 'Assessing the Effects of a "Loser Pays" Rule on the American Legal System: an Economic Analysis and Proposal for Reform' *Rutgers Journal of Law & Public Policy* Spring 2011 Vol 8:3 567-612 p. 568

⁸⁸⁴ Richard Lewis and Annette Morris, 'Challenging views of tort: Part 1' *J.P.I. Law* 2013, 2, 69-80 p. 76

largely because of reputational concerns. Even small claims are often resisted and independent expert evidence is obtained and, if supportive of a defence, used to resist claims.

8.2.4 Qualified One-Way Costs Shifting was based on a flawed impact assessment

Financial inequality was initially assumed

Not only does the current incarnation of QOCS fail to reflect the recommendations of Jackson but the Impact Assessment for its implementation is wholly misleading. There are gaps in the logic that led to the version of the rule now implemented. The underlying premise is that QOCS applies where the parties are financially unequal:

A package of reforms is being considered that aims to reduce costs overall. Part of that package includes a proposal that in certain types of case where the financial position of the parties is sufficiently unequal defendants should always be liable for their own costs, even if they are successful ...⁸⁸⁵

The Ministry of Justice, however, published a Written Ministerial Statement of its intentions for implementation saying:

- i. QOCS will apply to all claimants whatever their means; there is to be no financial test to determine eligibility;
- ii. Subject to the provisions below, claimants who lose will not have to contribute towards defendants' costs (there is to be no minimum payment by a losing claimant);⁸⁸⁶

The Civil Justice Council responded to the Ministry of Justice consultation by stating:

It seemed to us that if there is to be no consideration of the claimant's means then there should be no consideration either of the defendant's means. It would follow from this that uninsured defendants facing personal injury claims would be precluded from arguing that they should benefit from what would amount to QOCS in reverse (where the claimant would stand to lose the QOCS shield because the defendant was impecunious) as a consequence of their status alone.⁸⁸⁷

⁸⁸⁵ Impact Assessment Qualified One-Way Cost Shifting (n. 871)

⁸⁸⁶ Djanogly, Ministry of Justice, Written Ministerial Statement Tuesday 17 July 2012

<<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/wms-civil-litigation-costs-17072012.pdf>> accessed 3 October 2014

⁸⁸⁷ Civil Justice Council 'Response To Ministry of Justice Commissioning Note entitled "*Implementation Of Part 2 Of The Legal Aid, Sentencing And Punishment Of Offenders Act 2012: Civil Litigation Funding And Costs – Issues For Further Consideration By The Civil Justice Council*" June 2012 p. 8 [16]

This is a logical non sequitur. The fact that there is no consideration of the claimant's financial position means that the claimant can litigate with impunity. The defendant, on the other hand, if uninsured, will face potential ruin whether he wins or loses. This is a curious distribution of rights. It purports to shift the burden from 'claimants' to 'defendants'. However, there is in reality no *class* of defendants within society. It is an artificial compartmentalisation. Defendants only become defendants when a claimant chooses to sue them. Defendants have no choice in the matter: they join this transient group at another person's suit. At this point they become exposed to the risk of significant financial loss. What is really meant by 'defendants', is *liability insurers*. However, this is an equally imprecise grouping for the reasons discussed above.

It is submitted that such an outcome is unjust. It imposes a burden (or even a punishment in the sense of a financial penalty) on a person who has done no wrong and caused no harm, simply on the basis that a notional class of defendants as a whole generally pay less in costs under the reformed rules than they would have done before the reform. This may be of no benefit to an individual defendant, who is not an insurer with a book of claims across which the vicissitudes of litigation are able to counterbalance each other.

As Jackson pointed out

The most recent Social Trends report shows that 73% of all households have savings (made up of securities, shares, currency and deposits) of less than £10,000. Defence costs can easily be many times higher than £10,000 in fully-contested litigation.⁸⁸⁸

The right to a fair trial is potentially infringed

This brings into question whether QOCS potentially infringes Article 6 of the European Convention on Human Rights which provides:

Article 6

Right to a fair trial

1 In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ...⁸⁸⁹

⁸⁸⁸The Jackson Report (n. 6) p. 184 [1.2]

⁸⁸⁹ European Convention of Human Rights as implemented in the UK by Human Rights Act 1998

It is difficult to envisage how an uninsured defendant can possibly have a fair hearing in the knowledge that he will have to pay for his defence without any hope of recovery from the claimant, who can launch court proceedings with impunity. It is anticipated that it may not be long before this issue comes before the courts. In *Coventry v Lawrence*⁸⁹⁰ Lord Neuberger considered the argument that the pre-Jackson costs regime might infringe Article 6 ECHR. Here the claimants succeeded in the Supreme Court in reinstating a judgment of the first instance court that had been overturned in the Court of Appeal, against a motor-sports stadium, in a nuisance claim in respect of noise. The stadium owners argued that the costs order against them infringed Article 6 ECHR. Lord Neuberger noted the judgment of the European Court in *Mirror Group v UK*⁸⁹¹ in which it was held that the requirement for Mirror Group to pay success fees was disproportionate against a wealthy claimant, Naomi Campbell, who succeeded in a claim against the Mirror based on a breach of confidence in publishing the fact that she was receiving drug counselling. The European court held that the costs award constituted a breach of article 10, the right to freedom of expression.

The European Court had found in trying to balance the newspaper's right to freedom of expression with Ms Campbell's right to a fair trial, that the CFA scheme with recoverable success fees 'exceeded even the broad margin of appreciation to be accorded to the state in respect of general measures pursuing social and economic interests.'⁸⁹²

In *Coventry v Lawrence*, Lord Neuberger said that the issue of whether the costs regime introduced by the Access to Justice Act 1999, and in particular a claimant's right to recover any success fee and ATE premium from an unsuccessful defendant, infringes the Convention, is one which it is open to the Court to reconsider. However, he felt that the Government should have the right to address the court on the subject because:

a determination by a United Kingdom court that the provisions of the 1999 Act infringed article 6 could have very serious consequences for the Government. Although the Strasbourg court would not be bound by the

⁸⁹⁰ *Coventry and Ors v Lawrence and Another (no2)* [2014] UKSC 46 On appeal from: [2012] EWCA Civ 26

⁸⁹¹ *Mirror Group Newspapers Ltd v United Kingdom* (2011) 53 E.H.R.R. 5

⁸⁹² *Mirror Group Newspapers Ltd v United Kingdom* (n. 891) [217]

determination, it would, I suspect, be likely to agree or accept that conclusion, so that those litigants who had been “victims” of those provisions could well have a claim for compensation against the government for infringement of their article 6 rights.⁸⁹³

It was remarked by Lord Neuberger that ‘the relevant provisions of the 1990 and 1999 Acts⁸⁹⁴ have been repealed and replaced by a far less unsatisfactory system’. That system is QOCS and there appears to be no recognition of the inequality of arms in litigation argument outlined above in this Chapter. The arguments have now been heard by the Supreme Court and judgment is awaited at the time of writing.

More recently in *Wagenaar*⁸⁹⁵ the Court of Appeal rejected an argument that QOCS was Ultra Vires. The court recognised that ‘the QOCS regime is part of a wholesale reform of the funding of personal injury litigation ... If QOCS were to be struck down, there would need to be a complete rethink of the entire Jackson reform programme as it affects personal injury litigation.’⁸⁹⁶

Impossible success criteria

This, however, is not a good reason for failing to strike it down if it is wrong and it is argued here that the reform program is as flawed as the system it has replaced. The Ministry of Justice’s Impact Assessment for the ‘Cumulative Jackson Proposals’⁸⁹⁷ sets as the key success criterion: ‘... to ensure that parties who need to bring or defend a claim are able to do so...’ It has been shown above that the rules as framed cannot achieve this goal because the ‘unqualified’ cost shifting regime now in place will prevent some defendants from being able to defend a claim. Jackson had asked:

16...And is the approach to proportionality to be the same for defendants’ costs as it is for those of claimants? Such issues will have to be worked out, but the working out will involve the Judges exercising that quality which they are pre-eminently expected to have, namely judgement.⁸⁹⁸

⁸⁹³ *Coventry and Ors v Lawrence and Another (no2)* (n. 890)

⁸⁹⁴ Courts and Legal Services Act 1990 and the Access to Justice Act 1999

⁸⁹⁵ *Wagenaar v Weekend Travel Limited and Serradj* [2014] EWCA Civ 1105

⁸⁹⁶ *Wagenaar v Weekend Travel Limited and Serradj* [2014] (n. 895)

⁸⁹⁷ Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817)

⁸⁹⁸ The Jackson Report (n. 6) p. 38 [5.17]

As implemented, this is taken out of the Judges' hands. The rules do not permit a defendant to enforce a costs judgment - except in very limited circumstances, unrelated to any hardship the defendant may suffer.

Inadequate financial analysis

More worrying still is the lack of financial analysis of the proposed reforms. The Cumulative Jackson Proposal Impact Assessment, in considering the costs and benefits of the proposals, admitted:

This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing the policy package ... These might include how the proposals impact differently on particular groups of society, and the value of any distributional change.

... distributional impacts are difficult to quantify ... the majority of the financial implications on different parties cannot be sensibly monetised. This stems from a lack of robust baseline data, which prevents us from being able to aggregate the impacts on each group, as well the fact that we do not have the necessary data and evidence to quantify how the baseline factors would change in the future.⁸⁹⁹

If the cost of the reform cannot be predicted, this is tantamount to admitting that the reforms are worth implementing regardless of cost. There is no dispute that the existing system needed reform but this is not a sound basis for the particular reform selected. The generalisation (based on the false premise that QOCS was to be qualified) that the reforms 'are likely to have positive implications for economic growth'⁹⁰⁰ is beside the point. It is not based on any reliable financial data. Nor is the suggestion, however accurate, that the reforms are 'likely to increase competition between law firms'.⁹⁰¹ As benefits to society, these must rank far below the real distributional goals of enabling proportionate litigation to enforce rights. The Cumulative Impact Assessment admits: 'It is possible that a large number of cases might be settled less fairly than they are now. A range of wider social and economic costs apply when cases are not settled fairly enough'.⁹⁰²

⁸⁹⁹ Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817) [2.1 – 2.3]

⁹⁰⁰ Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817) [2.157]

⁹⁰¹ Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817) [4.1]

⁹⁰² Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817) [2.14]

De facto threshold for litigation

Lord Dyson was concerned that ‘reductions to legal aid will inevitably cause an increase in the number of litigants in person, putting increased pressure on courts at a time when budgets are being reduced.’⁹⁰³ The same principle applies to the funding of civil claims. The Cumulative Impact Assessment acknowledged:

The proposals may lead to some claimants not pursuing cases in future or litigating in person, in particular claimants with weaker cases, claimants with damages which are low compared to the legal costs involved, or claimants seeking a remedy other than damages.⁹⁰⁴

In effect, the imposition of limited cost recovery on low value claims is designed to introduce a threshold for litigation. If defendants cannot recover costs in low value claims, it is commercially more attractive to settle than spend thousands of pounds on a defence. From the claimant’s point of view, if there is so little profit in pursuing small claims, lawyers will not take these cases on. This leaves claimants the choice of abandoning the claim or litigating in person. Claims by litigants in person can be disadvantageous to the smooth and efficient running of the justice system. Because litigants in person are unlikely to be familiar with the law and the rules of procedure, it is likely that they will bring a greater number of bad claims and require more procedural assistance from the courts. It is too early to evaluate whether this is happening. The experience of the Practice is that there is some evidence that this may be the case. There is a sense that the County Courts are experiencing delays and backlogs but there is insufficient experience to present this as hard evidence. It needs to be monitored over the next year or two. An example of this is Case 128 in the PL Claims Survey at Appendix 4. This is a claim in which the vehicle in which the alleged defect existed was first supplied more than 10 years ago. There is therefore a firm defence under s 11A (3) Limitation Act 1980 which has extinguished the Claimant’s right of action under the Consumer Protection Act 1987. The Claimant’s lawyers had dropped out of the case, presumably because they realised that there is no way around the limitation defence (other than trying to base a claim in negligence which would be extremely difficult). However, the claimant decided to continue on her own. The defendant had the choice of settling the claim for perhaps £5,000 or spending £10,000

⁹⁰³ Catherine Baksi, ‘Brace yourself for unprecedented change, says master of rolls’ Law Society Gazette 19 October 2012

⁹⁰⁴ Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817) [2.88]

- £15,000 defending the case to trial. In the event, the defendant obtained summary judgment with costs – ordered not to be enforceable in accordance with QOCS.

8.2.5 Reducing the level of recoverable costs does not necessarily achieve a fair result

It might be argued that if this case is one of many handled by an insurer, the cost will be balanced by the benefits of fixed costs in low value claims and the irrecoverability of CFA success fees and ATE premiums.

There are two reasons to doubt this argument in PL cases. First, it is not agreed that this compromise should be accepted as a fair distribution of rights. The claimant above in case 128 had no claim in law. The substantive and limitation law make this clear. However, the procedural changes are in effect overriding the law to provide the claimant with a windfall ‘remedy’ if the defendant is forced to make a nuisance settlement. It is submitted that procedural changes should not have quasi-substantive effects - absolute liability regardless of causation - by holding the defendant to ransom. Second, there are a number of procedural anomalies applicable to PL claims which mean that producers do not necessarily benefit from the simplified reformed procedure. Based on an analysis of 5,041 EL cases, 3,528 public liability cases and 21,089 RTA cases, the Cumulative Impact Assessment noted that ‘[Public Liability] cases would be most affected once the reforms are implemented whilst RTA claims would be least affected. EL claims are somewhere in the middle.’⁹⁰⁵ There is no mention of PL cases. PL cases may fall into any of these categories depending on the context. However, they do not fall within the definitions of EL, RTA claims or Public Liability for the purposes of the low value protocols introduced as part of the Jackson reforms. There are two such protocols: the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents;⁹⁰⁶ and the Pre-Action Protocol for Low Value Personal Injury (Employers’ Liability and Public Liability) Claims.⁹⁰⁷ Claims under these protocols are commenced in the Ministry of Justice Portal and there are fixed

⁹⁰⁵ Impact Assessment *Cumulative Jackson Proposals* Royal Assent (n. 817) [1.32]

⁹⁰⁶ < <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013#> > accessed 24 April 2015

⁹⁰⁷ < <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims> > accessed 24 April 2015

costs applicable at various stages. Cases that settle within the Portal have lower fixed costs than those which settle outside the Portal.

In addition there is a fixed recoverable costs provision in road traffic accidents occurring on or after 6 October 2003 and before 31 July 2013 settling without issue of proceedings for damages not exceeding £10,000.⁹⁰⁸ This provision predates the Portal and does not apply to claims brought under the protocol. It will become redundant soon as all low value RTA claims will be commenced under the protocol.

In each case there are reasons why the procedures with their lower costs provisions do not apply to PL claims. The fixed costs regime predating the Portal applies to accidents 'resulting in bodily injury to any person or damage to property caused by, or arising out of, the use of a motor vehicle on a road or other public place...' The Practice has found itself arguing about whether an accident arising from a defect while the vehicle was being used on a road *arose* from 'use on a road' (see for example case 70 in the PL Claims Survey at Appendix 4 in which a driver's seat detached while driving on a dual carriageway). Another anomaly is where the accident happens on the owner's driveway rather than on a road or public place (see for example case 111 in the PL Claims Survey at Appendix 4 in which the driver was injured by a defective airbag deploying while the car was stationary in the drive). The same accident would fall within the fixed costs regime on the road but not on the drive. There is no logic to the separation. The explanation for the distinction is that the regime was not designed for PL cases. It was designed for collisions between cars on the road. Of course, the regime is also inapplicable to products that are not vehicles.

Similarly, the Protocol for low value RTAs applies to accidents after 30 April 2010 caused by, or arising out of, the use of a motor vehicle on a road or other public place. Again, it will not apply to products that are not motor vehicles nor will it affect accidents that are not on a road or public place. More importantly, under clause 4.4 of the protocol, it does not apply to

⁹⁰⁸ CPR 45.9

a claim (1) in respect of a breach of duty owed to a road user by a person who is not a road user.⁹⁰⁹

This means that the protocol will not apply to a manufacturer even if a breach of duty is alleged, as the manufacturer will not be another road user. The justification for this is that typical RTAs can be analysed simplistically according to rules of thumb (eg a driver who hits another vehicle from behind is at fault)⁹¹⁰ – whereas PL is based on proving the existence of a causative defect. This may require complex technical evidence to demonstrate whether there was a pre-existing defect or simply a failure of the product as a result of the accident. For example in case number 21 in the PL Claims Survey at Appendix 4 where the claimant's expert was unable to say whether failure of the wheel was a cause or an effect of the collision, there was no provable claim and the claimant eventually discontinued. Under CPR 38.6 the claimant was liable for the defendant manufacturer's costs, which were paid by ATE insurers. Under the current procedure, no order for costs would have been enforceable in accordance with CPR 44.14 – 44.16 as there was no misconduct, dishonesty or abuse of process.

The Employers'/Public Liability Protocol applies to 'claims by an employee against their employer for damages arising from—(a) a bodily injury sustained by the employee in the course of employment'. This will not include a typical consumer claim for a defective product. Next considering whether a PL claim could fall to be treated as Public Liability, the critical defining factor is that there must be a claim arising out of 'a breach of a statutory or common law duty of care'. This means that a PL claim will only fall within the Public Liability protocol if the basis of claim is a breach of a duty of care rather than strict liability under s2 Consumer Protection Act 1987. This will depend on whether there is an allegation of negligence. Taking Case Study 1, Martin v Kudo, for example, the initial letter of claim included:

The reason why we are alleging negligence is that there appears to be a fault with the handbrake and as such the mechanism was unsafe and not fit for purpose.

Thus a similar claim today could fall within the Protocol as a Public Liability Claim although it is unclear whether this was ever intended. However, if the allegation had

⁹⁰⁹ Low Value RTA protocol (n. 906) [4.4]

⁹¹⁰ Lewis, 'Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room' (n. 743) p. 5

simply been under s2 Consumer Protection Act 1987 then the claim would not have been for breach of duty of care and would not fit within the protocol.

The recent procedural reforms, culminating in the Jackson reforms, have introduced a number of bespoke targeted procedures for particular types of claim – with a view to improving the overall efficiency of dealing with them and thus reducing the costs.

Zuckerman has been critical of the change from a trans-substantive procedure (broadly one civil procedure for all types of litigation) to a retrograde ‘Balkanisation of civil procedure’ (in other words a multiplicity of procedures to suit different categories, sizes and forms of litigation).⁹¹¹ The contrary argument is that whilst a multiplicity of procedures can be confusing, claims vary in substantive and procedural complexity and it is unrealistic to apply a single set of rules to all cases. Jackson pointed out that whilst personal injury litigation was most sharply in focus, it only accounts for 5% of all proceedings issued in the County Courts and High Court.⁹¹² However, the Jackson Report does not mention PL at all, even to exclude PL claims from its ambit. PL appears to have been overlooked rather than having been deliberately omitted. PL falls into the general category of claims for personal injuries under CPR 44.13 so that QOCS applies. But PL neither has a special procedure nor fits within the procedures for RTA or EL/Public Liability claims designed to provide defendants with costs benefits as a *quid pro quo* for QOCS.

8.3 Unacceptable role of chance in tort claims

PL fails the fairness test for distributive justice on the grounds that chance plays a ‘normatively unacceptable role’⁹¹³ in the distribution. It is argued that society should protect its citizens from ‘brute luck’ over which they have no control but not ‘option luck’ which reflects their own gambles or bad choices.⁹¹⁴

⁹¹¹ Adrian Zuckerman, ‘The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system’ (n. 820) p. 276

⁹¹² Rupert Jackson: *Sir Rupert Jackson’s brief reply to Professor Oliphant’s Report* (n. 879) p.4 [3.9]

⁹¹³ Ronen Avraham, ‘Accident law for egalitarians’ (n. 118) p. 216

⁹¹⁴ Ronen Avraham, ‘Accident law for egalitarians’ (n. 118) p. 192, borrowing the terms from Ronald Dworkin, ‘What Is Equality. Part 2: Equality of Resources’ 10 PHIL. & PUB. AFF. 283, 293 (1981).

Luck plays a part in the causation of accidents and in the amount of compensation arising from an accident, but more importantly it plays a major role in the procedure for determining claims. If one were to design a complete system of compensation to meet the needs of injured people today, one of the key criteria, it is suggested, would be certainty. Claimants should not be embarking on litigation on the mere chance that they will succeed. If the right to compensation is one that society recognises as beneficial to all ‘victims’ then the requirement for one party to win and the other to lose a private contest seems counterintuitive because it leads to uncertainty.

This uncertainty is exacerbated by the system of Part 36 offers. These are particularly problematic because they require each party’s lawyer to make an assessment of the value of the case. The objective is to discourage claimants from over-claiming and defendants from undervaluing and to encourage parties to settle rather than proceed to trial.⁹¹⁵ Where a defendant makes a part 36 offer which the claimant fails to beat,

⁹¹⁵ Costs consequences following judgment

36.17

(1) Subject to rule 36.21, this rule applies where upon judgment being entered—

- (a) a claimant fails to obtain a judgment more advantageous than a defendant’s Part 36 offer; or
- (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, “more advantageous” means better in money terms by any amount, however small, and “at least as advantageous” shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

- (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and
- (b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

- (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
- (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
- (c) interest on those costs at a rate not exceeding 10% above base rate; and
- (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

- i) the sum awarded to the claimant by the court; or
- (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded

the defendant may set off, against the damages awarded, his costs wasted since the offer could have been accepted – because QOCS only prevents the defendant from recovering costs over and above ‘the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.’⁹¹⁶ Similarly a defendant who fails to beat a claimant’s offer suffers a range of penalties under part 36.17 (3) including penalty interest, part indemnity costs and a *pro rata* financial penalty of up to £75,000. The price for failing to accept a well-pitched Part 36 offer is deliberately punitive and may be disastrous for a litigant.

A claimant may potentially lose all of his damages for being too ‘greedy’. Yet how does he know what is greedy and what is fair? He has to be guided by his lawyer, for whom ‘part 36 throws up all manner of problems’;⁹¹⁷ and who often cannot give a precise figure; and who certainly will not be giving guarantees. Therefore a slight misjudgement, or difference of opinion from the trial judge, could cost a claimant dearly. The claimant may have done nothing other than follow professional advice (no doubt sufficiently caveated to prevent an E & O claim).

The concept of Part 36 offers was a creation of the Woolf Reforms, extending the previous procedure for making a payment into court. Zander observed that the rule of payments into court

depends for its effect on the plaintiff’s fear that failure to accept the offer paid-in will result in his losing much of the damages, in having to pay his opponent’s costs and his own.⁹¹⁸

He noted Lord Denning’s displeasure at the effect of a rule that could override the Judge’s award by depriving the plaintiff of her due damages but accepted that it was in the ‘public good’ not to allow litigants to go to court and run up costs with impunity.⁹¹⁹ Zander considered possible reforms to the rule, one of which would be to abolish it. In

Above £500,000

10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

⁹¹⁶ CPR 44.14

⁹¹⁷ Tony Lawton, ‘The perils and pitfalls of personal injury practice’ J.P.I. Law 2013, 4, 254-260

⁹¹⁸ Michael Zander, ‘Is the English Payment-Into-Court Rule Worth Copying?’ *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law*, 40. Jahrg., H. 3/4, Der Schutz Desschwächeren im Recht (1976), 750-758

⁹¹⁹ *Findlay v Railway Executive* [1950] 2 All ER 969

this respect he suggested that it would have the merit of ‘reducing the Russian roulette aspects of the system’ although more cases would be fought to conclusion. He posed the question: ‘what value is attached to the maximising of the number of settlements on the one hand, against on the other to seeing that defendants are not forced by rules of procedure to settle on unfavourable terms?’ He acknowledged that research would be required into the outcomes of cases to answer this. What is beyond doubt now is that whilst Lord Woolf was mindful of the fine line between incentivising litigants to settle sensibly and placing them under undue pressure,⁹²⁰ Part 36 does force defendants to settle on unfavourable terms and even to settle cases for a ‘nuisance value’ where there is no liability.

Higgins seeks to justify QOCS on fairness and efficiency grounds arguing that it improves access to justice for prospective claimants with arguable claims, by ending the need for ATE insurance in return for caps on damages based agreements and success fees, and bans on referral fees. More importantly he seeks to offer the machinery of Part 36 as a justification for QOCS on the basis that it acts as a brake and therefore ‘promotes proportionate use of the legal process’. This argument fails for the fundamental reason that it is premised on the assumption that reshuffling the cost of litigation is a beneficial objective in itself: a ‘vital public service for the enforcement of rights.’⁹²¹ This is a case of dividing the pie rather than first determining whether it is good to eat.

Higgins acknowledges that defendants who are not ‘repeat players’ or who are rarely sued will be net losers. Perhaps a more accurate assessment would be that QOCS works for volume insurers, eg motor insurers, which is the assumption upon which Jackson based it. The whole system is geared to settling claims, irrespective of the merits, rather than allowing them to proceed to trial. Genn argues that the civil courts are beneficial to society and economic wellbeing in protecting rights. However, she complains that official pressure to divert disputes to private resolution have brought about a decline in the civil justice system and undermined the public function of

⁹²⁰ Woolf Report (n. 4) Chapter 11

⁹²¹ Andrew Higgins ‘A defence of qualified one-way cost shifting’ C.J.Q. 2013, 32(2), 198-212

adjudication.⁹²² Genn cites the PL case of *Donoghue v Stevenson*⁹²³ as an example of the public benefit of courts adjudicating private disputes. It is submitted here that whilst the role of the courts in dispute resolution is not denied, the system has been hijacked by the perceived need for low value personal injury litigation. This has led to one reform of procedure after another without at any stage considering the underlying need for this litigation.

Conclusions

Procedural changes introduced by the Jackson Reforms merely redistribute the cost of litigation throughout society without addressing whether there is a need for access to litigation on the current scale.

The urgent necessity of dealing with low value motor and EL claims spiralling out of control, has led to the application of procedures tailored to such claims, most significantly QOCS, being applied more widely across liability cases. QOCS relies upon an insurance model that only really applies to motor insurance in which pooling of risks operates successfully because of the volume of insured persons and homogeneity of the pool. However, such procedures are particularly detrimental to PL which is treated substantively differently to EL, Public Liability and Motor Claims but which must fall into suit as ‘personal injury litigation’ when it comes to the Jackson Reforms. Where the reforms have introduced procedures that benefit ‘insurers’ on the whole these do not apply to PL claims. Thus PL claims suffer from the increased exposure that arises from improved ‘access to justice’ for lower value claims without the concomitant benefits of lower claimants’ costs in volume injury cases.

The overriding aim of the PL Directive was to harmonise liability for defective products across the Member States. This objective is subverted by a civil procedure that practically removes liability from the equation.

⁹²² Genn, Hazel (2012), ‘What Is Civil Justice For? Reform, ADR, and Access to Justice’ *Yale Journal of Law & the Humanities*: Vol. 24: Iss. 1, Article 18

⁹²³ *Donoghue v Stevenson* (n. 487)

Case Study 3: Compensation

Hudson, Allen, Farmer and Ilford v Tubitsu UK⁹²⁴

Letters of Claim

Four occupants of a Tubitsu vehicle, Hudson, Allen, Ilford and Farmer, represented by one firm of solicitors, claim that they each suffered injuries when the vehicle was involved in an accident. Each letter of claim, in materially identical terms, indicates that 'the engine fell out, whilst driving, causing the vehicle to come to a crashing halt'.

Each claimant suffered whiplash type injuries. There was no claim for loss of earnings.

The claims were addressed to the dealer who supplied the vehicle and the dealer sought indemnity from Tubitsu UK, the importer of the vehicle into the UK.

The claim against the dealer was that it 'failed to maintain the vehicle'. Notwithstanding the vague and inappropriate basis of claim, legal liability would ultimately boil down to whether there was a manufacturing defect.

Technical evidence

The vehicle was subject to a recall campaign which advised that one of the engine mounting bolts might suddenly become loose and fall out. This would allow the transmission to slip out of position so that the alternator pulley fouled the body panel next to it. In extreme cases a drive shaft could pull out and the alternator pulley could break so that the vehicle would lose power.

The vehicle was repaired under warranty and the repairing dealer's notes indicated

'CHECK FOR LOUD ENGINE NOISE FOUND TOP G/BOX MOUNT
BOLT STRIPPED THREADS IN MOUNT AND MAKE ENGINE AND BOX
DROP AND N/S DRIVE SHAFT RUBBING AWAY ON SUBFRAME AND

⁹²⁴ See Appendix 3 for verbatim extracts from the key documents in the case. The only alteration is to the parties' names for anonymity

ALTERNATOR PULLY IS UP AGAINST INNERWING CAUSING BELT TO SHRED ..REQ A NEW GEARBOX MOUNT + BOLT + ALTERNATOR + BELT + DRIVESHAFT ...'

Thus it was reasonably clear that the defect identified in the recall had occurred. However the effect of the defect was disputed by Tubitsu who explained that the vehicle would not stop suddenly or dramatically. There would be a noise from under the bonnet and a loss of power.

The claimants' solicitor relied on a telephone attendance with the recovery company which had collected the car, which stated that the 'engine was on the deck'. There was an issue as to whether the deck meant the ground or whether it meant that the engine was touching the tray under the engine.

Medical Evidence

Hudson, Allen and Ilford were all examined by an orthopaedic surgeon who advised:

1. Hudson stated that the car engine fell down and the car suddenly stopped with a big jerk. Hudson suffered neck shoulder and back pain which had an effect on his social life as he was unable to play cricket for 2 months and had a month off college. Requests for details of his cricket club and college tutor were declined, which raised suspicions.

On examination, Hudson's shoulder and back were completely normal. Neck movements were all normal but painful at extremes. There was no bruising, swelling or deformity. The prognosis was complete resolution within 5-6 months with 3-4 sessions of physiotherapy at £35 to £40 per session.

Hudson mentioned one previous road traffic accident. In fact, his medical records, which his expert had not seen, indicated five road traffic accidents in the past 4 years.

2. Allen told his consultant that the engine mount fell out of the car and the driver suddenly used the brakes.

Allen said that he suffered intermittent neck and back pain for which he self-medicated with pain killers. He claimed that he suffered from travel anxiety, mood changes, and 'social withdrawal and lack of concentration due to the accident for 2 weeks'.

On examination there was no swelling bruising or deformity, with most movements being normal and pain free. There was some pain at extremes of neck rotation and 50% limit of flexion of the back. Resolution was expected within 4-5 months.

The consultant orthopaedic surgeon opined that the symptoms of travel anxiety, mood changes and social withdrawal and lack of concentration for 2 weeks were appropriate.

3. Ilford told his consultant that the engine mount dropped very suddenly and the car stopped with a heavy jerk. He suffered neck, shoulder and back pain and self-medicated with painkillers. Ilford reported to his consultant that the incident affected his ability to play cricket and go to the gym for 6 months in addition to causing 2 months of travel anxiety, social withdrawal due to discomfort and flashbacks.

Neck, shoulder and back movements were normal but painful at extremes with no swelling, bruising or deformity. The consultant opined that the injuries were consistent with the history reported and Ilford sustained hyper-extension of the spine resulting in whiplash which he expected to resolve within 6-8 months. The psychological issues were appropriate as was the effect on his social and leisure activities.

4. Farmer was examined by a trauma surgeon who reported that Farmer told him that the engine fell on the road and the car suddenly stopped. He reports that Farmer told him he suffered pain in his neck and shoulder immediately after the accident for which he needs analgesia. However, there was no swelling, bruising or deformity on examination.

Neck examination was normal except for some limits in flexion; his shoulders and back were normal and pain free. The consultant advised that Farmer suffered a hyper-extension flexion injury to the spine resulting in a whiplash injury without nerve root compression or bony injury.

Farmer stated he has difficulties with leisure activities and maintaining personal hygiene. He said that the accident left him with a loss of confidence for 8 weeks. The trauma consultant went on to say that the symptoms of travel anxiety, disturbances, social withdrawal and lack of concentration were appropriate.

Outcome

Whilst there were a number of inconsistencies in the evidence, the cost of defending the claims would have exceeded the potential sum for which the claims could be settled. However, liability was denied and disclosure was sought of documents which might cast further doubt on the claimants' credibility. No such evidence ever materialised. Ultimately, having threatened to issue proceedings, it seems that the claimants lost interest in the case and the file was closed after the limitation period expired.

CHAPTER NINE - COMPENSATION

Although the tort system is said to have a number of objectives which include deterrence, retribution and appeasement, there is little disagreement that the objective of providing 'compensation' is one of the most significant.

Law Commission 225, 1994⁹²⁵

INTRODUCTION

In Chapter 2 it was noted that compensation may be looked at either in its narrow sense as an independent goal alongside deterrence, retribution, vindication and correction of wrongs; or in its wider sense as the means of achieving these other overriding goals of tort. Both schools of thought assume compensation is desirable. This chapter asks whether PL compensates in the narrow sense. This requires an examination of the domestic law of damages as applied across the whole of personal injury litigation. It is irrelevant here whether liability is strict or fault based. The issues are common to all tort claims not merely PL.

Compensation means in practical terms an award of a sum of money – damages. Lord Woolf in the Court of Appeal in *Heil v Rankin*⁹²⁶ in summarising the 'well established' purpose of compensation referred back to the textbook summary given by Lord Blackburn in *Livingstone v Rawyards Coal* as

that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.⁹²⁷

The primary function of compensatory damages is thus to make good loss: to repair or remediate damage. Where loss is ascertainable in monetary terms, *Special Damages* provide compensation in monetary worth. For example in a motor accident

⁹²⁵ Law Commission No. 225 *Personal Injury Compensation: How much is Enough? A study of the compensation experiences of victims of personal injury*; Item 11 of the Fifth programme of Law Reform: Damages 17 October 1994 HMSO page xviii

<http://www.ucl.ac.uk/laws/judicial-institute/files/Personal_Injury_Compensation_how_much_is_enough.pdf> accessed 9 January 2015

⁹²⁶ *Heil v Rankin and another* [2001] QB 272 at 293

⁹²⁷ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39

in which the Claimant's vehicle is damaged or destroyed, damages enable the Claimant to repair his car or, if destroyed, buy a like for like replacement. For the purpose of this thesis it is accepted that damages in tort fulfil this function.⁹²⁸ However, Atiyah explains

Lawyers usually talk about compensation 'for loss'; but as we will see, not all forms of compensation are concerned with 'loss' in any common sense of that word. To compensate a person is to make good an undesirable aspect of their circumstances or situation in life which falls below some pre-determined benchmark of acceptability.⁹²⁹

Atiyah is alluding to General Damages for Pain and Suffering and Loss of Amenity and suggests they are designed to *make something good*. This Chapter will argue that general damages for pain and suffering and loss of amenity are a critical factor in determining whether PL (and indeed tort liability generally) is desirable because

- (1) In smaller claims, general damages tend to form the larger part of the claim.
- (2) Small (so-called 'attritional') claims constitute the majority of claims and represent 'a substantial proportion of the total sums paid out'.⁹³⁰ The exact amounts will depend of course on the precise definition of 'small'.
- (3) Establishing pain and suffering and loss of amenity, of sufficient seriousness that it would give rise to general damages, acts as a 'gatekeeper'⁹³¹ to all personal injury claims.

Having established the significance of general damages for pain and suffering and loss of amenity, it is therefore of interest to ask why they are awarded and whether they put the claimant back into 'the same position as he would have been in if he had not sustained the wrong.' In short, do these damages fulfil a genuine compensatory function - or are they doing something else? Is this form of compensation socially desirable? It is argued in this chapter that general damages are capable neither of achieving a *restitutio in integrum* nor needed for this purpose in the majority of cases, in particular claims at the lower end of the injury spectrum.

⁹²⁸ More controversially, whether they do so efficiently is dealt with in Chapter 8 above on Distributive Justice.

⁹²⁹ Peter Cane (ed), *Atiyah's Accidents Compensation and the Law* (n. 72) p. 411

⁹³⁰ Peter Cane (ed), *Atiyah's Accidents Compensation and the Law* (n. 72) p. 27

⁹³¹ James M. Fischer, 'The Puzzle of the Actual Injury Requirement for Damages', 42 *Loy. L.A. L. Rev.* 197 (2008) p. 220

9.1 The Importance of General Damages for Pain and Suffering and Loss of Amenity

9.1.1 The make-up of small claims

In 97 out of 132 cases in the PL Claims Survey at Appendix 4 (almost three quarters of all cases surveyed) it was found that non-pecuniary loss claimed (or potentially to be claimed) exceeded pecuniary loss.

Where there is no loss of earnings or serious property damage, the most significant (or only) claim will be for general damages for pain and suffering and loss of amenity. It has been suggested that 'in settlements in general the largest component by far is the payment for pain and suffering'.⁹³² The Law Commission also found that in cases where the claimant makes a complete recovery 'most, if not all, of the award will consist of damages in respect of pain and suffering'.⁹³³

In Australia it has been found that general damages account for 45 per cent of the total cost of public liability personal injury claims between \$20,000 and \$100,000.⁹³⁴ In the USA it has been suggested that the proportion is as much as 55% to 60% of personal injury damages in medical malpractice claims.⁹³⁵ Given that in the latter case these figures are based on jury awards, this is at least some evidence that society (as represented by a jury) places considerable importance in compensating pain and suffering and loss of amenity.

⁹³² Richard Lewis, 'Increasing The Price Of Pain: Damages, The Law Commission And Heil v Rankin' *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001) 100-111 p. 103

⁹³³ Law Commission Consultation Paper 140 *Damages for Personal Injury: Non-Pecuniary Loss* (1995) p. 14 [2.13]

<http://lawcommission.justice.gov.uk/docs/cp140_Damages_Personal_Injury_Non-pecuniary_Loss_Consultation.pdf> accessed 26 December 2014

⁹³⁴ Trowbridge Consulting Limited, *Practical Proposals for Reform Report to the Insurance Issues Working Group of Heads of Treasuries* 30 May 2002 p. 85.

⁹³⁵ Giovanni Comandé, 'Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States' *Temple International & Comparative. Law Journal*. 19.02.2005 241-347 p. 244 footnote 1 (citing Neil Vidmar et al. 'Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards', 48 *DEPAUL L. REV.* 265, 296 (1998))

Case Study 3, Hudson and others v Tubitsu, is typical of UK low value claims. Assuming that the claimants were injured just as they claim, they would each be entitled to general damages for pain and suffering and loss of amenity. Their solicitor has expressly stated that there is no claim for loss of earnings. General damages are in practice assessed by reference to the Judicial College Guidelines⁹³⁶ as supplemented by case law. In the case of Hudson and others the figure would be in the region of £2,500 to £3,500 each. There would be almost no claim for special damages beyond a few pounds for over the counter painkillers. Damages could be increased by the recommendation to have physiotherapy sessions. However, the largest part of each of the claims is plainly the general damages for pain and suffering and loss of amenity because by the very nature of the claims, the injuries are minor, and therefore do not usually lead to significant consequential loss.

9.1.2 Low value claims form a substantial part of the overall cost of claims

The vast majority of the claims listed in the PL Claims Survey (Appendix 4) that could reasonably be quantified were worth less than £5,000.

Table 6 PL Claims Survey (Appendix 4) claim values

Value	Number of cases
≤ £5,000	86
£5,001 - £10,000	19
£10,001 - £50,000	19
> £50,000	7
TOTAL	131

It is unsurprising that minor injuries are suffered more frequently than serious ones. Such minor injuries form the ‘everyday battleground between insurers and claimants’⁹³⁷ according to Lewis who emphasises the ‘disproportionate importance of PSLA [pain and suffering and loss of amenity] in the award of damages’ and considers extraordinary the failure to focus on pain and suffering and loss of amenity

⁹³⁶ *Guidelines for the Assessment of General Damages in Personal Injury Cases* (n. 73)

⁹³⁷ Richard Lewis, ‘Increasing The Price Of Pain: Damages, The Law Commission And Heil v Rankin’ (n. 932)

in the 'post-Thalidomide era', when the future of tort was under close scrutiny. It remains a significant part of the 'burgeoning cost of bodily injury claims'⁹³⁸ which in the 20 years to 2010 (in the field of UK motor claims) were estimated to have increased from 20% to 50%.⁹³⁹ The simple point is that injury claims have increased in cost and general damages constitute a large proportion of the cost of injury claims.

In its review of damages for non-pecuniary loss, the Law Commission⁹⁴⁰ referred to the work of the Legal Aid Board Research Unit (LABRU),⁹⁴¹ which carried out an analysis of 762 legally aided cases (of which 8 were categorised as PL). It divided them into 6 categories from 'minor' (full recovery within a year) to severe (severe permanent disability). 'Nearly two-thirds of claimants suffered only 'minor' injuries and fully recovered within two years. Only around one claimant in twenty suffered 'severe' injury.'⁹⁴²

9.1.3 Actionable injury acts as a gatekeeper

Recognised physical or mental illness

The starting point for a personal injury claim is 'real damage as distinct from purely minimal damage'⁹⁴³ which amounts to medically recognised physical injury, in order 'to exclude imaginary or fraudulent claims'.⁹⁴⁴ Whilst mental injury unaccompanied by physical injury may prove sufficient, the threshold is high. The test is whether the claimant has suffered 'not merely grief, distress or any other normal emotion, but a positive psychiatric illness'.⁹⁴⁵ It is not unusual to experience feelings of anger, disappointment and upset as a result of even a minor accident: see for example case

⁹³⁸ HC 591 *The Cost of Motor Insurance*, Parliamentary copyright Prepared 11th November 2010 <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtran/writev/591/cmi03.htm>> accessed 4 October 2012

⁹³⁹ HC 591 *The Cost of Motor Insurance* (n. 938)

⁹⁴⁰ Law Commission Consultation Paper 140 (n. 933); and Law Commission No. 257 *Damages for Personal Injury: Non-Pecuniary Loss, Item 2 of the Sixth Programme of Law Reform: damages*. <http://lawcommission.justice.gov.uk/docs/lc257_Damages_Personal_Injury_Non-pecuniary_Loss.pdf> accessed 27 December 2014

⁹⁴¹ Pascoe Pleasence, Legal Aid Board Research Unit, *Report of the Case Profiling Study, Personal Injury Litigation in Practice, Research Paper 3*, (1998) ISBN 0 9529882 2 4 pp. 47-51 & pp. 59-62.

⁹⁴² Pascoe Pleasence, *Report of the Case Profiling Study*, (n. 941) p. 49

⁹⁴³ Lord Evershed MR, *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 p. 774

⁹⁴⁴ Giovanni Comandé, 'Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States' (n. 935) pp. 262/263

⁹⁴⁵ *McLoughlin v O'Brian* [1983] 1 AC 410 Lord Bridge p. 431

90 in the PL Claims Survey at Appendix 4, which describes the claimant's children's 'trauma, stress and distress' at witnessing the family car on fire. However, '... what Lord Bridge was concerned to discount in *McLoughlin v O'Brien* was 'normal human emotions', not significantly abnormal manifestations of non-physical sequelae.'⁹⁴⁶ It was not sufficient, for example, in *Nicholls v Rushton*⁹⁴⁷ that the claimant suffered 'severe shock and shaking up' in the absence of physical injury. In the context of PL, a recent Canadian case, *Mustapha v Culligan*,⁹⁴⁸ reminiscent of *Donoghue v Stevenson*,⁹⁴⁹ involved husband and wife claimants who noticed a dead fly in a bottle of water delivered to them. Neither drank the water and the bottle was not opened. The wife was instantly sick but suffered no serious ill effects whereas the husband suffered a major depressive disorder and since the incident had been 'unable to drink water or take showers'. The trial judge found Culligan negligent and that Mrs Mustapha had not suffered a 'recognisable mental illness' whereas Mr Mustapha had. Therefore Mr Mustapha was entitled to damages. The Ontario Court of Appeal overturned the judgment for Mr Mustapha on the basis that there was no breach of duty because the illness was not reasonably foreseeable in a 'person of normal fortitude or sensibility'. Mr Mustapha appealed to the Canadian Supreme Court which dismissed the appeal, opting for 'an objective rather than subjective assessment of the plaintiff, that is, a plaintiff is expected to be a person of ordinary fortitude, before damages for psychiatric injury will be awarded ...'.⁹⁵⁰

This is notably different from the approach in England where Lord Lloyd in *Page v Smith*⁹⁵¹ cited Geoffrey Lane J as holding that there is no difference in principle between an eggshell skull and an 'eggshell personality'.⁹⁵² Mr Mustapha would have succeeded by showing that he suffered a recognisable mental illness (although, in any event, a breach of duty would not have to be proved under the PL Directive, merely a defect).

⁹⁴⁶ Bevan 'Case Comment Hussain v Chief Constable of West Mercia' J.P.I. Law 2009, 2, C79-84

⁹⁴⁷ *Nicholls v Rushton* The Times 19 June 1992 – see Kemp & Kemp [3-005]

⁹⁴⁸ *Mustapha v Culligan of Canada Ltd* (2008) 293 D.L.R. (4th) 29 (Sup Ct (Can))

⁹⁴⁹ *Donoghue v Stevenson* (n. 487)

⁹⁵⁰ M.H. Ogilvie 'The fly in the bottle and psychiatric damage in consumer law' J.B.L. 2010, 2, 85-100 p. 89

⁹⁵¹ *Page v Smith* [1996] A.C. 155 Lord Lloyd p. 189

⁹⁵² *Malcolm v Broadhurst* [1970] 3 All E.R. 508

Where does the injury threshold lie?

The threshold of actionability was defined in the House of Lords by Lord Hoffman, in the 'pleural plaques' litigation, as the requirement to demonstrate damage in the sense of 'being worse off, physically or economically, so that compensation is an appropriate remedy.'⁹⁵³ In this group of cases claimants sought damages in respect of pleural plaques caused by inhaling asbestos fibres to which they were negligently exposed.

Gore explains that the 'route by which fibres reach the pleura has not been fully elucidated, but reach it they do, and there, they are associated with the causation of pleural consequences, one of which are so-called pleural plaques.'⁹⁵⁴ He notes that the House of Lords was unanimous in finding that these pleural plaques did not constitute an injury. As Lord Scott said:

None of the appellants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic and were not the first stage of any asbestos related disease.⁹⁵⁵

Gore argues that the *ratio decidendi* was that there was no injury. However, he says Lord Hope 'holds there to be an injury, but one that is de minimis and does not cross the threshold into actionability.'⁹⁵⁶ Lord Hope takes the position that:

It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue.⁹⁵⁷

Lord Hoffman asks:

How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. *De minimis non curat lex*. But whether an injury is sufficiently serious to found a claim for compensation or too trivial to justify a remedy is a question of degree. Because people

⁹⁵³ *Johnston v NEI International Combustion Ltd* [2008] 1 A.C. 281 Lord Hoffman p. 289

⁹⁵⁴ Allan Gore, 'What is actionable injury? The demise of the pleural plaques litigation' J.P.I. Law 2008, 1, 1-15

⁹⁵⁵ *Johnston v NEI International Combustion Ltd* (n. 953) Lord Scott p. 306

⁹⁵⁶ Allan Gore, 'What is actionable injury? The demise of the pleural plaques litigation' (n. 954) p. 7

⁹⁵⁷ *Johnston v NEI International Combustion Ltd* (n. 953) Lord Hope p. 299

do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is trivial has seldom arisen directly.⁹⁵⁸

This perhaps displays a lack of familiarity with the everyday world of trivial claims, Lewis's battleground - but not the daily fare of the Supreme Court. Gore concludes that the threshold for actionability is not satisfied by invisible physical changes that cause no symptoms which do not lead to other serious consequences. Nor is it sufficient to aggregate harmless changes with the risk of other serious diseases developing or 'anxiety, even if genuine and foreseeable, as to future health and welfare, but falling short of frank psychiatric illness'.⁹⁵⁹

In Case Study 3, *Hudson and others v Tubitsu*, the medical evidence supports actual physical injuries with symptoms, which although minor would be actionable. Once a physical injury has been established however, there may be a psychological element that should be recognised which falls short of an actionable psychiatric illness. This psychological element may enhance the symptomatology of the injury. In other words the cataloguing of subjective symptoms augments the seriousness of the physical injury.

In *Kathleen Mullins v Derek Gray*, the claimant suffered a whiplash injury in a car accident. The judge at first instance found that she suffered a 'psychiatric illness in the form of anxiety and depression' but did not differentiate between the physical pain from which Mrs Mullins claimed she was suffering as a result of the accident and the exacerbation of her psychiatric state. The defendant argued in the Court of Appeal that since her psychiatric expert had stated in terms that she had not suffered from any psychiatric disorder, this element of the claim should not be permitted. Longmore LJ held that the defendant's argument overlooked the fact that the claimant was not making any claim for psychiatric injury.

Her claim was for the pain and suffering which she undoubtedly did suffer from the accident causing the whiplash injury. The fact that that pain and suffering was, as a matter of history, heightened by what has been called

⁹⁵⁸ *Johnston v NEI International Combustion Ltd* (n. 953) Lord Hoffman p. 289

⁹⁵⁹ Allan Gore, 'What is actionable injury? The demise of the pleural plaques litigation' (n. 954) p. 10

her “enduring trait” or “anxious personality disorder” does not make it any the less a claim for pain and suffering caused by the injury.⁹⁶⁰

Having established the significance of pain and suffering and loss of amenity, the key question is whether damages awards for pain and suffering and loss of amenity in PL claims achieve the goal of compensating.

9.2 PL’s compensatory goal

9.2.1 PL directive designed to compensate damage to health

Council of Europe Resolution (75) 7⁹⁶¹ recommended a set of principles for Member State Governments to take into account when legislating on damages for personal injury or death. These principles include the general provision

... the person who has suffered damage has the right to compensation for this damage suffered so that he is restored to a situation as near as possible to that in which he would have been if the act for which compensation is claimed had not occurred.⁹⁶²

The aim is thus to achieve a *restitutio in integrum*, consistent with Lord Blackburn’s dictum in *Livingstone v Rawyards Coal*. Busnelli and Comandé argue

compensation for personal injuries (damage to health) fulfils mainly a compensatory goal.⁹⁶³

The purpose of the PL Directive should therefore be to put the claimant’s health back into the position it was in before the accident. However, it is argued here that this objective is not attained because:

(i) Damages for pain and suffering and loss of amenity can never ‘compensate’ *sensu stricto*: therefore they must be doing something else; and

⁹⁶⁰ *Mullins v Gray* [2004] EWCA Civ 1483

⁹⁶¹ Council of Europe, Committee of Ministers Resolution (75) 7 on Compensation for Physical Injury or Death (Adopted by the Committee of Ministers on 14 March 1975 at the 243rd meeting of the Ministers’ Deputies)

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1390303&SecMode=1&DocId=651122&Usage=2>> accessed 4 January 2015

⁹⁶² Resolution (75) 7 (n. 961)

⁹⁶³D Busnelli and G Comandé, W V Horton Rogers (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective* Springer 2001 ISBN 3-211-83602-0 p. 137

(ii) The perceived need for damages for pain and suffering and loss of amenity in all injury cases is overstated.

9.3 Damages for pain and suffering and loss of amenity can never ‘compensate’ *sensu stricto*: therefore they must be doing something else

Where a claimant has been injured, he is entitled to damages for pain and suffering and loss of amenity. According to Cockburn CJ in *Phillips v London & South Western Railway Co*, heads of non-pecuniary damage include: ‘the bodily injury sustained;’ ‘the pain undergone;’ and ‘the effect on the health of the sufferer.’⁹⁶⁴ It is accepted that the level of compensation is linked to the level of pain suffered in the sense that awards increase in proportion to the seriousness of the injury. Where the claimant is unconscious and suffers no pain ‘he needs no monetary compensation in respect of pain...’.⁹⁶⁵

Whilst ‘pain’ and ‘suffering’ are conceptually conjoined, they are two distinct components:

Traditional definitions describe the term “pain” as a sudden affliction of the nerves related to a *physical harm* of the person who suffered the injury. The term “suffering”, on the other hand, describes an affliction not directly related to a physical harm — it is more an individual emotional response.⁹⁶⁶

Loss of Amenity is discrete from pain and suffering. Sellers LJ distinguishes loss of amenity from loss of happiness or enjoyment:

Physical incapacity may restrict activity in one form or another or alter the conduct of life, the manner or the extent of living. The inquiry may be taken as far as that, to ascertain the limitations and variations which a physical injury has imposed or may impose so as to compensate for that ...⁹⁶⁷

⁹⁶⁴ *H West and Son Ltd v Shephard* [1964] AC, 326 at 345: citing *Phillips v. London & South Western Railway Co*. per Cockburn C.J (1879) 4 Q.B.D. 406 p. 407

⁹⁶⁵ *H West and Son Ltd v Shephard* (n. 964) Lord Morris of Borth-y-Gest p. 349

⁹⁶⁶ Giovanni Comandé, ‘Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States’ (n. 935) p. 260

⁹⁶⁷ *Wise v Kaye* [1962] 1 QB 638 Sellers LJ p. 652

The distinction is highlighted by cases where the claimant is in a coma. A comatose claimant may have minimal pain and suffering, if he is not sentient, but maximum loss of amenity.⁹⁶⁸ Lord Morris explained that loss of consciousness does not:

eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury.⁹⁶⁹

It is said of loss of amenities that ‘the task of this head of damages is to compensate the plaintiff for the physical disability sustained as a result of the accident (or as it is sometimes said, “for the injury itself”), and for the effect of that disability on his enjoyment of life.’⁹⁷⁰ The very nature of the losses or deprivations described suggests that they are not capable of conversion into monetary terms and that a *restitutio in integrum* is not possible whether by money or any other means.

9.3.1 Restitutio in integrum impossible

Whilst compensation for pecuniary loss seeks to achieve a *restitutio in integrum* by replacing for the claimant the ‘pecuniary advantages of which he has been deprived’, restitutionary compensation for non-pecuniary losses is, *ex hypothesi*, impossible.⁹⁷¹ None of the claimants in Case Study 3 could be said to *be put back in their pre-accident position* by damages. If they have ongoing pain, the best that can be done is to provide analgesics or possibly some physiotherapy as recommended by their consultants. These costs would be special damages. Compared with general damages of say £2,500 to £3,500 these costs would be very small. The more minor the injury, the more readily the claimant will return to his pre-accident condition through the natural healing process and the more effective analgesia is likely to be – therefore the less utility damages will have.

It has been suggested that there are three recognised theoretical approaches to awarding general damages.

⁹⁶⁸ *H West and Son Ltd v Shephard* (n. 964)

⁹⁶⁹ *H West and Son Ltd v Shephard* (n. 964) Lord Morris of Borth-y-Gest p. 349 – applied in *Lim Poh Choo Respondent v Camden and Islington Area Health Authority* [1980] A.C. 174

⁹⁷⁰ A Ogus, ‘Damages for Lost Amenities: For a Foot, a Feeling or a Function?’ (1972) 35 MLR 1.

⁹⁷¹ A Ogus, ‘Damages for Lost Amenities: For a Foot, a Feeling or a Function?’ (n. 970) p. 15

- First is the 'conceptual' approach in which the claimant's injury is treated as the loss of an asset;
- Second is the 'personal' approach which rejects the notion of objectively valuing a lost asset and instead assesses in monetary terms the claimant's subjective loss of pleasure and happiness;
- The third 'functional' approach is to pay the claimant the amount necessary to provide reasonable solace for his unhappy condition.⁹⁷²

In none of these cases does money directly compensate the pain suffering or loss of amenity.

Conceptual

English Law adopts the conceptual 'diminution in value' approach,⁹⁷³ whereby a claimant is entitled to damages where a defendant deprives him of something capable of being used.⁹⁷⁴ The loss is considered from a proprietary perspective: as a loss of a personal asset. A limb can be used for profit or pleasure and just as the loss of profit is compensated so, should the loss of pleasure – 'irrespective of whether there is mental suffering or not.'⁹⁷⁵

Mr Farmer in Case Study 3 would argue, that if he can establish that the accident caused him to miss a season playing cricket, then he has clearly lost something of value and so he is entitled to something to compensate him for this real loss. But it also must be accepted that money cannot repair the loss. A claimant's health cannot be substituted by a sum of money. 'Nonetheless, repugnant though such a concept is, this substitution must be made in order to compensate the victim.'⁹⁷⁶ In other words this is not strictly compensation to restore the claimant to his pre-accident condition but payment for loss of a right to the security to which all other members of society are entitled.⁹⁷⁷ A comparison may be made with other fields in which non-pecuniary damages are awarded, such as under the Human Rights Act 1998. Damages may be

⁹⁷² A Ogus, 'Damages for Lost Amenities: For a Foot, a Feeling or a Function?' (n. 970)

⁹⁷³ See Law Commission Consultation Paper 140 (n. 933)

⁹⁷⁴ *The Mediana* [1900] AC 113 per Lord Halsbury p. 116

⁹⁷⁵ *H West and Son Ltd v Shephard* (n. 964) Lord Devlin at 355

⁹⁷⁶ Giovanni Comandé, 'Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States' (n. 935) p. 310

⁹⁷⁷ George P. Fletcher, 'Fairness and Utility in Tort Theory' (n. 67) p. 550

awarded for violations of the European Convention on Human Rights that have resulted in the suffering of intangible losses such as distress, frustration, inconvenience, humiliation, anxiety, and loss of relationship.⁹⁷⁸ In *Anufrijeva v Southwark* Lord Woolf stated:

The code recognises the different role played by damages in human rights litigation and has significant features which distinguish it from the approach to the award of damages in a private law contract or tort action. The award must be necessary to achieve "just satisfaction"; language that is distinct from the approach at common law where a claimant is invariably entitled, so far as money can achieve this, to be restored to the position he would have been in if he had not suffered the injury of which complaint is made...⁹⁷⁹

On the contrary, it is submitted that the reality of the situation is that damages under the conceptual approach represent not compensation but satisfaction.

Personal

From a practical viewpoint, the subjective personal approach is even more problematic and radical.⁹⁸⁰ In *Wise v Kaye*, Sellers LJ commented on the judgment of Diplock LJ in the same case expressing concern about 'setting up happiness or unhappiness as the basis or yardstick of comparison ... for the loss of a limb or any bodily faculty'.⁹⁸¹ His concern was about the difficulties inherent in an 'investigation of the inner feelings and outward manifestations of conduct of and affecting a claimant'.⁹⁸² In practical terms the courts are faced with this dilemma in many small injury claims in that they have to assess the medical evidence of a subjective reaction to an incident. Three out of the four claimants in Case Study 3, *Hudson and others v Tubitsu*, submitted medical evidence reporting their own statements as to their psychological reaction to what was even on their own evidence a most minor incident. Psychological claims were identified in 22 cases out of 132 (16.6%). However, this figure may be misleading because half of all cases were abandoned and it may be that had some of these

⁹⁷⁸ John Hartshorne 'The Human Rights Act 1998 and damages for non-pecuniary loss' E.H.R.L.R. 2004, 6, 660-671

⁹⁷⁹ *Anufrijeva and Another v Southwark London Borough Council* [2003] EWCA Civ 1406 Lord Woolf CJ [55]

⁹⁸⁰ A Ogus, 'Damages for Lost Amenities: For a Foot, a Feeling or a Function?' (n. 970) p. 14

⁹⁸¹ *Wise v Kaye* (n. 967) Sellers LJ p. 649

⁹⁸² *Wise v Kaye* (n. 967) Sellers LJ p. 649

abandoned cases been pursued to the stage of obtaining medical evidence, psychological claims would have been introduced. There is a risk that by investigating whether there is any psychological element to a claim, a claimant's solicitor will introduce the concept to a claimant who otherwise might have been untroubled by such considerations. In *S v M* a recent case dealt with by the Practice, the claimant's orthopaedic expert commented when asked whether the Claimant should be seen by a psychologist: 'In my view, the last thing I would want to do is get him involved with a psychologist or psychiatrist'. The claimant's solicitor would no doubt argue that he has a duty to his client explore all potential elements of injury.

It is not merely that happiness is difficult to measure or even that subjective loss of happiness is difficult to prove, but there is a conceptual difficulty with equating the status quo with happiness. Wealth and health do not assure happiness nor do poverty or disablement necessarily entail unhappiness⁹⁸³ although some would argue that from being a means to happiness, money 'has come to be itself a principal ingredient of the individual's conception of happiness.'⁹⁸⁴

The survival of claims for pain and suffering and loss of amenity after death of the injured party⁹⁸⁵ throws further confusion on the purpose of such damages. On the injured party's death, his beneficiaries will have lost out on pecuniary loss to the estate. However, pain and suffering is personal to the sufferer. In case 109 in the PL Claims Survey at Appendix 4, the claimant commenced a claim arising from minor injuries that he suffered when his steering wheel came loose and he collided with a lamp post. The claim was abandoned and the claimant, who was elderly, subsequently died from natural causes entirely unrelated to the accident. The family of the deceased then received a recall notice in relation to the steering wheel of the subject vehicle and decided, as they were entitled to do, to pursue a claim in the deceased's name for the injuries that he had suffered. The claim was settled. The survival of the claim for general damages does not make sense in terms of loss to the estate. Nor does it make sense in terms of remediation of pain – because the injured party is dead.

⁹⁸³ *Wise v Kaye* (n. 967) Sellers LJ pp. 652/653

⁹⁸⁴ John Stuart Mill, *Utilitarianism*. < <http://www.utilitarianism.com/mill4.htm> > accessed 13 January 2013

⁹⁸⁵ Law Reform (Miscellaneous Provisions) Act 1934 s 1

Substitute solace

The functional approach, favoured in jurisdictions such as Canada, Australia⁹⁸⁶ and Spain,⁹⁸⁷ enables the claimant to purchase a 'substitute sources of satisfaction'.⁹⁸⁸ It has been argued that whilst

no money can actually replace the effects of an injury ... the award of a substantial sum of money in damages can to some extent compensate for injuries which have been suffered; it may enable the recipient to travel on holiday or purchase some other pleasure which he otherwise would not have enjoyed.⁹⁸⁹

Insofar as losses are irreparable, such *ends displacing* compensation is necessarily inadequate.⁹⁹⁰ Thus compensation for non-pecuniary loss is not the same as 'the restoration of the object itself, but rather the provision of something else altogether.'⁹⁹¹

None of these theories achieves a *restitutio in integrum*.

9.3.2 Valuation of damages is arbitrary

Whichever theory is preferred to justify awarding general damages for pain and suffering and loss of amenity, the fundamental problem is how to value damages. ' ... There is no reason, in logic or economics why for a specified period of suffering the award should be £100 rather than £1,000 or indeed any other figure.'⁹⁹² Atiyah argues that 'damages awarded for pain and suffering and loss of amenities ... could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today'.⁹⁹³

⁹⁸⁶ Ipp, Report *Review of the Law of Negligence* Final Report September 2002

ISBN 0 642 74165 4 < http://www.amatas.com.au/assets/ipp_report.pdf > accessed 5 December 2014

⁹⁸⁷ Miguel Martin-Casals, Jordi Ribot, and Josep Solé, W V Horton Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* Springer 2001 ISBN 3-211-83602-0 197 -199

⁹⁸⁸ Law Commission Consultation Paper 140 (n. 933) p.8 [2.3]

⁹⁸⁹ Simon P. Browne, 'Damages for personal injury: non pecuniary loss' 2000 J.P.I.L. 47

⁹⁹⁰ Robert E. Goodin, 'Theories of Compensation' Oxford Journal of Legal Studies, Vol. 9, No. 1 (Spring, 1989), 56-75 p. 73

⁹⁹¹ Robert E. Goodin, 'Theories of Compensation' (n. 990)

⁹⁹² Harvey McGregor, *McGregor on Damages* (n. 132) [35-258]

⁹⁹³ P Atiyah (Peter Cane (ed)), *Atiyah's Accidents Compensation and the Law* (n. 72) p. 162

Moreover such compensation can never be adequate. In other words paying a person £100,000 for the loss of a leg can never be truly adequate in the sense of providing an equivalent to that which is lost. 'It is an artificial sum and, increasingly, it is mechanically assessed.'⁹⁹⁴ Lord Morris pointed to the impossibility of money renewing 'a physical frame that has been battered and shattered.'⁹⁹⁵ However, the principle applies equally to small claims. In case study 3, *Hudson and others v Tubitsu*, whilst undoubtedly there is a sum of money that would have satisfied each of the claimants, it cannot be said that they would have been restored to their pre-accident condition – whether that sum was £5,000 or £500,000. Law Commission No. 225 Report *Personal Injury Compensation: How much is Enough?*⁹⁹⁶ contained a survey on how damages were spent. It is of limited value in that it lists a number of material items and notes how many surveyed claimants spent part of their damages on them. It is unclear how the damages are broken down between generals and specials and what the particular needs were of the individual claimants.

It has been argued that if a claimant is willing to reject an offer, he must subjectively value his loss at a sum in excess of the offer.

If I testify in a negligence suit that the loss of my little finger was a source of unbearable psychological agony, for which \$100,000 would barely compensate me, I am likely to be disbelieved; not so if I refuse a bona fide offer of \$100,000 for my little finger.⁹⁹⁷

However, there may be other explanations for the rejection of an offer. In case study 1, *Martin v Kudo*, Martin refused an offer of £7,500, notwithstanding the eventual agreement of damages (subject to liability) at £2,000. No doubt one important factor was Martin's liability for his own lawyer's costs. Another possible reason could be that a claimant's lawyer has advised that he is entitled to more. In other words this does not prove that an *injury* has a value: it merely means that a *claim* has a value. This goes to the heart of this thesis in the sense that the claim may be a desirable creation of the legal system but

⁹⁹⁴ Richard Lewis 'Increasing The Price Of Pain: Damages, The Law Commission And *Heil v Rankin*' (n. 932) p. 102

⁹⁹⁵ *H West and Son Ltd v Shephard* (n. 964) p. 346

⁹⁹⁶ Law Commission 225 (n. 925) p. 173 [10.9]

⁹⁹⁷ Richard A. Posner 'A Theory of Negligence' *The Journal of Legal Studies*, Vol. 1, No. 1 (Jan., 1972), 29-96 pp. 76/77

Facilitating compensation may be an effect produced by a change in the law such as the [PL] Directive – and an effect we find attractive – but to provide a convincing justification for a rule of civil liability a rationale must be sufficiently detailed to explain its boundaries, and the simple facilitation of compensation argument does not do this.⁹⁹⁸

9.3.3 Objective Valuation is Impossible

Lord Halsbury recognised the difficulty in arithmetical calculation of damages and even suggested

In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given.⁹⁹⁹

However, an objectively identifiable unit of pain, capable of monetary valuation still remains elusive. There is no formula for conversion of pain into money¹⁰⁰⁰ and awards are necessarily arbitrary.¹⁰⁰¹ Even under the functional theory, there remains the problem of the equivalence and proportionality of alternative sources of solace. The court would be faced with the invidious task of answering such bizarre questions as whether a particular holiday is the equivalent of a lost leg. The more serious the injury the more absurd these questions become.

9.4 The reported need for damages for pain and suffering and loss of amenity is overstated

9.4.1 Identifying the need for damages

The Law Commission has already devoted considerable efforts to researching damages. In 1994 as part of the 5th programme of Law Reform it commissioned a survey of accident victims and published 'Personal Injury Compensation: How much

⁹⁹⁸ Jane Stapleton, *Product Liability* (n. 9) p. 92

⁹⁹⁹ *The Mediana* (n. 974) pp. 116/117

¹⁰⁰⁰ *Heil v Rankin and another* (n. 926); see also Mark Geistfeld 'Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries' *California Law Review*, Vol. 83, No. 3 (May, 1995), 773-852 p. 781

¹⁰⁰¹ Nicholas Mullan, 'New Approach to Compensation for Non-pecuniary Loss in Australia' 17 *Melb. U. L. Rev.* 714 1989-1990

is enough?¹⁰⁰² The context of this report must be explained because it is referred to by the later Law Commission reports on non-pecuniary loss. This survey was in relation to personal injury damages as a whole – not merely non-pecuniary loss. The broad objective was to ask accident victims who had received compensation how that their lives had turned out many years later. In order to organise the evidence, the survey divided claims into 4 bands:

Band 1 £ 5,000-£19,999
Band 2 £ 20,000-£49,999
Band 3 £ 50,000-£99,999
Band 4 £100,000 or more

Thus the threshold for the lowest band was £5,000 which included general and special damages. The Law Commission then explained

Since the vast majority of damages awards and settlements are for relatively small sums of money, the greatest number of insurance company cases from which the sample was selected fell in band 1, and the number of settlements decreased for each subsequent band. A simple random selection of cases from insurance company files would have resulted in a sample largely comprising small settlements. Therefore, band 1 was significantly under-sampled, while larger awards (bands 2-4) were over-sampled to ensure sufficient numbers of cases of large settlements for analysis.

This means that the survey was aimed at more serious cases than the day to day minor claims typified by Case Study 1, *Martin v Kudo* or Case Study 3, *Hudson and others v Tubitsu*. A case study referred to by the Law Commission as representing band 1 involved loss of major useful function of the hand in an accident involving unguarded machinery leading to pain, deformity and scarring and 90 weeks off work. Damages in total came to £19,370. Even ignoring inflationary increases on this 1994 figure, 80% of the claims in the PL Claims Survey at Appendix 4 were quantified at less than this amount. The objectives of the survey included identifying the costs and expenses resulting from the injuries; and examining the respondents' use of and satisfaction with their compensation.¹⁰⁰³

Genn, who authored the report, gives examples of the descriptions by accident victims of the 'sometimes shocking evidence of unexpected, abrupt and often irrevocable

¹⁰⁰² Law Commission 225 (n. 925)

¹⁰⁰³ Law Commission 225 (n. 925) p. 7

physical damage'.¹⁰⁰⁴ They frequently remembered every detail of their accident years later: such as a policeman left with permanent injuries after a car he signalled to stop ploughed into him; and a man blinded in a work accident when a 22 foot iron girder fell on his head. In short these are injuries that require monetary compensation. If tort is the mechanism for compensating accidents (as opposed to a no-fault or state funded scheme) then clearly damages provide needed compensation for the lost earnings, the accommodation modifications, medical treatment, care needs and many other expenses directly resulting from these serious injuries.

The report also considered the adequacy of damages for non-financial loss and concluded:

with the exception of those respondents who had made a full recovery from their injuries, there was a general view amongst those who were given in depth interviews that the damages received could not compensate them for their experiences of the accident or the losses they had sustained, both physically and emotionally. Indeed, a number of people said that no amount of money would be adequate compensation in this respect.¹⁰⁰⁵

The ambiguity of the last sentence of the quotation is ironic. However, nearly all respondents felt that damages should contain an element for pain and suffering.¹⁰⁰⁶

The reasons most frequently given were:

the impact of pain on the victim's life: for example, the need to compensate victims who may be in constant pain for the rest of their lives, or who can no longer do their normal activities (work or leisure) because of the pain they suffered ... ;¹⁰⁰⁷

and

accident victims are blameless, they do not deserve what happened to them, so they should be given money for pain and suffering which has been caused by another person¹⁰⁰⁸

Another response was that it softens the blow by making 'victims' feel a little better or making life a little easier after the 'trauma' of their accidents. It must be remembered

¹⁰⁰⁴ Law Commission 225 (n. 925) p. 37 [3.1]

¹⁰⁰⁵ Law Commission 225 (n. 925) p. 208 [11.5]

¹⁰⁰⁶ Law Commission 225 (n. 925) p. 210 [11.6]

¹⁰⁰⁷ Law Commission 225 (n. 925) p. 210 [11.6]

¹⁰⁰⁸ Law Commission 225 (n. 925) p. 210 [11.6]

then that the context of these comments is generally in relation to serious accidents with life changing consequences. The interviewees may be described genuinely as *victims*. They clearly desire damages for their pain and suffering. The first response does not explain how the damages compensate the pain. The second response translates into correcting a wrong or perhaps even punishment of the defendant, rather than restoring the claimant to his pre-accident condition.

Only the third response touches on restoring the claimant. The suggestion is that ‘by making life a little easier’ it might alleviate the pain and suffering. For example a person with pain in his legs might use the damages to pay for a car or taxis to reduce having to walk – and therefore he decreases his pain. However, this example might well be made into claim for special damages in appropriate circumstances.

9.4.2 Obtaining the Views of Society

Against this background, in 1995, The Law Commission launched a Consultation Paper on *Damages for Personal Injury: Non-pecuniary loss*.¹⁰⁰⁹ This asked detailed questions on non-pecuniary damages, including whether such damages should be awarded at all and whether damages were too high or low. In response to the first question, the Law Commission answered that they do not seriously question that they should be available to recognise the ‘very real *personal*, as well as financial consequences for the individual concerned.’¹⁰¹⁰

In reaching this conclusion they took account of the empirical survey discussed above at 9.4.1, Law Commission 225 *Personal Injury Compensation: How much is enough?* They observed that their report had ‘drawn a link between the views of victims on this question and the surprisingly high number of victims ... who were still experiencing pain at the time of interview.’¹⁰¹¹

They also recognised the contrary arguments as:

The moral offensiveness of monetary indemnification for this type of loss;

¹⁰⁰⁹ Law Commission Consultation Paper 140 (n. 933)

¹⁰¹⁰ Law Commission Consultation Paper 140 (n. 933) p. 81 [4.5]

¹⁰¹¹ Law Commission Consultation Paper 140 (n. 933) p. 82 [4.6]

The fact that no sum can ever adequately compensate serious personal injury;
The cost of compensating non-pecuniary loss;
That there is a punitive element underlying damages for non-pecuniary loss;
And that these damages constitute a barrier to rehabilitation.¹⁰¹²

The consultation was followed up in 1998 with the report on *Damages for personal Injury: Non-Pecuniary Loss* of Law Commission No 257.¹⁰¹³ There was widespread support for retaining damages for non-pecuniary loss. Law Commission 257 concluded:

we believe that the widely-held view amongst consultees that damages for non-pecuniary loss in cases of serious personal injury are too low, particularly so far as it reflects difficulty in explaining the tort system to victims, in itself demonstrates that those damages *are* too low. On the other hand, that half of consultees did not consider awards in respect of “minor” injuries to be too low, suggests that those awards *are not* too low.¹⁰¹⁴

In assessing the strength of the Law Commission’s conclusion, it is necessary to understand how society’s views were canvassed; where the law Commission draws the line at serious or trivial injury; and whether the underlying research relied on was sufficiently robust. It is submitted, after considering these questions, that the time has come to revisit the question of whether damages for pain and suffering and loss of amenity are needed, not merely in the field of PL but across the board in personal injury.

(1) Canvassing society’s views

The Law Commission noted that one of the central messages from its consultees was that ‘the views of society as a whole should influence the level of damages for non-pecuniary loss in personal injury cases’.¹⁰¹⁵ ‘The views of society as a whole’ is a loose term. All legislation is supposed to reflect society’s wishes but the process of determining what is best for society is delegated to Parliament. The use of ‘vox pop’

¹⁰¹² Law Commission Consultation Paper 140 (n. 933) p.83 [4.7]

¹⁰¹³ Law Commission No. 257 (n. 940)

¹⁰¹⁴ Law Commission No. 257 (n. 940) p. 33 [3.25]

¹⁰¹⁵ Law Commission No. 257 (n. 940) p. 23 [3.4]

to justify changes in the tort system is fraught with danger.¹⁰¹⁶ ‘Society as a whole’ must be asked the right questions; it must be established that there are no underlying false assumptions; the respondents would need to understand the technicalities of how general damages fit into the whole scheme of tort and how tort fits into the scheme of distributive justice.

The Law Commission also said that it was influenced by Professor Genn’s 1994 study, *Personal Injury Compensation: How Much Is Enough?* As already explained, this study dealt with damages as a whole; and not merely non-pecuniary losses. Moreover, the emphasis was on serious injuries with long term consequence. The Report quotes directly from Professor Genn’s report in relation to the attitude of respondents to their compensation:

Three main reasons were given by respondents for being dissatisfied with their damages....The most frequent reason mentioned was that the settlement represented inadequate compensation because their whole way of life had changed or their life was now ruined as a result of their accident ...¹⁰¹⁷

It is argued that the justification for compensating people in one realm for losses suffered in some other realm entirely¹⁰¹⁸ by paying ‘non-economic damages for personal injury appears to be a tentative response to an irrefutable demand by society for compensation for “limitations on the person’s life created by the injury.”’¹⁰¹⁹ This argument seems, however, to fall into the error of treating every claimant as a victim. The case cited by Comandé in support of this proposition was *McDougald v. Garber*.¹⁰²⁰ This was a case in which the plaintiff ‘suffered oxygen deprivation which resulted in severe brain damage and left her in a permanent comatose condition.’ The arguments supporting general damages for a claimant in this condition should not necessarily be applied to a claimant such as Mr Hudson.

¹⁰¹⁶ Richard Lewis, ‘Increasing The Price Of Pain: Damages, The Law Commission And *Heil v Rankin*’ (n. 932) p. 106

¹⁰¹⁷ Law Commission No. 257 (n. 940) p. 34 [3.28]

¹⁰¹⁸ Robert E. Goodin, ‘Theories of Compensation’ (n. 990) p. 63

¹⁰¹⁹ Giovanni Comandé, ‘Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States’ (n. 935) p. 254

¹⁰²⁰ *McDougald v. Garber*, 536 N.E.2d 372, 379 (N.Y. 1989)

(2) What is a serious injury and what is trivial?

The Law Commission went on to define serious injury and found that the dividing line was ‘broadly speaking whether or not there has been a full recovery.’¹⁰²¹ Bearing in mind that damages for non-pecuniary loss tend to represent more than half of total damages awards at the lower end of the scale, the Law Commission concluded:

We therefore propose to define a serious injury as being an injury in respect of which the award for pain and suffering and loss of amenity in a case on any facts involving that injury alone, and ignoring contributory negligence, would be more than £2,000.¹⁰²²

In a footnote to this passage, the Law Commission added: ‘Examples of such injuries are rib fractures, minor soft tissue and whiplash injuries, fractures’.¹⁰²³ If these are serious injuries, it has to be wondered what moderate or minor injuries are. Lewis suggests that ‘the system overwhelmingly deals with small claims, the great majority leading to damages of less than £5,000’. In these cases, claimants suffer very little, if any, financial loss. They make a full recovery from their bodily injury and have no continuing ill effects.¹⁰²⁴ This is entirely consistent with the PL Claims Survey at Appendix 4. Indeed having considered the Law Commission Report 257,¹⁰²⁵ the Court of Appeal in *Heil v Rankin*¹⁰²⁶ saw no need to increase awards which are at present below £10,000 (80% of all claims in the PL Claims Survey at Appendix 4). The inference is that the Court of Appeal regards general damages claims below £10,000 as not being serious claims.

(3) Office for National Statistics survey

In seeking to canvass the views of society, the Law Commission also commissioned the Office for National Statistics to carry out a survey. The ONS carries out monthly omnibus surveys in which they interview a random and representative sample of the population. Interviewees were asked to consider four case studies ranging from a

¹⁰²¹ Law Commission No. 257 (n. 940) p. 36 [3.34]

¹⁰²² Law Commission No. 257 (n. 940) p. 37 [3.38]

¹⁰²³ Law Commission No. 257 (n. 940) p. 37 footnote 54

¹⁰²⁴ Richard Lewis ‘Increasing The Price Of Pain: Damages, The Law Commission And *Heil v Rankin*’ (n. 932) p.103

¹⁰²⁵ Law Commission No. 257 (n. 940)

¹⁰²⁶ *Heil v Rankin and another* (n. 926) p. 309 [74 and 83]

whiplash case, which they valued at a maximum of £3,500, to a quadriplegic case, for which they considered a likely maximum award would be £140,000 and to give their own valuation of the general damages (having been told that these are in addition to any financial loss). The results appear in Appendix B to Law Commission Report 257.¹⁰²⁷ Based on this survey the Law Commission stated:

These figures tend to suggest that the majority of the population would consider the current levels of damages for non-pecuniary loss in personal injury cases to be too low, at the very least by 50 per cent, and often by a much larger percentage.¹⁰²⁸

It was acknowledged by several consultees that the question of how damages are funded is relevant in considering how much is desirable but this was felt to be outside the terms of reference of the Law Commission's review. It was nevertheless a valid point that should have impacted on the questions and answers. The underlying assumption was that compensation should be awarded and that the system was efficient at delivering it, and that the only issue was whether the current tariff was sufficient. This is to disregard evidence that the cost of compensation had been increasing at 15% per year recently (written in 2002) and that 'this seems a fundamentally inefficient way of delivering compensation.'¹⁰²⁹ The assumption that individual compensation is desirable is questioned by Goodin:

Giving someone who has been crippled monetary damages does not help him up the stairs to the City Council chambers, whose meetings he used regularly to attend. Building him a wheelchair ramp does. 'The importance of these facts is that they suggest that public expenditure of money to overcome difficulties of this kind may be a higher priority than more private compensation for disabilities as such.'¹⁰³⁰

The Law Commission acknowledged a submission by Piers Ashworth QC:

It is the rare bird who, if asked whether he would like more money, says "no". Equally, most people if asked whether the levels of social security benefits or state pensions were adequate would say that they should be greatly increased. But if the same people were asked whether they would

¹⁰²⁷ Law Commission No. 257 (n. 940) Appendix B

¹⁰²⁸ Law Commission No. 257 (n. 940) p. 45 [3.58]

¹⁰²⁹ Julian Lowe, Institute of Actuaries Working Party 'The Cost of Compensation Culture' < <http://www.actuaries.org.uk/research-and-resources/documents/cost-compensation-culture-working-party-report> > accessed 23 April 2015

¹⁰³⁰ Robert E. Goodin 'Theories of Compensation' (n. 990) p. 73; citing P. Cane, *Atiyah's Accidents, Compensation and the Law* (n. 72)

be prepared to pay twice as much tax in order to fund greatly increased benefit, many would have second thoughts.

The Law Commission's response was that the ONS survey stated expressly to interviewees:

Generally, negligent people who cause an injury to someone else do not themselves pay the compensation. Instead, it is paid by their insurance company. If the amounts of compensation awarded by the courts change significantly, this is likely to lead to a change in the premiums charged by insurance companies...¹⁰³¹

The survey was remarkably simplistic, yet unless interviewees were merely expected to pluck a figure from the ether, it must have been assumed that they had a good working knowledge of how general and special damages fit together; what is covered by each; the supposed purposes of the award of general damages; and the extent to which premiums are likely to increase. If, hypothetically, they had been told that insurance premiums would double or perhaps even increase tenfold, it is questionable whether the same replies would have been given. Reliance on the survey was criticised by the Court of Appeal in *Heil v Rankin*:

...
if the survey was to be helpful we would expect the person interviewed to have much more information than he or she was given. We are also concerned about question five. The reference to the increase in the change in premiums charged by insurance companies was not sufficiently explicit. It would also have been preferable for there to have been some indication of the significance of an increase in damages on the resources of the NHS¹⁰³²

Finally, it was acknowledged that 'that a substantial minority surveyed did not support higher levels of damages.'¹⁰³³

(4) Time for fresh research into need for damages

A *desire* for compensation may easily be elevated to a perceived *need*. It is interesting to consider what a claimant needs to restore him to his pre-accident condition. In terms of pain and suffering he needs relief from pain. This may or may not be possible from

¹⁰³¹ Law Commission No. 257 (n. 940) p. 48 [3.63]

¹⁰³² *Heil v Rankin and another* (n. 926) p. 309 [87]

¹⁰³³ Law Commission No. 257 (n. 940) p. 45 [3.59]

case to case but it is informative that in Case Study 3, Hudson and others v Tubitsu, the medical reports on all four claimants (prepared by two different consultants) contain at several points, the phrase 'There is a need for analgesia.' So far as pain is concerned, this is arguably the principal *need*, as expressed objectively by the consultants. The more minor the injury, the more typically it might be expected that analgesia will go a long way towards restoring the claimant to a pain free condition, excepting abnormal pain conditions which arise from time to time. The cost of analgesics could be incurred by the claimants in buying over the counter medicines or in paying prescription charges, in which case these would be recoverable as special damages. It follows that in the cases of Hudson *et al*, the general damages must be compensating the loss of amenity rather than the pain. In Mr Ilford's case he said that he could not play cricket or go to the gym for 6 months. Again wasted gym membership or cricket club subscriptions would be special damages. It is in reality the loss of a right to be able to enjoy one's amenities that is being compensated. Before it is determined that society has a need to enforce such rights, it would be helpful to understand the cost to society of such claims. This requires a large scale research project across a large volume of small claims breaking down and analysing the elements of loss and injury claimed and calculating the cost insofar as possible in terms of insurance premiums.

Conclusions

The previous chapters have considered the role of compensation in its wider sense as a means of achieving deterrence, retribution, vindication and satisfaction or correcting wrongs. The question considered in this chapter is whether compensation *compensates* in the narrow sense of making good loss or damage: that is, in some way, repairing an injury and putting the claimant back into the position he was in before the injury occurred. It is concluded that the major element of injury claims is the award for 'pain and suffering and loss of amenity'. This is because small claims typically consist principally of general damages for pain and suffering and loss of amenity with very little by way of special damages for pecuniary loss. Moreover, most claims are small claims. The net result, both within the PL Claims Survey at Appendix 4 of cases handled by the Practice and more widely on published figures relating to personal injury claims generally, is that damages for pain and suffering and loss of amenity

comprise the largest part of damages in injury claims. This is why this chapter has focused on this aspect.

Pain and suffering and loss of amenity is the quintessence of non-pecuniary loss. Money cannot compensate non-pecuniary loss. It is impossible therefore, *ex hypothesi*, for damages to compensate pain and suffering and loss of amenity. Therefore compensation cannot be said to fulfil this socially beneficial purpose.

The theoretical bases of compensation for non-pecuniary loss include valuing the loss objectively, measuring the claimant's subjective loss of happiness and evaluating substitute solace for the loss. However, none of these restores the claimant to his pre-accident condition. Instead they are artificial and arbitrary in their conversion to monetary terms. They are awarded by convention. Convention needs to be challenged as it should not simply be assumed that awarding compensation is socially beneficial without clearly defining the purposes and boundaries. Money is incapable of providing real compensation for the injury.

Society appears to desire compensation but on closer scrutiny the reasons typically given to justify awards of general damages are suspect, resting on public misperceptions as to the role of such awards based on emotional responses to injuries of maximum severity with life changing consequences. These bear no relationship to the majority of claims that pass across the desks of lawyers and claims management companies. The rhetoric tends to focus on the former claims: Lord Diplock, for example, explaining the purpose of damages for loss of amenity stated:

I suspect that its social purpose is to relieve the horror and anguish which ordinary human beings who constitute society cannot but feel when contemplating the state to which the victim has been reduced.¹⁰³⁴

Further research is needed across a large volume of small claims to break down and analyse the elements of loss and injury claimed and calculate the cost of these claims.

¹⁰³⁴ *Fletcher v. Autocar and Transporters Ltd.* [1968] 2 QB 322 Diplock LJ pp. 352/353

CHAPTER TEN - COMMODIFICATION OF COMPENSATION

INTRODUCTION

The failure to question the need for damages for pain and suffering and loss of amenity has led inexorably to routine payments of conventional sums. This in turn has resulted in the 'commodification of compensation'.¹⁰³⁵ The focus has inevitably been on reducing the transactional cost of delivering the commodity of compensation. A negative consequence of the way in which claims are brought has been that low value claims are highly susceptible to moral hazard and thus to abuse. PL in common with other areas of personal injury, such as motor claims, has become an easy target for the 'have a go' culture. This particular vulnerability to systemic abuse, it is argued, outweighs any social benefit. The introduction of a clear threshold would provide a simple method of excising a large swathe of injury claims that are of no benefit to society.

10.1 Pain and Suffering and Loss of Amenity has become a mere conventional payment that is susceptible to moral hazard and abuse

Because the quantification of damages for pain and suffering and loss of amenity is so artificial, it has developed into a purely conventional payment. This has led to a set of known criteria that need to be reproduced to succeed in a claim, or to put it another way, to have a claim 'rubber-stamped'. This introduces an unacceptable degree of moral hazard in pursuing minor claims.

10.1.1 What is an injury worth?

The basis of quantification of damages for pain and suffering and loss of amenity is imprecise. It is guided by dicta indicating that damages should be 'such that the ordinary sensible man would not instinctively regard them as either mean or extravagant, but would consider them to be sensible and fair in all the

¹⁰³⁵ Jonathan Ilan, 'The Commodification of Compensation? Personal Injuries Claims In an Age of Consumption' *Social & Legal Studies* 2011 20(1) 39–55

circumstances’;¹⁰³⁶ or a ‘full and fair value of the loss, that is to say what it is worth according to current social standards ...’.¹⁰³⁷

A problem in evaluating damages for pain and suffering is that there is no *market* for pain and suffering or loss of amenities.¹⁰³⁸ By contrast, even unique property has a market value. If the owner received damages for the loss of the Mona Lisa, whilst he could not replace it, he could at least buy another masterpiece coming on the market. His compensation would be within the same ‘realm’¹⁰³⁹ as his loss.

It has been argued that a market is ‘nothing more than the sum of subjective evaluations which we deem as a whole, an average objective indicator or a best-informed result.’¹⁰⁴⁰ The inference is that a quasi-market is created by a history of settlements or judgments. However, this is not strictly correct. Settlements are not based on the subjective valuation of pain and suffering. Settlements are based on a number of elements including liability risks, the inconvenience and cost of having to deal with litigation and precedent awards. These awards set a benchmark but that does not mean they are the *market value* of pain. It is simply not possible to overcome the artificiality of quantifying pain in monetary terms. Pain (or more precisely the removal of pain) is not a tradable commodity. The fact that awards may have been regularly updated by reference to the Retail Price Index, as argued by Lord Goldsmith for the Association of British Insurers in *Heil v Rankin*¹⁰⁴¹ does not disguise the fact that there had to be a starting point for damages before applying increases in line with the Retail Price Index, and that starting point was arbitrary.

¹⁰³⁶ *Fletcher v Autocar and Transporters Ltd* (n. 1034) Salmon LJ pp. 363/364

¹⁰³⁷ P Havers, ‘Case Comment General damages raised by up to one-third’ J.P.I. Law 2000, 2/3, 123-128 p. 125 citing Munkman *Damages for Personal Injury and Death* 10th edition (1996) ISBN-10: 040605360X ISBN-13: 978-0406053602

¹⁰³⁸ Ipp Report (n. 986) p. 186 [13.21]; Giovanni Comandé, ‘Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States’ (n. 935) p. 302

¹⁰³⁹ Robert E. Goodin, ‘Theories of Compensation’ (n. 990) p. 63

¹⁰⁴⁰ Giovanni Comandé, ‘Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States’ (n. 935) p. 303

¹⁰⁴¹ *Heil v Rankin and another* (n. 926) p. 291

10.1.2 A conventional sum

The result of the impossibility of calculating the award in any meaningful way is that it is a *conventional sum* rather than an amount that is demonstrably necessary or useful, arrived at 'by speculative processes which receive judicial approbation only because the system must be made to work'.¹⁰⁴² The court is faced with performing an 'artificial task of converting into monetary damages the physical injury and deprivation and pain'.¹⁰⁴³

The arbitrariness of the award is heightened by the fact that general damages, like special damages, depend on the claimant's circumstances, which are a matter of pure chance. A claimant may have an 'egg-shell skull' or an 'eggshell personality'.¹⁰⁴⁴ Minor negligence can cause the gravest injury and great culpability a minor injury.¹⁰⁴⁵

The claimant in case 89 in the PL Claims Survey at Appendix 4 whilst receiving no serious physical injury was so affected by seeing a child in her car suffer a serious 'scalping injury', as a result of the parcel shelf being displaced in a multi-car collision on the motorway, that she herself suffered from exacerbation of pre-existing ME and anxiety about seeing similar vehicles on the road. The claim did not reach the stage of medical evidence but it was reported that the claimant had been flagging down similar cars to warn the drivers of the perceived dangers of the parcel shelf causing injury in an accident. In fact the parcel shelf was much like the parcel shelf on any other similar vehicle and the injury was a freak accident arising from the combination of collisions in which the vehicle was involved. Had the defendant been liable, damages would undoubtedly have been greater than normal because of the claimant's particular susceptibility.

Yet the rules of quantification may appear contradictory or inconsistent. Factors that increase the claimant's need for compensation, (such as an eggshell skull or eggshell personality) are taken into account, but factors that diminish the claimant's need (such

¹⁰⁴² Woodhouse Report, (n. 733) p. 77 [170]

¹⁰⁴³ *Heil v Rankin and another* (n. 926) p. 293 citing Lord Pearce in *H West & Son Ltd v Shephard* (n. 964) p. 364

¹⁰⁴⁴ *Page v Smith* (n. 951) Lord Browne-Wilkinson p. 182 G

¹⁰⁴⁵ *H West and Son Ltd v Shephard* (n. 964) Lord Devlin p. 362-363

as an independent income or first party insurance) are disregarded,¹⁰⁴⁶ as are savings in the cost of the amenities lost.¹⁰⁴⁷

10.1.3 Convention has transformed quantifying damages into a rubber-stamping exercise – rather than actually compensating anything

In Case Study 3, Hudson and others v Tubitsu, all four claimants suffered relatively similar physical injuries, but not all of them suffered psychological damage. Of the three who did, the symptoms, according to their evidence, varied from loss of confidence, travel anxiety and social withdrawal to sleep disturbance and flashbacks. These symptoms would probably fall short of a real psychiatric illness such as suffered by the claimant described in 10.1.2 above but would help to demonstrate that the claimants suffered a real physical injury. In routine small cases such as this, the typical award 'is an artificial sum and, increasingly, it is mechanically assessed.'¹⁰⁴⁸ In other words, in practice there is an element of rubber stamping of claims by reference to pre-set tariffs.

10.1.4 Tariffs create a relative scale but no universal calibration

Whilst tariffs create a relative scale, there is no universal tariff applicable throughout the EU. This suggests that the awards do not compensate pain and suffering in the narrow sense because if they did, the amounts would be the same regardless of the jurisdiction. It would be illogical to suggest that different sums make the same injury good in different States.

It is arguably possible to compare one pain with another¹⁰⁴⁹ or loss of amenity through one injury with loss of amenity through another.

When physical pain is over, leaving a permanent physical disability behind, the consequent "loss of amenities of life" can also be compensated only

¹⁰⁴⁶ Ronen Avraham 'Accident law for egalitarians' (n. 118)

¹⁰⁴⁷ Law Commission Consultation Paper 140 (n. 933) p.30 [2.38]

¹⁰⁴⁸ Richard Lewis 'Increasing The Price Of Pain: Damages, The Law Commission And Heil v Rankin' (n. 932) p. 102

¹⁰⁴⁹ See the Pain rating scale of the British Pain Society

< https://www.britishpainsociety.org/static/uploads/resources/files/pain_scales_eng.pdf > accessed 18 June 2015

by an arbitrary or conventional sum. Again, looked at in isolation, there is no rational ground for saying that £5,000 rather than £1,000 or £20,000 is the right award, in the case of a particular plaintiff for the loss of a leg below the knee: but once you premise that £5,000 is the right award for this "loss of an amenity of life " you can assert that the loss by the same plaintiff of a leg amputated above the knee should be compensated by a sum greater than £5,000 in the same proportion as the disability, which is of the same kind, is increased by reason of the amputation having taken place at a higher point in the limb. Here one is comparing like with like.¹⁰⁵⁰

Without a mathematical formula for assessing pain, the court must do its best. This means, once one accepts the artificiality of the valuation process, 'complete adherence to the fiction by establishing a detailed and reliable tariff system.'¹⁰⁵¹ A tariff can take the form of a list of precedents such as summarised in the Judicial College Guidelines¹⁰⁵² and case law in England; or a scale of rates expressed as percentage disability as in the French *Barème*.¹⁰⁵³

The result of the procedural and theoretical differences across Europe is that whilst most jurisdictions award damages for non-pecuniary loss, 'European nations are predicted to award vastly different amounts for pain and suffering damages to victims with the same injury.'¹⁰⁵⁴

One of the first projects of the European Centre of Tort and Insurance Law (ECTIL), founded in February 1999 as a research institute for comparative legal studies, was a comparative study of non-pecuniary damages across European Member States, presented at a Symposium in 2000.¹⁰⁵⁵ The study examines non-pecuniary loss in Austria, Belgium, France, Germany, Greece, Italy, Netherlands, Poland and Spain. Non-pecuniary loss was found to be recoverable in some shape or form in all the jurisdictions surveyed but with considerable variations.¹⁰⁵⁶

¹⁰⁵⁰ *Wise v Kaye* (n. 967) per Diplock LJ p. 664

¹⁰⁵¹ A. I. Ogus. 'Damages for Lost Amenities : for a foot, a feeling or a function' (n. 970) p. 12

¹⁰⁵² *Guidelines for the Assessment of General Damages in Personal Injury Cases* (n. 73)

¹⁰⁵³ *Barème indicatif des déficits fonctionnels séquellaires en droit commun*: see Giovanni Comandé, 'Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States' (n. 935) p. 286: see also W V Horton Rogers (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective* (n. 963) p. 90

¹⁰⁵⁴ Stephen D. Sugarman 'A Comparative Law Look at Pain and Suffering Awards' *DePaul Law Review* Vol. 55: 2006 399 p. 413; see also W V Horton Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (n. 963)

¹⁰⁵⁵ W V Horton Rogers (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective* (n. 963)

¹⁰⁵⁶ W V Horton Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (n. 963) p. 246

There have been attempts to improve the uniformity and rationality of tariffs such as the Pisa personal injury research project which proposed a monetary National Orientation Schedule that implements a Normalized Values Schedule. This was basically a points based percentage disability system derived from nationwide data. 'This approach has shown its suitability to provide uniform nationwide common ground for monetary assessments of [non-pecuniary damages]'.¹⁰⁵⁷

More significantly the Draft Report of the Committee on Legal Affairs and the Internal Market of the European parliament with 'recommendations to the Commission on a European disability rating scale'¹⁰⁵⁸ argued that assessment methods for personal injury compensation are derived from different judicial practices and 'schools of thought' across Europe and 'to facilitate free movement of persons within the internal market, assessment practices in the Member States should to some extent be harmonised' (recital 3); this requires a 'unit and a system' (recital 6); and disability should be defined consistently as

the definitive reduction of physical and/or mental potential which can be identified or explained medically, together with the pain and mental suffering known by the doctor to be a normal concomitant of the sequela plus the everyday consequences which commonly and objectively accompany that sequela (recital 7)

The proposed rating worked on a percentage disability rating against a theoretical 100% maximum. The scale did not provide 'off the shelf figures' but a process for quantification based on a uniform clinical approach (recital 16).

The response of the Pan-European Organisation of Personal Injury Lawyers to the draft proposal was that it would be 'unrealistic because it would compel most Member States to fundamentally alter their redress systems as well as the laws of procedure

¹⁰⁵⁷ Giovanni Comandé, 'Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States' (n. 935) p. 311

¹⁰⁵⁸ Draft Report of the Committee on Legal Affairs and the Internal Market of the European parliament 2003/2130 (INI)

< <http://www.europarl.europa.eu/meetdocs/committees/juri/20031001/505310EN.pdf> > accessed 7 January 2015

and evidence.¹⁰⁵⁹ The problem remains, however, that even if it is possible to establish a relative scale of damages, there is no consistency in the limits of the scales. There are no natural universal fixed reference points.

The Hodges Report¹⁰⁶⁰ as the first assessment of the application of the PL Directive noted:

34. The issue of damages is said to be of particular significance since the variation in awards of damages for the same injuries between Member States can be large. Commentators accept that whilst there may be good reasons for divergences in the level of damages awarded in different Member States, given divergences in local standards of living and the availability and cost of healthcare and social security, divergences in the methods of quantification of damages are more difficult to justify. The bases upon which damages are awarded are frequently difficult to calculate and in some Member States unprincipled and lacking in any consistency.

Howells observes how ‘bizarre’ it is that the EU did not seek to harmonise whether pain and suffering damages could be recovered under the PL Directive.¹⁰⁶¹ Indeed, it seems strange that there was no attempt at harmonisation of the quantum of non-pecuniary damages, when the PL Directive states that the approximation of laws is necessary ‘because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer’¹⁰⁶² and the overall goal of the legislation was to progress towards harmonisation.¹⁰⁶³ Faure explains:

...harmonization in Europe is more an approximation of administrative regulations to reduce differences as far as possible. But, in the absence of regulation, differences will remain. The essence of a directive is indeed that the Member States may themselves choose the methods of implementing the duties placed upon them by a directive.¹⁰⁶⁴

¹⁰⁵⁹ The Pan-European Organisation of Personal Injury Lawyers *PEOPIL'S RESPONSE TO THE RECOMMENDATIONS TO THE COMMISSION ON A EUROPEAN DISABILITY SCALE - 2003/2130 (INI)* January 2004

<<http://www.peopil.com/peopil/userfiles/file/BaremeMedicalTablesHarmonisationofdamagesJan2004.pdf>> accessed 9 December 2012

¹⁰⁶⁰ McKenna Report (n. 44) p. 12 [34]

¹⁰⁶¹ Geraint Howells, ‘PL – A History of Harmonisation’ Chapter 35 (n. 675) at p 646

¹⁰⁶² PL Directive Recital 1

¹⁰⁶³ PL Directive Recital 18

¹⁰⁶⁴ Michael Faure, ‘Defining Harmonization, Codification and Integration of Environmental Law: A Search for Definitions’ *European Environmental Law Review* June 2000 174

Without unifying legislation on damages, Member States were only required to focus on harmonising liability. Quantification of damages would remain untouched and any pre-existing divergences between Member States would survive. There are even material differences within the separate jurisdictions of the UK.¹⁰⁶⁵ If the goal was harmonisation of PL, the mere harmonisation of liability deals with only one side of the equation and is therefore ineffective. It is easy to attribute this anomaly to quirks in the different judicial and procedural systems but on a deeper analysis a plausible explanation is that damages for non-pecuniary loss do not in fact compensate in the narrow sense. There is no fixed sum of money that ‘makes good’ pain suffering and loss of amenity. The sums awarded are nothing more than a matter of convention and different states have developed different tariffs based on arbitrary datum points.

10.1.5 Proof and moral hazard

As each member State has its own legal system there are procedural differences in how ‘tariffs’ are applied or used including particularly the number and disciplines of experts permitted to be called.¹⁰⁶⁶

In the UK, pain and suffering and loss of amenity are matters to be proved by medical evidence. The Pre-Action Protocol for Personal Injury Claims¹⁰⁶⁷ encourages the claimant to nominate a medical expert. The defendant may object if he has grounds, for example if the expert’s CV suggests the injury is outside his field; otherwise the claimant will obtain a report and the defendant is not entitled to rely on his own expert evidence within that particular speciality unless the claimant agrees; the court permits or the report is amended and the claimant will not disclose the original.¹⁰⁶⁸

If proceedings are then issued, the CPR provides that the court is under an obligation to restrict expert evidence to ‘that which is reasonably required to resolve the proceedings’ (CPR 35.1). In cases in the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only

¹⁰⁶⁵ Simon P. Browne, ‘Damages for personal injury: non pecuniary loss’ (n. 989)

¹⁰⁶⁶ *Wall v Mutuelle de Poitiers Assurances* [2014] 1 W.L.R. 4263

¹⁰⁶⁷ Pre-Action Protocol for Personal Injury Claims 7.2 *et seq*

< http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic > accessed 14 June 2105

¹⁰⁶⁸ Pre-Action Protocol for Personal Injury Claims 7.6 *et seq* (n. 1067)

one expert on a particular issue who becomes a single joint expert. The Practice Direction requires the court to consider whether it is proportionate to allow separate experts for the parties. The practical result is that in smaller PL claims, the defendant will normally have to accept that medical evidence is given by the claimant's expert and the defendant is restricted to asking written questions. The court may not even allow experts to attend court to give oral evidence. (CPR 35PD.7).

In Case Study 1, *Martin v Kudo*, the claimant's expert wrote:

For neck problem I recommend referral to a rheumatologist. For shoulders ... rheumatologist. For elbows ... rheumatologist. For back ... rheumatologist. For right knee ... rheumatologist. For left knee ... rheumatologist. For ankles ... rheumatologist. For right foot ... rheumatologist. For left foot ... rheumatologist. For left foot ... rheumatologist.

The report gave the claimant's alleged injuries an air of credibility. These are sufficiently serious medical problems that the claimant needed to be referred to a specialist. The expert went on to say '...In my opinion some of the symptoms are not related to the accident.' The best Kudo could do was to ask which symptoms were and which were not related to the accident.

The same process would have applied in Case Study 3, *Hudson and others v Tubitsu*, if it had reached the stage of proceedings. The defendant is at a serious disadvantage. Moreover, the claimant's expert evidence is heavily dependent on what the claimant has told the expert, as discussed above. Although in some cases medical tests might catch out an untruthful claimant, it may be difficult to contradict what the claimant has reported. Here Mr Farmer has reported various aches and pains that are consistent with the accident circumstances he has described. Typically, with more serious orthopaedic injuries there is independent corroborative evidence, such as X-Rays showing broken bones, or MRI scans revealing tears and breaks. Minor injuries, however, rely heavily on the claimant's subjective reporting.

This means that small PL cases are subject to considerable moral hazard on the part of the claimant. Mr Hudson's case is a good example. Mr Hudson tells his medical expert he has had an accident; he describes pain and psychological symptoms; the expert produces a report, which is more or less proforma for whiplash type accidents,

describing the reported injuries, which fit the template for a whiplash type injury, which attracts a conventional sum in damages for this type of injury; the prospects for challenging the medical evidence are not promising and so quantum is rubber-stamped. Mr Hudson's claim may be genuine but it is apparent how easy it would be to fabricate it or exaggerate it.

In practice outright fraudulent fabrication of claims has not been a material issue in the Practice. There have been some notable exceptions such as case 99 in the PL Claims Survey at Appendix 4, in which the claimant's medical report was a collection of inappropriate medical terms linked by very little that made grammatical sense.¹⁰⁶⁹ Far more common is the suspected exaggeration of symptoms to push a minor incident over the threshold such as cases 49, 122 and 123 in the PL Claims Survey at Appendix 4. These all involved alleged 'jolting' injuries. The technical evidence in Case Study 3, Hudson and others v Tubitsu, suggested that this might have been such a case but it was never tested, as when challenged, the claimants did not pursue the claim.

10.1.6 Plans to tackle moral hazard

In December 2014 plans to tackle 'unjustified personal injury claims' were published by the Ministry of Justice.¹⁰⁷⁰ This reflected a concern that there had been an increase in fraudulent and grossly exaggerated claims. The plan involved amending the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the Civil Procedure Rules, to provide that where a Claim Notification Form sent on or after 6 April 2015 is in respect of a soft tissue injury, the claimant must obtain medical evidence sourced via a special internet portal. From 2016 the medical experts will have to be accredited under a new process. At the same time the claimant's legal representatives must carry out checks for any previous claims by the claimant. There are also fixed costs provisions aimed at reducing the cost of obtaining medical reports. Soft tissue injury has a specific definition:

¹⁰⁶⁹ See page 140 above

¹⁰⁷⁰ < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330722/fact-sheet-unjustified-personal-injury-claims.pdf > accessed 24 January 2015; these plans are now given effect by amendments to the RTA Protocol – see < <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013> > accessed 14 June 2015

‘Soft Tissue Injury Claim’ means a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury.¹⁰⁷¹

The overall objective is to cut down fraud and prevent medical experts from forming unethically close bonds with lawyers who generate their work. The Impact Assessment explains that the numbers of whiplash claims arising from motor accidents has increased significantly whilst the numbers of road traffic accidents has decreased and forecasts a reduction of 10% in road traffic accident soft tissue claims as a result of the reforms.¹⁰⁷²

Whilst this development recognizes the problem of fraudulent whiplash claims it does not address the deeper underlying issues highlighted in this Chapter and more widely in this thesis, particularly the lack of social desirability of low value claims for pain and suffering and loss of amenity. This reform implicitly accepts that there is a fundamental need for compensation for pain and suffering and loss of amenity. It simply targets the outright fraudulent claims in one area, road traffic accidents, and introduces a level of bureaucracy in obtaining medical evidence. There is no reason to believe that Mr Hudson’s claim in Case Study 3 would be more difficult to bring. It is not clear why an accredited medical expert should say anything materially different to Mr Hudson’s consultant Mr Andrews. It will not affect the rubber stamping of routine low value claims. The problem is far wider than outright fraud. There is no doubt that the ease of ‘access to justice’ has led to a ‘have a go’ culture in relation to low value claims.

10.2 PL has become an easy target for the ‘have a go’ culture;

The experience of the Practice suggests that the increased moral hazard and the ease and low risk of bringing PL claims has generated a compensation or ‘have a go’ culture in this field of claims. According to some, ‘compensation culture’ is merely a perception

¹⁰⁷¹ Whiplash Reform Proposal Annex A to the letter of 4 August 2014 from Lord Faulks QC, Minister of State for Justice < <http://www.justice.gov.uk/downloads/civil-justice-reforms/lord-faulks-letter-annex-a.pdf> > accessed 24 January 2015

¹⁰⁷² *Impact Assessment: Reforming medical examination and reporting in motor accident soft tissue injury claims*, IA No: MoJ 163 16 September 2014 < <http://www.justice.gov.uk/downloads/civil-justice-reforms/annex-e-impact-assessment.pdf> > accessed 24 January 2015

brought about by a general of concern over rising insurance premiums, levels of compensation and legal costs.¹⁰⁷³ It is said to be a media creation and 'on balance it looks as if the British continue to be nation of 'lumpers' rather than litigators'.¹⁰⁷⁴ According to Lewis and Morris there is no evidence that the system has been 'flooded with an increasing number of personal injury claims in recent years':

In particular, the majority of injured people still do not go on to claim compensation despite being encouraged to do so through widespread "no-win no-fee" advertising. The exception arises in the context of road traffic accidents, where there is a strong culture of claiming.¹⁰⁷⁵

There is evidence that the figures used to support the debate are misleading with claims below £2500 not being required to be reported until 1997 so that possibly half of all claims were not reported; and the CRU figures from 2000 to 2005 showed that tort claims had declined.¹⁰⁷⁶ However, it has to be pointed out first that these data may not be representative of a trend and are out of date. The period 2000 to 2005 broadly covers the first five years of operation of the Woolf Reforms. There would have been a surge of claims as access to justice was opened up. Existing untapped claims were targeted. This reserve would have dried up as the three year limitation period expired. Thus one might expect a bulge in claims followed by a levelling off as the existing reserves were depleted. What has happened since then is a steady increase which seems to have levelled out around 1 million claims per annum:

¹⁰⁷³ Lee McIlwaine, 'Tort reform and the "compensation culture"' J.P.I. Law 2004, 4, 239-249

¹⁰⁷⁴ K Williams, 'State of fear: Britain's "compensation culture" reviewed'. Legal Studies. (2005) 25 (3), 499-515.

¹⁰⁷⁵ Richard Lewis and Annette Morris, 'Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation' Journal of European Tort Law 3 (2), 230-264

¹⁰⁷⁶ Richard Lewis, Annette Morris and Ken Oliphant, 'Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom?' (2006) 14 Torts Law Journal 158-175 p. 161

Table 7 Cases Registered with CRU from 2010/11 to 2013/14 (plus 2006 to 2010 from archive)

	Clinical Negligence	Employer	Motor	Other	Public	Liability not known	Total
2013/14	18,499	105,291	772,843	14,467	103,578	2,123	1,016,801
2012/13	16,006	91,115	818,334	17,695	102,984	2,175	1,048,309
2011/12	13,517	87,350	828,489	4,435	104,863	2,496	1,041,150
2010/11	13,022	81,470	790,999	3,855	94,872	3,163	987,381
2009/10	10,308	78,744	674,997	2,806	91,025	3,445	861,325
2008/09	9,880	86,957	625,072	3,415	86,164	860	812,348
2007/08	8,876	87,198	551,905	3,449	79,472	1,850	732,750
2006/07	8,575	98,478	518,821	3,522	79,841	1,547	710,784

Source DWP Transparency data Number of cases registered to CRU Updated 24 April 2014¹⁰⁷⁷

Regardless of the terminology, the Practice sees far more low value claims today than 20 or even 10 years ago. This is clear evidence of a compensation culture in the sense that claimants are sufficiently motivated and empowered to bring minor claims which they would not have bothered to bring 20 years ago. Lord Young's Report *Common Sense Common Safety* was predicated on the basis that 'I believe that a 'compensation culture' driven by litigation is at the heart of the problems that so beset health and safety today.'¹⁰⁷⁸ The report has been criticised¹⁰⁷⁹ on the ground that it failed to include any empirical evidence to contradict the report of the House of Commons Constitutional Affairs Committee which did not support the proposition that there was a compensation culture.¹⁰⁸⁰ Lord Phillips of Worth Matravers, Lord Chief Justice, gave evidence to the Committee that there was none, based on the statistics

¹⁰⁷⁷ DWP Website, Transparency data, Number of cases registered to CRU:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306064/cases-registered-cru-2013-14.csv/preview > accessed 28 January 2015

¹⁰⁷⁸ Lord Young *Common Sense Common Safety: A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*. Cabinet Office October 2010

< <https://www.gov.uk/government/publications/common-sense-common-safety-a-report-by-lord-young-of-graffham> > accessed 1 May 2013 19:15

¹⁰⁷⁹ James Goudkamp, 'The Young Report: an Australian perspective on the latest response to Britain's "compensation culture"' P.N. 2012, 28(1), 4-26

¹⁰⁸⁰ House of Commons Constitutional Affairs Committee, *Compensation Culture: Third Report of Session 2005-2006*, vol 1, HC 754-I (London: The Stationery Office, 2006) p. 13 [31]

gathered by the Compensation Recovery Unit of the Department of Work and Pensions. It may be that as the years have passed, the picture has become clearer, so that by late 2012 the Centre for Policy Studies Report wrote of the number of complaints and claims increasing in every sector of public life; ‘misuse of tort to compensate for every misfortune’; and the explosion of litigation gaining ‘formidable momentum’.¹⁰⁸¹ The report cautioned that ‘a litigious climate inexorably leads to the diminishing of the ethos of public service and a decline in the quality of care in health and in the education of our children.’¹⁰⁸² This resonates with the Better Regulation Taskforce report of 2004, which sought to explode the ‘urban myth’ of compensation culture, suggesting that it was a ‘perception’¹⁰⁸³ but found that ‘more people have been encouraged to “have a go” at claiming redress for a wrong they feel they have suffered’.¹⁰⁸⁴ The report concluded that ‘Redress for a genuine claimant is hampered by the spurious claims arising from the perception of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real.’¹⁰⁸⁵

In the early days of the Consumer Protection Act 1987 almost all reported cases failed on the grounds of causation.¹⁰⁸⁶ Mildred’s premise is that “claimants have found it difficult to succeed.” The reality is that they have failed publicly in a few cases that went to court, the percentage of cases reaching court being very small.

Johnston comments, citing *Cases, Materials and Text on Consumer Law*¹⁰⁸⁷ that whilst other European courts were willing to infer a defect, the UK courts required a ‘more detailed explanation for why a defect exists’.¹⁰⁸⁸ Johnston gives as a prime example the case of *Foster v Biosil*¹⁰⁸⁹ in which Cherie Booth QC held, in relation to a breast

¹⁰⁸¹ Frank Furedi and Jennie Bristow, *The Social Cost of Litigation* Centre for Policy Studies, September 2012 Printed by IMS Ltd, Ellis Square, Selsey – Chichester – PO20 0AF ISBN No. 978-1-906996-39-0 p. i

¹⁰⁸² Frank Furedi and Jennie Bristow, *The Social Cost of Litigation* (n. 1081) p. 70

¹⁰⁸³ David Arculus and Teresa Graham, *Better Routes to Redress* (n. 240) p. 3

¹⁰⁸⁴ See David Arculus and Teresa Graham, *Better Routes to Redress* (n. 240) p. 5

¹⁰⁸⁵ See David Arculus and Teresa Graham, *Better Routes to Redress* (n. 240) p. 3

¹⁰⁸⁶ see Mildred, ‘Pitfalls in Product Liability’ (n. 211) citing *Richardson v LRC Products Ltd* [2000] P.I.Q.R. P164 (QBD); *Foster v Biosil* (2001) 59 B.M.L.R. 178 (CC (Central London)); *Tesco Stores Ltd v Pollard* [2006] EWCA Civ 393; (2006) 103(17) L.S.G. 23 (CA (Civ Div)); *Piper v JRI (Manufacturing) Ltd* [2006] EWCA Civ 1344; (2006) 92 B.M.L.R. 141 (CA (Civ Div)); *Worsley v Tambrands Ltd* [2000] P.I.Q.R. P95 (QBD)

¹⁰⁸⁷ Droushout (ed), *Cases, Materials and Text on Consumer Law* (Hart Publishing, 2010) p. 468

¹⁰⁸⁸ Christopher Johnston QC, ‘A personal (and selective) introduction to PL law’ (n. 674) pp. 11/12 (and footnote 46)

¹⁰⁸⁹ *Foster v Biosil* (n. 1086)

implant which leaked silicone, that it was for the claimant not merely to prove a defect but also the cause of the defect – on the basis that defect as used in the development risks defence ‘implied a technical defect in the manufacture or design’.¹⁰⁹⁰ This has always been a controversial case because it does not reflect the wording of the PL Directive which provides:

The injured person shall be required to prove the damage, the defect and the causal relationship between the damage and the defect¹⁰⁹¹

As Mildred rightly explains:

That the fact of a rupture of an implant after five months' use without surgical damage on implantation and necessitating removal did not imply a defect would surely appear extraordinary to the commonsensical observer.¹⁰⁹²

However, these early difficulties do not reflect the everyday experience of the Practice in dealing with routine claims. It is usually a matter of fact, not a complicated legal analysis. In other cases the defect is readily apparent and it is simply a question of whether it caused the injury. Defect and causation are not difficult to prove in the majority of cases. Problems usually only arise in complex products such as pharmaceuticals and other bioactive products, which is a good reason for treating pharmaceutical PL separately rather than trying to design a legal system around a complicated product when it will more often be applied to a simple product.

Even in the cases on the Directive the results turn on findings of fact rather than fine points of law. Such findings are a matter for the judge on the day. Indeed most cases in practice turn on facts. The same would apply even if the law provided for absolute liability. The claimant would still have to bring himself factually within the ambit of the legislation. As Mildred concludes:

Anecdotally the Act has been useful for encouraging swift settlement of small claims, particularly in relation to food.¹⁰⁹³

¹⁰⁹⁰ Foster v Biosil (n. 1086) p. 181

¹⁰⁹¹ PL Directive (n. 2) Article 4

¹⁰⁹² Mildred, ‘Pitfalls in Product Liability’ (n. 211) p. 144

¹⁰⁹³ Mildred, ‘Pitfalls in Product Liability’ (n. 211) p. 149

This is closer to the experience of the Practice: an increasing volume of small injury claims to be presented and paid. It may be that the debate about compensation culture is influenced by the sense that the term has a pejorative ring to it. Ilan seeks to justify compensation claiming as 'no more necessarily 'deviant' than the manner in which contemporary society is configured.'¹⁰⁹⁴ His point is that it is a feature of the consumerist society that claims have become 'commodified'. This is indisputable and the key reasons for this are funding and marketing.

10.2.1 Funding

It is less likely, in the experience of the Practice, that any of the claims in Case Study 1, *Martin v Kudo*, or Case Study 3, *Hudson and others v Tubitsu*, would have been brought before the Woolf Reforms improved access to justice. The funding changes have made it possible to pursue these claims without risk to the claimant and before the Jackson reforms, claimants' lawyers could obtain disproportionately large remuneration.¹⁰⁹⁵ These funding changes included recoverable After The Event Insurance; referral fees for third parties (often insurers) sending claims details to claimant lawyers; and conditional fee agreements with recoverable success fees.¹⁰⁹⁶ Whilst referral fees were banned as a result of the Jackson reforms, some insurers entered into joint ventures with claimant legal practices so that they could continue to generate claims.¹⁰⁹⁷

10.2.2 Marketing

Relentless television advertising has encouraged people to bring claims and it is accepted that 'certain adverts have given the impression of easy money'.¹⁰⁹⁸ The

¹⁰⁹⁴ Jonathan Ilan, 'The Commodification of Compensation? Personal Injuries Claims In an Age of Consumption' (n. 1035)

¹⁰⁹⁵ The Jackson Report (n. 6) and the Legal Aid, Sentencing and Punishment of Offenders Act 2012

¹⁰⁹⁶ See Adrian Zuckerman, 'The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system' (n. 820) p. 264

¹⁰⁹⁷ John Hyde, 'The spirit of the referral fee ban? It doesn't exist.' *Law Society Gazette* 7 November 2013

<<http://www.lawgazette.co.uk/practice/the-spirit-of-the-referral-fee-ban-it-doesnt-exist/5038640.fullarticle>> accessed 10 January 2015

¹⁰⁹⁸ Lee McIlwaine, 'Tort reform and the "compensation culture"' (n. 1073) p. 243

farming of claims is a sophisticated industry now regulated by the Claims Management Regulation Unit of the Ministry of Justice.¹⁰⁹⁹ However, many still seem to operate outside their supervision by bombarding mobile phones with automated cold calls and texts, fishing for any possibility of an accident in breach of the Claims Management Services Rules.¹¹⁰⁰ What is abundantly clear is that ‘society’ perceives that there is a need for low value injury claims: otherwise injured people would not pursue these claims. However, the perception of need is inculcated rather than innate. The claimants are exhorted to claim by their lawyers and their expectations are falsely raised. In a memorable case handled by the Practice *J v A* the claimant cut the top of her finger when her vacuum flask ‘exploded’. The evidence she gave was that she filled the flask with hot water and tea bags and the glass liner simply shattered, slicing the top off her finger. This was, in the claimant’s solicitor’s view, a case of *res ipsa loquitur*. However, the reality is that the claimant must show that a defect caused the injury. The inference was that there must have been a defect for the glass to shatter. It was not until disclosure that the true picture became clear. One of the claimant’s contemporaneous photographs showed the flask with a pile of shattered glass which had formed the lining of the flask next to it. More significantly, however, lying in the pile of glass was a long handled metal spoon - which the claimant had been using to stir the tea when she broke the glass liner. The claimant cannot be expected to know the law relating to PL but evidently her solicitor must have encouraged her to pursue the claim.

This is not an isolated example. It is in the nature of products that they are often broken in an accident and the question to be answered is whether the product broke so as to cause the accident or whether it broke as a result of the accident. For example in case 21 in the PL Claims Survey at Appendix 4 the claimant was seriously injured when her car overturned on a bend in the road. The nearside front wheel was found broken from the axle. The claimant’s own disclosed expert report said that it was not possible to say whether the wheel failed and caused the accident or whether it failed in the collision with a tree as the car left the road because the claimant lost control. Thus the

¹⁰⁹⁹ See < <https://www.gov.uk/government/groups/claims-management-regulator#role> > accessed 10 January 2015

¹¹⁰⁰ Claims Management Services Regulation - Conduct of Authorised Persons Rules 2014 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380623/CMR_Conduct_of_Authorised_Persons_Rules_Oct14a.pdf> accessed 23 April 2015

threshold for bringing a claim under the PL Directive was not met. Yet the claimant's solicitor encouraged the claimant to pursue the claim until it was eventually abandoned as hopeless. The claimant cannot be criticised for pursuing the claim if her solicitor advised her to do so.

10.3 Should the threshold for actionability be raised?

10.3.1 Australian experience of introducing thresholds

In Australia in 2002 a former New South Wales Supreme Court Judge David Ipp QC was appointed to chair a Panel of Eminent Persons¹¹⁰¹ to reform tort law. The panel produced the 'Ipp Report' on 30 September 2002 which set out the terms of reference explaining:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another¹¹⁰²

The Panel was tasked with inquiring into the application, effectiveness and operation of common law principles defining liability for injury and developing and evaluating 'principled options to limit liability and quantum'.¹¹⁰³

Although there was a need for radical steps as a pragmatic response to an insurance crisis,¹¹⁰⁴ it is clear that the Panel applied principles that are in harmony with the observations of this Chapter:

we do not think that changes in the law should be recommended merely for the sake of reform or to reduce liability. As elsewhere in this Report (and as required by our Terms of Reference), we have sought to identify changes that can be justified in terms of principle.¹¹⁰⁵

These principles were:

¹¹⁰¹ Which also included Professor Peter Cane

¹¹⁰² Ipp Report (n. 986) p. ix

¹¹⁰³ Ipp Report (n. 986) p. ix

¹¹⁰⁴ James Goudkamp, 'The Young Report: an Australian perspective on the latest response to Britain's "compensation culture"' (n. 1079) p. 6

¹¹⁰⁵ Ipp Report (n. 986) p. 181

- that resources devoted to compensation should be allocated to support the most needful: whereas personal injury law treats the less seriously injured relatively more generously than the more seriously injured. (13.2 p. 181)

- whilst the full compensation principle applies to economic losses it is merely assumed to be the basis for non-economic loss. However, it is not sacrosanct or beyond consideration for revision. Many legislative provisions compromise this principle to 'reflect community attitudes' (13.3 p. 181)

- the amounts awarded in tort are so disproportionately larger than amounts payable by way of social welfare, that the differentiation cannot be justified purely in terms of fault. (13.4 p. 182) Under strict UK PL law fault does not even enter into the equation.

- the smaller the claim, the more it costs as a proportion of the amount in issue to bring the claim. (13.5 p. 182)

- without denying the suffering that some claimants live with, it is more important to compensate financial loss than non-economic loss (as the social welfare system does). The smaller the claim, the greater the proportion attributable to general damages. (13.6 p. 182)

From this the Panel concluded that imposing a threshold¹¹⁰⁶ for awards of general damages would be an effective and appropriate way of significantly reducing the number and cost of smaller claims.

13.44 Therefore, the Panel recommends the adoption of a threshold for general damages in terms of 15 per cent of a most extreme case. Such a threshold provision has been the subject of judicial interpretation in NSW, and the Panel understands that it is now well understood in practice and is regarded as reasonably fair.

¹¹⁰⁶ Ipp Report (n. 986) p. 188 'A threshold should be distinguished from a deductible. For instance, imposing a deductible of \$10,000 would mean that no compensation would be payable for the first \$10,000 of any claim (for general damages). But a threshold of \$10,000 would have the effect that no compensation would be payable in respect of any claim (for general damages) worth less than \$10,000.'

13.45 The Panel has been informed that, in practice, cases that are assessed as below the threshold of 15 per cent of a most extreme case are typically cases of soft-tissue injury, which heals relatively rapidly.¹¹⁰⁷

The Law Council of Australia raised the concern that application of thresholds eliminates all claims below the margin, not only trivial ones.¹¹⁰⁸ This may discriminate against the elderly, children, pensioners, and stay at home parents who may have suffered no economic loss. But that is not discriminatory. Nobody can recover low value general damages and so no-one is worse off than anyone else. In so far as some claimants will recover special damages, this is because they have actually suffered pecuniary loss. The person who has not suffered financial loss is not discriminated against because the sufferer of financial loss recovers damages to make good his loss.

The Law Council of Australia also argues that thresholds discourage rehabilitation as it is in the interest of the injured person to stay injured and lose earnings. However it is submitted that it makes no difference whether there is a threshold or not. The longer a person is off work, the more his loss of earnings claim will be, and probably the higher his general damages for loss of amenity will be.

Ultimately a number of reforms were introduced including new thresholds to create a 'resulting statutory chaos'.¹¹⁰⁹ This is a result of the different states having their own legislative powers. This has the unfortunate consequence that plaintiffs recover different sums for the same injuries in different states. This emphasises the importance of unifying legislation at EU level.

10.3.2 Effect of introduction of thresholds in Australia

The Civil Liability Act 2002 of New South Wales provides:

¹¹⁰⁷ Ipp Report (n. 986) p. 192

¹¹⁰⁸ LCA Brief June 2004

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs_Fact_Sheets_and_Publications/Thresholds_for_General_Damages_-_Jun_2004.pdf>
accessed 24 January 2015

¹¹⁰⁹ James Goudkamp, 'The Young Report: an Australian perspective on the latest response to Britain's "compensation culture"' (n. 1079)

16 Determination of damages for non-economic loss

- (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
- (2) The maximum amount of damages that may be awarded for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case.

The Act then sets out a table of proportions of the maximum amount that apply to claims by reference to the severity of the non-economic loss as a proportion of the most extreme case. Goudkamp reports that some data are available by which to judge the impact of the imposition of a threshold in the New South Wales District Court (the equivalent of the English County Court in the most populous State). 'In 2001, filings were 20,784. This figure fell to 12,686 in 2002 and then to 7,912 in 2003. In 2004, only 6,789 claims were filed.'¹¹¹⁰

It is indicated that although there are no reliable data, anecdotal evidence suggests that insurance premiums have returned to pre-reform levels. However, there may be many factors that affect premiums and it is not possible to pinpoint a single cause. One of the problems with the reforms in Australia is that they were multifarious and wide ranging, in addition to varying widely from State to State, and concern has been expressed that they have gone too far.¹¹¹¹ It is clear that the imposition of the threshold has effectively cut off a considerable number of low value claims, which is the precise intention of the provision.

10.3.3 Concern about restricting rights

The concern about thresholds is that they provide an artificial barrier to enforcing a right. Society should therefore not impose thresholds lightly. However, thresholds are used widely in the law to restrict individuals' rights for the greater good, limitation periods being a prime example. More significantly the concept is not alien to PL. Two important thresholds were built into the PL Directive. The first is article 9 which provides that damage includes damage to property of a type ordinarily intended for private use or consumption and used by the injured person mainly for his own private

¹¹¹⁰ James Goudkamp, 'The Young Report: an Australian perspective on the latest response to Britain's "compensation culture"' (n. 1079) p. 13

¹¹¹¹ See James Goudkamp, 'The Young Report: an Australian perspective on the latest response to Britain's "compensation culture"' (n. 1079) p. 13

use or consumption 'with a lower threshold of 500 ECU'.¹¹¹² The reason for the threshold is expressly stated in recital 9 to the PL Directive as 'to avoid litigation in an excessive number of cases'.¹¹¹³

There is no explanation, in the Travaux Préparatoires to the PL Directive, for why this threshold only applies to property claims. There is no logical reason why the same considerations should not apply to minor injury claims. The threshold is expressed in ECU (European Currency Units which were replaced on 1 January 1999 by the Euro at parity). It has not been possible to identify how this figure was arrived at. The equivalent in the Consumer Protection Act 1987 under section 5(4) is £275. There is some divergence between Member States as to whether the threshold is applied as a kind of 'deductible' when the damage exceeds the limit or as a 'franchise' where the full amount is recoverable provided that the damage exceeds the threshold.

It may be that the absence of a threshold for injury claims simply arose because initially non-pecuniary claims were excluded under article 4 of the August 1974 first draft (in contrast with the Strasbourg Convention); 'Article 4 ...Compensation of non-pecuniary damage shall be excluded',¹¹¹⁴ on the grounds, according to the explanatory memorandum, that non-pecuniary damage, if taken into account, 'would unduly broaden its extent'.

Article 18 of the Directive provides for the Council to examine and if necessary revise the limits every five years after taking account of economic trends. The property damage threshold has never been changed. The threshold set in 1987 would be a little more than double the original sum if adjusted for inflation (by applying the RPI for example). This would still fall below even the most minor injury claim. Nevertheless there is scope for this element to be reviewed. Indeed the penultimate recital states

Whereas the harmonization resulting from this cannot be total at the present stage, but opens the way towards greater harmonization; whereas it is therefore necessary that the Council receive at regular intervals,

¹¹¹² PL Directive Article 9

¹¹¹³ PL Directive Recital 9

¹¹¹⁴ Preliminary Draft PL Directive (n. 24) p. 167

reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals.¹¹¹⁵

The second threshold in the PL Directive is Article 11 which provides

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage...¹¹¹⁶

When considering the draft PL Directive, the Law Commission was concerned that a 10 year prescription period was arbitrary and capable of 'working hardship and injustice to persons injured in the later stages of a product's life'.¹¹¹⁷ However, they were satisfied that it would be irrelevant to perishable goods and was needed in the interests of fairness in relation to durable goods, recognising difficulties in the burden of proof as time elapses. The Law Commission concluded that it was necessary that a producer should be able to 'close his books on a product' so as to enable him to assess risks and keep insurance premiums down. 'There is thus some saving, albeit marginal, which redounds to the general benefit of the public.'¹¹¹⁸

The Scottish Law Commission on the other hand felt that 'if strict liability was justified, one of its principal justifications must be that liability should subsist for as long as the product can be regarded as defective'. They concluded

It may be that insurance premiums in respect of such products may be higher if there is no cut-off period, but altogether to deprive an injured person of a right or a remedy in these circumstances seems too high a price to pay.¹¹¹⁹

The defendant in case 128 in the PL Claims Survey at Appendix 4 relied on the 10 year limitation period to obtain summary judgment. The claimant in that case crashed her car into a wall in a small car park and, having subsequently received a recall notice relating to jamming cruise controls, argued that this was the cause of the accident. Technical evidence showed that the two were unrelated and in all probability the sticking throttle she experienced was due to lack of maintenance of the cable on an

¹¹¹⁵ PL Directive Recital 18

¹¹¹⁶ PL Directive Article 11

¹¹¹⁷ Law Com. No. 82 *Liability for Defective Products* (n. 252) p.47 [151]

¹¹¹⁸ Law Commission 82 (n. 252) p. 47 [151 – 153]

¹¹¹⁹ Law Commission 82 (n. 252), pp. 47-48 [154 & 155]

old car. Her solicitors dropped the case and she continued on her own until the defendant obtained summary judgment. The imposition of a ten year time limit might be considered fair in the sense that the vehicle had had ten years and 92,997 miles of use and abuse since it left the factory.

When the Law Commission reviewed damages for non-pecuniary loss it specifically asked the question ‘Should there be a threshold for the recovery of damages for non-pecuniary loss?’¹¹²⁰ The Law Commission considered the arguments in favour of a threshold: this would reduce the cost of tort compensation in damages and costs; cases which are most vulnerable to exaggeration would be excluded from the tort system: and there is less of a case for compensating small injuries than large ones.

The Law Commission concluded by way of criticism that these arguments tended to be pragmatic rather than principled. However, the legal system must fulfil a practical function. To ignore pragmatism in favour of idealistic (and arguably misguided) principles is of no utility to society. The alternative of introducing an opaque and artificial costs regime to increase the difficulty in pursuing low value claims is an entirely pragmatic step and one that lacks the justification of transparency. In any event the imposition of thresholds is not lacking in principle. It is a fundamental principle that individual freedom must be subject to the rights of society as a whole, as part of the individual’s social contract:

The function of the “de minimis” doctrine (as it is frequently cited) is to place “outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society.”¹¹²¹

The Law Commission identified a number of counter-arguments:¹¹²²

‘(1) Even if the tort system is too expensive, costs should be reduced by other methods than interfering with basic common law principles’.

¹¹²⁰ Law Commission No. 257 (n. 940) p. 10 [2.25]-[2.28]

¹¹²¹ Jeff Nemerofsky, ‘What is a “Trifle” Anyway?’ *Gonzaga Law Review* [Vol. 37:2 2001/02] 315-341 pp. 323/324

¹¹²² Law Commission No. 257 (n. 940) pp. 10-11 [2.26]

This misses the point that this is not simply about the cost of tort. The point argued here is that it fails to *compensate* in the narrow sense.

‘(2) A threshold might itself lead to exaggeration.’

This is true but there is already a *de facto* threshold to be overcome. The Judicial College guideline for minor injuries values ‘injuries where there is a complete recovery within seven days’ at up to £550. Injuries where there is a complete recovery within 28 days are valued at £550 to £1,100. Theoretically, therefore, the threshold currently stands at £550. The reality is different. Only 5 of the claims for injuries in the PL Claims Survey at Appendix 4 settled for less than £1,000 and in two of these, NHS charges took the final payment over £1,000.

The current limit for a personal injury claim to remain in the small claims track is that the personal injury element must not exceed £1,000.¹¹²³ A successful claimant in the small claims track is only entitled to very limited costs. It is therefore more attractive to a claimant if the claim exceeds £1,000, so that it falls into the fast track.¹¹²⁴ Thus exaggeration is a risk (and a fact) with the current system. By increasing the threshold to a significant sum, claimants will not be able to exceed the margin by modest exaggeration and so attempts to mislead are more likely to be detected.

‘(3) As minor injuries typically do not cause pecuniary loss, to refuse non-pecuniary damages would mean some wrongs went uncompensated’.

This assumes that non-pecuniary loss can be compensated by damages. It has been shown in Chapter 9 that in fact damages fail to compensate minor injuries.

‘(4) The Pearson Commission’s recommendation that a threshold be introduced should be seen in the context of its wide terms of reference, and its view that tort damages should be seen as a supplement to no-fault compensation from the state’.

¹¹²³ CPR 26.6 (1) (a) (ii)

¹¹²⁴ CPR 26.6 (4)(a)

Whilst it is true that the Pearson Commission recommended a package of reforms, it would be inaccurate to suggest that introducing a threshold was somehow a *quid pro quo* for no-fault liability. The Pearson Commission saw the need for a threshold (a three month time period rather than a monetary amount) as a matter of principle. They made it clear that they found payments for minor non-pecuniary loss ‘wasteful’. It was

... hard to justify payments for minor or transient non-pecuniary loss, such as may equally be incurred through sickness or some everyday mishap. We find it impossible to justify their use as bargaining counters. The emphasis in compensation for non-pecuniary loss should in our view be on serious and continuing losses, especially loss of faculty.¹¹²⁵

‘(5) There are already disincentives to small claims, for example in costs rules’

It is submitted that costs disincentives are entirely lacking in legal principle. If legislation is to take away rights then it should be clear that this is what it does.

‘(6) An exclusion, on the Pearson model, of damages for non-pecuniary loss in the first three months after the accident would in many cases exclude compensation when a victim’s pain is at its worst.’

It is correct that a time-based threshold would affect the period immediately after the injury. The Law Commission’s reference here to a ‘victim’ is telling. It is submitted that the role of a threshold should be to remove trivial claims. Although the Pearson Commission expressed their proposal for a threshold as a temporal measure, it was made clear that their intention was simply to exclude minor claims as explained above. It is also important to note that the Pearson Commission postulated two alternative temporal thresholds. The first, which they preferred, was a complete bar to recovery of non-pecuniary damages for the first three months after the injury. The second permitted recovery for the first three months if the injury persisted beyond this period.

There are many ways of defining a threshold including a monetary limit, a time period, a verbal threshold (which has the advantage that it is less susceptible to

¹¹²⁵ Pearson Commission (n. 191) pp. 89/90 [383-384]

exaggeration)¹¹²⁶ or a set of specific conditions (or a combination of these). For example Sugarman proposes

For injuries causing less than six months of disability, only those suffering a serious disfigurement or impairment (later defined in some detail) would have access to the tort system for the payment of general damages.¹¹²⁷

A difficulty in defining a threshold in connection with the PL Directive is that there is no harmonisation of non-pecuniary damages and so ideally this deficiency would need to be addressed at the same time.

Conclusions

The need for damages for minor injuries has been manufactured by the litigation industry. Too many claimants are induced to bring claims that they would not otherwise bring, typically at the lower end of the scale. Access to justice for those claims has opened a door to automatic compensation for the most minor of injuries. PL seems to be particularly vulnerable because strict liability is too often misinterpreted by claimant lawyers unused to PL claims as liability emanating from the mere happening of an accident. It will be argued by some that they are simply exercising their rights and it should make no difference how they are apprised of these rights.

In both Case Study 1, *Martin v Kudo*, and Case Study 3, *Hudson and others v Tubitsu*, the claimants were represented by solicitors. It is not possible to know from a defendant's perspective precisely what advice was being given to the claimants or why one proceeded to trial and the other abandoned the case. The hope would be that the legal profession would be giving proper advice on the legal merits of the case. Whilst the position is often not clear cut, claimants' solicitors must from time to time face an ethical dilemma as to whether to advise the client to drop the case because it is bad in law – or to carry on pursuing a bad case because the likelihood is that the innocent defendant will pay something to dispose of the nuisance. The Practice has never had

¹¹²⁶ James M. Anderson, Paul Heaton, Stephen J. Carroll, 'The U.S. Experience with No-Fault Automobile Insurance A Retrospective' p. 105
<http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG860.pdf > accessed 23 November 2014

¹¹²⁷ Stephen D. Sugarman, 'Serious Tort Law Reform', 24 SAN DIEGO L. REV. 795, 807, 823-25 (1987) p. 807

to face this issue as a defendant. Such low value claims are highly susceptible to moral hazard given the lack of extrinsic evidence of injury.

Procedural reforms indirectly seek to control the numbers of claims by putting the financial viability of claiming in issue. It is concluded that this is an uncertain and disingenuous way to tackle the problem. It would be fairer for legislation, at EU level, to impose a value threshold below which claims could not be brought on the basis that the arguments for retaining damages for pain and suffering are more persuasive in relation to larger claims. The financial cost to society of such claims requires a further detailed research project. It would be a worthwhile exercise. Only then can sensible limits be set and the amounts saved from overcompensating individuals for minor injuries reassigned to the higher priority of socially beneficial public expenditure on projects that improve safety and the wellbeing of society as a whole.¹¹²⁸

¹¹²⁸ Robert E. Goodin 'Theories of Compensation' (n. 990) p. 73

PL CLAIMS SURVEY: Data Analysis

Facts and figures

The survey reviewed 132 cases from the Practice's archives. These were all PL cases that are closed. There were no particular criteria for acceptance other than that they were archived and could be retrieved. Some older files have been destroyed but the remaining archived boxes stretch back 10 years or more. The sample represents approximately 10 cases per year ranging from the smallest soft tissue injuries to paraplegic and fatal cases.

The factors reviewed included:

1. Outcomes

Out of 132 cases 66, exactly half, were abandoned. Three more were discontinued formally after proceedings and a further three were won in court by the defendant, two at trial and one by summary judgment.

On the other side of the scales 58 claims were settled with an additional two cases won at trial or by summary judgment.

The significance of this finding is that in half the cases claimants began claims and then abandoned them. In each case the potential defendant had to set in motion a process of investigation often involving insurers, technical staff sometimes including external consultants and in-house or external lawyers. This is a cost that has not been expressly taken into consideration in the various reviews of damages (Law Commissions 225 and 257; Pearson Commission, and of civil procedure (Woolf Reforms and Jackson reforms) discussed in this thesis. Similarly the reports to the European Commission on the PL Directive (see section 1.5 above) have failed to take into account the hidden cost of claims being brought and not merely lost but abandoned even if for perfectly legitimate reasons.

58 cases were settled and only two reached court. This might be considered a success of the system as settling cases must be more efficient than having to go to trial because the costs of counsel, solicitor and experts of both sides are usually considerable. However this must be balanced by two factors. First in more than half of these settlements nuisance offers were made (almost a quarter of all cases). This term is used to denote a case in which the defendant is not liable or believes strongly that it is not liable, but it considers the cost of defending and the risks inherent in the litigation system too great to run the defence to trial. It includes cases in which the defendant simply does not want the publicity of fighting cases in court.

Notably in cases where the defendant felt that there was fraud afoot, it was inclined to fight (cases 62 and 99).

2. Moral hazard

56 cases, almost half of all claims were considered to be at risk of moral hazard, meaning that the circumstances of the accident or the nature of injuries rendered them vulnerable to exaggeration. That is not to say that claimants habitually fabricate or exaggerate their injuries but that the nature of injury claims and the mode of proof means that Claimants who wish to do so can manufacture actionable injuries without difficulty. The more minor the injury the easier it is to exaggerate it. Breakages of bones, lacerations and broken tendons and ligaments can be detected by diagnostic equipment. However, soft tissue injuries and mental injuries (or psychological effects of physical injuries) rely almost entirely on the claimant's report of the pain and disability caused by the accident. 37 of the 86 lowest value cases (up to £5,000) were considered to exhibit moral hazard. Conversely only 19 cases (14.4% of all the cases in the survey where moral hazard was identified as a potential issue) related to cases valued at more than £5,000. Thus there appears to be a correlation between low value cases and cases involving moral hazard. This is unsurprising because when deciding whether a case contained potential moral hazard an obvious factor was whether there was a soft tissue injury.

3. Value

It was possible to ascribe a value to 131 cases in the sample. Case number one was ignored as it was not possible on the limited information available to make a plausible estimate of quantum. The method of valuation was to take the settlement sum in respect of the element recoverable under the Consumer Protection Act where settlement was achieved. In cases which were not settled, if there was a valuation on the file this was used. For example the fee earner may have assessed the value for reporting on quantum. Where there was no evaluation, a rough evaluation was made using the 12th edition of the Judicial College Guidelines on the Assessment of Personal Injury Damages. The post Jackson figures have been used for consistency. These are 10% higher than the pre-Jackson figures but the difference is not material in the context of the research which is the subject of this thesis. Where there is a range of figures the approach has been reasonably generous to the claimant assuming the higher end of the bracket. If a less generous approach had been taken a few more cases would have fallen into the lowest value bracket, but the numbers are not material.

Where cases were abandoned, the quantum was still evaluated as if there were 100% liability as the purpose of this criterion was to assess the size of claims without considering liability.

The values of cases confirmed existing wider research cited (see 9.1.2 above) on personal injury generally, in that the majority of claims were in the lowest value band as set out in table 6 above. The overwhelming majority of valued cases, 65.6%, were quantified at less than £5,000 and only 5.3% of claims exceeded £50,000.

This strongly supports the argument that the rationale for general damages cited by Genn¹¹²⁹ of 'victims' descriptions of their life changing injuries, does not apply to the majority of PL cases (or at least those handled by the Practice).

¹¹²⁹ Law Commission 225 (n. 925)

4. Transactional costs

Given the number of small claims, a feature of concern was the disproportionality between the value of cases and the transactional costs. In this case the value of the claim was the value at final outcome. Therefore if a settlement was achieved, the settled sum relating to damages for injury was taken as the value. Where a case was abandoned or lost, the value was nil. This value of outcome was then compared with the expense of costs for legal and expert fees expended by all parties. The simple task was to assess whether the fees exceeded the value of the case. It did so in 119 out of 132 cases: that is 90% of cases. It was this concern which led to the Jackson review. It is presumably because this statistic is so notable that the focus of the Jackson review was entirely on the cost of litigation and Jackson LJ's remit did not stretch to considering the social desirability of the litigation as a whole.

5. Causation

Causation was in issue in 95 out of 132 cases (72%), indicating that notwithstanding strict liability under the PL Directive, liability does not automatically follow and liability still has to be proved.

6. Regulatory

There were regulations in place in relation to 100% of the products which were the subject of the sample claims. Most of the claims were in the motor manufacturing sector but there were also fireworks, medical products and electrical goods. Moreover the General Product Safety Regulations would impose safety requirements where there was no product specific legislation. This supports the proposition that PL is unnecessary for the purpose of regulating safety.

7. Confidentiality/damages

There were no cases in which a claimant refused to sign a confidentiality agreement when reaching settlement. This supports the argument that Claimants typically want

money rather than public vindication of their rights by naming and shaming the manufacturer.

8. Insurer control

An interesting aspect of PL is that in none of the cases was an Insurer in ultimate control of the claim. It is certainly the experience of the Practice that when dealing with volume personal injury litigation, insurers may take complete control of claims and settle them without reference to their insured. However, in PL cases the insured manufacturer typically takes a serious interest in claims. It is also typically involved in investigations. It may be the expert on the product concerned and may have to help an independent expert with some of the proprietary technology.

9. Mental injury

It was the author's perception that mental injuries are claimed more frequently now than perhaps 10 or 15 years ago but there was no evidence to support this in the survey. There were 22 cases out of 132 (16.6%) in which a specific mental injury was claimed and these are spread fairly evenly over the period covered by the survey. However, this should be distinguished from the mental element of minor soft tissue injuries which is an integral part of the value of the claim. It is also unknown whether some of the cases that were abandoned early on would have produced claims for psychological injury had they advanced further, particularly those where lawyers had not yet been involved.

CHAPTER ELEVEN: CONCLUSIONS

This thesis has sought to answer the primary question as to whether PL Claims are socially desirable by reference to three PL case studies and a survey of 132 archived PL claims that constitute a representative random sample of PL cases handled by the Practice. Whilst the sample is scientifically small the cases span a period of 13 years or so (older files having been destroyed and recent files still being open). More importantly the author's legal practice has provided a window through which

- (i) failings can be seen in a strict liability based European Directive;
- (ii) deficiencies are revealed in tort itself as a mechanism for compensating injured persons; and
- (iii) the newly reformed domestic civil procedure put in place to distribute rights is shown to be flawed.

11.1 Findings

According to the most recent report of the EU commission on the PL Directive:

In general, the Directive is seen as achieving a balance between consumer protection and the producers' interests. Most contributions to this report confirm the fact that Directive 85/374/EEC is an instrument that offers the real possibility of filing a claim for appropriate remedy and compensation for damage caused by a defective product.¹¹³⁰

The general assessment has been that there is nothing wrong with the PL Directive and so there is no need to fix anything. This thesis argues the contrary position: that there is much that is wrong and that the time has come to consider radical reforms. This Chapter first summarises the findings leading to this conclusion. The second part of this chapter sets out the conclusions reached as to the way forward. This will involve considerable work to be done by way of investigation and economic scrutiny. It would be unrealistic to expect this thesis to be able to go further than identifying the general scope of this work.

¹¹³⁰ Fourth report on the application of Council Directive 85/374/EEC (n. 59)

11.1.1 Do PL claims achieve the socially desirable goals of tort?

The question posed by this thesis is whether PL claims are socially desirable. The question was tackled by first asking whether PL claims achieve the socially beneficial goals of tort. Social desirability was tested by using as a benchmark the widely accepted goals of tort identified as deterrence, corrective justice, vindication and retribution, overarching distributive justice and compensation.

Deterrence

There is no evidence in the case studies or the PL Claims Survey to support the EU Commission's claim that the Directive helps to increase the level of protection against defective products by complementing the regulatory measures and checks to prevent the marketing of defective products and thereby protects consumers.¹¹³¹ Consumer safety is a separate and effective limb of EU policy.¹¹³² All of the products in the PL Claims Survey were subject to strong regulation.¹¹³³

Damages awards in the UK are not at the level of US awards and provide no punitive incentive on manufacturers.¹¹³⁴ Group litigation has not emulated class actions and has had little effect on litigation in the UK. Although contingency fees are now permissible in the UK the EU Commission has recommended a ban on the use of such funding for collective redress.¹¹³⁵

Cautious behaviour is not rewarded by a strict liability regime or where insurance meets any claims.

The world of routine PL claims has nothing to do with deterrence. It deals with predominantly small claims, two thirds of those in the PL Claims Survey worth less

¹¹³¹ Green Paper (n. 45)

¹¹³² See p. 96

¹¹³³ See p. 327

¹¹³⁴ See p. 63

¹¹³⁵ See p. 70

than £5,000¹¹³⁶ which have increased in volume in line with small injury claims generally.

Corrective Justice

It was found that strict liability formed an unsatisfactory basis for corrective justice because there is no clear wrong to right. Wrong has to be assumed without regard to the particular circumstances of the case, especially the social value or '*sozialadäquat*' of the product.¹¹³⁷

Settlements in the PL Survey had no correlation with wrong. Payments were made in cases where there was a clear defect, even though the supplier might merely have been an importer with no way of checking the functionality and safety of the product. A fault based system with an innate conception of wrong at the heart of it is a fairer and more predictable guide to socially desirable behavioural norms. Payments were also made on a nuisance basis where there was no defect, because of the penal cost of defending a claim.

Vindication and Retribution

Private law remedies are inappropriate for establishing the recognition of public rights. There are social organs and institutions better designed for this purpose.¹¹³⁸ Retribution falls within the province of the criminal law. It has a declining (if not extinct) role in modern society and civil liability's instrumental character is in any event ill-equipped to dispense the non-utilitarian purpose of enabling victims to exact revenge on supposed culprits.

Distributive Justice

The second question asked was why strict liability was perceived to be necessary. It was explained why strict liability for defective products was an inappropriate means of

¹¹³⁶ See p. 275

¹¹³⁷ See p. 135

¹¹³⁸ See p. 137

dispensing distributive justice for claimants and defendants alike because the grounds for adopting strict liability were deeply flawed. They followed a highly suspect legal theory which rose to prominence in the US in the 1960s but which was largely discredited and abandoned by the late-1980s, precisely when the PL Directive was introduced in Europe.¹¹³⁹

Unprecedented tragedies in the 1960s and 1970s led to an emotive clamour for some form of collective redress based on a legal theory which could overcome the problems of proof of fault and causation. Strict liability was selected without sufficient thought as to whether it was capable of achieving these aims. It was not. Even if fault is removed from the equation, causation remains the dominant issue in PL claims and was in dispute in nearly three quarters of all the cases in the PL Claims Survey. The arguments in favour of strict liability lead more obviously to no-fault liability.¹¹⁴⁰

Finally it was shown that the reforms to civil procedure which followed the Jackson Report on 'civil litigation costs' whilst aimed at the acute problem of the disproportionate cost of litigation, failed to address the question of whether the underlying litigation is socially desirable. The most significant reform, Qualified One-Way Costs Shifting is a comprehensive transfer of the costs of personal injury litigation onto the artificial social group of 'defendants'. Unfortunately QOCS has been shown to be fundamentally unsound in so many ways that it does not constitute a fair redistribution of rights.¹¹⁴¹ Instead it substitutes an 'absurd' system of shifting the claimant's litigation risk to the defendants with a different method of doing the same thing.¹¹⁴² It was also argued that whilst the Jackson reforms will discourage the pursuit of minor claims by making them financially less viable for lawyers this is a disingenuous way of withdrawing rights. If distributive justice demands that individuals' rights should be restricted in the greater interests of society as a whole, then the law should be transparent about this.

¹¹³⁹ See p. 176

¹¹⁴⁰ See p. 220

¹¹⁴¹ See p. 241

¹¹⁴² Adrian Zuckerman 'The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system' (n. 820) p. 267

An area highlighted by this thesis, upon which there has been a remarkable dearth of academic discussion, is the concept of gambling present in the current civil litigation process. Compensation should be based on need. There should be certainty. It should not become a game or a sport in which there are winners and losers.¹¹⁴³

Compensation

Compensation is the most conspicuous purpose of PL and to a degree it achieves this goal. However, this is where the third fundamental question arises: does PL actually compensate injury?

It is widely assumed that compensation is a worthy goal in itself and debate over the past 20 years has focused on the cost of delivery. This thesis has considered how compensation is awarded in practice and concentrated on general damages which make up the largest part of all compensation paid. In almost three quarters of all cases in the PL Claims Survey, it was found that non-pecuniary loss claimed (or potentially to be claimed) exceeded pecuniary loss. This is typical of small claims, which make up the vast majority of injury claims.

It was concluded that whatever jurisprudential basis was adopted to explain general damages for pain and suffering and loss of amenity, there was a gap between theory and practice. In many small claims, damages simply represent a windfall for the claimant. And the litigation industry: the rhetoric explaining the need for such damages being based on life changing injuries and being totally inapposite to the bumps and scrapes of everyday life.¹¹⁴⁴ Claims for such minor injuries are subject to moral hazard due to the lack of extrinsic evidence of injury. These claims have become a commodity: an artificial form of money distribution generated by the litigation industry in the name of 'access to justice'.¹¹⁴⁵

Research is urgently needed to quantify the overall cost to society of these low value claims (not merely in the field of PL).

¹¹⁴³ See p. 52

¹¹⁴⁴ See p. 291

¹¹⁴⁵ See p. 299

Thus it can be said that PL Claims fall a long way short of satisfying the test of social desirability.

11.2 Conclusions

11.2.1 The PL Directive

The PL Directive has been shown to be of very little benefit to society. Harmonising the basis of liability alone is of no practical use. The usefulness of the PL Directive is limited to providing an extra-contractual right of action to those injured using products which they have not purchased and to bystanders.

These claimants will usually have a concomitant right of action in negligence. Thus the real advantage of a right of action under the PL Directive is that it is based on strict liability. Yet the putative justifications for strict liability as the common basis of liability for defective products are deeply flawed. There is no reasonable justification for strict liability, fault providing a more rational basis of liability (assuming a tort based system) and no-fault providing a fairer distribution.

It has also been argued that there is no reason to treat PL as a special class of liability. The logical conclusion, therefore, is that the PL Directive serves no practical purpose and should be repealed.

11.2.2 Civil Liability as a whole

However there is a wider ranging and more radical conclusion following from the fact that PL is practically a sub-set of personal injury generally. The time has come to re-examine Atiyah's 1997 conclusion that the 'whole system of legal liability needs a good hard look'.¹¹⁴⁶ He ventured 'a few tentative suggestions about such an extensive subject as reforming the whole system of civil liability' the most significant of which was that 'the action for personal injuries should simply be abolished and first party

¹¹⁴⁶ Atiyah, P S, *The Damages Lottery* (n. 13) p. 173

insurance should be left to the free market.¹¹⁴⁷ This thesis, by reference to a specialist PL practice of 15 years (and a further 15 years of PL experience before that) goes some way towards validating Atiyah's unorthodox conception. However Atiyah saw first party insurance alone as filling the space left by tort. Whilst this thesis supports investigating the potential for developing the first party insurance market, it is concluded that compensation should be based on need and a basic level of compensation should be guaranteed by the state. This means investigating the possibility of introducing a no-fault scheme along the lines of the NZ Accident Compensation Scheme discussed in Chapter 7.

11.2.3 The optimal no-fault scheme

The optimal no-fault scheme should be based on need. If a person is injured why should it matter whether that injury is caused by a car or a pharmaceutical or the claimant's own carelessness in tripping over a natural hazard?

Atiyah ruled out a scheme providing compensation at the level of civil liability as too costly. Although a specific costing exercise needs to be undertaken, this undoubtedly remains so. The New Zealand 'prototype' has demonstrated this. The solution therefore has to be to apply limits on recoverability. This is most conveniently done by introducing a threshold at the bottom end and a compensation ceiling at the top end. This is an efficient and manageable way of controlling expenditure.

This is where Atiyah's first party Insurance market can fill the void by offering cover for injuries at the lower end of the scale (no doubt at considerable cost) and top up cover above the ceiling. To make such a scheme work would be a real financial challenge. The starting point would be a data gathering exercise on the cost of the existing civil liability system.

Reliable data would be required on injury claims paid and premiums charged across typical liability sectors. As this thesis has identified, the cost of claims started and abandoned must not be left out of consideration. In addition a detailed investigation of

¹¹⁴⁷ Atiyah, P S, *The Damages Lottery* (n. 13) p. 189

the New Zealand Accident Compensation Scheme would be required, to learn from its successes and problems, in addition to other more limited schemes for medical injury and motor liability that already exist around the world. To this end the Report of the No Fault Compensation Review Group Report¹¹⁴⁸ is a good starting point.

Such a scheme would resolve many of the failings of civil litigation identified in this thesis as applying not only to PL claims but across the full range of injury litigation.

- Compensation based on need can cover not merely injury for which a responsible person can be identified but also persons injured by disease,¹¹⁴⁹ unavoidable accidents that are no-one's fault; and accidents that are the claimant's own fault. Considerations of blame would be irrelevant and so this would be true to the ideals expressed to support strict liability.
- There is certainty of compensation and any form of gambling is removed from the process.
- The inequality of distribution is corrected:
 - compensation is not limited to the fortunate few winners
 - transactional costs are reduced significantly if the current legal process is abandoned
 - threshold provisions eradicate the large volume of low value high moral hazard claims currently within the litigation system.
- Whilst it would be necessary to remove insurers' rights of subrogation to make such a scheme work, a right of recovery could be preserved by insurers against any party whose reckless or deliberate act caused the injuries for which compensation is to be paid. Such liability would be uninsurable as is currently the case. This satisfies the requirements of corrective justice and deterrence.
- A no-fault scheme must operate alongside effective regulation to ensure an appropriate level of deterrence and punishment for behaviour tending to expose consumers to unacceptable risks. This may require a review of sanctions to be conducted.

¹¹⁴⁸ No Fault Compensation Review Group Report and Recommendations (n. 778) pp. 25-27

¹¹⁴⁹ See generally: Stapleton, J, *Disease and the Compensation Debate* (n. 747)

- The primary focus should be on rehabilitation rather than arbitrary sums of money being paid for pain and suffering and loss of amenity.
- Mass disasters should be dealt with by the state (whether within the scheme or outside it) and the state can control its exposure through risk transfer as necessary.

11.2.4 Social Welfare

Whilst Atiyah was against utopian all-embracing state schemes as he saw 'paternalism' as the root cause of over-dependence on welfare, this is a political judgement. If taken to its logical conclusion it would mean that education, health and pensions would all have to be removed from the public sector. Such a scheme has been 'more aptly described as a supplementary social security and public healthcare system than as an injury compensation scheme.'¹¹⁵⁰ Despite his grave doubts about such wholesale schemes providing the answer to the compensation needs of society, Atiyah supported a no-fault scheme for motor accidents and applauded the fact that New Zealand had proved that the damages action is not indispensable.

A first party insurance scheme could provide funding for claims below the threshold and more importantly above the ceiling. This would provide opportunities for the insurance industry to replace their role in personal injury liability insurance.

Again, politics are beyond the scope of this work but it can be said that a mixed scheme involving state funded core compensation and private sector first party insurance meets two key objectives of the EU. The first is protection of the consumer (the state based no-fault scheme) and the second is competition (insurers competing on premiums and benefits).

11.2.5 Obstacles

Such sweeping proposals face a number of obstacles, even assuming that after rigorous financial examination a scheme is viable. First, there is the legal profession

¹¹⁵⁰ Thomas Douglas, 'Medical Injury Compensation: Beyond 'No-Fault' Medical Law Review, 17, Spring 2009, pp. 30–51 at p. 39.

which can be expected to resist changes that would decimate the personal injury litigation business. Such opposition should not be allowed to interfere with developments in the law that are beneficial for society. The legal profession is there to serve society not to create an artificial industry to support itself. Lawyers should have the skills to turn their attention to other areas of law where their help may be more useful. There will no doubt still be a role for the medical profession and for the insurance market in the field of compensation.

A greater obstacle is the position of the UK within the EU. It is less complicated for a country such as New Zealand to make wide scale changes to its legal process than a nation which had ceded part of its legislative power to the EU. The EU is both a problem and a potential solution. It would require intricate examination of any potential UK based scheme to ensure that the UK complied with existing Europe wide legislation. Insofar as the UK offered a greater degree of protection than the minimum required by EU law it is conceivable that a partial UK scheme could work. There are already medical no-fault schemes in Sweden, Denmark, Norway, Finland and France.¹¹⁵¹ A wider scheme would require rewriting of EU law.

This work has also highlighted the unrealistic aspirations of the EU in seeking to harmonise legislation by introducing a common liability standard when the Member States have widely divergent methods of quantifying damages. The EU needs to tackle the issue of harmonisation of compensation and of procedures which have quasi-substantive effects. This is a considerable challenge but surely not impossible: after all 19 of the 28 Member States have managed to agree to a common currency.

A better solution would be for Europe wide legislation to require all Member States to introduce no-fault compensation schemes. This would be an opportunity to promote true harmonisation of laws where to date there has been a complete failure of harmonisation due to differences between the Member States' systems most particularly as to damages.

¹¹⁵¹ See generally on the relative merits of variations on the no-fault theme Thomas Douglas, 'Medical Injury Compensation: Beyond 'No-Fault' (n. 1150)

The most significant obstacle is cost. The wider the scheme the fairer it becomes but the greater the cost. However, the solution to this problem is to apply a suitable 'excess' (whether defined in value or words) to the scheme or more accurately a 'franchise' (so that the excess is not applicable where the claim is larger than a specific amount). This encourages cautious behaviour while reducing the overall cost. The overall cost of claims at the lowest level is substantial. Yet the PL Claims Survey supports the proposition that the lowest level of claim represents the least needful of compensation.

11.3 Final Comments

These conclusions are not novel in that the no-fault argument periodically comes in and out of focus. However, this thesis supports the conclusion that the time has come to give it serious consideration on a large scale. Almost 20 years have passed since first publication of *The Damages Lottery*. This is a significant period in which the successes and failures of the New Zealand system in practice can be reappraised against the post-Woolf traditional civil liability system of the UK. The fact that no-fault has received a mixed reception in the past should not deter the fresh investigation of an advancement that provides a fairer distribution of rights than the current system whilst adopting the pragmatic yet principled concept of thresholds pioneered in Australia. Such a system discards

- outgrown concepts both of fault and so called strict liability (which remain largely to support the litigation industry which has grown around them rather than performing an efficient compensatory function);
- uncertainty and inconsistency in the security of awards;
- discrimination against those who suffer injury and disease through natural causes and
- a system of gambling at society's expense that rewards the lucky minority (and sometimes fraudsters and chancers).

Instead of seeing personal injury as a game between claimants and defendants, it considers what injured persons need and ensures that there is a dependable response to that need. It defines and ignores minor injuries that do not give rise to real needs

and in return it provides a reliable safety net for those who have suffered material injuries. This is desirable for society as a whole.

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APPENDIX 1

Case Study 1: Martin v Kudo (GB) Motor Company

Extracts of key documents from the file

1. Kudo's Inspection Report

...vehicle was presented to yyy Garage to carry out a parking brake test using a roller brake test machine to confirm the efficiency of the parking brake. The qualified M.O.T. engineer carried out this test and confirmed that the parking brake efficiency was 26%, this being 10% above the required legislation.

... both the left hand and right hand rear park brakes operated correctly with no imbalance, thus enabling the parking brake to exceed the efficiency level laid down by legislation.

The park brake adjustment/travel was checked against the specifications using a calibrated spring balance ... the Kudo specification being 4-6 clicks at 20Kgf.

... The incline was measured and found to be a 4 degree incline. The park brake was applied in the following sequence and the result noted.

<u>Park lever clicks</u>	<u>Result</u>
1	Vehicle Moved
2	Vehicle Moved
3	Vehicle Moved but park brake could be felt to be operating
4	Vehicle held stationary

2. Letter of Claim

'The circumstances of this incident are that our client's vehicle was parked on an incline with the handbrake applied and whilst he was at the rear of the vehicle with his daughter and wife the vehicle began to roll backwards.

The reason why we are alleging negligence is that there appears to be a fault with the handbrake and as such the mechanism was unsafe and not fit for purpose.

Our client has suffered an injury to his back as a result of the incident and has also suffered time off work due to the injury...

We have instructed xxx Consultants Ltd to provide an in depth engineer's report and enclose a copy of this for your information.'

3. Martin's Expert Engineer

... as a result of this unplanned occurrence that the Claimant suffered personal injuries to his back and furthermore a great deal of distress to his family.

It is the Claimants case that hand brake had held the car for approximately 30 seconds, which was just long enough for the Claimant and his family to vacate the vehicle and commence unloading the boot.

... I pulled the hand brake lever up and obtained the following results: -

- 1 Click ... Effort Required ... 5.56Kgf
- 2 Clicks ... Effort Required ... 6.21 Kgf
- 3 Clicks ... Effort Required ... 10.23Kgf
- 4 Clicks ... Effort Required ... 16.74Kgf
- 5 Clicks ... Effort Required ... 24.71 Kgf
- 6 Clicks ... Effort Required ... 30.00Kgf

... I requested the Claimant to park his car on an incline which measured 15 degrees. I requested the Claimant to apply his handbrake in what I consider to be a normal handbrake application ... With the handbrake applied the car was then left for approximately 10 minutes on the incline to observe for any movement. No movement of the car was detected.

To achieve the optimum braking effort from new brakes will require the use of the brakes so that both of the friction surfaces marry together. With this in mind it is my opinion that whilst the immediate contact achieved with new components should meet reasonable braking requirements further brake performance can only be achieved when completion of the bedding-in process or acceptable buffing of the pad and disc has taken place.

In this case the Claimant suffered injuries to his back, and but for his quick thinking at the material time the accident could have been more horrific than what it was.

At the material time the Claimant simply parked his car and applied the hand brake in the same way as he has always done in his 11 years of safe, accident free driving.

... I could find no mechanical fault with the foot brake on the rear wheels nor the parking brake which operated both near side and off side rear brakes as designed to do so, however, to apply of the park brake fully became more difficult the further the hand brake was pulled past the fourth click which as stated required 16.74Kgf to apply. This position on the hand brake would not fully hold the vehicle on our 15 degree

slope, a further click requiring 24.71Kgf was required to fully retain the car in its position.

Based on the balance of probability if the vehicle where to be parked on an even steeper incline four clicks would not solely hold the vehicle and a further click of the hand brake would be required which as stated required a force of 30Kgf for it to be achieved.

... the Claimant stated that both the 5th and 6th clicks very difficult to apply.

Information in the form of a Technical Information ... sheet from Kudo relates to the poor performance of the parking brake on the particular model vehicle as that of the Claimants.

These defects present within the Claimants vehicle were as shown in the Technical Information were known to the Defendants and as a consequence the Defendants have allowed the vehicle to be used by the Claimant resulting in the Claimant suffering a personal injury.

In this regard I believe the Claimant will be able to rely on the General Product Safety Regulations 2005, This General Product Safety Directive is to ensure that all products intended for or likely to be used under normal or reasonable conditions are safe.

In addition I believe the Claimant will be able to rely on the Vosa Code of Practice on Safety Defects.

It is my opinion that in order to achieve 26% efficiency from the hand brake would require a great deal of strength to apply. This in my opinion would be far in excess (sic) of some people's capabilities to achieve, the Claimants wife being one example.

What is interesting in this case is that the Kudo Vehicle Quality Engineer ... had concerns about the efficiency of 281 - 372N of force needed to apply the hand brake after adjustment had been made. He goes on to say that in his opinion this is much too high for some people to apply and release.

4. Defendant's expert

Once the car started to move, it would have been relatively difficult for anybody to stop it moving by pulling up the parking brake lever, because parking brakes are not designed or intended to be used to bring moving vehicles to a standstill.

Mr Xxx's Engineer's Response includes references to the Manual Handling Operations Regulations 1992 and comments which aim to connect the action of pulling on a parking brake lever with guidance on lifting weight limits during manual handling tasks.

In my view, references to manual handling guidance and Regulations are irrelevant to this matter.

... in his Engineer's Response he said "*What I was most taken aback with during my inspection was the amount of physical effort I had to apply to the handbrake lever in order to achieve the maximum braking result*". In fact, he never established the amount of physical effort he had to apply in order to achieve "*the maximum braking result*", because he never equated his physical effort with the parking brake's efficiency.

Mr Xxx of Xxx Engineering Consultants Limited...established little more than that, in essence, it got harder to pull up the lever (i.e. more force was required), the greater the number of the notch on the ratchet that was reached. That is entirely what I would expect with this system, because pulling the lever upwards tensions the parking brake cables.

5. Kudo Technical Instruction

Some customers may complain that excessive pulling force is needed on the handbrake lever, to hold the vehicle on an incline. Please confirm if the vehicles parking brake meets the Ministry Of Transport requirements prior to carrying out this procedure. If the parking brake performance does not meet the MOT standard requirement then please continue with the procedure below.

6. Kudo Response

The Kudo specification for the park brake for this vehicle is "4-6 notches @ 20kg force". Your client's vehicle was tested ... at the time of this inspection the vehicle was parked on an incline of approximately 4 degrees. The park brake was applied and the following sequences and results were noted.

Park lever clicks Result

- 1 Vehicle moved
- 2 Vehicle moved
- 3 Vehicle moved but park brake could be felt to be operating
- 4 Vehicle held stationary

During the examination of the vehicle [your expert] confirmed that on applying the park brake in accordance with the handbook "no movement of the car was detected"

[your expert] confirms that ...he ... "could find no mechanical fault with the park brake"

...

The bulletin clearly states that the procedure described should only be undertaken if the parking brake performance does not meet the required MOT standard. As a result

of your client's complaint his vehicle was taken to a qualified MOT tester ... for a brake test to be carried out ... (See copy invoice and report attached). The report shows that the park brake achieved 26% efficiency which exceeds the legal requirement of 16%.

7. Particulars of Claim

1. Defendants were responsible as the manufacturers of Kudo motor vehicles in the United Kingdom.
2. ...purchased by the Claimant's wife...
3. ... the vehicle was parked on an incline with the handbrake applied but the handbrake failed so that the vehicle began to roll backwards and the Claimant (and his wife) who was behind it putting their 2 year old daughter into a pram attempted physically to arrest the roll of the vehicle and in doing so suffered injury but not before it had crushed the pram and damaged a vehicle parked behind it.
4. That incident occurred because the handbrake fitted to the vehicle by the Defendants at manufacture was defective.

Particulars

... handbrake ... requires a total of 5 clicks on the ratchet to be able to hold it on a 15° slope but the force which is required in order to apply that necessary fifth click is 24.7IKgf;

... because the 2 friction surfaces forming the relevant part of the handbrake mechanism had not undergone any buffing or bedding in procedure

5. ...will rely in support ... internal email ... did not provide an answer why the efficiency reduced so much between the vehicle being new and covering thousands of miles ... such would not help smaller or weaker customers to apply the necessary amount of effort needed to hold the vehicle on a 12° slope and in his opinion the force ... was way too much to ask some people to apply.

6. Vehicle accordingly contained a defect from manufacture for which the Defendants are in law liable to the Claimant under Section 2 of the Consumer Protection Act 1987.

7. Alternatively... Defendants as manufacturers ...owed to the Claimant a duty of care in tort... which was breached

8. Particulars

... fitted a handbrake to the vehicle which required force in order to enable it to achieve the required efficiency of retaining the vehicle on a slope which was beyond the capacity of many driver (sic); failed to subject the relevant part of the handbrake mechanism of the vehicle to any or any adequate buffing; failed to recall the vehicle

Particulars of Injuries

Soft tissue injuries to the neck, back, upper limbs and lower limbs. Pain, discomfort and restriction of movement. Shock and upset.

Particulars of Special Damage

Damage to pram	£ 90.00
Miscellaneous travel expenses, telephone calls, postal charges etc	£
50.00	
Loss of earnings (details awaited from Claimant's employer)	£ TBA

8. Defence

1. ... As part of that inspection, the vehicle was examined by an independent MOT test station and the handbrake was found to be working correctly and within specification.

2. Claimant was negligent in that he:

- a. Failed to apply the handbrake properly;
- b. Failed to ensure the handbrake was fully engaged;
- c. Failed to ensure that the vehicle was stationary before exiting it;
- d. Failed to follow paragraph 252 of the Highway Code in that he parked on a hill without applying the handbrake firmly, selecting a forward gear and turning the steering wheel away from the kerb;

... It is averred that the handbrake design complies with the requirements of **COUNCIL DIRECTIVE of 26 July 1971 on the approximation of the laws of the Member States relating to the braking devices of certain categories of motor vehicles and of their trailers (71/320/EEC)**, which provides:

“ANNEX II

Braking Tests and performance of braking systems...

2. PERFORMACE OF BRAKING SYSTEMS...

2.1. Vehicles of categories M and N...

2.1.3. Parking braking systems

2.1.3.3. If the control is a manual control, the force applied to it shall not exceed 400 N in the case of category M1 vehicles...”

3. The Directive therefore permits a design which requires up to 400N of input force (equivalent to approximately 40.8 Kgf).

9. Claimant's expert's letter

I have reported on facts that I have either been provided with or I have found through engineering practices and experience.

no reference has been made to the Technical Bulletins or email correspondence from Kudo which makes specific reference to the handbrake and the fundamental problem there was with the handbrake that they clearly knew about i.e. that the brakes had not been 'buffed' or 'bedded in' properly.

The parking brake fitted to the material vehicle is only applied when the vehicle has come to a complete stop. This is why it is imperative for the brake shoes and drum to be bedded in together before the vehicle is first used by a member of the public. If they are not then the type of accident that has occurred in this case could quite easily occur again.

The Claimant says that the hand brake was applied by himself in what he describes as his "normal way". He complains that it was just was not capable of holding the vehicle stationary on the gradient that the Claimant had parked it on at the material time.

VOSA Individual Vehicle Type Approval Manual ... states ... "The parking brake system must be capable of being operated and released whether the vehicle is stationary or moving". The fact that the Claimants wife attempted to stop the vehicle moving with the park brake without exerting excessive force would indicate in my opinion that the parking brake fitted to the Claimants vehicle did not conform to VOSA's Type Approval Manual requirements.

... how do we know how much effort the NT [Nominated Tester] put into pulling the hand brake to its maximum, did he use one hand or two, it would be my opinion, based on the balance of probability, that the NT would have been an individual who is far stronger than the Claimant's wife... It is in my experience as a qualified MOT Manager, Quality Controller and Nominated Tester, that in most cases of testing hand brakes NT's do have a tendency to use both hands ...

I would now like to draw attention to the Health and Safety Executive's (HSE) Guidelines (L22) to the Manual Handling Operations Regulations 1992. This well respected publication provides guidelines for manual handling operations whilst

seated. The basic guideline figure for handling operations carried out whilst seated is 5kg for men and 3kg for women ... I therefore question the figure quoted in the Technical Information for a 'manual control' of 40kgf or 400N maximum as compared to the HSE maximum guideline figures.

The Council Directive ... states:- *"The parking brake system shall enable the vehicle to be held stationary on an up or down hill gradient even in the absence of the driver..... The driver shall be able to achieve this braking action from his driving seat."* ... This would entail applying the force to the handbrake whilst in a seated position. Therefore maximum guideline figures should not exceed 6kg. If one looks at this piece of legislation and the amount of maximum force required (400N) it is my opinion that this is beyond the capability of most people.

... the Claimant's representatives were not present during any investigation work, or testing of the material vehicle. It could well be that the parking brake shoes had been 'buffed in' prior to the brake test being carried out however this is a matter of evidence.

10. Claimant's GP's report

... had a road traffic accident about 5 years ago which caused injuries to his back and neck. He had physiotherapy and his symptoms became better after three and a half years after his accident. He was not fully recovered at the time of this accident. The back problem was exacerbated by this accident.

INJURIES SUSTAINED *(As described to me at the time of examination)*

pain in his neck a few months after the accident... pain is still moderate and is intermittent pain in his thoracic spine immediately after the accident, this has not improved and is still severe... lumbo-sacral spine... pain has become worse and is now radiating toward his legs... moderate pain in both shoulders immediately after the accident. This has not improved yet... mild pain in both elbows a few months after the accident... became moderate six months later.... became severe... Developed mild pain in right knee 6 months after the accident. This got worse and is now severe and exacerbates with walking. Developed moderate pain in left knee on the same day as the accident. This got worse after six months and is now severe and intermittent. Developed moderate pain in ankles 12 months after the accident. This got worse and is now severe. Developed moderate pain in both heels 12 months after the accident. This got worse and is now severe. Developed mild pain in balls of toes, mainly in big toes 3 months after the accident. This got worse and is now moderately severe. After the accident he went home.

EFFECTS ON WORK

... main occupation is as a Financial Advisor for 70 hours per week. He did not take time off from work immediately after the accident, but, has now been on sick leave, since 18th June 2008.

His ability to do DIY has been moderately restricted. At start it was worse and is now severe. His ability to lift heavy items has been moderately restricted. At start it was worse and is now severe at times. His ability to look after his children has been moderately restricted. At start it was worse and is now severe. His sex life has been moderately restricted. It has not yet improved. His ability to manage his personal care has been moderately restricted. The problem has improved and is now mild to moderate ... states that he was unable to play football ... states that he was unable to play golf ... states that playing tennis has been severely restricted ... unable to play snooker

NECK

Forward flexion, extension, right rotation, left rotation, right lateral flexion and left lateral flexion were normal with full range of movements. There was no bony tenderness. There was no muscle spasm. There was soft tissue tenderness on paravertebral muscle ... There is no clinical evidence of any neurological deficit.

UPPER LIMBS

Right shoulder was normal with full range of movements. Left shoulder was full range of movements but appeared painful. Right elbow movement was full range of movements but appeared painful on the lateral epicondyle. Left elbow movement was full range of movements but appeared painful on the lateral epicondyle. Right wrist movement was full range of movements but appeared painful. Left wrist movement was full range of movements but appeared painful. Right hand movement was normal with full range of movements. Left hand movement was normal with full range of movements.

BACK

Back movements were 51 - 75% of the normal and appeared painful. Left straight leg raising was normal with full range of movements. Right straight leg raising was normal with full range of movements. There was no bony tenderness. There was no muscle

spasm. There was soft tissue tenderness on the paravertebral muscles on the lumbosacral spine.

There is no clinical evidence of any neurological deficit.

LOWER LIMBS

Right hip movement ... normal ... full range. Left hip movement normal with full range Right knee movement ... 76 - 99% ... appeared painful. Left knee movement ... 76 - 99% ... appeared painful. Right ankle movement ... full range ... appeared painful. Left ankle movement ... full range ... appeared painful. Right toe movement ... full range ... appeared painful. Left toe movement ... full range ... appeared painful.

SUMMARY

...In my opinion some of the symptoms are not related to the accident.

OPINION AND PROGNOSIS

For neck problem I recommend referral to a rheumatologist. For shoulders ... rheumatologist. For elbows ... rheumatologist. For back ... rheumatologist. For right knee ... rheumatologist. For left knee ... rheumatologist. For ankles ... rheumatologist. For right foot ... rheumatologist. For left foot ... rheumatologist. For left foot ... rheumatologist.

In my opinion, perseverance of travelling will improve self confidence in travelling and hence will also help him with his psychological recovery. Final prognosis will depend on the Rheumatologist's assessment as a lot of symptoms occurred few months after the accident.

11. Defendant's costs letter

We refer to Mr Xxx's "Response"/Supplemental Report of 26 August 2010.

Paragraph 3: Mr Xxx refers to the technical bulletin relating to handbrakes on this **type** of model. The simple fact is that the Claimant's car complied with braking efficiency requirements and the maximum application force permissible for a hand operated handbrake according to the specific EU Directive governing handbrake design.

Paragraph 7: Mr Xxx says that the handbrake did not comply with the Directive. There is absolutely no basis for this. His own measurements set out in his initial report confirm that it did comply. He cannot simply make up facts because the true facts do not suit his argument.

Paragraph 8: The requirement for a parking brake to be capable of operation and release whether the vehicle is stationary or moving has nothing to do with the legal requirement as to the ability of the brake to hold the vehicle on a gradient (rather than stop a moving vehicle). They are separate issues. The brake has to be capable of being pulled on while the vehicle is moving. This vehicle complies. The regulation is there to prohibit a braking system in which there is a mechanical lock which can only be selected when the vehicle is stationary.

Paragraph 10: Mr Xxx's speculation about the size and strength of the MOT tester is irrelevant. The vehicle complied with the directive on Mr Xxx's own measurements. It is not for Mr Xxx to make up evidence as to the possible or probable size of the tester compared with the Claimant's wife or whether he may have used one or two hands to pull the brake on. This is not expert evidence.

Paragraph 12/14: Mr Xxx's reference to the Manual Handling Operations Regulations 1992 is completely irrelevant. There is a specific Directive dealing with handbrakes on vehicles. He may "question the figure quoted" but it is stipulated clearly in the Directive as pleaded. It is not for Mr Xxx to say that he doesn't like the figure set out in the relevant applicable legislation and so he will apply a different regulation that applies to something else. If you propose to run the case that notwithstanding compliance with the Directive the brake is "defective" (which is not admitted) you will need to plead this specifically in a Reply. This will be met by the absolute defence under section 4(1)(a) of the Consumer Protection Act 1987

4 Defences.

(1) In any civil proceedings by virtue of this Part against any person ("the person proceeded against") in respect of a defect in a product it shall be a defence for him to show—

(a) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation

Paragraph 15: Mr Xxx speculates as to whether the brakes might have been buffed in before the test was carried out. As he rightly says this is a matter for evidence. No such allegation has been pleaded, nor has any evidence been put forward to suggest that the test was anything other than proper. Again, this is not expert evidence: it is inappropriate mischievous conjecture.

Paragraph 17: The time between the incident and Mr Xxx's tests is irrelevant. The brake would no doubt have been applied many times but it is not pleaded nor has any evidence been put forward to suggest that the brakes had been buffed. However surprised he was at the physical effort required to apply the brake, he measured the forces and they comply with the Directive.

We remind Mr Xxx of his duty to the court set out in his signed pro-forma declaration. *"I understand that my duty in writing report and giving evidence is to the Court, rather than the party who engaged me"*.

It is clear that Mr Xxx has lost any sense of objectivity. He is setting out to try to prove the Claimant's case rather than assessing the actual evidence. In doing so he is ignoring the simple basic fact that the handbrake complied with the maximum application force permissible for a hand operated handbrake set out in the specific EU Directive on the requirements for handbrakes. Mr Xxx's own measurement of the forces required to pull on the handbrake, as set out in his disclosed report, confirmed that this vehicle complied comfortably with the requirements.

Moreover, the vehicle was checked at an MOT station 4 days after the incident and was found to be within the manufacturer's specification and satisfactorily above the MOT parking brake efficiency requirement. There is therefore no defect upon which your client can base his case.

Mr Xxx ought properly to concede that on his own measurements the vehicle complies with the appropriate EU Directive. Instead he has embarked on a completely spurious argument based on speculation and irrelevance with no legal or factual basis. This has the consequence that our client is forced to incur disproportionate costs in defending a very small claim with no legal basis. This is a complete waste of time and costs. We put you on notice now that will be drawing this to the attention of the court and seeking appropriate costs sanctions. In this regard please ensure that your expert is made aware of the judgment of the Honourable Mr Justice Peter Smith in *Phillips v Symes (Costs No.2) [2004] EWHC 2330, Ch D*.

12. Offers

17 May 2010: Kudo's solicitor to Martin's solicitor. We...offer pursuant to part 36 ...£2,000 [plus] costs to be the subject of a detailed assessment if not agreed...

27 May 2010: Martin's solicitor to Kudo's solicitor. ...our client has rejected the offer of £2,000...

5 July 2010: Kudo's solicitor to Martin's solicitor. ...our Part 36 offer dated 17 May 2010 is formally withdrawn.

4 August 2010: Kudo's solicitor to Martin's solicitor. ...you have rejected our offer without even having taken your client's expert's instructions upon our letter of 5 July 2010 despite this letter clearly setting out a fundamental flaw in the basis of his claim....we put you on notice ...we intend to seek wasted costs of the CMC against your firm at trial...

6 August 2010: Kudo's solicitor to Martin's solicitor. We are instructed to extend time for acceptance of our client's offer to bear its own costs if your client discontinues ...

4 October 2010: Kudo's solicitor to Martin's solicitor. ...we are instructed to offer the sum of £5,000 ...inclusive of costs...

5 October 2010: Martin's solicitor to Kudo's solicitor. We...ask you to provide a breakdown of your offer between damages and costs...

6 October 2010: Kudo's solicitor to Martin's solicitor. ...the offer is made on an all inclusive basis and, if accepted, the precise breakdown between damages and costs is a matter for you and your client.

15 December 2010: Martin's solicitor to Kudo's solicitor. ...your offer is unacceptable and fails to compensate our client sufficiently both for his injuries and his costs and disbursements...Total disbursements £4,038.88...

15 December 2010: Martin's solicitor to Kudo's solicitor. The Claimant will accept the sum of £2,000 in respect of his claim...If the offer is accepted ...the defendant will be liable for the claimant's costs.

1 March 2011: Kudo's solicitor to Martin's solicitor. ...we are instructed to offer the sum of £7,500 ... inclusive of both damages and costs.

13. Judgment

IT IS ORDERED THAT

1. Claim dismissed.
2. The Claimant must pay the Defendant's costs assessed at £20,000.

APPENDIX 2

Case Study 2: Vaughan v Cranwell

Extracts of key documents from the file

1. AAIB DRAFT REPORT

Following a pleasure flight in the local area, as part of the birthday celebrations for his passenger, the pilot made a high-speed low-level pass adjacent to the runway threshold, in front of a group of onlookers. Witnesses saw the aircraft pitch up abruptly, climb to a height of around 200 ft and roll inverted, prior to entering a vertical dive. The aircraft did not recover from this dive; it impacted the ground in a near vertical attitude and caught fire. The impact was not survivable.

Examination of the wreckage failed to reveal any technical reason for the accident. It was, however, established that the passenger in the rear seat was only using the lap strap elements of his seven point harness. It was possible, therefore, that in the final inverted manoeuvre, that the rear seat occupant could have inadvertently restricted pilot's movement of the flight controls whilst inverted, precipitating a loss control of the aircraft at a critical moment. Other possibilities were that one or both occupants became incapacitated following the rapid onset of positive g, or that an intentional aerobatic manoeuvre was mis-handled.

...

[the aircraft] was equipped with seven-point seat harnesses in both cockpits, each comprising two shoulder straps, a crotch strap and two lap straps. When all are employed, the two shoulder straps, which have slotted metal fittings at their free ends, are inserted on to the tongues of the upper lap belt buckle. When the lap belt is fastened, the shoulder straps are secured. The single crotch strap locates similarly on the lower lap belt buckle. When all belts are assembled, the harness is adjusted to securely restrain the occupant.

Several of the harness attachment points to the aircraft's structure, in both cockpits, were found to have failed in overload and were consistent with being occasioned during the impact

...

The front cockpit harness was found with the lap straps fastened and the shoulder straps in place. The crotch strap had not been used. The harness in the rear cockpit, however, was found with the two lap belts fastened, but neither the two shoulder straps nor the crotch strap had been inserted ... It had not been necessary for the emergency services to release the seat belts during the recovery operation, due to the failures of the attaching structure and melting of the belt fabric.

...

The CAA publishes a series of Safety Sense leaflets (SSLs). Leaflet 2b, entitled '*Pilots - it's YOUR decision*' states:

'Audiences: are you impressing anyone?'

In the review of fatal accidents, more than half of the low flying and aerobatic accidents involved an 'audience' - seldom at a formal air show, but more often to impress friends on the ground, at the clubhouse, or even passengers taken for a flight. The temptation to 'show off', to impress those watching, proved fatal in too many cases.

...

It was not established why the passenger did not secure his shoulder and crotch straps to the dual lap belt element of his harness. It may have been that he found them uncomfortable when he boarded and strapped in for the first attempt at the flight, or that he simply did not wish to be constrained. His action was contrary to acknowledged good practice and would have deprived him of the maximum restraint possible in the case of a survivable accident. The accident to [...] was not survivable and, therefore, the unsecured shoulder straps were not a direct causal factor in the passenger's demise.

Whilst it was beyond doubt that the passenger's shoulder harness was not fastened at the time of the accident, it is not known whether the pilot would have been aware of this fact. On the first boarding of the aircraft, the passenger had fastened his shoulder straps, and the pilot, quite naturally, may have assumed that he would do likewise on the second boarding. It is considered very unlikely indeed that the pilot would have carried out any aerobatic manoeuvres, but particularly roll the aircraft inverted, had he known the passenger's shoulder straps were unfastened. There is considerable evidence that, from the outset, the pilot did not intend to conduct aerobatics during the flight. He elected not to use parachutes, replacing them with cushions, and witnesses recalled that the passenger indicated that he did not wish to fly aerobatic manoeuvres. In addition, the opinion of several experienced [... aircraft ...] display pilots was that to decelerate from the high speed run in to a power-on inverted stall, in a properly controlled fashion, would have required a climb of considerable height, more than the few hundred feet mentioned by witnesses. However, it is notable that the aircraft's speed, determined as 340 kph (183 kt), was close to its design manoeuvring speed of 360 kph (194 kt). Had the pilot intended to fly an aerobatic manoeuvre at low height, such as a roll or barrel roll, maximising entry speed would have provided for the greatest possible margin of error.

The likely consequences of rolling the aircraft inverted with the rear seat passenger secured only by the lap straps were considered. In a positive g inverted manoeuvre (such as a barrel roll), a passenger not experienced in, or apprehensive of, aerobatics, might feel discomfort at the possibility of 'falling out' of his harness. It is possible that such discomfort might be expressed by shouting a (distracting) warning and/or grabbing at the aircraft's structure or controls in an attempt to feel more secure. However, the consequences in negative g flight could be much more serious. It is possible, in such circumstances, that an occupant who was not properly secured by a

shoulder harness might fall toward the canopy, particularly so if the lap belts were not fastened tightly. It is possible, even probable, that the occupant might grab at anything to hand, or restrict the movement of, or make an input to, the flight controls. Witness recollections of a noticeable yaw prior to the final pitching manoeuvre suggest that an inverted stall or a significant control input, or both, occurred. Should the passenger, in [the aircraft's] case, already have been 'following through' on the flying controls, then the potential for inadvertent interference with control of the aircraft at a critical moment is considered to be greater.

...

Conclusion

It was not conclusively established why control of the aircraft was lost, following the fast run in and pull up to an inverted low level manoeuvre. In the absence of any pre-existing technical defects being identified from the examination of the wreckage, the following causal factors could not be dismissed:

- The passenger inadvertently interfered with the aircraft's flight controls as the aircraft became inverted, as a result of his shoulder and crotch straps being unsecured
- Incapacitation of either or both the aircraft's occupants occurred following the rapid onset of positive g
- Mis-handling of a low level aerobatic manoeuvre

2. FINAL AAIB REPORT

...The most likely cause of any restriction of the controls was that a buckle on the unsecured crotch strap may have become jammed in the flight controls.

...

3. INQUEST VERDICT

'Mr Cranwell was the pilot of a [...] aircraft with dual controls. The passenger in the rear seat had not secured his shoulder or crotch straps. It is not known whether the pilot was aware of this. Mr Cranwell requested permission for a low approach and go around. Permission was given. The aircraft was seen to come in at high speed, following which it climbed to about 200 feet and started to loop round, at which point the aircraft went inverted and struck the ground. It caught fire and the pilot and passenger were both killed. Subsequent investigations show that the rear seat strap could become trapped in the controls so as to prevent the pilot from controlling the aircraft.'

4. AIR NAVIGATION ORDER 2005 (current at the time)

53 – (1)... the commander of an aircraft registered in the United Kingdom shall take all reasonable steps to ensure – (a) before the aircraft takes off on any flight, that all passengers are made familiar with the position and method of use of... safety belts... safety harnesses...

Public transport of passengers – additional duties of commander

54 – (1) This article applies to flight for the purpose of the public transport of passengers by aircraft registered in the United Kingdom...

(5) before the aircraft takes off on a flight to which this article applies, and before it lands, the commander shall take all reasonable steps to ensure that the crew of the aircraft are properly secured in their seats...

5. PARTICULARS OF CLAIM

8. Mr Cranwell was or should have been familiar with flying the aircraft. In particular, in October 2005 he had undergone a "spin and acrobatics" check with another co-owner of the aircraft who was a former fast-jet pilot and instructor.

9. Before arriving at [...] Airport, Mr Cranwell removed the aircraft's parachutes (typically carried as a safety precaution when acrobatics are planned) and replaced them with cushions.

...

14. Upon returning to the vicinity of [...] Airport, Mr Crossley reported by radio to the Bournemouth air traffic control tower and requested "A LOW APPROACH AND GO AROUND AND THEN JOIN DOWNWIND" His intention was apparently to conduct a low level pass simulating part of a landing approach along or near to the runway centre line (in sight of the party going on at the Club) before rejoining the circuit for a real landing approach. There was no operational need to conduct the low-level pass and go-around.

15. The aircraft made a pass over [...] Airport in a westerly direction, very close to the flying club at an altitude as low as about 50ft and a mean ground speed as much as about 340 kph. While still close the flying club, the aircraft was seen to enter another "zooming climb". At a height of approximately 100 - 200ft, the aircraft began to roll to the right. Once the aircraft reached the inverted position, it pitched nose downwards and yawed before crashing, almost vertically, into the ground at speed. The impact point was between the runway and airport buildings to the north.

PARTICULARS OF NEGLIGENCE

- (1) Failing to observe or heed Vaughan's expressed wishes for a pleasurable flight around the local area without aerobatics.
- (2) Failing properly to plan the flight (with or without acrobatics) so as to ensure the safety of the aircraft, its occupants and persons and property on the ground.
- (3) Failing to follow any such plan.
- (4) Failing to give any proper advance briefing or warning of the characteristics of the intended flight (and of any intended acrobatics) and/or failing to obtain Vaughan's agreement to any acrobatics in advance.
- (5) Failing, before arriving at [...] Airport or before the intended flight, to conduct a proper pre-flight check of the aircraft and, in particular, of any loose items which might foul the flight controls.
- (6) Failing to ensure, before takeoff, that the aircraft was equipped, secured and prepared for the flight (including any intended acrobatics) and, in particular, that any loose items (such as seatbelt straps/buckles and tools in the cockpit) were secured.
- (7) Performing acrobatics and/or abrupt flight manoeuvres such as conducting a low level pass over the airport near buildings and/or performing a zooming climb and/or rolling the aircraft and/or pitching the nose down and/or diving into the ground.
- (8) Conducting such manoeuvres at an altitude which was far too low in the circumstances.
- (9) Failing to give himself a margin for error or malfunction.
- (10) Flying the aircraft too fast, too low and/or too close to buildings, with landing gear retracted.
- (11) Failing to control the aircraft so as to avoid a crash.
- (12) Failing to fly within his own limits and training (including any appropriate margin of safety).
- (13) Subjecting himself and Vaughan to high g-forces.
- (14) Subjecting Vaughan to unexpected and/or potentially frightening manoeuvres.
- (15) Failing to heed guidance given by the CAA in its "Safety Sense" leaflets that *"more than half of the low flying and aerobatic accidents involved an 'audience'- seldom at a formal air show, but more often to impress friends on the ground, at the clubhouse, or even passengers taken for a flight."*
- (16) Allowing his flying to be influenced by the existence of an audience on the ground at the flying club and/or his passenger.

(17) Failing to pull out of the yaw/roll.

(18) Diving into the ground.

(19) Failing to conduct himself as a reasonably competent pilot of the aircraft would have done in all the circumstances.

19. Further or alternatively, the maxim *res ipsa loquitur* will be relied upon.

6. DEFENCE

... 7. As to paragraph 6 the Deceased

(a) Was a qualified and experienced pilot with over 20 years flying experience

(b) Held a National Private Pilots Licence

(c) Had 1545 recorded hours of flying experience

(d) Was the holder of a twin engine rating

(e) Had at various times been the co-owner of light aircraft as a member and/or shareholder of a syndicate/company owning such aircraft

(f) As such was or ought to have been familiar with safety requirements and procedures for light aircraft -including those recommended in Safety Sense Leaflets published by the CAA.

(g) Such safety requirements included the need to abide by any briefing given to passengers by the pilot in command.

(h) Was aware that the aircraft had separate front and rear cockpits so that the pilot in command had limited visibility into the rear cockpit.

(i) Was aware of the need to keep shoulder harnesses and lap straps securely fastened at all times.

(j) Was aware that any loose items had the potential to interfere with flight controls (as appears from paragraph 18h of Flight Safety Sense leaflet 01 version e as published by the CAA and available in full online) and as such must not be permitted.

(k) Was aware that the Aircraft was fitted with a 7 point lap crotch and shoulder harness should have been securely fastened at all times while seated in the Aircraft.

(l) Was or ought to have been aware that if any part of the 7 point harness was not fastened and allowed to hang loose that it had the potential to interfere with flying controls.

... 20. Mr Cranwell and the Deceased re boarded the Aircraft once the engine was able to be started

(a) but on this occasion the Deceased was assisted into the Aircraft by a friend

(b) the friend noticed that the Deceased did not secure the shoulder straps of the 7 point harness

(c) the friend offered the Deceased assistance so to do

(d) the Deceased declined stating that he would not require shoulder straps.

21. It is to be inferred that Mr Cranwell was not aware of the decision by the Deceased not to wear shoulder straps still less as appears likely that he intended to allow them to hang down in a manner that was likely to and probably did interfere with the flight controls thereby causing the Aircraft to crash.

...

29. Hence, the crash and the tragic death of the Deceased and Mr Cranwell was caused or alternatively contributed to not by any negligence on the part of Mr Cranwell but by the Deceased and his own negligence.

30. It was negligent of the Deceased having regard to the matters pleaded in paragraph 7 above

...

(2) to disregard the safety briefing he was given

(3) to refuse to fasten the harness

(4) not to ensure the 7 point harness was securely fastened and if not fastened then secured in such a way as not to interfere with flight controls

(5) as an experienced pilot to allow loose straps to remain unsecured

(6) failing to use common sense when declining to fit shoulder straps even though he should have noted that Mr Cranwell did so

(7) causing the crash in the manner described above

APPENDIX 3

Case Study 3: Hudson, Allen, Farmer and Ilford v Tubitsu UK

Extracts of key documents from the file

1. Letters of claim Hudson, Allen, Farmer and Ilford

We are instructed by the above named to claim damages in connection with a road traffic accident on ...

The circumstances of the accident are that whilst our client was a passenger in [the vehicle] the engine fell out, whilst driving, causing the vehicle to come to a crashing halt ...

A description of our client's injuries is as follows:- Whiplash type injuries ... In accordance with the pre-action protocol we propose to instruct ABC medical to prepare a medical report ...

Our client has not instructed us to pursue any lost earnings ...

This claim is funded by way of a Conditional Fee Agreement with a success fee ...

2. Hudson Medical Report by Mr Andrews, Orthopedic Surgeon

...

INTRODUCTION

Mr Hudson is a 18 year old gentleman ...

HISTORY OF ACCIDENT

Mr Hudson stated that he was travelling as a front seat passenger of a car. The car was going down hill when car engine fell down and car suddenly stopped with a big jerk. His body went forward and backward. The client was wearing three-pointed seatbelt ... An airbag was available ... However it was not activated during the impact

...

He stated that he did not perceive warning prior to the accident. As a result he was unable to brace his torso in order to minimise the force of the deceleration ... No emergency services attended the scene of the accident.

...

INJURIES SUSTAINED

1. Neck pain
2. Shoulder pain
3. Back pain

IMMEDIATE AND SUBSEQUENT TREATMENT

Mr Hudson stated that he self-medicated with over the counter painkillers.

EFFECT ON SOCIAL, LEISURE AND DOMESTIC ACTIVITIES

Unable to play cricket for 2 months

CONSEQUENTIAL LOSS

Mr Hudson is currently a student at college and has taken 1 month off his college.

PROGRESSION OF SYMPTOMS

1. Neck pain

Mr Hudson stated that he developed neck pain immediately after the accident. The neck pain was located in the back of the neck. The neck pain was associated with stiffness of the neck muscles ... He advised me that he is now experiencing intermittent pain which is triggered by movements. There is a need for analgesia.

2. Shoulder pain

Mr Hudson told me that he developed shoulder pain 2 hours after the accident. The pain was located in the back trapezius muscle area. There was associated stiffness of the muscles. There was restriction of the movements.

3. Back pain

Mr Hudson stated that he developed back pain 2 hours after the accident. The back pain was not associated with stiffness of the back muscles ... He told me that the back pain has fully recovered.

ACCIDENTS BEFORE THIS ACCIDENT

He told me that he had been involved in previous road traffic accident 1 year ago ... he sustained low back, shoulder and neck pain and was fully recovered ...

...

PRESENT COMPLAINT

1. Intermittent neck pain

...

OBSERVATION MADE IN RELATION TO THE CLAIMANT'S GENERAL DYNAMIC MOVEMENT

Gait: Normal ...

Posture: Normal ...

Rising from sitting position: Without any assistance ...

1. Neck

On inspection of the neck there is no swelling, bruising or deformity. Contour is normal. There is tenderness of left Para spinal muscles on palpation.

Neck movements

- i) Flexion is within normal limits and is painful at extreme
 - ii) Extension is within normal limits and is painful at extreme
 - iii) Right lateral rotation is within normal limits and is painful at extreme
 - iv) Left lateral rotation is within normal limits and is painful at extreme
 - v) Right lateral flexion is within normal limits and is painful at extreme
 - vi) Left lateral flexion is within normal limits and is painful at extreme
 - vii) Axial rotation of neck is within limits and is painful at extreme
- Sensations, power and reflexes of the upper limbs are entirely normal.

2. Shoulders and upper limbs

No swelling, bruising or deformity on inspection. Alignment and contour of the shoulders was within the normal limits. There is no obvious tenderness of muscles on palpation.

Movements of the bilateral shoulder joints

- i) Flexion is within normal limits and is pain free
 - ii) Extension is within normal limits and is pain free
 - iii) Abduction is within normal limits and is pain free
 - iv) Adduction is within normal limits and is pain free
 - v) External rotation is within normal limits and is pain free
 - vi) Internal rotation is within normal limits and is pain free
- The power, sensations and reflexes of the upper limbs are in tact.

3. Back

No swelling, bruising or deformity on inspection. Alignment and contour of the back was within the normal limits. There is no obvious tenderness of muscles on palpation.

Movements of back:

- i) Flexion is within normal limits and is pain free
- ii) Extension is within normal limits and is pain free
- iii) Right lateral flexion is within normal limits and is pain free

- iv) Left lateral flexion is within normal limits and is pain free
 - v) Right lateral rotation is within normal limits and is pain free
 - vi) Left lateral rotation is within normal limits and is pain free
 - vii) Bilateral straight leg raise test is positive
- The power, sensations and reflexes of lower limbs are in tact.

OPINION, PROGNOSIS & CONCLUSION

...

This accident resulted in injuries to his neck, shoulder and back. I believe that these injuries are consistent with the history mentioned earlier.

In my opinion it is likely that he has sustained a hyper-extension flexion injury to the spine resulting in a whiplash injury without nerve root compression or bony injury.

...

I would expect full resolution of the whiplash injury symptoms within the **5-6 months** from the date of accident with the help of palliative treatment such as analgesia and physiotherapy ...

EFFECT ON SOCIAL, LEISURE AND DOMESTIC ACTIVITIES

The client advised me that he was unable to continue his usual social and leisure activities the details are documented earlier in the report for 2 months.

In my opinion it is appropriate considering the circumstance of the accident and the injuries sustained as the result of the accident.

EDUCATION LOSS

Mr Hudson is currently student who took 1 month off college following the accident. On the balance of probability it is appropriate considering the circumstances of the accident.

RECOMMENDATION

In my opinion, further referral for physiotherapy is indicated after considering his symptoms and sign at the time of consultation.

In my opinion he would benefit from 3-4 sessions of physiotherapy, according to my knowledge the approximate price is £35 to £40 per physiotherapy session.

PROSPECTS ON THE OPEN JOB MARKET

... his job prospects will not be hampered ...

During the preparation of the Report I found Hudson to be a co-operative and reliable witness.

3. Allen Medical Report by Mr Andrews, Orthopedic Surgeon

...

INTRODUCTION

Mr Allen is a 24 year old gentleman ... unemployed.

HISTORY OF ACCIDENT

Mr Allen stated that he was travelling as a back seat passenger of a car. Engine mount fell out of their car driver suddenly use the brakes. The client's head hit against the front seat.

... He stated that he did not perceive warning prior to the accident. As a result he was unable to brace his torso in order to minimise the force of the deceleration ...

...

INJURIES SUSTAINED

1. Neck pain
2. Back pain

IMMEDIATE AND SUBSEQUENT TREATMENT

Mr Allen stated that he self-medicated with over the counter painkillers.

PSYCHOLOGICAL CHANGES ARISING SINCE THE ACCIDENT

Mr Allen stated that the accident had left him with a loss of confidence in travelling as a passenger for 2 weeks.

Mr Allen describes symptoms of travel anxiety for 2 weeks.

He stated that he experienced mood changes, social withdrawal and lack of concentration due to the accident for 2 weeks.

...

PROGRESSION OF SYMPTOMS

1. Neck pain

Mr Allen stated that he developed neck pain next morning after the accident. The neck pain was located in the back of the neck. The neck pain was associated with stiffness of the neck muscles ... He advised me that he is now experiencing intermittent pain which is triggered by movements of the head, bending. There is a need for analgesia.

2. Back pain

Mr Allen stated that he developed back pain few hours after the accident. The back pain was associated with stiffness of the back muscles ... He is now experiencing an intermittent back pain which is triggered by movements. There is a need for analgesia.

ACCIDENTS BEFORE THIS ACCIDENT

He told me that he had never been involved in any previous road traffic accidents. There are no ongoing claims.

...

OBSERVATION MADE IN RELATION TO THE CLAIMANT'S GENERAL DYNAMIC MOVEMENTS

Gait: Normal and without any assistance

Posture: Normal for the claimant's age group

Rising from sitting position: Without any assistance or significant difficulty

1. Neck

On inspection of the neck there is no swelling, bruising or deformity. Contour is normal.

There is tenderness of lower cervical spine on palpation.

Neck movements

- i) Flexion is within normal limits and is pain free
 - ii) Extension is within normal limits and is pain free
 - iii) Right lateral rotation is within normal limits and is pain free
 - iv) Left lateral rotation is within normal limits and is pain free
 - v) Right lateral flexion is within normal limits and is pain free
 - vi) Left lateral flexion is within normal limits and is pain free
 - vii) Axial rotation of neck is within limits and is painful at extreme
- Sensations, power and reflexes of the upper limbs are entirely normal.

2. Shoulders and upper limbs

No swelling, bruising or deformity on inspection. Alignment and contour of the shoulders was within the normal limits. There is no obvious tenderness of muscles on palpation.

Movements of the bilateral shoulder joints

- i) Flexion is within normal limits and is pain free
- ii) Extension is within normal limits and is pain free
- iii) Abduction is within normal limits and is pain free
- iv) Adduction is within normal limits and is pain free
- v) External rotation is within normal limits and is pain free
- vi) Internal rotation is within normal limits and is pain free

The power, sensations and reflexes of the upper limbs are intact.

3. Back

No swelling, bruising or deformity on inspection. Alignment and contour of the back was within the normal limits. There is tenderness of Para vertebral muscles.

Movements of back:

- i) Flexion is limited by 50% and painful
- ii) Extension is within normal limits and is pain free
- iii) Right lateral flexion is within normal limits and is pain free
- iv) Left lateral flexion is within normal limits and is pain free
- v) Right lateral rotation is within normal limits and is pain free
- vi) Left lateral rotation is within normal limits and is pain free
- vii) Bilateral straight leg raise test is positive

The power, sensations and reflexes of lower limbs are intact.

OPINION, PROGNOSIS & CONCLUSION

Mr Allen is a 24 year old gentleman who was involved in a road traffic accident ... as the back seat passenger of a car. I have examined him approximately 2 months after this accident. This accident resulted in injuries to his neck and back. I believe that these injuries are consistent with the history mentioned earlier.

In my opinion it is likely that he has sustained a hyper-extension flexion injury to the spine due to the use of emergency brake resulting in a whiplash injury without nerve root compression or bony injury.

...

I would expect full resolution of the whiplash injury symptoms within the **4-5 months** from the date of accident with the help of palliative treatment such as analgesia and physiotherapy ...

PSYCHOLOGICAL

Mr Allen describes the symptoms of travel anxiety, mood changes and social withdrawal and lack of concentration for 2 weeks, which in my opinion is appropriate following the accident of this nature and injuries sustained.

RECOMMENDATION

...

In my opinion he would benefit from 3-4 sessions of physiotherapy, according to my knowledge the approximate price is £35 to £40 per physiotherapy session.

...

4. Farmer Medical Report by Mr Hall, Trauma Consultant

...

HISTORY OF ACCIDENT

Mr Farmer informed me that he had been involved in a road traffic accident on the ... The client was a driver of a car. The car was going straight. Car speed ... was 30mph. The engine fell on the road and the car was suddenly stopped. An airbag was available as a safety feature but was not activated ...

IMMEDIATE AND SUBSEQUENT TREATMENT

The claimant advised me that he self-medicated with over the counter painkillers.

INJURIES SUSTAINED

1. Neck pain
1. Shoulder pain
2. Back pain

...

EFFECT ON SOCIAL, DOMESTIC AND LEISURE ACTIVITIES

Mr Farmer stated that the accident had an effect on his leisure activities such as.

- He also told me that he faced difficulties to maintain his personal hygiene.
- Unable to play sports

...

PSYCHOLOGICAL SYMPTOMS

Mr Farmer stated that the accident had left him with a loss of confidence for initial 8 weeks.

The accident had left him shocked and shaken.

He stated that he experienced sleep disturbances due to physical discomfort and flashbacks of the accident.

He stated that he has been more cautious and aware of his surroundings since the accident.

...

ACCIDENTS BEFORE THIS ACCIDENT

He told me that he had been involved in previous road traffic accidents on 2004, and in 2006.

...

DETAILS OF SYMPTOMS

Neck pain Mr Farmer stated that he developed neck pain immediately after the accident. The neck pain was located in the back of the neck. The neck pain was associated with stiffness of the neck muscles ... He advised me that he is now experiencing intermittent pain which is triggered by movements of the head, lifting and bending. There is a need for analgesia.

Left shoulder pain Mr Farmer told me that he developed shoulder pain immediately after the accident ... He advised me that he is now experiencing intermittent pain which is triggered by movements, lifting and bending. There is a need for analgesia.

Back pain Mr Farmer stated that he developed back pain immediately after the accident. The back pain was associated with stiffness of the back muscles ... He is now experiencing an intermittent back pain which is triggered by movements, lifting and bending. There is a need for analgesia.

EXAMINATION

Mr Farmer is a 24 year-old man who walked into the room with a normal gait. He did not seem to be in any pain or discomfort.

...

OBSERVATION MADE IN RELATION TO THE CLAIMANT'S GENERAL DYNAMIC MOVEMENTS

Gait: Normal and without any assistance

Posture: Normal for the claimant's age group

Neck

On inspection of the neck there is no swelling, bruising or deformity. Contour is normal. There is tenderness of left Trapezium muscle

Neck movements

- i) Flexion is limited and is painful
- ii) Extension is within normal limits and is pain free
- iii) Right lateral rotation is within normal limits and is pain free
- iv) Left lateral rotation is within normal limits and is pain free
- v) Right lateral flexion is limited and is painful
- vi) Left lateral flexion is limited and is painful

Sensations, power and reflexes of the upper limbs are entirely normal.

Shoulders and upper limbs

No swelling, bruising or deformity on inspection. Alignment and contour of the shoulders was within the normal limits. There is no obvious tenderness of muscles on palpation.

Movements of the bilateral shoulder joints

- i) Flexion is within normal limits and is pain free
- ii) Extension is within normal limits and is pain free
- iii) Abduction is within normal limits and is pain free
- iv) Adduction is within normal limits and is pain free
- v) External rotation is within normal limits and is pain free
- vi) Internal rotation is within normal limits and is pain free

The power, sensations and reflexes of the upper limbs are intact.

Back

No swelling, bruising or deformity on inspection. Alignment and contour of the back was within the normal limits. There is tenderness over paravertebral muscles.

Movements of back:

- i) Flexion is limited and is painful
- i) Extension is within normal limits and is pain free
- ii) Right lateral flexion is limited and is painful
- iii) Left lateral flexion is limited and is painful
- iv) Right lateral rotation is within normal limits and is pain free
- v) Left lateral rotation is within normal limits and is pain free
- vi) Bilateral leg raise test is positive

The power, sensations and reflexes of lower limbs are intact.

OPINION, PROGNOSIS & CONCLUSION

Mr Farmer is a 24 year old gentleman who was involved in a road traffic accident on ... as the driver of a car. I have examined him approximately 4 months after this accident. This accident resulted in injuries to his neck and back. I believe that these injuries are consistent with the history mentioned earlier.

In my **opinion** it is likely that he has sustained a hyper-extension flexion injury to the spine resulting in a whiplash injury without nerve root compression or bony injury.

....

I would expect full resolution of the whiplash injury symptoms within the **12 months** from the date of accident with the help of analgesia.

...

PSYCHOLOGICAL

Mr Farmer describes the symptoms of travel anxiety, disturbances, social withdrawal and lack of concentration which in my opinion is appropriate following the accident of this nature and injuries sustained.

These symptoms do resolve in time as the memory of the accident fades and in my opinion, on the balance of probability I would expect a full recovery within 2 months from the date of the accident.

EFFECT ON SOCIAL, LEISURE AND DOMESTIC ACTIVITIES

The client advised me that he was unable to continue his usual social and leisure activities, the details are documented earlier in the report, for 8 weeks. In my opinion it is appropriate considering the circumstance of the accident and the injuries sustained as the result of the accident.

5. Ilford Medical Report by Mr Andrews, Orthopedic Surgeon

HISTORY OF ACCIDENT

Mr Ilford stated that he was travelling as a back seat passenger of a car. He told me that the engine mount dropped very suddenly car stopped with heavy jerk and client went forward and backward. The client was wearing a three-pointed seatbelt anchored to the vehicle's chassis with a headrest fitted to his car seat. An airbag was available as a safety feature.

However it was not activated during the impact ... Despite experiencing physical discomfort he confirmed that he got out of the damaged vehicle without assistance.

...

INJURIES SUSTAINED

1. Neck pain
2. Right Shoulder pain
3. Back pain

IMMEDIATE AND SUBSEQUENT TREATMENT

The claimant advised me that he self-medicated with over the counter painkillers.

EFFECT ON SOCIAL, LEISURE AND DOMESTIC ACTIVITIES

The accident had an effect on his leisure activities such as: playing cricket and gym for 6 months.

PSYCHOLOGICAL CHANGES ARISING SINCE THE ACCIDENT

Mr Ilford stated that the accident had left him with a loss of confidence in travelling as a passenger for 2 months.

Mr Ilford describes symptoms of travel anxiety for 2 months.

He stated that he experienced social withdrawal and lack of concentration due to physical discomfort and flashbacks of the accident for 2 months.

In general, other than reactive anger, feeling of injustice and inconvenience arising as a result of the accident, he did not suffer from any significant personality changes in terms of panic attacks, depression since the accident.

CONSEQUENTIAL LOSS

Mr Ilford is currently a Labour Worker and he took 2 months off from work following his accident.

PROGRESSION OF SYMPTOMS

1. Neck pain

Mr Ilford stated that he developed neck pain immediately after the accident. The neck pain was located in the back of the neck. The neck pain was associated with stiffness of the neck muscles ... He advised me that he is now experiencing intermittent pain which is triggered by movements of the head, lifting and bending. There is a need for analgesia.

2. Right shoulder pain

Mr Ilford told me that he developed right shoulder pain immediately after the accident. The pain was located in the back of trapezius muscle. There was associated stiffness of the muscles. There was restriction of the movements.

He advised me that he is now experiencing intermittent pain which is triggered by movements, lifting and bending. There is a need for analgesia.

3. Back pain

Mr Ilford stated that he developed back pain immediately after the accident. The back pain was associated with stiffness of the back muscles ... He is now experiencing an intermittent back pain which is triggered by movements, lifting and bending. He is having difficulties bending to pick up food products at work. There is a need for analgesia.

ACCIDENTS BEFORE THIS ACCIDENT

He told me that he had never been involved in any previous road traffic accidents. There are no ongoing claims.

...

PRESENT COMPLAINT

1. Intermittent neck pain.
2. Intermittent right shoulder pain.
3. Intermittent back pain.

...

OBSERVATION MADE IN RELATION TO THE CLAIMANT'S GENERAL DYNAMIC MOVEMENTS

Gait: Normal and without any assistance

Posture: Normal for the claimant's age group

Rising from sitting position: Without any assistance or significant difficulty

1. Neck

On inspection of the neck there is no swelling, bruising or deformity. Contour is normal. There is tenderness of Paravertebral muscles.

Neck movements

- i) Flexion is within normal limits and is painful at extreme
- ii) Extension is within normal limits and is painful at extreme
- iii) Right lateral rotation is within normal limits and is painful at extreme
- iv) Left lateral rotation is within normal limits and is painful at extreme
- v) Right lateral flexion is within normal limits and is painful at extreme
- vi) Left lateral flexion is within normal limits and is painful at extreme
- vii) Axial rotation of neck is within limits and is painful at extreme

Sensations, power and reflexes of the upper limbs are entirely normal.

2. Shoulders and upper limbs

No swelling, bruising or deformity on inspection. Alignment and contour of the shoulders was within the normal limits. There is tenderness of Trapezius muscles

Movements of the right shoulder joint

- i) Flexion is within normal limits and is painful at extreme
- ii) Extension is within normal limits and is painful at extreme
- iii) Abduction is within normal limits and is painful at extreme
- iv) Adduction is within normal limits and is painful at extreme
- v) External rotation is within normal limits and is painful at extreme
- vi) Internal rotation is within normal limits and is painful at extreme

The power, sensations and reflexes of the upper limbs are intact.

3. Back

No swelling, bruising or deformity on inspection. Alignment and contour of the back was within the normal limits. There is tenderness of Paravertebral muscles.

Movements of back:

- i) Flexion is within normal limits and is painful at extreme
- ii) Extension is within normal limits and is painful at extreme
- iii) Right lateral flexion is within normal limits and is painful at extreme
- iv) Left lateral flexion is within normal limits and is painful at extreme
- v) Right lateral rotation is within normal limits and is painful at extreme
- vi) Left lateral rotation is within normal limits and is painful at extreme
- vii) Bilateral straight leg raise test is positive

The power, sensations and reflexes of lower limbs are intact.

OPINION, PROGNOSIS & CONCLUSION

Mr Ilford is a 26 year old gentleman who was involved in a road traffic accident ... as the back seat passenger of a car. I have examined him approximately 7 months after this accident. This accident resulted in injuries to his neck, right shoulder and back. I believe that these injuries are consistent with the history mentioned earlier.

In my opinion it is likely that he has sustained a hyper-extension flexion injury to the spine resulting in a whiplash injury without nerve root compression or bony injury.

...

I would expect full resolution of the whiplash injury symptoms within the **6-8 months** from the date of examination with the help of palliative treatment such as analgesia and physiotherapy.

...

PSYCHOLOGICAL

Mr Ilford describes the symptoms of travel anxiety, social withdrawal and lack of concentration for 2 months, which in my opinion is appropriate following the accident of this nature and injuries sustained.

EFFECT ON SOCIAL, LEISURE AND DOMESTIC ACTIVITIES

The client advised me that he was unable to continue his usual social and leisure activities, the details are documented earlier in the report, for 6 months. In my opinion it is appropriate considering the circumstance of the accident and the injuries sustained as the result of the accident.

WORK LOSS

Mr Ilford is currently a Labour worker who took 2 months off work following the accident. On the balance of probability it is appropriate considering the circumstances of the accident.

RECOMMENDATION

In my opinion, further referral for physiotherapy is indicated after considering his symptoms and signs at the time of consultation

In my opinion he would benefit from 6-8 sessions of physiotherapy, according to my knowledge the approximate price is £35 to £40 per physiotherapy session.

6. Extract from Recall Notice

On certain Tubitsu vehicles, the No. 4 engine mount bolt may loosen ... If the vehicle is continuously driven under such condition, the No. 4 engine mount bolt may loosen and fall out or break, allowing the transmission to be out of position and the alternator pulley may interfere with the body panel near the engine. In extreme cases, the driveshaft may become detached and/or the alternator pulley may break. If this occurs the vehicle will immediately lose power, come to a stop and be inoperable. Should this occur, there is an increased risk of an accident.

7. Driver Statement

The accident happened on Doncaster Rd, I was driving towards Sheffield when the engine fell out of the car and the car came to a sudden stop.

8. Job Card AB Recovery Services

'Fault Reported: Spark from Engine ...

Unsafe to drive due to engine leaning on inner wing ...

... veh recoverd in non runner. found bolt in top g/box mount sheared causing engine to drop. n/side driveshaft rubbing onto subframe and alternator dropped onto inner wing shredding belt and distorting pulley ...

WORK DONE

CHECK FOR LOUD ENGINE NOISE FOUND TOP G/BOX MOUNT BOLT STRIPPED THREADS IN MOUNT AND MAKE ENGINE AND BOX DROP AND N/S DRIVE SHAFT RUBBING AWAY ON SUBFRAME AND ALTERNATOR PULLY IS UP AGAINST INNERWING CAUSING BELT TO SHRED ... REQS NEW GEAR BOX MOUNT + BOLT + ALTERNATOR + BELT + DRIVESHAFT ...

.... Work carried out under warranty :-
RECOVERD IN LOUD NOISE FROM ENGINE AREA

9. Claimants' Solicitor's attendance note with recovery agent

'... the engine was on the deck ...'

APPENDIX 4

PL Claims Survey

Attached as Excel Spreadsheet file Appendix 4 PL survey anonymised spreadsheet
12.4.15