# 14 Out-of-Court Settlement

The most important general issue in compensation today must be the administration of the tort system in cases with large numbers of individuals and single or multiple institutional defendants. Cases move effortlessly from hundreds of thousands and tens of thousands, with the inevitable evolution of out-of-court arrangements to deal with the exponential rise in litigation. The first set of questions concerns the equities of the various parties. The second concerns the familiar economic questions of administrative costs. (Epstein, 1984).

R. F. V. Heuston wrote in Salmond on the Law of Torts, "Unions can provide immediate advice about the possibility of claiming compensation. They provide easy access to the legal system and insulation from the potential cost of an unsuccessful claim. Once a claim has been accepted by a Union, the individual is entirely sheltered from many of the normal difficulties of pressing a claim. Union intervention is very important in providing the impetus in people who might not have raised the issue at all. The negotiations then take place between organisations and this increases the favourable outcome to the individual."

The recent attempts to invite the Courts to provide guidelines on assessment of compensation have come out badly, the courts restricting their judgments to the instant cases. Since the publication of the Blue Book [1] in 1983, the assessment for the purposes of compensation out of court has become increasingly standardised. Its object is to meet the legal need for a simple, pragmatic, comprehensive scheme, but at the same time acceptable having regard to present scientific evidence.

No judicial stamp of approval has yet been placed on the sigmoid shaped Disability Scale which at present is widely used. It is not clear what 100% disability is worth; other parameters need to be distinguished in the judgments. These out-of-court schemes place various claimants on a disability scale with a high degree of precision which the courts have not wholly accepted. Conversely, there is no evidence to suggest that current medical assessment or out-of-court practice is being modified in the light of the recent test cases.

The recommendations of the Blue Book are similar to the Coles-Worgan scheme which has been judicially considered by the Courts.

The Coles-Worgan scale was devised for use by the Treasury Solicitor in his negotiations with a variety of trade unions and for out-of-court settlements of deafness claims arising from civilians in Ministry of Defence employment. It is probably one of the best schemes because it allows for the fact that some individuals start with hearing losses restricted to the 3 or 4 kHz region and yet will have some distinct disability which will not figure under any form of frequency averaging process. As noise-induced hearing loss grows it begins to invade the lower frequencies and have greater effects on speech. Thus after what is called the Auditory Handicap Group II, for the further groups III up to X, it switches to averaging across 0.5, 1 and 2 kHz ... There is considerably wide individual variation in actual disabling effect from a given degree of impairment. No one frequency

[1] The procedural guidelines approved by the British Association of Otolaryngologists and the British Society of Audiology, first published in British Journal of Audiology, 1983, 17, 203-212: "BAOL/BSA Method for Assessment of Hearing Disability". Covered copies may be obtained at a charge of £2.50 (plus postage for overseas applicants) from the British Association of Otolaryngologists, Royal College of Surgeons, 35-43 Lincoln's Inn Fields, London WC2A 3PN.

average is totally correct as different frequencies seem to affect different types of persons and possibly different noise sources. Thus these schemes are fine for out-of-court settlements and so on, but may be quite inadequate when applied to individual persons and have limited application in court hearings under Common Law. The appealing feature of this scale is that there is an attempt to translate figures into a short clinical description e.g. Group VI: Marked difficulties in communication since he would sometimes be unable to clearly understand even loud speech. In noise he would find it impossible to distinguish speech; disability rating = marked: 65%. If there is a scale of 1 to 10 for wind and earthquakes, it is fair to have one for hearing disability.

In *Smith v BRE,* 1980, CA, Lord Justice Lawton referred to the scale. The claimant was on the 6 level. He had a loss of hearing between 61 to 70 decibels. That was clearly a considerable loss of hearing.

In *Heslop v Metalock (Britain) Ltd,* 1981, Mr Justice Mustill advised that it should be used with caution.

In *Edwards and Others v Ministry of Defence,* 1982, Mr Justice Bristow disapproved of the scale, regarding it as an unsatisfactory approach to the problem of evaluating the effect on individual patient's enjoyment of life by reason of hearing loss, though no doubt useful for the widely different purpose for which it was designed. He disregarded it in assessing damages.

The scale of 1 to 10 then became a regrettable omission from the Blue Book: it could be of considerable assistance with the emphasis on the Broad Jury Approach recently. A notional jury would find no trouble with a scale of 1 to 10. In the event, it was not included in the 1983 Blue Book even though Dr Coles was one of the Blue Book's chief engineers.

The 1 to 10 scale resurfaced in *Thompson* [1984], this time Mr Justice Mustill appeared to have accepted it without too much qualification. The development illustrated well the question which came first, scientific evidence or judicial guidance? A chicken or the egg situation. The Coles-Worgan scale had the exceedingly rare distinction of being an appendix to a judgment. It is very unusual judicial practice to have appendices, but the data in *Thompson* necessitated five altogether (including a Burns-Robinson graph!). The clinical matching involved was a more difficult task than audiometric readings, very skilled personnel were required.

At the time of publication of the Blue Book, it is acknowledged by the formulators that it is a matter of law to define what is or is not compensable. The trade unions are not obliged to follow judicial interpretation of their own schemes. They are fully entitled to pursue separate negotiations with employers which have binding legal effect. It can be argued that the judicial guidelines are unsettled law and the possibility of bringing further test cases to courts of higher jurisdiction lends moral support to present agreed procedures, regardless of judicial guidelines. [2]

The effect of recent legal decisions on the main recommendations of the Blue Book can be summarised as follows:

1. Definitions of Impairment, Disability and Handicap should be treated as if they had the legal effect of words in a statute, having great legal weight.
2. Disability Scale: a rough guideline only, courts will interfere especially where experts disagree.
3. Binaural disability formula, where Percentage Disability = [4×Better Ear Disability + 1×Worse Ear Disability] ÷ 5, has no legal effect. It is also used by the DHSS for reasons of administrative convenience. It cannot be relied

[2] Not an approach which will travel very far in the present political climate. However, the high levels of compensation in the GMBATU out-of-court settlement scheme in comparison with those awarded in the Mustill judgment were negotiated after the case was decided. This shows that there is broad agreement between management and the Unions. The 1984 agreement has worked satisfactorily and has been up-dated in 1986 with some modifications. Individuals remain free to pursue claims in court. Employers do not concede negligence after 1978 because they claim hearing protection was being provided in the industries covered by the settlement scheme from 1978. The maximum compensation under the 1986 scheme is £9,600.

upon to support claims in Common Law. There are many scientific variations of it.

4. Start of Disability at 20 dB is debatable, since "disability" is subjective in law. By comparison, the threshold for the GMBATU out-of-court settlement scheme is only 10 dB with a £400 payout.
5. Presbyacusis correction: No legal effect, possible exception in extreme cases of youth and old age.
6. Quantum: more or less standardised by the Court of Appeal.
7. Tinnitus: general principles relating to pain and suffering apply.
8. Apportionment between employers: the principle was settled in *Thompson* [1984]. In practical terms, the judgments are consistent with the pro rata method in the Blue Book. Damages are apportioned according to the length of employment with each employer, except in particular cases where it would be grossly and manifestly unfair to do so.
9. Prognosis allowance: there is a legal basis for this for personal injury cases but this is not yet a feature of industrial hearing loss cases.
10. Date of commencement of liability: 1963, being more widely reported, has the edge over 1960. *Kellett,* as yet unreported, may not be cited in accordance with a House of Lords practice guideline [3].

A new "Method of Assessment" is being drawn up to replace the present Blue Book. The Working Party is drawn from the British Association of Otolargnygologists, the British Association of Audiological Physicians and the British Society of Audiology [4].

[3] The citation of cases not reported in the "Official" Law Reports received short shrift in the House of Lords in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 1 All ER 564. Lord Diplock laid down a restricted procedure, the medical analogy of which would be preventing the citation of "unpublished papers" and those "accepted" but not yet published. No occupational hearing loss case has yet reached the House of Lords.

[4] Out of court, Profs Hinchcliffe and Coles often take on the role of the devil's advocate in true scientific spirit. There are fewer differences in opinion between them than their opposing roles in court would imply. Legal representatives can legitimately highlight scientific evidence selectively.