Can compensation bring satisfaction?
What do damages for personal injury represent?

Personal Injury Bar Association
Annual Lecture
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Thank you for the invitation to give this lecture. It is always a pleasure to sing for one's supper by speaking to a large group of experts, on a topic about which you the audience know as much as I do.

There are two stimuli for this talk. Firstly, it is good, from time to time, to lift our heads above the detail, the practical administration of the law, and ask ourselves in a broader sense what we are about. The second stimulus came as I listened to a section of this lecture given last year by my most distinguished predecessor, Lord Sumption. Those of you who were present may recall that, towards the end of his talk, he suggested that our system of tort damages should in effect be abolished, in favour of a no-fault insurance system, stripping out the cost and trouble of deciding fault, and focussing simply on the assessment of the award. Somewhat wistfully, he immediately went on to say his suggestion would never be put into practice however, because it would cost too much.

As I listened, I found myself disagreeing with the idea, not because of the cost, and not because it would greatly add to the income of the members of this association, litigating causation and quantum for many more clients. Why was I disagreeing? Because it felt wrong, unjust, to abolish the notion of fault from an award of damages. And why is that? What is the reason for the instinctive (or is it learned) link between fault and compensation? What does an award of damages mean to people? How far do damages bring more than simple financial recompense, whether for past or future loss? Have the commercial interests of insurers and lawyers, and risk avoidance by government, reduced the satisfaction derived from damages? I want to reflect on these questions in this talk. I rather fear, we may end with nearly as many questions as we began.

I am going to start, not by looking at damages themselves, but at the system through which personal injury damages are recovered. I wish to take the bird's eye view, perhaps I should say the drone's eye view, quite consciously.

By the late 20th Century, the insurance industry had long morphed from its beginnings in bodies providing mutual assurance into major profit-driven commercial enterprises. By the 1990s there were few mutual bodies surviving. The NHS Litigation Authority, now NHS Resolution, is the only major exception I can think of, which is not a commercial enterprise.

From the 1990s, legal aid for personal injury claims has been progressively restricted or abolished. The drive to do so has emerged from the Treasury, not from the Lord Chancellor's Department or its successors. At the outset in the late 1980s the idea was that conditional fee agreements, an established but very limited mechanism in Scotland, would fill the gap[1]. Other ideas, such as a Contingency Legal Aid Fund on the Hong Kong model, were pushed aside, as was the fact that the nett cost to government of personal injury legal aid, once recovered costs and recouped benefits were accounted for, was £30 million per annum, even then a very minor figure in the departmental budget. The governmental drive for change was unstoppable.

During this process, the Treasury dispatched a young, very clever and personable official, to oversee discussions between the DCA as it had become, the Bar Council and the Law Society. His name was Simon Less, which I always liked: less by name, less his objective.

Over the same period at the end of the 20th Century and the beginning of the 21st Century, union membership fell[2]. In 1989 UK trades union membership was 10.04m. In 2004/2005 it was 7.5m. In 1989, 38.6% of employees were unionised. In 2005 the figure was 28.3% (incidentally, in 2017 it was 22.9%). A big benefit that unions could offer was access to legal services, and no-win, no-fee arrangements reduced their appeal.

Through the years since, conditional fees have been extended and altered, contingency fees legalised and expanded, and legal aid in personal injury claims very largely abolished. You know that better than I.

[1] Created by s.8 of the Courts and Legal Services Act 1990.
[2] https://assets.publishing.service.gov.uk Tables 1.1 and 1.2b.

At the same time, the reforms following on from the Clementi Report of December 2004[3] have transformed the ownership and organisation of many legal practices. The effects of the Legal Services Act 2007 have been swift and transparent in terms of the formal regulatory structures governing the legal profession. However, their effects so far as Alternative Business Structures, and the question of who owns legal practices, are much more opaque.

Sir David Clementi, now Chairman of the BBC, was himself a former Chairman of Prudential plc. The holdings of a major publicly-listed insurance corporation such as The Pru will be clear and transparent, for those who know how to trace them. However, as recent events may suggest, other ownership structures and flows of money in the insurance industry may be markedly less transparent.

Regulatory control of Alternative Business Structures is quite limited. Such enterprises must be licensed, and a range of particulars must be furnished to the relevant regulator, either the Solicitors' Regulation Authority or the Bar Standards Board[4]. The BSB has been notified of ten ABS entities, the SRA of some hundreds. In neither case does the Register tell the reader who owns the entity.

There is nothing to prevent, for example, a legal practice being owned by a claims handling company (a so-called claims farmer), or the claims handling company (or the indeed legal practice) being owned by an insurer. Nor, as far as I can see, is there any necessity for such ownership to be transparent. These are not ordinary businesses, but companies in control of professional practices, which require rigorous enforcement of professional rules and the avoidance of conflicts of interest. There is much more reason for transparency than in the ordinary commercial sphere. I wonder if there is not a need to make such information publicly available, in a clear and comprehensible form. Should we not see who is profiting from what? As the Americans say: who has skin in the game?

Now what has all this got to do with personal injury damages, the ingredient of fault in the award of damages, and what damages mean to those who are injured? Well, I suggest that the commercialisation of the system – I apologise for the word – may

[3] *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, December 2004: https://webarchive.nationalarchives.gov.uk
[4] S.87 Legal Services Act 2007.

mean that commercial or "producer" interests have become dominant, and that at least to some extent the way personal injury litigation and compensation is managed reflects the interests of the producer more than those injured, or the public at large. In cruder language, that this is often a sausage machine, processing large numbers of claims of small or moderate value in a very risk-averse and costs-responsive way.

One measure of that would be if there are significant numbers of claims brought which would not have been brought in the past, and would not be pursued now, but for the combination of no win, no fee agreements on the one hand, and marketing and advertising by the commercial parties on the other. Another measure of the impact of "producer" interests might be consistent under-settlement of claims, to limit exposure on the part of legal practices, and insurers. And what of the recent drive to establish fraud if at all possible, not for its own sake, but so as to avoid qualified one-way costs shifting?

The hackneyed phrase "compensation culture" is not only tired and dull, but misleading. If there is an excess number of not very worthwhile personal injury claims – arising from events which, in a former era, the aggrieved party would have ignored, or treated with stoicism – then that change does not arise from a general spontaneous uprising in greed. The cases arise because people have been subjected to intensive and repeated marketing by claims handlers or law firms. And often the prime benefit for such claims, claims which would not otherwise be brought because not so serious as to demand action, is not to the claimants who receive modest and often standardised awards, but to those who process the claims, both for and against such claimants. We should not forget that, without claims, defendants' insurers would make no profit.

When the figures are teased out, there has been no marked increase in the number of personal injury claims over very recent years: in fact there has been a decrease. The figures for the last eight years are tabulated by the Government's Compensation Recovery Unit[5]. Overall claims were 987,381 in 2010/11, peaked at 1,048,309 in 2012/13 and in 2017/18 were around 19% down at 853,615. This must reflect in part, ever safer roads. 2013 and 2015 represented the two years with the lowest ever reported personal injury accidents[6].

[5] Compensation Recovery Unit performance data: updated 23 April 2018.
[6] House of Commons Briefing Paper No 06061 18.x.2017. Motor Car Insurance: page 9.

However, if one goes further back, a different pattern can be discerned. In 1979, according to government statistics, there were 72,751 serious or fatal road accidents in Great Britain. In 2016, the number was 23,420[7]. So, our roads are very much safer now that they were forty years ago. Yet in 2017/18 there were 683,329 motor claims. From 2000 to 2017 AXA reported there had been a 100% increase in motor claims[8]. As another example, fatal injuries to workers were 495 in 1980 and 135 in 2016/2017, yet workplace claims increased.

I appreciate of course that statistics may mislead. Fatal accidents may not be a perfect proxy for injuries. Improved medical science keeps people alive who would previously have died. But the broad picture, despite some decline in very recent years, has been more personal injury litigation, against a background of a much safer environment. We will see if recent costs changes alter that.

I have been able to find no reliable research or data on under-settlements. Intuitively, my guess is that they are widespread. The costs risk now being primarily borne by lawyers, insurers and even potentially claims farmers, are a potent force towards under-settlement. Of course, if the case being under-settled is a minor claim which was only stimulated by advertising no-win, no-fee arrangements in the first place, then no great loss to the injured party will arise. But the pressures leading to under-settlement cannot be confined to such cases. Perhaps the real point is that we have no evidence as to the extent of this effect.

Over the same decades there have been a number of moves to make damages awards more consistent, and thus more predictable. It is easy to see the utility of those changes. The down-side may be a sense that here too a sausage-machine is operating, different from the long common law tradition of jury awards, which persisted in England beyond World War II, and still persists in the USA.

In fact, standardisation of damages' awards is a very old idea. People think of the maxim "*an eye for an eye, a tooth for a tooth*" as biblical in origin[9], but Christ in the Sermon on the Mount was referring to a provision which is traceable to the Code of Hammurabi, King of Babylon from 1792 to 1750 BC.

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[7] https://www.gov.uk/government/statistical-data-sets/ras10-reported-road-accidents#table-ras10013
[8] House of Commons Paper 06061 18.x.2017, p.14.
[9] Matthew 5 v38.

But how about this.

Legal procedures were crude, lawyers a subset of the priesthood and very thin on the ground, and legal aid non-existent. So King Aethelberht of Kent (who reigned in the early 7th Century AD) set the compensation to be paid for each injury[10]. There was a comprehensive range of standard awards. For striking off the little finger, 11 shillings; for a stab to the thigh 1-2 inches deep, 1 shilling; 2-3 inches deep, 2 shillings; 3 inches deep, 3 shillings. Loss of four front teeth was 6 shillings. Bruises were differently compensated if they were showing outside the clothes or not. Toes other than the big toe required half the compensation of the corresponding finger – and so forth. There was a standardised award for those who needed medical treatment of 30 shillings. It is worth pointing out that in 7th Century Kent a shilling was a measure of gold, about 1.3 grams, and so a reasonable sum.

There are some standard awards which look odd to the modern eye. At six shillings, the compensation for piercing through the generative organ seems a little mean to me, particularly in the light of the 11 shillings award for the loss of a little finger. Then, if you stole church property (that is to say, God's property) you had to pay the church twelve-fold compensation. If a man lay with a maiden belonging to the King (this being a slave society) he had to pay 50 shillings compensation (to the King, not the maiden).

The most important award was the Wergild, the amount to be paid for the death of a man. This was again standardised, and depended on the status or inherited rank of the man or woman who died: 1200 shillings for a 1200 shilling man, 200 for a 200 shilling man, and so forth. In the code of King Alfred[11], the law had to accommodate the presence of Britons – Celtic people not Saxons - who were referred to as "Welshmen". They cost less: 60 shillings for the death of a Welshman with no land, for example.

Well, apart from the curiosity of all this, it can I think tell us of the universality of the idea that compensation needs to be regulated; and that as a means of reparation it is very widespread in time and place. One more thing, it was linked to fault: it had to be paid by the wrongdoer, in some cases assisted by his kin. The Kentish Code is insistent on this. Decree 30 of Aethelberht reads:

[10] www.law.harvard.edu>courses>materials
[11] King of Wessex, 871 to 899 AD.

> *"If one man slays another, he shall pay the wergild with his own money and property (i.e. livestock or other goods) which whatever its nature must be free from blemish [or damage].*"

The Code also provided for staged payments of the Wergild, and for sureties to guarantee the payments were kept up. This was all critically important, not just to replace the wealth or earnings capacity lost, but to assuage the feelings of the injured person or the family of the deceased. This was the means by which the State ensured a sufficient sense of justice, of satisfaction, and thus kept the peace. These awards were intended to go beyond compensation in the narrowest sense.

Perhaps the greatest jurist and scholar of Natural Law – that law that is said to arise universally and without reference to specific creed or express law of the state – was the 17th Century Dutchman Hugo de Groot, or Grotius[12]. In his famous book *De Jure Belli ac Pacis*[13] he wrote:

> *"It has been said … that the rights due to us arise from three sources, which are contract, injury and law. It is unnecessary here to dwell upon the nature of contracts which has been already so fully discussed. The next point therefore to which we proceed is an inquiry into the rights resulting to us from injuries received. Here the name of crime or misdemeanor is applied to every act of commission or neglect repugnant to the duties required of all men, either from their common nature or particular calling. For such offences naturally create an obligation to repair the loss or injury that has been sustained."* (Chapter 17)

Grotius wrote that "*the loss or diminution of anyone's possessions is not confined to injuries done to the substance alone of the property, but includes everything affecting the produce of it, whether it has been gathered or not*", in other words compensation must extend to the consequences of damage or loss. And critically, the individual who committed the injury, whether by negligence or otherwise, is responsible for repair of the losses.

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[12] 1583 to 1645.

[13] *On the law of War and Peace* 1625: https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf

According to the eminent English legal historian Sir Frederick Pollock, it was natural law, thinking, in particular as described by Grotius, which was the origin of, or was at least a congruent development with, the common law notion of the responsibilities and standard of action of the "reasonable man". In his essay "*The History of the Law of Nature: A Preliminary Study*[14] he wrote:

> "*Within the last century and a quarter, or thereabouts, the whole doctrine of negligence has been built up on the foundation of holding every lawful man answerable for at least the amount of prudence which might be expected of an average reasonable man in the circumstances. Now, St German pointed out as early as the sixteenth century that the words "reason" and "reasonable" donate for the common lawyer the ideas which the civilian or canonist puts under the head of "Law of Nature". Thus natural law may fairly claim, in principle though not by name, the "reasonable man" of English and American law and all his works, which are many.*"

Thus, it seems to me fair to observe that the principle that reasonable compensation for injury, and the consequences of injury, are the responsibility of the person who has caused the injury, is an absolutely fundamental part of just law, of natural law, as well as of common law. So let us now turn to the common law.

McGregor on Damages has had two very distinguished editors, the late and much missed Harvey McGregor QC, and now Mr Justice Edelman, of the High Court of Australia. The introductory parts of Chapter 1 of the 20th Edition constitute an elegant analysis of the legal fundamentals, and include the definition of damages, initially laid down by McGregor in 1961. Edelman traces the changes since then. McGregor's 1961 definition was adopted wholesale by the House of Lords in *Broome v Cassell & Co*[15]. For reasons which Edelman explains, the definition has had to change. There is no time to discuss those changes here, but I recommend those pages as mind-clearing for all tort lawyers. Edelman emphasises that:

> "*The requirement of a wrong is entirely necessary; it is an essential feature of damages. There is thus excluded from damages three*

[14] Journal of Comparative Legislation, 1900, p.418.
[15] [1972] AC 1027 @ 1070E

> *common types of case giving pecuniary satisfaction by success in an action because they are not dependent on wrongdoing. These are actions for money payable by the terms of a contract, actions for restitution based on unjust enrichment, and actions under statutes where the right to recover is independent of any wrong*."[16]

In Chapter 2 McGregor addresses the "object of an award of compensatory damages". He straight away cites what has become Answer 1 from the law student's Catechism of Damages, the general rule as to the measure of compensatory damages, as laid down in the speech of Lord Blackburn in *Livingstone v Rawyards Coal Company*[17]:

> "*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*."

How often have we all seen that cited as the ultimate ground for the scope of compensation? How rarely have we looked back at the case itself, to find the context and the full extent of Lord Blackburn's speech.

Livingstone v Rawyards concerned land in Lanarkshire. The pursuer Livingstone held property rights – the "feu" – in something over 1½ acres of land, on which 30 cottages were built. The land was surrounded by the Rawyards property. In the 1870s, the Rawyards Co mined the Coal under Mr Livingstone's land, believing they had the right to do so. Livingstone was ignorant of his rights. The mining caused subsidence. In the course of investigation, it transpired that Livingstone had the rights in the coal under his land, not the Rawyards Coal Company. The extraction was what in English law would be called trespass, but it was agreed it was innocent trespass. The innocence of both parties is emphasised in the speeches of Lord Cairns LC and Lord Hatherley. And thus the measure of damage fell to be decided.

The full principle enunciated by Lord Blackburn goes beyond the passage so frequently cited. The full passage reads:

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[16] *McGregor on Damages* 18th Ed. Para 1-004.
[17] (1880) 5 App. Cas. 25 @ 39.

> "*The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at 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."*

That is the passage we have seen so often. The speech goes on:

> *"That must be qualified by a great many things which may arise - such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer - many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the Defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the Pursuer, then comes the question, - how are we to get at the sum of money which will compensate them*?"

Thus, on this formulation, the principle of exact compensation for loss sustained is confined to the innocent trespasser, is not appropriate for a wilful or intentional trespasser, and arguably not for cases of any significant negligence or carelessness.

Now of course the law has developed since then, despite the repeated reliance on Lord Blackburn's dictum. In *Rookes v Barnard*[18] the House of Lords clarified the

[18] [1964] AC 1129

circumstances in which exemplary and aggravated damages could be awarded, please note, by the jury, still then responsible for making the award in many cases. There could still be a considerable degree of flexibility, often even where exemplary or aggravated damages are not in question. As Lord Devlin put it:

> "*It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved*." [p.1221]

In personal injury cases, damages for pain, suffering and loss of amenity are "at large".

In *Broome v Cassell* the House of Lords essentially upheld the analysis of Lord Devlin in *Rookes v Barnard*. It is fair to say that their Lordships differed, as Justices of the Supreme Court sometimes still do, in considering the wider implications and approach. Lord Hailsham LC, for example, emphasised the breadth, or potential breadth, of even explicitly compensatory awards:

> "*Nevertheless in all actions in which damages, purely compensatory in character, are awarded for suffering, from the purely pecuniary point of view the plaintiff may be better off. The principle of restitutio in integrum, which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any pecuniary loss*." [p.1071B]

By 1999, the Law Commission concluded that general damages for non-pecuniary loss were too low[19]. This led to the hearing before the five-judge Court of Appeal in *Heil v Rankin*[20], in which the Court moved some way to meet the views of the Law Commission. They introduced a tapered increase for awards then above £10,000, rising to an increase of one-third for catastrophic injuries.

By the time of *Heil v Rankin*, the *Guidelines for the Assessment of General Damages in Person Injury Cases* had been published, the First Edition in 1992. Essentially the awards for pain, suffering and loss of amenity have simply been uprated in step since. Although, Lord Judge CJ emphasised in *Simmons v Castle*[21] that the Court of Appeal still has "the power and the duty" to review and if necessary alter "the level of damages, this has not happened save in non legally-aided cases, and there as a consequence of the Jackson Costs Reforms". As Lord Judge acknowledged, that case had not involved a general review of the awards of general damages. The Court noted that Sir Rupert had observed that the levels of damages "… is not high at the moment"[22]. The Court also noted the observation by Lord Woolf in *Heil v Rankin* that the obligations of the Court of Appeal to review the level of damages included responding to "changes which take place in society"[23].

At the very least one can say that even in relation to compensatory damages, there may be more authority for flexibility, and potentially for change, than might be assumed.

Underpinning the speech of Lord Blackburn, the sense of natural justice, and I would guess the instinctive sense of all those of us who conduct or adjudicate personal injury claims, on whichever side of the adversarial fence, from the Bar or the Bench, is the idea that the outcome should be just, and bring fair recompense. If that is not the product of the system, then the public will look beyond the system of civil justice, if not for money, then for that intangible sense of justice or fair play.

I believe there is an increasing desire for acknowledgment or recognition of wrong beyond pure financial compensation for identified loss. You see that in how families

[19] Law Commission Report No 257: *Damages for Personal Injury: Non-pecuniary Loss* 19 April 1999.
[20] [2001] QB 272.
[21] [2013] 1 WLR 1239; [2012] EWCA Civ 1039. Judgment of 26.vii.2012 [12].
[22] *Simmons v Castle* Judgment of 10.x.2012 [13]; Jackson: Final Report, Chapter 10, [5-6].
[23] *Simmons v Castle* Judgment of 26.vii.2012 [11]; *Heil v Rankin* [28-29].

talk after accidental bereavement: a most conspicuous recent example being the loss of so many people in the fire at the Grenfell Tower. In that inquiry and others, those who have lost relatives or those displaced from their homes, want acknowledgement as much as financial recompense; although they want and need the latter too.

You see the same impulse in the increasing and worldwide phenomenon of leaders apologising for past wrongs that were very often never the responsibility of the leader concerned. One of the very earliest examples of such an apology was in 1970 when Chancellor Willy Brandt of West Germany fell to his knees before the monument to the Warsaw Uprising. In 2007 Prime Minister Blair apologise for the slave trade, and Prime Minister Gordon Brown apologised in 2009 for the treatment of Alan Turing and of other gay men. Prime Minister Cameron apologised in 2012 for the disaster at the Hillsborough Stadium in 1989, and for the failure in the following years to identify and acknowledge the poor decisions and actions of the police which allowed the tragedy to happen. In May this year, Prime Minister May apologised for the treatment of the "Windrush" citizens.

We have seen two Australian Prime Ministers apologise for the cruelty to the "lost generation" of indigenous Australians and for the treatment of children, including child migrants, in Australian institutions. The Pope, Archbishops and Bishops have apologised for sexual abuse, and the protection of or failure to report clerical abusers. The Canadian Prime Minister Justin Trudeau has issued a raft of apologies to those who were children in institutions in Canada, to gay people, to Jewish refugees from Europe in 1939 whose ship was turned away and even to a group of Sikh, Muslim and Hindu migrants from Imperial India who were refused immigration to Canada in 1914. There is a strong desire for recognition or acknowledgement of wrongs.

Of course, such acknowledgement can be given in the course of a judgment at the end of a trial, but that is a rare event indeed nowadays in this field. Is it not implicit in what Lord Blackburn was saying that, to the extent that is possible, damages awards should embody recognition of fault, and the degree of fault, by differentiating between the tort that is a wrong, but "innocent", the tort that flows from carelessness or negligence, and the tort that is grossly negligent, or indeed wilful and deliberate?

In my view we have seen at least one and possibly more examples where the demand for such recognition, for an expression of justice, has spilled over from the civil law, and forced the extension of criminal liability.

I drive a motor car. Most of those here will do so. I defy any honest-minded driver to say they have never done anything whilst driving that constituted careless driving – not dangerous driving, but careless driving. A single misjudgement of distance, a slight excess of speed, or being a little late in braking. As from 2006 the offence was created of causing death by careless driving[24]. Thus, matters that had always been dealt with by purely civil litigation became criminal. The relevant sentencing guidelines[25] mean that, if the carelessness or negligence is mid-range or above (but still short of dangerous driving), and especially if the negligence kills more than one person then, despite culpability which was previously thought insufficient to justify criminal liability, a person of good character may go to prison[26].

A similar process, it seems to me, has taken place in relation to corporate manslaughter, introduced by the Corporate Manslaughter and Corporate Homicide Act 2007, which set out to define and ascribe criminal liability in such cases, and has been followed by sentencing guidelines in 2015[27]. This has intentionally extended criminal liability beyond the previous common law manslaughter by gross negligence, imported criminal liability to organisations, and greatly increased the penalties which can be passed.

I should not be understood to suggest that the extension of criminal liability in those fields is wrong: that is a matter for Parliament. I do suggest that it is likely that the limits on damages awards in civil claims, particularly in the context of what I have called the commercialisation of the tort system, has contributed to the drive to extend criminal liability in these ways.

Let me try and draw the threads together. First, a couple of suggestions which I believe make good sense. Would it not be good for our system if regulators were required to be informed, and to publish, all the ownership, including ultimate ownership, of legal practices? These are not just ordinary businesses. When law

[24] S.20 of the Road Safety Act 2006, inserting S.2B into the Road Traffic Act 1988.
[25] *Causing Death by Driving: Definitive Guideline*, Sentencing Council 19 July 2018
[26] Guideline (ibid) p. 15
[27] *Health & Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offence: Definitive Guideline*, Sentencing Council 2015

practices or chambers were confined by the old professional Rules, their independence from outside ownership was protective at least to some degree of conflict and undue commercial pressure. That has gone with Alternative Business Structures. Let us see in detail who owns whom: who has skin in the game.

Second, it seems to me that under-settlement of personal injury claims is a ripe field for academic study. I have no doubt about the complexity of the exercise: confidentiality, commercial reputation, legal professional privilege and sheer judgement about litigation risk would all represent considerable barriers. However, it would be a valuable piece of research if it could be achieved.

On a more reflective note, am I right in my sense that our system of claiming and awarding damages has become too standardised, and is failing to bring acknowledgement, or recognition, where it should do so? Actual losses, past and future, should be computed as carefully, and with as much technical accuracy as possible. A great deal has been done over recent decades to improve that: more accurate and elaborated heads of claim, periodical payments, conditional awards and so on. Nor do we want to stimulate pointless marginal contests in place of sensible settlements.

But if I am right that fault is intrinsic to tort, and Lord Sumption is right that a no-fault system of compensation will never come about, then I suggest it may be time to consider how acknowledgement, or recognition of fault, may be marked, at least in more egregious cases of fault and in larger cases. That might be by greater use of claims for aggravated or exemplary damages, where appropriate. It might be by stipulating public acknowledgement of fault and apology as part of settlement. Should the Civil Procedure Rules address that? Should there be costs consequences of gross negligence, or of a failure to admit and acknowledge serious fault? Should aggravated and exemplary damages be recoverable by the insurer from the insured?

I have no settled ideas on these questions, which will be for the professions to explore and develop, in any event. I do have the sense that justice requires the injured citizen, where possible, to receive satisfaction and acknowledgement of fault from our civil justice system, as well as strictly computed damages for his or her financial losses and attributable needs.

Thank you very much for listening.

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