Editorial

"Clawbacks"

"Clawback" is an example of English words that show the living and dynamic qualities of our language. Originally a noun meaning a flatterer or a toady, it has more recently come into financial and legal jargon as a noun and a verb to describe an arrangement whereby a financial benefit is recouped, in full or in part, by taxation or other means.

Why then should clawbacks interest occupational medicine? Basically it is for two reasons. Because clawback provisions have recently been introduced into the social security legislation of the United Kingdom and occupational physicians, therefore, need to know of them when advising their patients; and because the evolution of thought and approach that has resulted in this change might interest practitioners in other countries, particularly Europe, who follow the trends in the United Kingdom.

The idea of putting on to employers the financial burden of paying compensation as a means of accident prevention, which had been put forward by Chadwick as early as 1833, recurred at intervals during the Victorian period.[1] Thus the Select Committee on Railway Labourers, in 1846, commented that "by making the companies liable . . ., your Committee contemplates fixing that party with the liability, who had the greatest power to prevent the injury and the greatest means to repair it."[2]

From that it is clear that there was, then, a clear association in concept between the prevention of occupational accidents (diseases were then barely recognised in this connection) and any ensuing recompense for their consequences. The only recompense open to the injured workman was to sue the employer who, however, had two important advantages on his side. Firstly, the injured workman had to prove that the employer was at fault and secondly, the defence of "common employment" prevented an employee from suing the employer in respect of the negligence of a fellow employee (that is, someone in common employment). That defence of common employment was abolished only in 1948.

After the general election of 1895, when an act to provide for workmen's compensation was assured, two courses were open to the legislators. On the one hand, the advocates of prevention wished to put such a financial burden on the employer in case of accidents as to provide a direct financial incentive to improve safety and lessen risks. On the other hand, the advocates of compensation preferred to concentrate attention on assuring adequate financial relief to the injured workman.[3] The "compensationists" prevailed and so the main thrust of the Workmen's Compensation Act of 1897 was to provide compensation; prevention was left very much to the criminal law. So from then on in the United Kingdom the systems for statutory compensation and for prevention have remained separated.

That Workmen's Compensation Act gave to the injured workman two possible courses. He could go either for the "safe" (because it was no fault liability) but modest benefits of the Workman's Compensation Act or for the more lucrative rewards of an action for negligence at common law. He was barred from attempting both courses. To add to his difficulties neither remedy was a foregone conclusion; even the Workman's Compensation Act gave rise to much litigation.

Half a century later came the great social changes of the "Welfare State". Among the plethora of legislation the Law Reform (Personal Injuries) Act of 1948 saw two changes to that earlier thinking. The injured (which for some years had included the diseased) workman was no longer barred from pursuing both courses. He could claim workman's compensation, renamed as industrial injuries benefit, *and* he could, if he wished, sue the employer for damages for negligence at common law. If he went for both, then this Act required that industial injuries benefits were to be taken into account in calculating special damages, on the basis that the loss of wages occasioned by an accident or disease would be adjusted so as to credit the defendant (the employer) with one half of certain of the benefits received by the plaintiff (the injured or diseased workman). The result was that the successful plaintiff could only have half his cake and eat it, because half his statutory benefits were deducted from the award at common law. Paradoxically, the negligent employer, or rather the employer's liability insurance company, which generally paid the damages at common law, benefitted from these provisions. The state social security system was therefore subsidising employers who failed in their duty to care for their employees.

Thirty years later, in 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury[4] examined the effectiveness of the system of compensation for work related injury. The Commission was impressed by the range and amount of benefits available under the social security system. It considered that the existence of the no fault scheme

(the statutory industrial injuries scheme) prompted serious consideration of the abolition of action at common law for negligence. After weighing the arguments, however, the Commission concluded that, because the fear of being sued was an incentive to maintain standards of accident prevention, the dual system of statutory benefit and of the right to sue at common law should be continued. In a minority report on that section Richard Schilling, then professor of occupational health at the University of London, thought that common law actions, for work related injury and disease, should be abolished, arguing that accident prevention is best secured by strong and effective criminal laws and that compensation should be left to the social security system.[5] The conclusions of the majority have stood and the dual system continues although the "industrial preference" (the larger financial benefits for industrial accident or disease over ordinary sickness benefit) has been considerably reduced with the advance of sickness and disablement benefits for all.

We are now passing through another period of social change, including an emphasis on greater individual responsibility and a critical revision of central government's expenditure on social welfare. The rules under which compensation and statutory benefits are calculated have been radically altered by Section 22 and Schedule 4 of the Social Security Act 1989. Under these provisions the defendant (the employer or usually his liability insurer) must deduct, from the damages paid to the plaintiff (whether as a result of a voluntary settlement or a court judgement) in respect of an accident, injury, or disease occurring after 1 January 1989, the gross amount of any relevant social security benefits paid or likely to be paid to the victim for five years. The defendant then reimburses the Secretary of State with this sum.

These provisions operate, in the case of both occupational accidents and disease, when the payment of compensation is made on or after 3 September 1990. For an occupational disease, the provisions operate if the victim's first *claim* for a relevant benefit for the disease is made on or after 1 January 1989.

The mechanism by which these clawback provisions will work is that the Department of Social Security (DSS) will issue certificates of **total** benefit detailing relevant benefits paid during a specific period. When a claim is finalised a certificate of deduction will be provided specifying the amount of benefit that has been deducted from compensation and paid to the DSS. The defendant remains liable to pay the DSS.

The relevant benefits include not only disablement benefit but others also, including sickness benefit, satutory sick pay, reduced earnings allowance (formerly special hardship allowance), severe disablement allowance, unemployment benefit, invalidity pension and allowance, mobility allowance, and attendance allowance. The Act applies neither to compensation payments of less than £2500 nor to awards of damages under the Fatal Accidents Acts.

In considering the role of the occupational physician in these matters we quote from a recent textbook of occupational medicine:

> "The word "compensation" still however produces feelings of hostility in injured workmen . . . This is accentuated by the equally emotive word "negligence" which can still be pleaded by the injured workman. The majority of them have great difficulty in distinguishing this specific civil law claim from no-fault payment by the State, and the discerning occupational health physician should be at pains to explain the two systems as an integral part of his counselling role."[6]

The occupational physician should, therefore, keep abreast of changes in the recoupment of social security benefits from damages awarded for personal injuries—that is, clawback.

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4 Royal Commission on Civil Liability and Compensation for Personal Injury. Cmnd 7054. London: HMSO, 1978.
5 Kloss Diana M. *Occupational health law*. Oxford: BSP Professional Books, 1989:165–6.
6 Edmonds OP. Occupational Health and the Law. In: Howard JK, Tyrer H, eds. *Textbook of occupational medicine*. London: Churchill Livingstone, 1987:67.