Lilly has its headquarters, decided in 1984 that the English courts would be a more appropriate forum. But as the case has progressed through those courts it has shown just how ill suited the English legal system and the legal aid scheme are for mass personal injury litigation, particularly when some plaintiffs receive legal aid and some do not.

About 500 of the claimants in the benoxaprofen case were not receiving legal aid either because they did not qualify financially or because the rules would have required them to hand over a large chunk of their savings at the beginning of the case, savings that many of them relied on for part of their income. The rules for legal aid discriminate against elderly people who have built up a nest egg for their retirement. The plaintiffs' lawyers hoped to choose some dozen test cases to represent the different alleged side effects and the different issues in the litigation, which all would have been legal aid cases. The Court of Appeal, however, ruled last May that all the plaintiffs, whether receiving legal aid or not, would have to share the costs, which could have totalled £6 million if the case went to trial.[2]

Most of the plaintiffs receiving legal aid were resigning themselves to dropping their claims when a "fairy godparent," property developer Godfrey Bradman, offered to underwrite their legal costs. Had he not done so even the plaintiffs receiving legal aid might well have had to pull out because with fewer plaintiffs left in the case the costs liability for each would have been higher and could well have wiped out their compensation if, for instance, they had won on one issue and lost on another or won against Lilly but lost against the government.

How claims are to be settled

Some of the claims have been brought on behalf of the estates of elderly people who died after taking the drug, mainly from liver or kidney failure. In Britain the death of an elderly person with no dependants is worth only a few thousand pounds (mainly compensation for pain and suffering undergone before death). A surviving spouse, if there is one, is entitled to a statutory £3500. The settlement offer—which would pay a lot less than £5000 for the death of an elderly person with no dependants—contrasts strikingly with the $6 million award by a jury to the son of an elderly American victim of the drug. Most of that sum was punitive damages, which are awarded when a jury believes that a defendant has been reckless or grossly negligent about safety. The nearest equivalent in the English legal system, exemplary damages, is awarded sparingly. Lilly has won in two other cases that went to trial in America but has settled out of court in an unknown number of American cases. (Swearing plaintiffs to secrecy as part of the deal has long been a feature of American drug injury settlements; in Britain this practice, introduced by American drug companies during the past decade, has also become quite common.)

The settlement figure was reached by estimating what each of the claims would fetch if the cases went to court, totalling the sums, and applying a discount (the size of which is also secret but probably around 30%). A discount from the full value of the claim is usual when cases are settled out of court because the plaintiff not only receives the money early—in this case possibly as much as four years early—but also escapes the risk of losing the case altogether and ending up with nothing.

Claimants allege a variety of side effects. Almost all claim to suffer from photosensitivity. One stumbling block to an early settlement of the claims—the drug was withdrawn five years ago—was the company's reluctance to compensate for side effects that it had warned about, including photosensitivity. The warnings, however, were of "mild and transient" reactions to sunlight. Many of the plaintiffs claim to have suffered severe reactions, and some say that they still cannot expose themselves to the sun without extreme discomfort. Lilly has now agreed that it will pay compensation provided a medical practitioner has attributed a plaintiff's injury to benoxaprofen. The only exceptions are when the injury or side effect "corresponds in duration and severity" with the terms of warnings in data sheets and other promotional material and when the side effect is too minor to justify court proceedings. Lawyers estimate that around 100 of the 1300 claimants will probably be disqualified under these rules.

The six main firms of solicitors, with the advice of leading and junior counsel, will allocate a share of the total settlement to each claimant on the basis of medical reports. Anyone who is excluded under the rules or who questions the size of his or her allocation will be able to ask the court to arbitrate. Claimants will not be paid compensation unless they undertake to acknowledge Lilly's non-acceptance of liability, not to disclose the financial terms, and not to campaign further against Lilly. The lawyers concerned will also be required to undertake to keep the terms of settlement confidential and not to campaign against Lilly.

Most controversially, as a condition of the settlement the solicitors have been asked to undertake not to act for any future claimants against Lilly. This is common practice in America when drug firms settle a mass claim—for example, in the litigation over the Dalkon Shield intrauterine contraceptive device—but has so far not been a feature of litigation in the United Kingdom. It may even breach the professional rule which requires that prospective clients should be free to choose their own solicitor. To insist on it in this case would mean that 550 claimants who are not included in the offer of compensation (because they issued their writs after the deadline or have not yet issued writs) will have no access to the skill of nearly 300 solicitors' firms, including most if not all of those with experience of large drugs claims and all of those with detailed knowledge of this case accumulated during five years of litigation in Britain and America.

Repercussions for future litigation

The claimants in the benoxaprofen case will not have much choice but to accept the offer. However low the compensation seems it is in line with the sum a court would award, less a discount for early settlement. The legal aid authorities will usually withdraw aid from a plaintiff who turns down an offer of settlement recommended as proper by his legal advisers, as this one has been. When explaining the terms of the offer Mr Justice Hirst pointed out that plaintiffs who had received legal aid should be aware that, should they reject the offer against legal advice, there was a risk that their legal aid certificates would not be continued.

The drawbacks in the legal system of England and Wales that have been shown up by the Opren saga will probably result in some reform at least to allow a form of class action that could dispose of several claims in a single action. The Civil Justice Review, an important review of the civil litigation system in England and Wales, has this subject on its agenda, as has the Law Society's civil litigation committee. But class actions will not solve all the problems of funding litigation against huge corporations. The Law Society has suggested that legal aid should be available without a means test in cases of public interest such as this against Lilly but with a clawback from the compensation if full costs are not recovered from the other side. But in cases when each person's entitlement is small that could leave little or nothing to show for years of litigation. The only satisfactory answer seems to be a no fault compensation fund, funded by the pharmaceutical industry, for victims of drug injury.

References

1 Taggart HMcA, Alderdice JM. Fatal cholestatic jaundice in elderly patients taking benoxaprofen. *Br Med J* 1982;**284**:1372.
2 Dyer C. Benoxaprofen case makes legal history. *Br Med J* 1987;**295**:39-40

Correction

Comroe and Dripps revisited

In the article by Dr Richard Smith (28 November, p 1404) an error occurred in the diagram showing the development of erythropoietin. At the bottom of the figure Eschbach *et al* are shown as coming from the UK. In fact they come from the United States. We apologise to Professor Eschbach for the mistake.