

# **PART I**

## **INTRODUCTION**

### **1. THE MEANING OF COLLATERAL BENEFITS AND MAIN ISSUES**

- 1.1 In this paper we deal with the treatment of what lawyers term “collateral benefits” in the calculation of damages for personal injury.<sup>1</sup> Using jargon-free language we can say that we are considering the extent to which an injured person may recover compensation from both the tort system and from another source. For example, should an injured plaintiff be entitled to recover full damages plus sick pay provided by his or her employer and/or a voluntary payment made by his or her trade union and/or the proceeds of a personal accident insurance policy? This problem of overlapping compensation frequently arises and has long perplexed the courts. It raises complex issues of policy.
- 1.2 We must also make clear the central strategic importance of this issue. If collateral benefits are deducted, the quantum of damages for personal injury is reduced. One argument that we shall consider is that such deduction is merited because while not unduly prejudicing plaintiffs, who will be fully compensated in any event, deduction reduces the costs of the tort system. The savings could instead be used to improve provision for the ill and injured. Indeed the savings could be used to fund provisional recommendations which will increase tort damages, that we have put forward in other aspects of this damages project.
- 1.3 A collateral benefit is a payment or benefit in kind (other than the tort damages being claimed) which the tort victim would not have received but for the tort.<sup>2</sup> Although the term collateral benefit has the shortcoming that it may be taken to imply that the benefit is in some sense unrelated to the tort, when the opposite is true, in our view it may nevertheless usefully be employed as a term of art.
- 1.4 The central issues to be considered in this paper are: first, whether payments (or benefits in kind) received or to be received as a result of an injury should be deducted from damages or ignored; and secondly, whether the provider of the payment (or benefit in kind) should have the right to recover its value from the

<sup>1</sup> The treatment of collateral benefits in Fatal Accidents Act claims is dealt with as part of our Consultation Paper No 148 on claims for wrongful death, which is being published on the same day as this paper. The issue of how to treat a collateral benefit can also arise in other contexts, for example where damages are claimed in respect of property damage or wrongful dismissal. While consistency across all areas is desirable, we do not directly address in this paper collateral benefits in other areas, both because the law’s treatment of collateral benefits elsewhere is heavily dependent on the central area of personal injury damages and also because we wish to avoid overcomplicating a paper that already raises extremely difficult issues.

<sup>2</sup> Although the cause of action will almost invariably be tort (and we shall throughout assume this to be the case unless the contrary is stated) the same law applies and should apply, if the claim for personal injury is based on a breach of contract.

tortfeasor (or from the victim).<sup>3</sup> Although we shall be focusing on payments the same law does, and should, apply to benefits in kind.<sup>4</sup>

- 1.5 The key difficulty in this area of the law resides in the conflict between the fundamental principle that (leaving aside exceptional measures of damages)<sup>5</sup> tort damages are designed to compensate but not to overcompensate,<sup>6</sup> and a set of policy arguments favouring overcompensation. If tort damages are compensatory, recovery by the plaintiff of damages for a loss which has already been, or will be, met from elsewhere would, on the face of it, be wrong. Yet for some collateral benefits but not others the courts have found this to be acceptable. This paper is primarily concerned to establish whether the case law resolution of the tension between the principle against double recovery and the policy arguments for it is in need of amendment.
- 1.6 The case law on collateral benefits in personal injury claims deals with charitable payments, insurance payments, sick pay, disablement pensions, retirement pensions, redundancy pay and social security benefits. Accordingly we primarily direct our attention to those specific collateral benefits.<sup>7</sup>

<sup>3</sup> The judiciary has over the years grappled with the first question, while the second has received less attention.

<sup>4</sup> An exception to this is the provision of services (eg gratuitous nursing services) which has been treated in English law as raising distinct issues and was dealt with by us in our Consultation Paper, *Damages for Personal Injury: Medical Nursing and Other Expenses*, (No 144, 1997). In that paper we did not treat gratuitous nursing services as falling within the law on collateral benefits because, in our view (consistently with *Hunt v Severs* [1994] 2 AC 350) it is artificial to regard the plaintiff as suffering an initial pecuniary loss which is met by the gratuitous services. That is, the question of the gratuitous services being a benevolent collateral benefit does not arise. But if one does regard the plaintiff as incurring an initial pecuniary loss, constituted by the need for services (ie the factual necessity to incur expense) the question of whether to deduct the value of the services as a collateral benefit would arise. Allowing the plaintiff to recover damages for the carer is best seen alongside the discussion in paras 2.84-2.88 below as a further method of allowing a third party to recover the value of the collateral benefit from the victim (based perhaps on the restitutionary concepts of “necessitous services” or “free acceptance”: see CP 144, paras 2.29 and 3.45). We should add that the policy reasons we expressed in CP 144 for our provisional recommendation that - contrary to *Hunt v Severs* - damages should be recoverable even on behalf of the tortfeasor carer (eg that otherwise tort victims would be encouraged to enter into contractual arrangements for the provision of care either with other relatives or friends or with commercial care providers) do not appear to be applicable to other examples of the tortfeasor being the provider of the collateral benefit.

<sup>5</sup> Most obviously, exemplary damages which are concerned to punish the defendant. See generally *Aggravated Restitutionary and Exemplary damages*, (1993) Consultation Paper No 132.

<sup>6</sup> See for example Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; *Shearman v Folland* [1950] 2 KB 43, 49; *British Transport Commission v Gourley* [1956] AC 185, 197; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, 186; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433, 456; *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223. Also H McGregor, “Compensation Versus Punishment in Damages Awards” [1965] MLR 629, 633; J Fleming “Collateral Benefits” *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 7; A S Burrows *Remedies for Torts and Breach of Contract* (2nd ed 1994), p 125.

<sup>7</sup> However the treatment of most social security benefits paid as a result of tortiously caused personal injury is governed by the Social Security Administration Act 1992, which provides

## 2. OUR DAMAGES PROJECT

- 1.7 This is the sixth consultation paper arising from the Law Commission's current review of damages. Under item 2 of the Sixth Programme of Law Reform<sup>8</sup> we are to examine "the principles governing, and the present effectiveness of, damages for monetary and non-monetary loss, with particular regard to personal injury litigation". Certain matters to which "specific consideration is to be given include... (a) deductions and set-offs against monetary loss (excluding unless expressly approved, the recovery provisions of the Social Security Administration Act 1992)<sup>9</sup> ...". We should emphasise from the outset that, in line with our terms of reference,<sup>10</sup> our role in this review is not to advocate the replacement of the existing tort system but rather, assuming its continued existence, to recommend improvements to it.
- 1.8 The five previous consultation papers dealt with structured settlements and interim and provisional damages;<sup>11</sup> aggravated, exemplary and restitutionary damages;<sup>12</sup> liability for psychiatric illness;<sup>13</sup> non-pecuniary loss in personal injury cases;<sup>14</sup> and medical, nursing and other expenses in personal injury cases.<sup>15</sup> A consultation paper on claims for wrongful death is being published on the same day as this paper.<sup>16</sup> We have published a Report on structured settlements and interim and provisional damages,<sup>17</sup> and its recommendations have largely been implemented.<sup>18</sup> We have also published a report containing a study based on the results of a large-scale survey of victims of personal injury.<sup>19</sup>

for recoupment by the state from the tortfeasor of social security benefits paid to tort victims. The Social Security (Recovery of Benefits) Act 1997, which is to be brought into force in October 1997, has made changes to the operation of the recoupment scheme. See paras 2.71 & 2.72 below. The recoupment scheme is excluded from consideration by our terms of reference - see para 1.7 below - so we essentially confine our consideration of social security benefits to those to which the scheme does not apply.

<sup>8</sup> Sixth Programme of Law Reform (1995) Law Com No 234, item 2: formerly Fifth Programme of Law Reform (1991) Law Com No 200, item 11.

<sup>9</sup> But see the Social Security (Recovery of Benefits) Act 1997 (para 1.6 n 7 above).

<sup>10</sup> See especially the description of item 11 of the Fifth Programme of Law Reform (1991) Law Com No 200.

<sup>11</sup> (1992) Consultation Paper No 125. The Commission has published its Report on this project, (1994) Law Com No 224.

<sup>12</sup> (1993) Consultation Paper No 132.

<sup>13</sup> (1994) Consultation Paper No 137.

<sup>14</sup> (1995) Consultation Paper No 140.

<sup>15</sup> (1996) Consultation Paper No 144.

<sup>16</sup> (1997) Consultation Paper No 148.

<sup>17</sup> (1994) Law Com No 224. The Report also deals with other aspects of the assessment of lump sum damages in personal injury actions, such as the use of actuarial tables and discounting using the rates of return on Index-Linked Government Securities.

<sup>18</sup> The recommendations on the tax treatment of structured settlements were initially implemented by the Finance Act 1995, s 142, inserting new sections 329A and 329B into the Income and Corporation Taxes Act 1988 but, for all payments received after 29 April 1996, are effected by s 329AA; the recommendation relating to the admissibility, as evidence, of the actuarial tables issued by the Government Actuary's Department (the

### 3. PREVIOUS REFORM RECOMMENDATIONS

- 1.9 The question of how collateral benefits should be treated in the assessment of personal injury damages has been addressed in previous law reform projects. In 1946 the Monckton Committee recommended that past and future social security benefits paid in respect of an injury should be deducted from tort damages. The plaintiff should not recover more in damages and benefits than the maximum recoverable from either source alone.<sup>20</sup> This recommendation was not, however, implemented, following opposition by the trade unions. Instead a compromise was reached which led to the enactment of s 2(1) of the Law Reform (Personal Injuries) Act 1948, which provided that one-half of certain social security benefits paid or likely to be paid in the five years from when the cause of action accrued should be deducted from damages for loss of earnings or profits.
- 1.10 In 1963 the Law Reform Committee recommended abolition of the old action by employers for loss of services,<sup>21</sup> which had originated in the idea that a master had a quasi-proprietary interest in his servant. This led to consideration of whether an employer, as a third party provider of a collateral benefit to a tort victim, should be able to recover its outlay from the tortfeasor. In the Committee's view employers should have a direct claim against tortfeasors for reimbursement of expenses incurred (for example in providing sick pay or disablement pension to an employee) as a result of tortious injury. This has never been implemented.
- 1.11 In 1968 the Law Commission also put forward a provisional recommendation that the action for loss of services should be abolished. They also considered that past payments (for example, sick pay) by an employer to a tortiously injured employee should be disregarded in the assessment of the latter's damages, contrary to the rule at that time that such payments should be deducted from damages for loss of earnings. The question of repayment should be left to be resolved between employer and employee, either prospectively, in the employment contract, or retrospectively, after the victim had received damages from the tortfeasor. As for future payments by employers, these should be taken into account in the assessment of damages for future loss.<sup>22</sup>
- 1.12 The Law Commission did not move to a report following consultation on its 1968 working paper. But a further working paper was published in 1971<sup>23</sup> after the leading House of Lords decision, *Parry v Cleaver*.<sup>24</sup> The working paper

Ogden Tables) was implemented by the Civil Evidence Act 1995, s 10. The remainder of the recommendations have been substantially implemented by the Damages Act 1996, which received Royal Assent on 24 July 1996, and came into force on 24 September 1996.

<sup>19</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225.

<sup>20</sup> Final Report of the Departmental Committee on Alternative Remedies (1946) Cmnd 6860, paras 38, 48, 92, 96, 98.

<sup>21</sup> Law Reform Committee Eleventh Report (Loss of Services, etc.) (1963) Cmnd 2017, para 5.

<sup>22</sup> The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement, (1968) Law Commission Working Paper 19, para 3 & 9-45.

<sup>23</sup> Personal Injury Litigation Assessment of Damages, (1971) Law Commission Working Paper 41, paras 124-129.

<sup>24</sup> [1970] AC 1.

recommended that the law should stay largely as it then was. The only suggestion for change was that supplementary and unemployment benefit should be treated in the same way as the benefits covered by s 2 of the Law Reform (Personal Injuries) Act 1948, but that state retirement benefits should continue to be ignored. In 1973 the Commission published its report following this consultation exercise.<sup>25</sup> It altered its view concerning social security benefits not covered by s 2 of the Law Reform (Personal Injuries) Act 1948 and recommended that they all be ignored in the assessment of damages. In respect of sick pay, insurance, pensions and charitable gifts, no change was advocated. It also recommended that the employer's action for loss of services should be abolished<sup>26</sup> and that it should not be replaced by any mechanism to enable employers to recover the sums paid by them to employees injured by the tort of another. The Commission included a clause to deal with these points in the draft bill appended to the report, but this was never enacted.

- 1.13 Finally, the Royal Commission on Civil Liability and Compensation for Personal Injury reported in 1978 ("The Pearson Commission").<sup>27</sup> It recommended that social security benefits be deducted in full from tort damages to meet the same loss and that permanent health insurance taken out by employers be ignored in the assessment of damages (on the basis that this type of insurance was not already covered by the rule that insurance should be ignored in the assessment of damages). No change was thought desirable to the existing rules concerning sick pay, insurance payments, occupational disability pensions and charitable payments, except that in respect of the latter it was thought that where the payment was by the defendant it should, subject to limited exceptions,<sup>28</sup> be taken into account in the assessment of damages. These recommendations have not been implemented, but the introduction in the late 1980s of the recoupment scheme for social security benefits was partly influenced by this report.<sup>29</sup>

#### **4. EMPIRICAL DATA**

- 1.14 It may be helpful to consultees at the outset to have an overview of empirical data regarding the incidence of collateral benefits. In respect of sick pay coverage, a DHSS report<sup>30</sup> in 1974 estimated that 79.5 per cent of full-time workers were members of sick pay schemes.<sup>31</sup> The Oxford survey<sup>32</sup> in 1976 provided information

<sup>25</sup> Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 129-154.

<sup>26</sup> This was done by section 2 of the Administration of Justice Act 1982.

<sup>27</sup> Cmnd 7054-I, II & III, paras 465-542.

<sup>28</sup> These were first, where the payments were made subject to an express contractual provision that they would be repaid from any damages recovered and secondly, where the payments were in the form of contributions to a general fund from which people other than the plaintiff also benefited.

<sup>29</sup> See para 1.6 n 7 above and paras 2.71-2.72 below and Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, Minutes of Evidence, p 6, paras 28 & 29.

<sup>30</sup> *Report on a Survey of Occupational Sick Pay Schemes* (1977) HMSO.

<sup>31</sup> D Harris, M Maclean, H Genn, S Lloyd-Bostock, P Fenn, P Corfield and Y Brittan, *Compensation and Support for Illness and Injury* (1984), p 213.

about people whose normal activities had been interrupted by accident or illness for more than two weeks during the previous year. It found that 56.2 per cent of full-time workers off work because of their illness reported that they had received sick pay.<sup>33</sup> In 78 per cent of cases recipients said they had “full pay” or “made up pay” for at least part of their period of absence.<sup>34</sup> Seventy-six per cent were paid sick pay for the whole of their absence from work, although the proportion was higher for shorter absences.<sup>35</sup> In 1981 it was estimated that 90 per cent of employees participated in voluntary or occupational sick pay schemes.<sup>36</sup>

- 1.15 The study conducted by Professor Hazel Genn for the Law Commission provided more recent statistics about sick pay provided to successful tort claimants who left work as a result of their injuries. Among victims surveyed who were in work at the time of their accident, 54 per cent never returned to their job, although 18 per cent eventually returned to different work. The reason given for leaving work was almost always their injuries.<sup>37</sup> Of those who returned to their pre-accident employment, one-third received full pay during their absence. One-quarter received no pay while off work. Of those who did not return to their pre-accident employment, nearly one-half received no pay after their accident. A minority received full pay for any length of time, and even fewer part of their pay. A small minority received some sort of lump sum from their employer: 7 per cent in bands 2-4<sup>38</sup> and 3 per cent in band 1<sup>39</sup> received £10,000 or more.<sup>40</sup>
- 1.16 The Oxford study also obtained information about personal accident insurance.<sup>41</sup> Fourteen per cent of the sample had one or more policies.<sup>42</sup> Forty-one per cent with insurance covering illness or injury obtained an insurance payment.<sup>43</sup> The amounts received were a trivial contribution to the costs of illness or injury.
- 1.17 About one in ten respondents in Professor Genn’s survey reported payments from several types of insurance policy. Roughly half received regular weekly or monthly

<sup>32</sup> D Harris, M Maclean, H Genn, S Lloyd-Bostock, P Fenn, P Corfield and Y Brittan, *Compensation and Support for Illness and Injury* (1984).

<sup>33</sup> *Ibid*, p 213.

<sup>34</sup> *Ibid*, p 212.

<sup>35</sup> *Ibid*, pp 212-213.

<sup>36</sup> HC Debs, 6th Series, Vol. 13, cols. 642-3 (23 November 1981), cited in P Cane, *Atiyah’s Accidents, Compensation and the Law*, (5th ed 1993), p 243.

<sup>37</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, pp 93 & 98.

<sup>38</sup> Bands 2-4 covered those who received damages of £20,000 or more, *ibid*, p 4.

<sup>39</sup> Band 1 covered those who received damages in the range £5,000 to £19,999, *ibid*, p 4.

<sup>40</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, pp 134-135.

<sup>41</sup> D Harris, M Maclean, H Genn, S Lloyd-Bostock, P Fenn, P Corfield and Y Brittan, *Compensation and Support for Illness and Injury* (1984), p 223 and Question 81a, Appendix II.

<sup>42</sup> *Ibid*, pp 223-224.

<sup>43</sup> *Ibid*, p 224.

payments, and half a lump sum. The regular payments ranged from about £10 per week to over £100 per week, with most in the £20 - £60 range.<sup>44</sup>

- 1.18 In 1990, 68.4 per cent of households were paying for life insurance and total UK premium income for life insurance in 1991 was almost £38 billion.<sup>45</sup> Less than £2 billion net premium income in the UK in 1991 was attributable to accident and health insurance, out of a total figure for fire and general accident insurance of some £9.7 billion.<sup>46</sup> A small amount of accident and sickness insurance is provided by friendly societies and trade unions.
- 1.19 Medical insurance has flourished in recent years. A study in 1988 estimated that the private health care sector accounted for about 14 per cent of health spending in the UK and that about 11 per cent of the population had private medical insurance.<sup>47</sup> The results from the General Household Survey in 1995 showed that 10 per cent of males and 9 per cent of females were covered by private medical insurance.<sup>48</sup>
- 1.20 In respect of private medical treatment, Professor Genn's study showed that one-third of respondents in band 1 and two-fifths in bands 2-4 received some private medical treatment. Of these 39 per cent in band 1 and 46 per cent in bands 2-4 said they did not have to pay for this or it was covered by private medical insurance.<sup>49</sup>
- 1.21 The results from the General Household Survey in 1995 estimate that 86 per cent of men in full-time work were members of either an occupational or a personal pension scheme compared with 77 per cent of women working full time and 35 per cent of women working part time. The split between types of pension was as follows: full time men, 58 per cent occupational and 28 per cent personal; full time women, 55 per cent occupational and 22 per cent personal; part time women, 24 per cent occupational and 11 per cent personal.<sup>50</sup> We would have thought it a reasonable assumption that a significant proportion, certainly of occupational schemes, provide for a pension if a person is forced to retire early for health reasons.

<sup>44</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, p 155.

<sup>45</sup> Association of British Insurers, *Insurance Statistics 1987-1991*, pp 13 & 40, cited in P Cane, *Atiyah's Accidents, Compensation and the Law*, (5th ed 1993), p 241.

<sup>46</sup> *Ibid*, pp 23 & 25, cited in P Cane, *Atiyah's Accidents, Compensation and the Law*, (5th ed 1993), p 242.

<sup>47</sup> *Independent* 9 May 1988, p 2, cited in P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993), p 244.

<sup>48</sup> *Living in Britain; Results from the 1995 General Household Survey*, Office for National Statistics, Social Survey Division (ISBN 0 11 691550 1), p 122.

<sup>49</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, p 145. It is important to note that where costs for private medical treatment were ultimately reimbursed in damages settlements, these costs were categorised as having been paid for by respondents; only those medical costs which were covered by private medical insurance were excluded.

<sup>50</sup> *Living in Britain; Results from the 1995 General Household Survey*, Office for National Statistics, Social Survey Division (ISBN 0 11 691550 1), p 72.

- 1.22 According to Professor Genn's study among victims who had retired since the accident, 42 per cent of those in band 1 and 67 per cent in bands 2-4 were receiving a pension from a previous employer.<sup>51</sup>
- 1.23 It may also be helpful to consultees to bear in mind trends regarding the volume of litigation in the personal injury field. In their submission to the Social Security Select Committee at the time of its enquiry into compensation recovery, the Law Society said that the number of personal injury claims had increased in recent years and the indications were that it would continue to do so.<sup>52</sup> There was a 139 per cent increase in personal injury litigation between 1975 and 1989.<sup>53</sup> More specifically, in 1973 there were about 700 medical malpractice claims (not necessarily all writs), rising to 2,000 by 1983/4 and to above 4,000 by 1987.<sup>54</sup>

## 5. STRUCTURE

- 1.24 The present law concerning collateral benefits will be set out in Part II. Part III looks at the law in other jurisdictions and Parts IV and V deal with the options for reform. Part VI contains a summary of our views and of the issues on which we invite responses.
- 1.25 We have found the subject matter of this paper especially challenging. We are also aware that it is a topic that is likely to arouse a wide-range of different views. Prior to hearing the opinion of consultees, we have decided not to express a provisional preference on the main options for reform.
- 1.26 We would like to thank the following for their help: Mr Justice Girvan; Mr J.W. Davies of Brasenose College, Oxford; Professor Richard Lewis of Cardiff Law School; Professor Harold Luntz of the University of Melbourne; Dr Werner Pfennigstorf; Harvey McGregor QC; Ian McLaren QC; Duncan Matheson QC; Ronald Walker QC; the Association of British Insurers; the Bar Law Reform Committee; the Civil Litigation Committee of the Law Society; the Department of Social Security; the Lord Chancellor's Department; the Scottish Law Commission.

<sup>51</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, p 120.

<sup>52</sup> Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, Minutes of Evidence, p 53.

<sup>53</sup> Vincent-Jones, "The Litigation Explosion" [1990] 140 NLJ 1602, cited by Howarth, *Textbook on Tort* (1995), p 8.

<sup>54</sup> See also discussion of this issue in the HSBC James Capel paper "Composite Insurance Pain and suffering: the rising cost of injury claims" (December 1996) which concludes "We do not think that in the UK there is an explosion of personal injury claims and claims costs under way, or that the courts are "out of control" in their awards. Importantly, underlying trends in the incidence of personal injuries and industrial diseases are relatively benign. But a combination of four factors - underlying legal trends; the possible implementation of Ogden's recommendations by a future Labour government; strengthening economic activity; and rising service sector inflation - will increase the rate at which claims costs are rising during 1997 and 1998."

1.27

## PART II

# THE PRESENT LAW

- 2.1 Our examination of the present law is divided into three main sections. The first, and by far the longest section, asks whether collateral benefits are deducted or not in assessing damages for personal injury. The second examines the rights of the provider of the collateral benefit to recover the value of it from the victim or the tortfeasor. The third highlights some of the inconsistencies in the present law.

### 1. ARE COLLATERAL BENEFITS DEDUCTED OR NOT?

#### **(1) Do the courts apply a single principled test for determining whether collateral benefits are to be deducted or not?**

- 2.2 A starting point is that some gains to a plaintiff, although they would not have been received but for the tort, will be ignored because their receipt is so indirectly related to the tort as to be essentially coincidental to it.<sup>1</sup> This sort of reasoning does not, however, establish a single rule for the treatment of collateral benefits. This is not only because there is some difficulty in devising a satisfactory test for directness; but also, and more importantly, because there have been held to be other considerations of “justice, reasonableness and public policy”<sup>2</sup> which justify ignoring the benefit in question. Early judicial support for a causation or remoteness rationale as the sole criterion for determining whether benefits should be deducted or not has accordingly not found favour in the more recent authorities. Although there remains a line of authority concerning gains to a plaintiff resulting from actions by the plaintiff going beyond the duty to mitigate, which employs a remoteness type analysis<sup>3</sup> our view is that at least in personal injury cases, the indirectness principle is relevant only to exclude from consideration extreme cases where the causal link between the benefit and the tort is tenuous. Examples are where a plaintiff wins the lottery or makes a materially advantageous marriage, having used spare time resulting from the injury to enter the lottery or to socialise.
- 2.3 The common collateral benefits paid to an injured plaintiff *are* directly related to the tort, in that they are paid to deal with the consequences of the personal injury. Other criteria than causation or remoteness have been held to be relevant to how they should be treated in the assessment of damages. This was clarified in the leading case, *Parry v Cleaver*,<sup>4</sup> in which the House of Lords decided by a bare majority that disablement pensions, whether contractual or voluntary, should be

<sup>1</sup> A S Burrows *Remedies for Torts and Breach of Contract* (2nd ed 1994), p 121.

<sup>2</sup> See *Parry v Cleaver* [1970] AC 1, 13 (*per* Lord Reid) cited in full at para 2.3 below.

<sup>3</sup> *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673; *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278; *Bellingham v Dhillon* [1973] QB 304; *Hussey v Eels* [1990] 2 QB 227; *Gardner v Marsh & Parsons*, [1997] 1 WLR 489 & see for example McGregor on Damages (15th ed 1988), Chapter 7, but particularly pp 325-342.

<sup>4</sup> [1970] AC 1.

ignored in the assessment of damages for loss of earnings. Lord Reid said the following:

Two questions can arise. First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages. *British Transport Commission v Gourley*<sup>5</sup> did two things. With regard to the first question it made clear, if it had not been clear before, that it is a universal rule that the plaintiff cannot recover more than he has lost...But *Gourley's* case had nothing whatever to do with the second question. It did not arise...Before *Gourley's* case it was well established that there was no universal rule with regard to sums which came to the plaintiff as a result of the accident but which would not have come to him but for the accident...The common law has treated this matter as one depending on justice, reasonableness and public policy.<sup>6</sup>

In deciding what was “just”, “reasonable” and in line with “public policy” Lord Reid considered that it was justifiable to ignore benevolence and insurance, and by analogy with the latter, disablement pensions, in the assessment of damages. In the case of charity this was because the wrongdoer should not benefit from the benevolence of others and because deduction would discourage donors. He also implicitly relied on the argument that the intention of the benefactor was not to relieve the tortfeasor. Insurance should be ignored because the plaintiff had paid for it and because the wrongdoer should not benefit from the plaintiff’s foresight. Lord Reid was also influenced in reaching his final view by the fact that the Fatal Accidents Act 1959 provided that all pensions should be disregarded in the assessment of damages.

- 2.4 Of the other two Law Lords in the majority in *Parry v Cleaver*,<sup>7</sup> Lord Pearce took a similar general approach to Lord Reid. While Lord Wilberforce agreed that it was impossible to devise a general principle to cover all collateral benefits, he did not think much assistance could be drawn from intuitive feelings as to what was just. In addition he disapproved of reasoning from one type of benefit to another. Instead he examined carefully the terms on which the payment at issue had been made to reach a conclusion how it should be treated in the assessment of damages.
- 2.5 It follows from there being no single principled test for determining whether collateral benefits are to be deducted or not that, in examining the present law, one needs to look separately at the treatment afforded to each of the main types of collateral benefit. Hence this section is divided hereafter into seven sections: charitable payments; insurance; sick pay; disablement pensions; retirement

<sup>5</sup> [1956] AC 185; in this case the House of Lords decided that damages should be paid net of income tax.

<sup>6</sup> [1970] AC 1, 13.

<sup>7</sup> Lords Pearce and Wilberforce. Lord Morris and Lord Pearson dissented.

pensions; redundancy payments and social security benefits outside the statutory recoupment scheme.<sup>8</sup>

## (2) Charitable payments

- 2.6 Charitable payments are ignored in the assessment of damages. Andrews LCJ reached this conclusion in *Redpath v Belfast and County Down Railway*<sup>9</sup> on the basis that it was not the tort which led to the charitable payment but the generosity of the contributors to the fund from which it came. He said:

The important consideration, to my mind...is that the circumstance relied upon in mitigation of damages arose independently of the cause of action, and was not naturally attributable to it. Whilst admittedly a sequence it was not a consequence. It arose really as the result of a *novus actus interveniens*, and was not the outcome of the relations between the plaintiff and the defendants which gave rise to the cause of action. The defendants' wrongful act may in each case have been a *causa sine qua non*, but in no true sense was it the *causa causans* of the circumstance relied upon in mitigation of damages. In the present case the *causa causans* of the Fund was not the accident, but the bounty or charitable motives of the subscribers.<sup>10</sup>

- 2.7 After distinguishing cases in which payments were made from funds in existence at the time of the tort, which might properly be deducted from tort damages, he went on to say:

In these circumstances common sense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrongdoer as compensation to the victims for their loss. Why, one may well ask, should the defendants' burden be lightened by the generosity of the public?<sup>11</sup>

- 2.8 Lord Reid stated in *Parry v Cleaver*<sup>12</sup> that benevolence should be disregarded in the assessment of damages in personal injury cases. He distinguished the approach of the courts under the Fatal Accidents Act 1846 pursuant to which, until legislative change intervened, there was a general common law rule that collateral benefits should be taken into account. As we have seen,<sup>13</sup> he went on to identify the real reasons for ignoring charitable payments, partly on the basis of *Redpath*.<sup>14</sup>

<sup>8</sup> Social security benefits within the recoupment scheme are outside our terms of reference. See para 1.7 above.

<sup>9</sup> (1947) NI 167.

<sup>10</sup> *Ibid*, 172-173.

<sup>11</sup> *Ibid*, 175.

<sup>12</sup> [1970] AC 1.

<sup>13</sup> See para 2.3 above.

<sup>14</sup> [1947] NI 167.

- 2.9 In *Cunningham v Harrison*,<sup>15</sup> the Court of Appeal refused to take account of an ex gratia payment by an employer of £828 per annum for life. More recently in *Hussain v New Taplow Paper Mill Ltd*<sup>16</sup> Lord Bridge agreed that benevolence should be ignored, because the tortfeasor should not derive benefit from money provided by a third party with the sole intention of benefiting the injured plaintiff. In *Hodgson v Trapp*<sup>17</sup> Lord Bridge reiterated his view that the common sense of this rule was obvious and again referred to it in *Hunt v Severs*.<sup>18</sup>
- 2.10 The very difficult case of *McCamley v Cammell Laird Shipbuilders Ltd*,<sup>19</sup> concerned a payment made by an employer pursuant to a personal accident insurance policy, which had been taken out by the employer's holding company for itself and its subsidiaries to benefit the group's employees. O'Connor LJ gave the judgment of the court. He found that the payment did not come within the insurance money exception. This was because that rule was based on the plaintiff's entitlement to receive insurance because he or she had paid for it. Still, O'Connor LJ found that the payment in issue was not an advance in respect of any particular head of damages and had been provided by the employer's benevolence and should therefore be ignored in the assessment of damages.
- 2.11 A short word should be said about the possibility that a charitable gift may be in kind in the shape of housing, food, clothing or some other tangible benefit. A rare case on this is *Liffen v Watson*<sup>20</sup> in which the Court of Appeal held that provision by the plaintiff's father of board and lodging should be ignored in the assessment of damages, which included damages for having lost employment which provided board and lodging. The case predates many of the important authorities dealing with collateral benefits and was decided on the unconvincing basis that a wrongdoer should recompense a plaintiff for all the damage which naturally flows from the wrongdoing, irrespective of whether damage was subsequently made good from another source.<sup>21</sup> Nevertheless, the decision is consistent with those cases establishing that charitable *payments* should not be taken into account in the assessment of the plaintiff's damages.
- 2.12 A charity cannot recoup the value of its payment from the tortfeasor direct. But a charity can provide in a contract with the victim for repayment in the event of a successful tort claim or it can make the gift conditional.<sup>22</sup>

<sup>15</sup> [1973] QB 942.

<sup>16</sup> [1988] AC 514.

<sup>17</sup> [1989] AC 807.

<sup>18</sup> [1994] 2 AC 350, 358.

<sup>19</sup> [1990] 1 WLR 963.

<sup>20</sup> [1940] 1 QB 556.

<sup>21</sup> Lord Pearson, dissenting in *Parry v Cleaver* [1970] AC 1, 50, said of it: "I must confess that I do not find the judgments stating any clear principle, but the decision could be based on the principle that the father's kindness in taking his daughter into his house was an extraneous and independent matter and too remote to affect the damages."

<sup>22</sup> See paras 2.84-2.91 below for further detail.

2.13 It is not entirely clear if an ex gratia payment *by the tortfeasor* would be ignored. This has been considered where the victim's employer is the defendant. In *Hussain v New Taplow Paper Mill Ltd*<sup>23</sup> in the Court of Appeal (subsequently affirmed on different grounds in the House of Lords), Lloyd LJ, with whom Ralph Gibson LJ agreed, said obiter:

But there is one consideration of public policy which is worth mentioning. If an employee is injured in the course of his employment and his employers make him an immediate ex gratia payment, as any good employer might, I see no reason why such a payment should not be taken into account in reduction of any damages for which the employer may ultimately be held liable. Employers should be encouraged to make ex gratia payments in such circumstances. If so, then public policy would seem to require that such payments be brought into account.

It could, of course, be said that an ex gratia payment is like a sum coming to the plaintiff by way of benevolence, and should therefore be disregarded. This is so where it is a third party who is ultimately held liable (see *Cunningham v Harrison*<sup>24</sup>). But there must surely be an exception to that general rule where the ex gratia payment comes from the tortfeasor himself. So, if it is right that an ex gratia payment by the employer should be brought into account where the employer is the tortfeasor, why should it make any difference that the payment is one which he has contracted to make in advance? So if counsel for the defendants is wrong in his main argument, that payments under the scheme are in the nature of wages and should be brought into account on that score, there would be much to be said for his alternative argument that such payments should in any event be brought into account on the grounds of "justice, reasonableness and public policy". But it is unnecessary to decide the case on that ground, since, on the facts of the present case, counsel for the defendants is entitled to succeed on his first ground.<sup>25</sup>

2.14 In *McCarmley v Cammell Laird Shipbuilders Ltd*,<sup>26</sup> O'Connor LJ cited this passage with apparent approval. In essence he seemed to accept that an ex gratia payment by an employer-defendant should be deducted from tort damages, unless, as he found on the facts of *McCarmley*, it could be inferred that the payment was not intended to be on account of damages. Nevertheless the case is a difficult one to

<sup>23</sup> [1987] 1 All ER 417. For the facts of this case, see para 2.22 below.

<sup>24</sup> [1973] QB 942.

<sup>25</sup> [1987] 1 All ER 417, 428; & See J Fleming, *The Law of Torts* (8 ed 1992), p 249 "The case for crediting the tortfeasor for benefits with which he has himself furnished the plaintiff is perhaps strongest: here there is no room for the argument that it would subsidise the tortfeasor at someone else's expense; moreover, it encourages voluntary aid by those who are often in the best position to offer it to their victims when it is most needed." and similar arguments in J Fleming "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 14.

<sup>26</sup> [1990] 1 WLR 963. See para 2.10 above.

interpret on this point and the safe conclusion is that the law in relation to gratuitous payments by tortfeasors is not entirely clear.<sup>27</sup>

### (3) Insurance

- 2.15 It has been settled law since *Bradburn v The Great Western Railway Company*<sup>28</sup> in 1874 that insurance payments are not taken into account in the assessment of damages.<sup>29</sup> The rule was established because first, the plaintiff had bought the insurance and secondly, because it was not the accident which led to the insurance pay-out, but the contract of insurance.
- 2.16 The House of Lords approved *Bradburn*<sup>30</sup> in *Parry v Cleaver*,<sup>31</sup> *Hussain v New Taplow Paper Mills Ltd*<sup>32</sup> and *Hodgson v Trapp*,<sup>33</sup> but without employing any causation or remoteness rationale. There is, however, some uncertainty about the ambit of the rule that insurance payments should be ignored in the assessment of personal injury damages.<sup>34</sup> *Bradburn v The Great Western Railway Company*<sup>35</sup> might be argued to apply only to personal accident insurance. However, the cases since have not viewed the rule as limited in that way.<sup>36</sup>

<sup>27</sup> See paras 3.5-3.7 below for the position in Scotland, where there is now provision for deduction of some benevolent payments by the defendant.

<sup>28</sup> (1874) LR 10 Exch 1.

<sup>29</sup> See Staughton LJ in *Hopkins v Norcross Plc* [1994] ICR 11, 15-16 for an account of the potential consequences of this rule. Commenting on *Parry v Cleaver* [1970] AC 1, he said "So, the reasoning of that decision was that, in a case of insurance effected by the plaintiff, he does not have to give credit because he paid the premiums with his own money. In the case of a pension from an employer, that is in the same position as the insurance, the premiums being paid by the plaintiff's work rather than by his money... . It is sometimes said that this doctrine results in double recovery: and so, in a sense, it does. A plaintiff might take out insurance against the loss of a leg in an accident, for £100,000. He might then go to another company and take out another policy against the same risk for the same amount, and do it a third time. Then he might be run down in an accident and lose his leg. He would recover four times - three times on the policies he had taken out and the fourth time in damages against the person who had run him down. That would be because he had taken out and paid for three policies of insurance. If that is double recovery, there is nothing unlawful about it. It may be a bit unusual, but if that is what people choose to do, they are entitled to do it. They must of course make sure that none of the insurance contracts is worded as a contract of indemnity." (It should be noted however that this factual situation is unlikely, as many personal accident insurance policies bar recovery under their terms in the event that recovery can be made under another policy.)

<sup>30</sup> (1874) LR 10 Exch 1.

<sup>31</sup> [1970] AC 1.

<sup>32</sup> [1988] AC 514, 527.

<sup>33</sup> [1989] AC 807, 819-820.

<sup>34</sup> See McLachlin J's interesting discussion of this issue in her dissenting opinion in the case of *Cunningham v Wheeler* (1994) 113 DLR 1, 25-33. See paras 3.79-3.82 below.

<sup>35</sup> (1874) LR 10 Exch 1.

<sup>36</sup> Furthermore automatic subrogation rights for indemnity insurers - which we discuss at paras 2.18 and 2.89-2.90 below - would be meaningless if this type of insurance was deducted from damages.

2.17 Also, while *Parry v Cleaver*<sup>37</sup> established that the underlying rationale for ignoring insurance was that the plaintiff had paid for it, Lord Reid stated the proposition formulated in *Bradburn*<sup>38</sup> as a general one, applicable whether or not the insurance premiums had in fact been paid by the plaintiff. Lord Denning in *Cunningham v Harrison*<sup>39</sup> and Lord Templeman in *Smoker v LFCDA*<sup>40</sup> stated the position in similarly general terms.<sup>41</sup> However, in *Hussain v New Taplow Paper Mills Ltd*<sup>2</sup> and *Hodgson v Trapp*<sup>43</sup> Lord Bridge incorporated the rationale for ignoring insurance payments into his statement of the rule: that is, he said that insurance should only be ignored if the plaintiff had actually paid the relevant premiums. *McCambley v Cammell Laird Shipbuilders Ltd*<sup>44</sup> and *Page v Sheerness Steel PLC*<sup>45</sup> applied the rule in this more limited way.<sup>46</sup>

<sup>37</sup> [1970] AC 1, 14 *per* Lord Reid; 35 *per* Lord Pearce; 39 *per* Lord Wilberforce (the majority); 31 *per* Lord Morris of Borth-y-Gest and 49 *per* Lord Pearson (the minority) (also see paras 2.32-2.37 below).

<sup>38</sup> (1874) LR 10 Exch 1.

<sup>39</sup> [1973] QB 942.

<sup>40</sup> [1991] 2 AC 502.

<sup>41</sup> Two non personal injury cases specifically address this issue. In the High Court case, *The "Yasin"* [1979] Lloyds Law Reports 45, 48 Lloyd J said: "...Mr Phillips submits that the principle in *Bradburn's* case only applies where it is the plaintiff himself who has paid the premium, thereby purchasing for himself the benefit of which he would be deprived if the proceeds of insurance were taken into account. There is, I think, a short answer to that argument. There could be no sensible distinction between a case where the plaintiff himself pays the premium and a case where the premium is paid on his behalf. That must be so where the premium is paid on his behalf by a third party and it is equally so, in my judgment, where it is paid on his behalf by the defendant." In *Bristol & West v May & Merrimans (No 2)* [1997] 3 All ER 206, 226-232 Chadwick J reached the opposite conclusion. The case concerned whether mortgage indemnity guarantee payments made to a lending institution should be deducted from damages to that institution. In his view, in non-subrogation cases, the insurance exception to the rule against double recovery only applies where the plaintiff has paid for the insurance. In subrogation cases ignoring insurance is not justified by arguments against double recovery, because there is no double recovery in such circumstances. Chadwick J reconciled his conclusion with the result in "*The Yasin*" by distinguishing that case, because there the insurance was found to have been paid for indirectly by the plaintiff, whereas in *Bristol & West* this was not the case. Furthermore he relied on case law in the personal injury field since "*The Yasin*" which he found to support his view. Chadwick J also referred to a series of recent first instance decisions, dealing with a similar factual situation to that involved in the *Bristol & West* case, namely *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (8 March 1993, unreported); *Portman Building Society v AB & Co* (25 May 1994, unreported); *Europe Mortgage Co v Halifax Estate Agencies, The Times*, 23 May 1996; *National Home Loans Corp plc v McCarthy Robertson* (20 September 1996, unreported); *Platform Home Loans Ltd v Gummer & Singh (a firm)* (31 October 1996, unreported).

<sup>42</sup> [1988] AC 514, 527.

<sup>43</sup> [1989] AC 807, 819-820.

<sup>44</sup> [1990] 1 WLR 963. See para 2.10 above.

<sup>45</sup> [1996] PIQR Q26 (first instance) & [1997] 1 WLR 652 (CA). See paras 2.25 & 2.26 below.

<sup>46</sup> If the narrower formulation of the rule is correct, aside from introducing the possibility of arbitrary results and the need for difficult distinctions to be made, for example where it is argued that insurance has been paid for indirectly (see discussion of this issue in McLachlin J's dissenting judgment in *Cunningham v Wheeler* (1994) 113 DLR 1, 38-39 & see para 3.82 n 128 below), it is in clear conflict with the existence of automatic subrogation rights for all

- 2.18 Alone amongst the providers of collateral benefits to personal injury victims, an indemnity insurer has the right - which arises automatically, by operation of law<sup>47</sup> - to take over the victim's tort claim by subrogation in order to recover the value of the insurance payments made. Mitchell defines indemnity insurance thus:

Indemnity insurance policies are policies taken out to indemnify the insured for specific heads of loss, rather than those under which an insurer promises to pay a certain sum of money on the happening of a specified event, regardless of the actual measure of the loss suffered by the insured.<sup>48</sup>

So, for example, personal accident insurance is non-indemnity insurance: whereas medical expenses and permanent health insurance are indemnity insurance.<sup>49</sup>

#### **(4) Sick pay**

- 2.19 Sick pay may take many different forms. In particular, it may be contractual or voluntary.
- 2.20 Traditional sick pay, in the sense of payments made in the same way as wages, but during the employee's incapacity, is the subject of a line of authority which does not make a clear distinction between contractual or voluntary sick pay. In *Parry v Cleaver*<sup>50</sup> Lord Reid said:

...Then it is said that instead of getting a pension he may get sick pay for a time during his disablement - perhaps his whole wage. That would not (*sic*) be deductible, so why should a pension be different? But a man's wage for a particular week is not related to the amount of work which he does during that week. Wages for the period of a man's holiday do not differ in kind from wages paid to him during the rest of the year. And neither does sick pay; it is still wages. So during the period when he receives sick pay he has lost nothing.<sup>51</sup>

indemnity insurers. This is because if indemnity insurance payments are deducted where the premiums were paid by someone other than the plaintiff, there would be no conceivable justification for the indemnity insurer's subrogation rights.

<sup>47</sup> Although it is common for subrogation to be expressly provided for in a contract of indemnity insurance.

<sup>48</sup> *The Law of Subrogation* (1994), 67.

<sup>49</sup> The figures included in para 1.18 above suggest that permanent health insurance is rare, although we do not have figures which specifically identify the policy income attributable to it, nor more recent figures to show if the incidence of such insurance is increasing, which our informal enquiries suggest is likely.

<sup>50</sup> [1970] AC 1.

<sup>51</sup> *Ibid*, 16; Atiyah says in "Collateral Benefits Again" [1969] MLR 397, 401 "...their lordships appear to have rejected the distinction which was formerly thought to exist between wages paid to a tort victim voluntarily on the part of the employer, and wages paid under a contractual or statutory obligation. It is true that they do not expressly deal with this case, but undoubtedly the emphasis of their speeches would lead to the conclusion that what matters is not whether the wages are paid voluntarily or not, but the fact that they are payments of the same kind as those which have been lost - indeed in this situation there may, of course, be no "loss" at all. This seems to follow from the fact that all their lordships thought that even future discretionary payments should be taken into account subject to a

2.21 In *Turner v MOD*<sup>52</sup> in the Court of Appeal Lord Denning gave a judgment with which Winn LJ and Cross LJ both agreed. Lord Denning relied on what Lord Reid had said in *Parry v Cleaver*<sup>53</sup> to find that the plaintiff's loss was not of full wages but of wages less sick pay.

2.22 In *Hussain v New Taplow Paper Mills Ltd*<sup>54</sup> the sick pay at issue was long-term and provided for under an insurance scheme, taken out and funded by the plaintiff's employers to insure themselves against contractual liability for sick pay extending beyond thirteen weeks. In the Court of Appeal Lloyd LJ relied on Lord Reid's remarks cited above in reaching the conclusion that sick pay should be deducted from damages.<sup>55</sup> Furthermore he said:

I find it impossible to agree that these payments should be left out of account. They went directly to reduce the plaintiff's loss of salary. If the plaintiff were to receive both sick pay in lieu of salary and damages for loss of the same salary, then, as a matter of ordinary common sense, he will be receiving double compensation.<sup>56</sup>

2.23 In the House of Lords Lord Bridge gave a speech with which the rest of the Law Lords agreed. He referred to Lord Reid's judgment in *Parry v Cleaver*,<sup>57</sup> but maintained that the prima facie rule was that collateral benefits should be deducted from damages. While he considered the grounds for the non-deduction of benevolence and insurance to be a matter of common sense,<sup>58</sup> there were borderline cases where it was not obvious whether the rule against double recovery or some principle derived by analogy from the exceptions to that rule should prevail. In such cases the correct approach depended at common law on justice, reasonableness and public policy.

2.24 Counsel for the plaintiff had argued that the payments in the present case should be ignored within the insurance or the disablement pension exceptions to the deduction rule. Lord Bridge rejected this submission. In his view the question of deductibility of the scheme payments must be answered in the same way whether they were to be made for a few weeks or for an entire working life. He found the payments indistinguishable in character from the contractual sick pay paid for the first 13 weeks of incapacity. They were the antithesis of a pension because they were payable before employment ceased. That the defendants had insured their liability to meet these contractual payments could not affect the issue. He concluded:

discount because of the discretion, so long as they were payments of a kind which were deductible in principle.”; see also P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993), p 325, n 28 for a similar view.

<sup>52</sup> (1969) 113 SJ 585.

<sup>53</sup> [1970] AC 1.

<sup>54</sup> [1988] AC 514.

<sup>55</sup> [1987] 1 All ER 417, 425-428.

<sup>56</sup> *Ibid*, 424.

<sup>57</sup> [1970] AC 1.

<sup>58</sup> See para 2.9 above.

In this jurisdiction there is no authority directly in point, perhaps because it has always been assumed as axiomatic that an employee who receives under the terms of his contract of employment either the whole or part of his salary or wages during a period when he is incapacitated for work cannot claim damages for a loss which he has not sustained... It positively offends my sense of justice that a plaintiff, who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity to work from two different sources, her employer and the tortfeasor. It would seem to me still more unjust and anomalous where, as here, the employer and the tortfeasor are one and the same.<sup>59</sup>

2.25 In *Page v Sheerness Steel PLC*<sup>60</sup> the plaintiff was entitled to half pay for life under a permanent health insurance policy taken out and paid for by his employers. He was covered by the policy because he had joined his employers' contributory pension scheme. At first instance Dyson J held, applying *Hussain*,<sup>61</sup> that payments under the policy should be deducted from damages for past and future loss of earnings. In his view the payments were indistinguishable in character from sick pay. He rejected counsel's argument that the payments should be ignored as insurance and that *Hussain* was distinguishable because here the defendant had no contractual obligation to carry on paying sick pay. Dyson J was not prepared to accept that there was no continuing obligation to pay sick pay, not having seen all the documentation needed to establish the precise contractual position. In any event, he did not accept that this case fell within the insurance exception to the deduction rule, because the plaintiff had not paid the relevant insurance premiums. He said:

It seems to me that it is an essential requirement of the insurance exception that the cost of the insurance be borne wholly or at least in part by the plaintiff.<sup>62</sup>

2.26 Dyson J's decision on this point was affirmed by the Court of Appeal on the basis that, as in *Hussain*, Mr Page had not paid for the permanent health insurance which he received, and accordingly it should be classified as sick pay and not insurance.

<sup>59</sup> [1988] AC 514, 529-532; it was apparently accepted by the plaintiff that voluntary payments of sick pay should be deducted from loss of earnings, given Lord Bridge's comment at 526 "What happened in the plaintiff's case was that the defendants treated him more generously than their contractual obligations required. They paid him at the full rate of his pre-accident earnings for 15 months following the accident and thereafter until trial at half the rate of his pre-accident earnings. Since the trial they have paid and will continue to pay him, in addition to his earnings as a weighbridge attendant, half the difference between those earnings and his pre-accident earnings. No claim is made for any loss of earnings for the first 13 weeks after the accident when the plaintiff was receiving his full wage as sick pay, nor in respect of the amount representing half his pre-accident earnings which for the following year the defendants continued to pay him on an ex gratia basis."

<sup>60</sup> [1996] PIQR Q26 (first instance) & [1997] 1 WLR 652 (CA). An appeal in this case is to be heard by the House of Lords.

<sup>61</sup> [1988] AC 514.

<sup>62</sup> [1996] PIQR Q26, Q34.

- 2.27 While the general rule must be taken to be that sick pay is deducted from damages for loss of earnings, the cases do not necessarily resolve how the courts would treat a contractual or voluntary payment unlike traditional sick pay, but which was to meet earnings lost during incapacity, for example a lump sum insurance payment representing a year's salary. It might be said that they point in different directions. *Cunningham v Harrison*<sup>63</sup> and *McCamley v Cammell Laird Shipbuilders Ltd*<sup>64</sup> suggest that a payment of this type may be ignored, although *McCamley* arguably does not support this result if the employer is also the tortfeasor. On the other hand ignoring sick pay, whatever form it took, would surely be hard to reconcile with *Hussain*, which would take precedence as a decision of the House of Lords.<sup>65</sup>
- 2.28 Under the present law (although criticism has been made of it) an employer has no direct claim against a tortfeasor to recover payments it has made to an employee which meet loss resulting from a tort.<sup>66</sup> It can, however, make provision in a contract with the employee to recover such payments if the employee succeeds in a tort claim and, at least where the employer does not waive its right of repayment, this will mean that, contrary to the normal rules, sick pay will not be deducted in assessing damages.<sup>67</sup>

#### **(5) Disablement pensions<sup>68</sup>**

- 2.29 Until the House of Lords settled the matter in *Parry v Cleaver*<sup>69</sup> in 1970, there was inconsistency in the cases on the question about whether or not account should be taken of disablement pensions in the assessment of damages.
- 2.30 In *Payne v Railway Executive*<sup>70</sup> in 1952 the Court of Appeal decided that receipt of a naval disablement pension should be ignored. The ratio of the decision is not clear. Two speeches were given based on different reasoning, and Birkett LJ agreed with them both. Cohen LJ thought the pension should be left out of account because otherwise the tortfeasor would take the benefit of the plaintiff's entitlement to a pension and because the accident was the *causa sine qua non*, not

<sup>63</sup> [1973] QB 942, 950-951 and see para 2.9 above.

<sup>64</sup> [1990] 1 WLR 963.

<sup>65</sup> [1988] AC 514.

<sup>66</sup> See *IRC v Hambrook* [1956] 2 QB 641 & *Met Police District Receiver v Croydon Corp & Monmouthshire County Council v Smith* [1957] 2 QB 154. For criticism see, eg Law Reform Committee Eleventh Report (1963) Cmnd 2017, paras 2-16, 24.

<sup>67</sup> In *Dennis v London Passenger Transport Board* [1948] 1 All ER 779, where it was not clear that the employer had a legal claim to recover sick pay from the employee, damages for sick pay were awarded but on condition that the employer be reimbursed contrary to the normal principle that damages be unconditional. *Dennis* is the only case of which we are aware in which conditional damages have been given in respect of sick pay.

<sup>68</sup> The appropriate treatment of incapacity pension in the calculation of damages for loss of pension rights is an issue with which the courts have recently grappled. However, we have chosen to examine this question in the context of retirement pensions, on the basis that after normal or planned retirement age an incapacity pension is practically indistinguishable from a retirement pension.

<sup>69</sup> [1970] AC 1.

<sup>70</sup> [1952] 1 KB 26.

the *causa causans* of receipt of the disability pension.<sup>71</sup> Singleton LJ, while indicating that he was prepared to adopt a causation argument, preferred to base his judgment on the fact that the pension might in the future be withheld or reduced.

- 2.31 In *Browning v War Office*<sup>72</sup> a majority of the Court of Appeal took the opposite view. Denning LJ and Diplock LJ reached their decision applying the theory that tort damages should be compensatory and not punitive. Denning LJ treated the ratio of *Payne*<sup>73</sup> as being the ground for decision set out in Singleton LJ's speech. While voluntary disablement pensions should be treated in the same way as charitable payments because of the possibility that they would cease, the same should not apply to a contractual disablement pension as was in issue in this case.<sup>74</sup> Diplock LJ considered *Payne*<sup>75</sup> not binding, because its ratio, which relied on a punitive tort measure of damages, was inconsistent with the House of Lords decision in *British Transport Commission v Gourley*,<sup>76</sup> of which he said:

*Gourley's* case raised the same issue of principle: whether damages for negligence were punitive or compensatory. That issue, upon which a careful linguistic analysis of the previous cases to which we have been referred in the course of the argument will show that different views had long been held by different judges, was in *Gourley's* case authoritatively settled in favour of the principle that damages are compensatory.<sup>77</sup>

In dissent Donovan LJ thought himself bound by *Payne*<sup>78</sup> to ignore the disablement pension, although in any event he thought this the right approach.

- 2.32 As we have seen,<sup>79</sup> the House of Lords in *Parry v Cleaver*<sup>80</sup> settled the matter in favour of the result in *Payne v Railway Executive*,<sup>81</sup> by finding that disablement pensions, whether voluntary or not,<sup>82</sup> should be ignored in the assessment of damages for loss of earnings.

<sup>71</sup> In *Judd v Hammersmith West London and St Mark's Hospitals Board of Governors* [1960] 1 All ER 607 receipt of a pension was ignored following *Payne*.

<sup>72</sup> [1963] 1 QB 750.

<sup>73</sup> [1952] 1 KB 26.

<sup>74</sup> In *Carroll v Hooper* [1964] 1 WLR 345 and *Elstob v Robinson* [1964] 1 WLR 726 the High Court did not take account of the receipt of disablement pensions, because of a discretion to reduce them.

<sup>75</sup> [1952] 1 KB 26.

<sup>76</sup> [1956] AC 185.

<sup>77</sup> [1963] 1 QB 750, 772.

<sup>78</sup> [1952] 1 KB 26.

<sup>79</sup> See paras 2.3 & 2.4 above.

<sup>80</sup> [1970] AC 1.

<sup>81</sup> [1952] 1 KB 26.

<sup>82</sup> In that case the pension concerned was contractual.

- 2.33 Lord Reid treated the question to be examined as depending on justice, reasonableness and public policy.<sup>83</sup> He examined and reaffirmed the policy justifications for not deducting charitable and insurance payments from damages and, having analogised disablement pensions to the latter, established the rule that these should also not be deducted. He considered that the Fatal Accidents Act 1959, which provided that all pensions be disregarded in claims under that Act, supported his conclusion.
- 2.34 Lord Pearce found that because disablement pensions flow from past work, they equate to rights from private insurance and should therefore be ignored in the assessment of damages. As with private insurance, they are intended to benefit the workman and not to be a subvention for wrongdoers. Furthermore, particularly in the case of a policeman's pension, disablement pensions are not intended as a substitute for capacity to earn. He also considered the Fatal Accidents Act 1959 to provide some support for this conclusion.
- 2.35 Lord Wilberforce argued for non-deductibility on the basis that the pension was payable irrespective of loss of earning capacity. He found this argument consistent with and supported by the view that the pension represented earnings for past service and, to the extent of the plaintiff's own contribution, past savings.
- 2.36 Lord Morris of Borth-y-Gest, dissenting, cited *British Transport Commission v Gourley*<sup>84</sup> as authority for a compensatory measure of damages. If what was being ascertained was the monetary loss which the plaintiff sustained, there was no valid reason for distinguishing between periods of loss, nor for saying that pensions are at some times, but not at others, to be taken into consideration.<sup>85</sup>
- 2.37 Lord Pearson, also dissenting, cited the conception of compensation set out in *Gourley*.<sup>86</sup> He derived a remoteness test from the authorities and found nothing in this case to justify a departure from the presumption, in accordance with the correct measure of compensation, that there should be deduction.
- 2.38 More recently in *Smoker v. London Fire and Civil Defence Authority*<sup>87</sup> the House of Lords unanimously affirmed that disablement pensions should be disregarded in the assessment of damages for loss of earnings. The case concerned a contractual pension. Lord Templeman gave the leading speech.<sup>88</sup> He considered *Parry v*

<sup>83</sup> See para 2.3 above.

<sup>84</sup> [1956] AC 185.

<sup>85</sup> Incidentally he also said of the argument that the Fatal Accidents Act 1959 supported ignoring disablement pensions: "There are manifest differences between claims under the Fatal Accidents Act and claims by a living person for damages which he has sustained. It might be said that, as Parliament in 1959 legislated to exclude pension receipts in reference to claims under the Fatal Accidents Act, 1846, but did not exclude them in other cases, the inference could be drawn that it was recognised that the receipts were not to be excluded in assessing damages. But I would not regard any such approach as sound. The only approach, in my view, in the absence of any statutory enactment, should be that of applying principle." [1970] AC 1, 25.

<sup>86</sup> [1956] AC 185.

<sup>87</sup> [1991] 2 AC 502.

<sup>88</sup> Lord Lowry added a short speech.

*Cleaver*<sup>89</sup> to be binding and found it indistinguishable, albeit that in this case the defendant was also the victim's employer. He relied on Lord Reid's reasoning, which he said that the speeches of Lord Pearce and Lord Wilberforce agreed with, in particular the principle that the tortfeasor should not be able to appropriate the fruit of the plaintiff's past work.

- 2.39 Lord Templeman specifically rejected the proposition that the result should be different because it was the tortfeasor who was here providing the disablement pension. He said:

In the present case counsel for the appellants sought to distinguish the decision of this House in *Parry v Cleaver*<sup>90</sup> on the ground that the appellants are in the triple position of employers, tortfeasors and insurers. In my opinion this makes no difference to the principle that the plaintiff has bought his pension...<sup>91</sup>

- 2.40 Accordingly the cases establish that disablement pension is ignored in the calculation of damages for loss of earnings, and whether it is paid by the tortfeasor or a third party.
- 2.41 The provider of a pension cannot recover its value from the tortfeasor. But there is nothing to prevent a pension fund from providing, in a contract with the victim, for repayment by the victim in the event of the victim recovering damages from the tortfeasor.

#### **(6) Retirement pensions**

- 2.42 The issue in *Hewson v Downs*<sup>92</sup> was how to treat a retirement pension in the calculation of the plaintiff's damages for loss of earnings where the pension was taken earlier than planned because of injuries caused by the defendant's tort. The plaintiff was over 66 at the time of the accident, but had agreed with his employer that he would carry on working until the age of 70. As a result of the accident he was forced to retire earlier than he had intended. He received the state retirement pension.<sup>93</sup> The court found in the light of *Parry v Cleaver*<sup>94</sup> that this should be left out of account and awarded damages for loss of earnings on this basis.<sup>95</sup>

<sup>89</sup> [1970] AC 1.

<sup>90</sup> [1991] 2 AC 502.

<sup>91</sup> [1991] 2 AC 502, 543. Also Lord Lowry referred at 546 to an unreported judgment in 1989 in *Guy v Police Authority for Northern Ireland*, in which McDermott J reached the same conclusion.

<sup>92</sup> [1970] 1 QB 73.

<sup>93</sup> He also received two occupational retirement pensions but the defendants conceded that they should be ignored in the assessment of the plaintiff's special and general damages.

<sup>94</sup> [1970] AC 1.

<sup>95</sup> It should be noted however, that the plaintiff also received damages for loss of pension rights. As these were damages for the reduction in his pension from having stopped work earlier than he had intended by definition it was appropriate for the court to take account of the level of the pension that he did receive in assessing this head of loss, and this issue was not even discussed. *Parry v Cleaver* [1970] AC 1 and *Auty v National Coal Board* [1985] 1 All ER 930 confirm that this is the correct approach (See para 2.45 below). However, see

- 2.43 In *Hopkins v Norcross plc*<sup>96</sup> the Court of Appeal dealt with a similar issue where the plaintiff claimed contractual damages for wrongful dismissal. As he had a fixed term contract without a notice period damages were prima facie the amount he would have earned until retirement age, subject to the duty to mitigate. The plaintiff took the option under the defendant's pension scheme of taking a pension before the usual retirement age of 60. The parties agreed before trial that the pension received was the same as the plaintiff would have earned had he not been wrongfully dismissed. The defendants alleged that the retirement pension should be deducted from the plaintiff's damages. Staughton LJ, on behalf of the court, relied on *Parry v Cleaver*<sup>97</sup> and *Smoker v LFCDA*<sup>98</sup> to say that the pension should be ignored in calculating the plaintiff's damages because it had been paid for, even if this resulted in some double recovery.<sup>99</sup> There should be the same conclusion in respect of tort damages for personal injury and contractual damages for wrongful dismissal.<sup>100</sup> Implicitly, it was thought the law would treat a retirement pension in the same way as a disablement pension.
- 2.44 There has recently been controversy about how to treat extra pension payments received because of a tort (because pension payments have started earlier than anticipated) in the calculation of damages for lost retirement pension (often also known as damages for loss of pension rights). This is a confusing area, made more difficult because in some cases the pension received earlier than planned will be an incapacity pension,<sup>101</sup> in others a retirement pension<sup>102</sup> and in still others an early retirement pension.<sup>103</sup>
- 2.45 The pension at issue in *Parry v Cleaver*<sup>104</sup> was called an incapacity pension both before and after normal retirement age. The majority held that after normal retirement age it should be taken into account in assessing damages for the plaintiff's lost retirement pension,<sup>105</sup> despite their decision that before normal retirement age it should be ignored in assessing the plaintiff's damages for loss of

paras 2.44-2.63 below in respect of a controversy which has developed concerning assessment of damages for loss of pension rights.

<sup>96</sup> [1994] ICR 11.

<sup>97</sup> [1970] AC 1.

<sup>98</sup> [1991] 2 AC 502.

<sup>99</sup> *Hewson v Downs* [1970] 1 QB 73 was seemingly not cited or referred to.

<sup>100</sup> [1994] ICR 11, 14-16; Also in *Stocks v Magna Merchants Ltd* [1973] ICR 530 Arnold J said (at 533-534) of *Parry v Cleaver* [1970] AC 1, "*Parsons v BNM Laboratories Ltd* [1964] 1 QB 95 was cited and mentioned in the speeches of three of the Lords of Appeal and no distinction was drawn between the case of an award of damages for personal injuries, such as was in question in *Parry v Cleaver*, and one of an assessment of damages for wrongful dismissal, such as was in question in *Parsons v BNM Laboratories Ltd*. In my judgment, for purposes here relevant, the principles governing the one may properly be regarded as governing the other."

<sup>101</sup> *Parry v Cleaver* [1970] AC 1; *Longden v British Coal Corporation* [1995] ICR 957.

<sup>102</sup> *Hewson v Downs* [1970] 1 QB 73.

<sup>103</sup> *West v Versil Ltd and Others*, *The Times* 31 August 1996.

<sup>104</sup> [1970] AC 1.

<sup>105</sup> *Auty v National Coal Board* [1985] 1 All ER 930 endorsed this approach.

earnings. The three Law Lords in the majority reached this conclusion on the basis that while they considered that before normal retirement age to compare earnings and incapacity pension was not to compare like with like, after normal retirement age to compare incapacity pension and retirement pension was to compare like with like.<sup>106</sup> Having earlier made the general point that the treatment of collateral benefits should depend not on their source but on their intrinsic nature,<sup>107</sup> Lord Reid said:

As regards police pension, his loss after reaching police retiring age would be the difference between the full pension which he would have received if he had served his full time and his ill-health pension. It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier period. The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind.<sup>108</sup>

- 2.46 In *Longden v British Coal Corporation*<sup>109</sup> the defendants argued that an incapacity pension and lump sum paid before normal retirement age, even if not deducted from damages for loss of earnings, should be deducted from damages for lost retirement pension in order to prevent double recovery. The Court of Appeal rejected this submission. It went further than the trend in previous cases in holding that the lump sum as well as the periodical payments should be ignored.<sup>110</sup> Roch LJ, giving judgment for the Court, noted that to deduct these sums would extinguish the plaintiff's damages for loss of pension rights, which would lead to a windfall for the tortfeasors as they had paid damages for loss of earnings net of pensions contributions.
- 2.47 In his view it was only where the same pension scheme provided for both the incapacity and the retirement pension that *Parry v Cleaver*<sup>111</sup> had decided that incapacity pension after normal retirement age should be taken account of in calculating loss of pension rights. This decision had been reached because otherwise the plaintiff would recover more than he or she had lost. Roch LJ

<sup>106</sup> *Parry v Cleaver* [1970] AC 1, *per* Lord Reid at 20-21, *per* Lord Pearce, who said there was no dispute on the point, at 33 and *per* Lord Wilberforce at 42.

<sup>107</sup> *Ibid*, 15.

<sup>108</sup> *Ibid*, 20-21.

<sup>109</sup> [1995] ICR 957; an appeal in this case is awaiting hearing before the House of Lords.

<sup>110</sup> *Parry v Cleaver* did not deal with the question of deductibility of a lump sum received pre-retirement. See discussion of this issue generally by J James Rowley in "A Guide to Pension Loss Calculation" [1995] JPIL 107, 115-120 and "An Updated Guide to Pension Loss Calculation" [1995] JPIL 212, 212-213.

<sup>111</sup> [1970] AC 1.

contrasted this with the rule that incapacity pension before normal retirement age should not be deducted from damages for lost earnings, on the basis that in this instance there was no double recovery *as against the tortfeasor*. By this Roch LJ seemed to imply that there would be nothing wrong with double recovery provided the tortfeasor did not pay the two amounts.

- 2.48 Roch LJ went on to consider the rules for the treatment of other collateral benefits. He noted the justification for ignoring insurance payments to be that they are the result of the prudence and foresight of the tort victim, the fruits of which the tortfeasor should not be allowed to appropriate. On the authority of *Parry v Cleaver*<sup>112</sup> incapacity pension is to be treated like insurance. Furthermore, although triggered by the accident, incapacity pension is not the result of it but of the contributions by the tort victim,<sup>113</sup> in this case being 6 per cent of his earnings plus his remuneration in the form of employer's contributions. Moreover, to take account of incapacity pension would favour an imprudent over a prudent tort victim.
- 2.49 Roch LJ concluded that the tortfeasor should not be allowed to off-set incapacity pension before normal retirement age against his claim for lost retirement pension, on the ground that the plaintiff had purchased the incapacity pension. Roch LJ considered his view to be supported by authority, in particular *Parry v Cleaver*<sup>114</sup> and *Smoker v London Fire and Civil Defence Authority*.<sup>115</sup>
- 2.50 To sum up, therefore, Roch LJ distinguished between incapacity pension before and after normal retirement age. Incapacity pension before normal retirement age should be ignored in assessing damages for loss of pension rights, first, to avoid a windfall to tortfeasors and, secondly, because the plaintiff had paid for the incapacity pension. Incapacity pension after normal retirement age should be deducted from damages for loss of pension rights where the two pensions were provided for under the same scheme, because otherwise the plaintiff would doubly recover.<sup>116</sup>

<sup>112</sup> *Ibid.*

<sup>113</sup> This is a unusual recent example of remoteness reasoning. See para 2.2 above.

<sup>114</sup> [1970] AC 1.

<sup>115</sup> [1991] 2 AC 502.

<sup>116</sup> J James Rowley analyses the distinction made here in "An Updated Guide to Pension Loss Calculation" [1995] JPIL 212, 212-213, as follows: "Pensions were considered by Lord Reid in *Parry v Cleaver* to be a form of insurance. That is why they are not to be deducted from other heads of loss; but this also provides the rationale for not deducting early receipts of pension. The difference between...where the plaintiff had to wait to 65 to obtain his pension...and...where a lump sum and early periodical payments had already been received...is illuminated by Roch LJ's reasoning. Put in bald terms, it must cost more to provide a scheme with ill-health early retirement provision on top of a normal retirement pension, as against a simple retirement pension. There is no free lunch. Whether a contributory or non-contributory scheme, the cost of provision is seen as part of the employee's remuneration over many years of work. There is no double recovery because the pre and post normal retirement elements can be seen as separately provided parcels of insurance covering pre and post normal retirement periods."

- 2.51 Aside from the apparent inconsistency in treating the same collateral benefit differently at different times, we have, with respect, some concerns about this decision. First, we disagree that *Parry v Cleaver*<sup>117</sup> decided that incapacity pension after retirement should be taken into account in calculating loss of pension rights *only where the incapacity and retirement pensions at issue arose under the same scheme*. Our reading of the majority's speeches in *Parry v Cleaver*<sup>118</sup> indicates that incapacity pension after retirement is always taken into account in the assessment of damages for loss of pension rights.<sup>119</sup>
- 2.52 Secondly, so far as the decision implies that double recovery is acceptable so long as it is not the tortfeasor who pays for the same loss twice, again with respect, we disagree. The principle is that tort damages should not lead to double recovery for the tort victim, not that they should avoid double recovery only where both sums are paid by the tortfeasor.
- 2.53 Another issue around which there is some controversy is the entitlement of a tort victim whose life-expectancy has been shortened by a tort, to damages for loss of pension rights during his or her lifetime, where the loss results from options exercised to optimise his or her dependants' pension benefits following the tort victim's anticipated decease.
- 2.54 This question was examined by the Court of Appeal in the case of *West v Versil Ltd and Others*.<sup>120</sup> The background to the decision in the Court of Appeal is complex. The case concerned a claim by Mr West for damages for personal injury, including asbestosis, which had shortened his expectation of life by ten years. As a result of the injury Mr West gave up work at the age of 60 when he had planned to work until the age of 65.
- 2.55 He was faced with a number of options as to how to take his pension. Owing to his illness Mr West chose to start drawing his pension at the age of 60, instead of when he reached 65. He also chose to take the pension on a surviving spouse basis, instead of on a single life basis. These choices meant that Mr West was entitled to a pension of £18,885 per annum until his death, after which his wife would receive £12,363, whereas but for the tort he would have received £39,306 per annum, but his wife would have had no pension entitlement following his decease.
- 2.56 The defendants conceded that Mr West was entitled to damages for lost pension rights during his lifetime, being the difference between what he would have received but for the tort and what he did receive. Mr West was accordingly awarded damages for this loss. In addition he was awarded damages for pension loss during the "lost years", although only on the basis of the lower pension he received as a result of the tort, not the higher pension he would have had if the tort had not occurred.

<sup>117</sup> [1970] AC 1.

<sup>118</sup> *Ibid.*

<sup>119</sup> See para 2.45 above.

<sup>120</sup> *The Times* 31 August 1996.

- 2.57 The appeal concerned the defendant's contentions that the damages for pension loss in the lost years first, should have been extinguished or reduced by the amount of pension the plaintiff's widow would receive and secondly, in any event were excessive and amounted to double recovery because Mr West had already been compensated through the damages for lost pension rights during his lifetime for the cost to him of providing for his wife. Pending a decision by the House of Lords in the *Longden*<sup>121</sup> case, the defendant reserved its right to pursue a third ground of appeal that the damages awarded for lost pension rights during the plaintiff's lifetime should have been reduced in respect of the receipt by the plaintiff of pension payments between 60 and 65, which he would not have had but for the tort.
- 2.58 In reaching his decision Phillips LJ distinguished *Longden v British Coal Corporation*<sup>122</sup> on the facts. He went on to consider if the defendant had been right to concede that the plaintiff was entitled to damages for lost pension rights during his lifetime, as this was necessary to decide the issues which were before the Court. It is to be noted that the Court reached a view on this point without the benefit of argument. Phillips LJ found that although the plaintiff had acted reasonably in making his pension arrangements to benefit his wife after his death, his actions to this effect amounted to a *novus actus interveniens* for the consequences of which the defendant should not have been held liable. He concluded that the plaintiff was entitled to damages for loss of pension rights in the lost years without account being taken of his wife's entitlement to a pension. Even though in this case the plaintiff received damages for the reduction of his pension in his lifetime, this was due to a concession by the defendants which should not have been made. If that concession had not been made and damages had been correctly assessed, the plaintiff would have received no damages for his pension loss during his lifetime and he would, therefore, have paid for his wife's pension entitlement and for this reason it would be wrong to deduct it from his lost years claim.
- 2.59 Millett LJ agreed that the plaintiff should not have received damages for loss of pension rights in respect of the reduction in his pension in his lifetime, because: first, so far as the reduction was due to the cessation of his pension contributions, this was compensated for in his loss of earnings; secondly, so far as it was due to the early drawing of a pension, there was no loss as the plaintiff had applied the income from the pension fund he had built up to purchase an earlier pension; finally, so far as the reduction was due to the plaintiff's decision to provide for a pension for his wife after his death, he had suffered no loss but had used what he would otherwise have received to purchase a widow's pension. It followed that the widow's pension should be ignored in respect of a claim for damages for lost pension during the "lost years", because it had been paid for by the plaintiff (although in this instance, because of the defendants mistaken concession, he had received damages in respect of this payment). Neill LJ agreed with the judgements of both Phillips LJ and Millett LJ.

<sup>121</sup> [1995] ICR 957.

<sup>122</sup> *Ibid.*

- 2.60 At first glance the Court of Appeal appears to have ignored the authorities which firmly establish a tort victim's prima facie entitlement to damages for loss of pension rights where a tort has led to a reduction in pension benefits. However, it may be that this case was distinguishable from other situations in which damages for loss of pension rights have been awarded because: first, the plaintiff had a choice how to deploy the pension entitlement which he had built up to the best advantage of his likely survivors; secondly the plaintiff was entitled to damages for his lost years of life owing to the tort, which is the case only where a tort has led to a reduction in life expectancy.
- 2.61 On the other hand a tort victim is entitled to be compensated for the consequences of reasonable steps taken to mitigate loss, and it would seem questionable if he or she should lose this entitlement where the steps were taken to mitigate loss to others following death owing to a tort. Moreover, in this case the tort made it reasonable for the plaintiff to accept a lower pension now, in order to improve his wife's position on his death. As a result of the tort, therefore, he chose to accept a certain loss now, for the sake of a future benefit which might not materialise, for example if his wife pre-deceased him. Was it then fair to deny him compensation for that loss, because of what might, but also might not, happen in the future, particularly given that damages for loss of pension rights are heavily discounted to take account of contingencies?
- 2.62 In keeping with the position in respect of a disablement pension, a retirement pension by the tortfeasor would be treated in the same way as a pension made by any other third party. Indeed this seems to have been the position in *Hopkins v Norcross plc*<sup>123</sup> and was implied in *Longden v British Coal Corporation*.<sup>124</sup>
- 2.63 A pension fund has no direct claim against a tortfeasor to recover payments it has made which meet loss resulting from a tort. There is, however, nothing to prevent a pension fund providing, in a contract with the victim, for repayment by the victim in the event of the victim recovering damages from the tortfeasor.

### **(7) Redundancy payments**

- 2.64 Redundancy payments are statutory payments to which certain employees are entitled on termination of their employment. Provided an employee fulfils a number of general qualifying conditions, the essential criterion for eligibility is that the employee has been dismissed because his or her job has ceased to exist. Statutory redundancy payments are calculated according to a formula, pursuant to which entitlement increases with length of service.<sup>125</sup> The statutory entitlement only establishes, however, the minimum which employers are required to pay. It is not uncommon for employees to receive larger redundancy payments, either pursuant to the terms and conditions of their employment or as a result of a voluntary gesture by their employers on termination.

<sup>123</sup> [1994] ICR 11.

<sup>124</sup> [1995] ICR 957, 962.

<sup>125</sup> Employment Rights Act 1996, s 162.

- 2.65 The treatment of redundancy payments in the cases is somewhat confusing. In *Wilson v National Coal Board*,<sup>126</sup> while the House of Lords said that only exceptionally should redundancy payments be deducted from damages, because they are not compensation for loss of earnings, but for loss of a settled job,<sup>127</sup> their Lordships also said that where the tort for which damages are being awarded has caused the redundancy, the payment should be deducted.<sup>128</sup> Their Lordships reached this conclusion partly on the policy ground that otherwise employers would be discouraged from making tort victims redundant when they could also be dismissed on grounds of ill-health.
- 2.66 In *Mills v Hassalls*<sup>129</sup> Heilbron J held that a redundancy payment should not be deducted from damages for loss of earnings, because it was not the accident and its effects which had caused the plaintiff to volunteer for redundancy and because redundancy payments are not comparable to damages for lost earnings.
- 2.67 In *Colledge v Bass Mitchells & Butlers Ltd*,<sup>130</sup> the Court of Appeal deducted a redundancy payment from damages for loss of earnings, on the ground that but for the accident the plaintiff would have been unlikely to have been made redundant. Giving the judgment of the Court Sir John Donaldson said of the argument that a redundancy payment should not be deducted from tort damages because it is not compensation for lost earnings:

The only way in which, as it seems to me, this argument can be put is that the plaintiff suffered a head of damage which one can describe as “loss of the job” and that the redundancy payment was exclusively designed and intended to compensate him for this head of damage. Loss of future earnings was something distinct and fell to be

<sup>126</sup> 1981 SC (HL) 9; see also earlier cases concerning the deductibility of redundancy payments from damages for wrongful dismissal: *Stocks v Magna Merchants Ltd* [1973] ICR 530 (HC) & *Basnett v J & A Jackson Ltd* [1976] ICR 63 (HC); and in respect of damages for unfair dismissal: *Yorkshire Engineering and Welding Co Ltd v Burnham* [1974] ICR 77 (CA). In *Stocks v Magna Merchants Ltd* the redundancy payment was deducted on reasoning derived from *Parry v Cleaver* [1970] AC 1, while in *Basnett v J & A Jackson Ltd* and *Yorkshire Engineering and Welding Co Ltd v Burnham* the redundancy payments were ignored the former on a variety of rationales and the latter because the redundancy payment would have been received irrespective of the unfair dismissal.

<sup>127</sup> Lord Keith and Lord Scarman relied on *Hindle v Percival Boats Ltd* [1969] 1 WLR 174 as authority for this proposition (see Lord Denning in dissent at 176); See also *Lloyd v Brassey* [1969] 2 WLR 310, 313, *per* Lord Denning & *Marriott v Oxford and District Co-operative Society Ltd* (No 2) [1970] 1 QB 186, 192, *per* Lord Denning.

<sup>128</sup> Lord Keith, with whom the other Law Lords agreed said “The Lord President expressed the view that, giving due regard to the nature of a redundancy payment, it would be unjust and unreasonable to assess damages upon the basis presented by the appellant, namely that but for the accident he would have continued in the employment of the respondents for the rest of his working life, and yet to refrain from taking into account a redundancy payment made on the footing that he was not going so to continue. I agree entirely with that approach, which seems to me to accord wholly with the realities of the situation, which are, as the Lord President stressed that the appellant would not have been dismissed at all for the purposes of the Act but for the very incapacity to which his claim for loss of earnings relates.” [1981] SC (HL) 9, 21.

<sup>129</sup> [1983] ICR 330.

<sup>130</sup> [1988] 1 All ER 536.

compensated separately. So far so good, but if this is correct every workman who loses his job in consequence of an accident, but is not redundant, should receive damages for “loss of the job”, the measure presumably being the amount which he would have received if he had been made redundant. This does not happen...I have also considered whether any different result could be achieved by regarding the plaintiff as claiming a “loss of redundancy rights”. This may be slightly more promising, in that he would not have lost those rights but for the accident. However, it grinds to a halt because exactly the same could have been said by the plaintiff in *Wilson v National Coal Board*.<sup>131</sup>

- 2.68 Accordingly there seems to be some disagreement between *Colledge v Bass Mitchells & Butlers Ltd*<sup>132</sup> and *Wilson v National Coal Board*<sup>133</sup> as to the significance of redundancy payments not being compensation for lost earnings. Indeed Sir John Donaldson explicitly cast doubt on the approach in *Wilson* when he went on to say:

I would only add that, since their Lordships regarded Wilson’s position as exceptional, it must be possible to construct a scenario in which the amount of a redundancy payment would not fall to be deducted. Nevertheless there is only one case in which I can foresee this, namely where the plaintiff would have been made redundant regardless of the accident.<sup>134</sup>

We agree with this observation.

- 2.69 It is implicit in *Wilson v National Coal Board*<sup>135</sup> that redundancy payments will be treated in the same way where the employer is the tortfeasor, given that one of the justifications for deduction was the effect of the treatment of redundancy payments in the assessment of damages on employers’ choices between redundancy and incapacity dismissal. The Court seemingly took the view that an employer-defendant would be influenced to choose redundancy over incapacity dismissal, if it knew that its damages bill would be reduced by the payment (even though its insurance company would pay the damages), but not otherwise.
- 2.70 As with sick pay, where his or her employee has been made redundant as a result of injuries occasioned by a tort, an employer has no direct claim against a tortfeasor to recover any redundancy payment. There is, however, nothing to prevent an employer providing, in a contract with the employee, for repayment of the redundancy money in the event of the victim recovering damages from the tortfeasor, or from making the redundancy payment on this condition. In certain circumstances the state guarantees redundancy pay, but provision is not made for

<sup>131</sup> *Ibid*, 540.

<sup>132</sup> [1988] 1 All ER 536.

<sup>133</sup> 1981 SC (HL) 9.

<sup>134</sup> [1988] 1 All ER 536, 540.

<sup>135</sup> 1981 SC (HL) 9.

recoupment even if a particular recipient would not have been made redundant but for a tort.<sup>136</sup>

### **(8) Social security benefits outside the statutory recoupment scheme<sup>137</sup>**

- 2.71 The treatment of almost all social security benefits in the assessment of personal injury damages is at present governed by the Social Security Administration Act 1992, although the Social Security (Recovery of Benefits) Act 1997, which is to be brought into force in October 1997, makes important changes in this area. The 1992 Act provides that almost all social security benefits, paid or likely to be paid to the victim in respect of the injury or disease caused by the tortfeasor, either in the five years from the day after the cause of action accrued (or until an earlier final settlement payment of damages) are to be deducted from damages and repaid by the tortfeasor to the State. There are two limitations to the coverage of the statutory scheme: first it applies only to “relevant benefits”<sup>138</sup> and secondly it applies only to compensation payments above £2,500. Therefore the DSS does not recoup social security benefits paid to a tort victim who receives compensation of £2,500 or less nor social security benefits which are not “relevant”.
- 2.72 Under the 1997 Act, although the tortfeasor’s liability to repay benefits will be the same as under the 1992 Act, benefits will only be offset against the plaintiff’s damages which meet comparable losses to those met by the social security payment. Accordingly the plaintiff’s damages for loss of earnings, cost of care and for loss of mobility may be reduced, but not damages for pain and suffering and loss of amenity. In addition, the Act does not provide for a small payments limit, although one might be introduced by secondary legislation.
- 2.73 Still, for the moment the treatment in the assessment of damages of “relevant benefits” paid as a result of a tort, for which the tort victim receives tort compensation of £2,500 or less, is governed by section 2 of the Law Reform (Personal Injuries) Act 1948. This section provides that half of such benefits for five years beginning with the time the cause of action accrued should be taken into account against tort damages.
- 2.74 Social security benefits which are not “relevant” are those which are not included in the list of “relevant benefits” contained in regulation 2 of the Social Security (Recoupment) Regulations 1990. Our understanding is that the social security benefits that are not in the list are state retirement pensions, Christmas bonus for pensioners, widow’s payment, widowed mother’s allowance, widow’s pension, child’s special allowance, guardian’s allowance, invalid care allowance, state maternity allowance, statutory maternity pay, child benefit, housing benefit, community charge benefits, reliefs available to the disabled from public transport charges, parking charges and Vehicle Excise Duty and, finally, payments out of the

<sup>136</sup> Employment Rights Act 1996, ss 166 & 167.

<sup>137</sup> Social security benefits within the recoupment scheme are outside our terms of reference: see para 1.7 above.

<sup>138</sup> Social Security Administration Act 1992, s 82. These are defined in s 81 of the 1992 Act and regulation 2 of the Social Security (Recoupment) Regulations 1990 SI 1990 No 322. Under the Social Security (Recovery of Benefits) Act 1997 the benefits to be recouped are called “listed” benefits (see s 1(b)).

social fund.<sup>139</sup> Other payments which might be said to fall into this category would be foreign state benefits and payments from the Independent Living (1993) Fund and the Independent Living (Extension) Fund.<sup>140</sup>

- 2.75 The rule for state retirement pensions is set out above.<sup>141</sup> Survivors' benefits are not relevant to non-fatal personal injury claims.<sup>142</sup> In respect of some of the other benefits listed it is hard to imagine circumstances in which they would be paid as a result of a personal injury. Invalid care allowance, housing benefit, community charge relief, transport cost reliefs for disabled people, foreign benefits and payments from the Independent Living (1993) Fund and the Independent Living (Extension) Fund might, however, be encountered.<sup>143</sup> It is not entirely clear how they would be treated in the assessment of damages.
- 2.76 If the benefit was to meet a loss which had nothing to do with the tort, it would presumably be ignored. However, if it was to meet a loss for which tort damages would also be payable, the House of Lords decision in *Hodgson v Trapp*<sup>144</sup> suggests that, in the absence of an express indication in the legislation that the benefit was to be enjoyed in addition to tort damages, both past and future payments of the benefit would be deducted from damages for the same loss.
- 2.77 *Hodgson v Trapp*<sup>145</sup> pre-dated the recoupment scheme and concerned whether mobility and attendance allowance should be deducted from damages for the cost of caring for the plaintiff, who had been severely disabled in a car accident for which the defendant admitted liability. Although mobility and attendance allowance are both now "relevant benefits" and therefore subject to the DSS recoupment scheme, Lord Bridge's speech, with which the rest of the House agreed on this point, gives a very clear indication of how another court faced with a different social security benefit should approach this issue.

<sup>139</sup> See Social Security and Contributions Act 1992.

<sup>140</sup> The Independent Living (1993) Fund and the Independent Living (Extension) Fund were established by deeds dated 25 February 1993 made between the Secretary of State for Social Security (on behalf of the government) and Robin Glover Wendt and John Fletcher Shepherd (on behalf of the Funds). They replaced the old Independent Living Fund which had been founded in June 1988 as an interim measure. The Disability (Grants) Act 1993 empowers the Secretary of State for Social Security to make payments to the Funds. Local authorities apply to the Funds when assessing the needs of disabled people in their area. The Funds then decide whether to supply additional help to that provided by the local authority.

<sup>141</sup> See para 2.42 above.

<sup>142</sup> Claims for Wrongful Death (1997) Consultation Paper No 148.

<sup>143</sup> It is also conceivable, although unlikely to arise frequently (for example because violent criminals are unlikely to be worth suing), that a person could recover both tort damages and a payment under the Criminal Injuries Compensation Scheme. In those circumstances he or she would be under an obligation to repay the Criminal Injuries Compensation Authority to the extent of the damages payment. (See paragraph 48 of the Criminal Injuries Compensation Scheme 1995). Accordingly, as in the case of other repayable collateral benefits, a criminal injuries award would be ignored in the assessment of tort damages.

<sup>144</sup> [1989] AC 807. See also A S Burrows, "Damages for Personal Injury: Collateral Benefits and Tax" (1989) 105 LQR 366 for commentary.

<sup>145</sup> [1989] AC 807.

2.78 He found that the basic rule applying the compensatory principle, is that collateral benefits should be deducted from damages, although this is subject to certain exceptions.<sup>146</sup> The question to be resolved was whether social security benefits should be treated as analogous to benevolence and ignored on that ground. Lord Bridge referred to the following obiter remark by Lord Reid in *Parry v Cleaver*.<sup>147</sup>

We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer.

2.79 Lord Bridge went on to say:

...when I turn to consider statutory benefits for the relief of various forms of need which are payable as of right to those who fulfil the qualifying conditions, I find the concept of “the intent of the person conferring the benefit” a somewhat elusive one. Statutory benefits of the kind in question come either directly from the pocket of the taxpayer or from some fund to which various classes of citizens make compulsory contributions. The legislation providing for the benefits is prompted by humanitarian considerations directed to meeting certain minimum needs of the disadvantaged, irrespective of their cause. It is, of course, always open to Parliament to provide expressly that particular statutory benefits shall be disregarded, in whole or in part, and section 2 of the Law Reform (Personal Injuries) Act 1948 is the most familiar instance where it has done so. But in the absence of any such express provision, where statutory benefits are payable to one whose circumstances of qualifying need arise in consequence of a tort of which he was the victim, I can certainly discern no general principle to support Lord Reid’s tentative opinion “that Parliament did not intend them to be for the benefit of the wrongdoer”.<sup>148</sup>

2.80 He referred to *Parsons v BNM Laboratories Ltd*,<sup>149</sup> affirmed by the House of Lords in *Westwood v Secretary of State for Employment*,<sup>150</sup> in which it was found that unemployment benefit should be taken into account as mitigating loss of earnings occasioned by wrongful dismissal. In respect of *Lincoln v Hayman*,<sup>151</sup> where the Court of Appeal followed *Parsons* in holding that supplementary benefit paid to the plaintiff in a personal injury action should be set off against loss of earnings, Lord Bridge rejected the submission that that case was distinguishable because there is an essential difference between payments from public funds “to provide the indigent with a minimum acceptable level of subsistence” and payments to meet the needs of those suffering from particular disabilities.

2.81 He concluded:

<sup>146</sup> See para 2.9 above.

<sup>147</sup> [1970] AC 1, 14.

<sup>148</sup> [1989] AC 807, 822 (Citation of Lord Reid from *Parry v Cleaver* [1970] AC 1, 14).

<sup>149</sup> [1964] 1 QB 95.

<sup>150</sup> [1985] AC 20.

<sup>151</sup> [1982] 1 WLR 488.

In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as the “benevolent donor,” intends to benefit “the wrongdoer” as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to me entirely artificial. There could hardly be a clearer case than that of the attendance allowance payable under section 35 of the Act of 1975 where the statutory benefit and the special damages claimed for cost of care are designed to meet the identical expenses. To allow double recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground. It could only add to the enormous disparity, to which the advocates of a “no-fault” system of compensation constantly draw attention, between the position of those who are able to establish a third party’s fault as the cause of their injury and the position of those who are not.<sup>152</sup>

- 2.82 Lord Bridge also considered mobility allowance to be available to meet the cost of the plaintiff’s care. Accordingly both types of benefit should be deducted from damages for the cost of the plaintiff’s care.
- 2.83 Although the deduction of these “non-relevant” social security benefits may be regarded as discharging part of the tortfeasor’s liability, the present common law does not allow recoupment<sup>153</sup> and this position is strengthened by the specific exclusion of these benefits from the DSS recoupment scheme.

## **2. THIRD PARTY RIGHTS TO RECOVER COLLATERAL BENEFITS**

### **(1) The right to recover the payment from the victim in the event of a successful tort claim**

- 2.84 Can the provider of the collateral benefit recover it from the victim in the event of the victim’s successful tort claim? In general terms the provider of the collateral benefit has no restitutionary claim to recover the value of the benefit from the victim because he or she has rendered the benefit either as a volunteer (for example, where the collateral benefit comprises a charitable payment) or in accordance with a valid contractual (or perhaps statutory) obligation owed to the victim (for example, where the collateral benefit comprises contractual sick pay or an insurance payment).<sup>154</sup>
- 2.85 In general, therefore, the only possibilities for recovery are where the provider has a contractual right to repayment (for example, where the victim promises to repay

<sup>152</sup> [1989] AC 807, 823. See para 4.25 n 44 below.

<sup>153</sup> See paras 2.84-2.91 below for further detail.

<sup>154</sup> An exception is an indemnity insurer’s subrogation right to repayment from the victim sums received by the victim from the tortfeasor. This is an aspect of the indemnity insurer’s simple subrogation rights, discussed at paras 2.89-2.90 below.

the provider of the collateral benefit in the event of recovering damages); or where the benefit is rendered on the basis of a condition that “fails” so that the provider has a claim for restitution grounded on “failure of consideration” (for example, where the benefit is rendered conditionally on the victim not succeeding in a tort claim).<sup>155</sup>

- 2.86 It may not always be easy to determine whether a benefit has been rendered conditionally. This has been a matter of dispute among restitution-theorists.<sup>156</sup> One can safely say that normally the condition will need to be made express. An unarticulated “condition” will normally be insufficient. The danger otherwise is that those who have simply changed their mind about rendering gifts will be permitted to have restitution. However, it may be that in certain contexts it is so obvious, as established by custom and practice, that the provider renders the benefit conditionally that it is unnecessary for that condition to be expressed in order to trigger restitution if it fails.
- 2.87 The most common examples of contractual arrangements for repayment are those by employers in relation to sick pay. Under such schemes sick pay is typically expressed to be a loan, repayable if the employee is successful in recovering damages for the relevant loss of earnings. It is theoretically possible for contractual arrangements to be made for repayment of charitable payments, disablement pensions, retirement pensions<sup>157</sup> and redundancy pay, but in practice it would appear that these possibilities are not exploited.
- 2.88 It is another question how often contractual repayment rights are enforced. For example Cane states that BUPA try to avoid double recovery by stipulating that it will not pay for medical expenses which are legally recoverable from a third party. He goes on to say:

since in practice the expenses will usually need to be paid long before any damages are received, BUPA will advance the amount payable by way of loan, and the member is expected to repay this when damages are recovered. But it seems probable, nevertheless, that many members secure double recovery, and the amount repaid to BUPA in this way is negligible.<sup>158</sup>

<sup>155</sup> “Failure of consideration” is wide enough to embrace the failure of a non-promissory condition. See eg *Chillingworth v Esche* [1924] 1 Ch 97; *Essery v Cowlard* (1884) 26 Ch D 291; *Re Ames’ Settlement* [1946] Ch 217. See Birks, *An Introduction to the Law of Restitution* (1989) p 223.

<sup>156</sup> See eg P Birks, “In defence of free acceptance” in A S Burrows (ed), *Essays on the Law of Restitution* (1991), pp 105, 115; A S Burrows, *The Law of Restitution* (1993), pp 319-321.

<sup>157</sup> See in this respect David Latham QC in the High Court in *Hopkins v Norcross plc* [1993] 1 All ER 565, 572.

<sup>158</sup> P Cane, *Atiyah’s Accidents, Compensation and the Law* (5th ed 1993), p 330, n 60. It may be, however, that Cane overestimates the extent to which private medical insurance leads to overcompensation. Our informal enquiries suggest that some private medical insurers are becoming more assiduous in the exercise of their contractual and/or automatic subrogation rights.

**(2) The right to take over the victim’s tort claim by “simple” subrogation.**

- 2.89 As we have seen,<sup>159</sup> indemnity insurers have the automatic right to take over the victim’s tort claim by subrogation. An indemnity insurer’s right of subrogation - which Mitchell has usefully labelled “simple subrogation”<sup>160</sup> - differs from most other forms of subrogation (which Mitchell labels “reviving subrogation”) in that the insurer takes over “live” rights of the victim rather than being entitled to “revive” discharged rights of the victim, as for example, with a surety’s, lender’s or banker’s subrogation. Technically, therefore, the tortfeasor’s liability to the tort victim is not discharged by the payment by the insurer to the insured.<sup>161</sup>
- 2.90 The justification for an indemnity insurer’s simple subrogation right appears to be that it is one way of ensuring that the victim is not overcompensated while enabling the provider to be reimbursed by the tortfeasor. It therefore fits neatly with the tort rule against double recovery. However, a weakness of “simple subrogation” is that it is not effective to avoid double recovery in cases where an indemnity insurer decides not to exercise its subrogation right.<sup>162</sup>

**(3) The right to recoupment from the tortfeasor (other than by “simple subrogation”).**

- 2.91 Where a benefit has been deducted, can the provider of it recoup its value from the tortfeasor on the basis that he or she has discharged the tortfeasor’s liability under legal compulsion?<sup>163</sup> The answer is no, because of *Metropolitan Police District Receiver v Croydon Corp*<sup>164</sup> in which the Court of Appeal denied a restitutionary right for the recovery from the tortfeasor of payments of sick pay made to the victim pursuant to statutory obligation, on the basis that the tortfeasor’s liability had not been discharged by the payments, because a court would deduct them in assessing the victim’s damages.

<sup>159</sup> See para 2.18 above.

<sup>160</sup> See C Mitchell, *The Law of Subrogation* (1994).

<sup>161</sup> See eg *Esso Petroleum Co Ltd v Hall Russell & Co Ltd*, *The Esso Berincia* [1989] AC 643, (HL, SC).

<sup>162</sup> James J Meyers “Subrogation rights and recoveries arising out of first party contracts” (1973) 9 *The Forum* 83, 84-85 provides some evidence of the extent to which indemnity insurers exercise their subrogation rights. The author estimated the percentage of total insurance payments made by insurers in the US in 1972 recovered by subrogation (on the basis of the experience of insurance companies with which he was associated). These percentages were 14.15 % in ocean marine insurance, 8.56 % in motor vehicle property insurance, 2.45 % in workers’ compensation insurance, 0.80 % in homeowners’ insurance and 0.68 % in fire insurance. It is noteworthy that even in respect of property insurance the figures for subrogation recoveries seem low. See also the dissenting judgment of McLachlin J in *Cunningham v Wheeler* (1994) DLR 1, 37 where she said: “Rights of subrogation appear to be exercised rarely. The Report of Inquiry into Motor Vehicle Accident Compensation in Ontario... concluded that the collateral benefits rule in Ontario resulted in persons with collateral sources of indemnity recovering an average of 136 % of their gross wage loss.”

<sup>163</sup> Or, possibly, necessity: see *Owen v Tate* [1976] QB 402; *The Zuhul K* [1987] 1 Lloyd’s Rep 151. See generally, Goff & Jones, *The Law of Restitution* (4th ed 1993) chs 14 and 15; A S Burrows, *The Law of Restitution*, chapters 7-8; Peter Birks & Jack Beatson, “Unrequested Payment of Another’s Debt” (1976) 92 LQR 188.

<sup>164</sup> [1957] 2 QB 154.

### **3. SUMMARY OF THE PRESENT LAW**

2.92 It may assist consultees to have a brief summary of the present law at this stage. The rules for the deduction or non-deduction of different categories of collateral benefit in the assessment of damages are as follows:

- (1) Charitable payments are ignored in the assessment of damages, although there is some uncertainty as to whether it makes a difference if the benefactor is the tortfeasor.
- (2) Insurance is ignored in the assessment of damages. It is not, however, entirely clear whether this is the case where the plaintiff has not actually paid for the insurance.
- (3) Sick pay is deducted from damages for loss of earnings. This approach may not, however, be taken to lump sum payments of sick pay.
- (4) Disablement pensions are ignored in the assessment of damages for loss of earnings, but after retirement age they are taken into account in the assessment of damages for loss of pension rights. The rule is the same whether or not the provider of the pension is the tortfeasor.
- (5) Retirement pensions are ignored in the assessment of damages for loss of earnings. The rule is the same whether or not the provider of the pension is the tortfeasor.
- (6) Redundancy payments (where the plaintiff has been made redundant because of the actionable injury) are deducted from damages for loss of earnings.
- (7) Social security benefits outside the recoupment scheme are either governed by section 2 of the Law Reform (Personal Injuries) Act 1948, which provides that half the benefit for five years beginning with the time the cause of action accrued should be taken into account against tort damages, or are subject to the common law. The general common law rule (to which state retirement pensions are an exception) appears to be that social security benefits, past and future, should be deducted in full from tort damages to meet the same loss.

2.93 There is no general right for the provider of a collateral benefit to recover the value of the benefit from the tort victim, although contractual provision may be made for this. Alternatively the payment may be made subject to a condition. If the condition failed the provider would have a restitutionary claim to recover the value of it from the tort victim on the ground of failure of consideration. Indemnity insurers, however, have automatic subrogation rights enabling them to take over the victim's tort claim. No other collateral benefit provider has the automatic right to recover the value of their payment to the tort victim from the tortfeasor.

#### 4. IS THE PRESENT LAW INTERNALLY CONSISTENT?

##### (1) The measure of damages applied by the courts

2.94 Careful examination of the authorities dealing with collateral benefits reveals that there is a tension concerning whether the measure of tort damages is purely compensatory or has a punitive element. In *Browning v War Office* Diplock LJ exposed and analysed this issue as follows:

In the ultimate analysis this case turns on a question of principle fundamental in the law of torts, videlicet, whether in those types of action such as negligence which have developed from trespass on the case, where actual damage suffered by the plaintiff is an essential ingredient to his cause of action, the monetary damages to be awarded are compensatory or punitive: whether the policy of the common law in these types of actions is to provide restitution for the plaintiff or to visit retribution on the defendant.

I use the word “defendant” rather than applying to him so emotive a label as “wrongdoer” or even “tortfeasor”, for the emotions with which these latter expressions are charged tend, I think, to obscure not only the realities of the situation in the modern world but also the principle of law involved in actions of these types. ...it is perhaps more important for present purposes that the principle of law in actions for negligence is also obscured by applying pejorative labels to the defendant. A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff.

Thus in relation to damages for negligence, to speak of the wrongdoer appropriating to himself the benefit of some fortuitous circumstance which has in fact reduced the loss which the plaintiff might otherwise have sustained as a result of the defendant’s negligence involves what I respectfully think is an erroneous approach to the problem. Implicit in such a statement is the tacit assumption that there is some norm of damages which a defendant who has acted without reasonable care ought to pay for his careless act, even though owing to some circumstances for which the defendant is not directly responsible (*res inter alios acta*) the plaintiff has not in fact suffered a loss corresponding to the norm. If this were correct it would logically follow that where a plaintiff who sustained physical injuries which, in the ordinary course of events, if treated with ordinary surgical skill would result in total disablement, was completely cured of his physical disabilities by an operation performed with unique skill by a surgeon of exceptional brilliance (*res inter alios acta*), the damages should nevertheless be awarded against the defendant on the basis that the cure, which was unforeseeable, had not been effected. No one has ever suggested that such a principle should be applied to that element in the damages awarded for negligence which is ascribed to the pain and suffering or physical disabilities sustained by the plaintiff. It is only in relation to pecuniary loss that, prior to *Gourley’s case*<sup>165</sup> at any rate, one finds traces of it in the cases. But there is no distinction between the two heads of damages which is relevant for present purposes. It is true

<sup>165</sup> [1956] AC 185.

that damages under the former head are less susceptible of exact calculation, for the court in assessing the cash equivalent of a loss which has not been sustained in money, whereas the loss under the latter head will be - and in the case of special damage will have actually been by the date of the trial - sustained in money and is for this reason much easier to assess. Nevertheless, under either head, the defendant is liable for, and is a wrongdoer only in respect of, the loss actually sustained by the plaintiff as a consequence of the defendant's act or omission.<sup>166</sup>

- 2.95 Still, in *Parry v Cleaver*<sup>167</sup> a majority of the House of Lords declined to follow *Browning v War Office*.<sup>168</sup> As we have seen,<sup>169</sup> although Lord Reid acknowledged that *British Transport Commission v Gourley*<sup>170</sup> established a universal rule that the plaintiff should recover no more than he or she had lost, in his view this had no bearing on collateral benefits. The common law treated the question as depending on "justice, reasonableness and public policy". Indeed it is arguable (although this interpretation is inconsistent with Lord Reid's vociferous opposition elsewhere to the award of punitive damages) that Lord Reid's subsequent analysis of the justifications for disregarding benevolence and insurance implicitly accepted a measure of tort damages which included at least some punitive element.<sup>171</sup>
- 2.96 Nearly twenty years later in *Hussain v New Taplow Paper Mills Ltd*<sup>172</sup> Lord Bridge referred to Lord Reid's two-stage analysis of the assessment of damages (set out in paragraph 2.3 above) and said:

This dichotomy, however, must not be allowed to obscure the rule that prima facie the only recoverable loss is the net loss. Financial gains accruing to the plaintiff which he would not have received but for the event which constitutes the plaintiff's cause of action are prima facie to be taken into account in mitigation of losses which that event occasions to him.<sup>173</sup>

- 2.97 It is, with respect, perhaps somewhat surprising that Lord Bridge went on to cite with approval Lord Reid's statement that the common law treats the question of collateral benefits as depending on "justice, reasonableness and public policy", when that contention was predicated on the absence of a prima facie rule for the treatment of collateral benefits.

<sup>166</sup> [1963] 1 QB 750, 764-766; also see para 2.31 above and Lord Denning at 758; also Lord Goddard in *Met Police District Receiver v Croydon Corp & Monmouthshire County Council v Smith* [1957] 2 QB 154, 163-164.

<sup>167</sup> [1970] AC 1.

<sup>168</sup> [1963] 1 QB 750.

<sup>169</sup> See paras 2.3 & 2.33 above.

<sup>170</sup> [1956] AC 185.

<sup>171</sup> See paras 4.31-4.33 below.

<sup>172</sup> [1988] AC 514.

<sup>173</sup> *Ibid*, 527.

2.98 The shift of principle was re-iterated in *Hodgson v Trapp*<sup>174</sup> when Lord Bridge said:

My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the injured plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages. All this is elementary and has been said over and over again.<sup>175</sup>

2.99 Lord Bridge repeated this view in *Hunt v Severs*:<sup>176</sup>

The starting point for any inquiry into the measure of damages which an injured plaintiff is entitled to recover is the recognition that damages in the tort of negligence are purely compensatory. He should recover from the tortfeasor no more and no less than he has lost. Difficult questions may arise when the plaintiff's injuries attract benefits from third parties. According to their nature these may or may not be taken into account as reducing the tortfeasor's liability...<sup>177</sup>

2.100 In *Colledge v Bass Mitchells & Butler Ltd*,<sup>178</sup> Sir John Donaldson interpreted Lord Reid in *Parry v Cleaver*<sup>179</sup> as having established a straightforward position, that there should be deduction of sums received because of an accident from damages for the losses flowing from the accident, subject to qualifications on grounds of justice, reasonableness and public policy. Although this accords with Lord Bridge's approach, it is not a natural reading of Lord Reid's speech.

2.101 In *Berriello v Felixstowe Dock & Railway Co*,<sup>180</sup> where the collateral benefits in issue were payments to meet loss of earnings from a seamen's fund administered by the Italian State, although these sums were not deducted from damages because the plaintiff was liable to repay the fund from his damages, Dillon LJ seemed to recognise the shift since *Parry v Cleaver*:<sup>181</sup>

<sup>174</sup> [1989] AC 807.

<sup>175</sup> *Ibid*, 819.

<sup>176</sup> [1994] 2 AC 350.

<sup>177</sup> *Ibid*, 357-358.

<sup>178</sup> [1988] 1 All ER 536.

<sup>179</sup> [1970] AC 1.

<sup>180</sup> [1989] 1 WLR 695.

<sup>181</sup> [1970] AC 1.

The judge held that neither sum was deductible from any damages which might be payable to the plaintiff. He regarded both sums as arising in relation to an insurance scheme against personal injury, and he held that the effect of the decision of the House of Lords in *Parry v Cleaver*<sup>182</sup> was that such insurance payments were not deductible from damages recoverable for personal injury. It has been common ground between counsel in this court, and is, if I may say so, plainly right that that approach by the judge cannot now be supported in view of the subsequent decisions of the House of Lords in *Hussain v New Taplow Paper Mills Ltd*<sup>183</sup> and *Hodgson v Trapp*.<sup>184</sup> In the light of these two decisions, the two sums which I have mentioned would prima facie be deductible from the damages recoverable because the payments to which the two sums relate are payable by the Cassa Marittima to the plaintiff to compensate him for his loss of earnings as a result of the accident for which the damages were awarded.<sup>185</sup>

2.102 Nevertheless in *Smoker v LFCDA*<sup>186</sup> the House of Lords, including Lord Bridge, rejected a submission by counsel for the defendant that since *Parry v Cleaver*<sup>187</sup> there had been a clear shift of approach at common law against double recovery. Lord Templeman giving the leading speech rejected this contention on the basis that the cases supporting deduction since *Parry v Cleaver*<sup>188</sup> did not deal with disablement pensions. It will be apparent by now that, on our reading of the authorities, that submission by Counsel was entirely accurate.

2.103 On one view the shift of approach can be seen as an example of the common law developing and re-interpreting itself. But the danger of not clearly recognising a shift of approach is that inconsistent decisions may be left in place.

## **(2) Inconsistency between benefits**

2.104 The rules as to whether particular collateral benefits are, or are not to be deducted, contain numerous uncertainties and inconsistencies. We have drawn attention to some of these in earlier sections. The various uncertainties include: first, whether it makes a difference whether the provider of the collateral benefit is the tortfeasor;<sup>189</sup> secondly how the courts might be expected to treat a lump sum payment of sick pay;<sup>190</sup> thirdly whether or not it makes a difference to the treatment of insurance payments if premiums have not been paid by the plaintiff;<sup>191</sup> fourthly, the account to be taken of extra pension payments in the calculation of

<sup>182</sup> *Ibid.*

<sup>183</sup> [1988] AC 514.

<sup>184</sup> [1989] AC 807.

<sup>185</sup> [1989] 1 WLR 695, 699-700.

<sup>186</sup> [1991] 2 AC 502.

<sup>187</sup> [1970] AC 1.

<sup>188</sup> *Ibid.*

<sup>189</sup> See above paras 2.13-2.14 (charitable payments); paras 2.39-2.40 (disablement pensions); para 2.62 (retirement pensions).

<sup>190</sup> See para 2.27 above.

<sup>191</sup> See para 2.17 above.

damages for loss of pension rights;<sup>192</sup> and fifthly the treatment by the common law of social security benefits outside the recoupment scheme.<sup>193</sup> One clear example of inconsistency is the decision in *Longden v British Coal Corporation*<sup>194</sup> according to which exactly the same collateral benefit is to be treated differently before and after normal retirement age. In this section, we wish to highlight the most striking example of inconsistency in the treatment of collateral benefits, namely that sick pay is deducted from damages for loss of earnings, whereas disablement pensions are ignored.

2.105 In the leading case, *Parry v Cleaver*,<sup>195</sup> Lord Reid's<sup>196</sup> reason for distinguishing between disablement pensions and sick pay was as follows (part of his view on sick pay has already been cited):<sup>197</sup>

...the true situation is that wages are a reward for contemporaneous work, but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind.<sup>198</sup>

2.106 So sick pay is treated like wages as being deductible, whereas disablement pensions are regarded as different and non-deductible. Lord Reid's argument implies that they are different because the former is the reward for contemporaneous work and the latter for past work. But a person might receive sick pay for 6 months, a year or 2 years. Indeed in the case of *Page v Sheerness Steel PLC*<sup>199</sup> the payments were to carry on for life. It becomes very hard to see these sums as the reward for contemporaneous work. It follows that this reason for distinguishing between sick pay and disablement pension is difficult to sustain.

2.107 In any event it is not entirely clear why the view that sick pay is remuneration for contemporaneous work and disablement pension is remuneration for past work leads to deduction of the former but not the latter. Both types of collateral benefits are by Lord Reid's analysis "paid for" by the plaintiff, and it is therefore hard to

<sup>192</sup> See paras 2.44-2.52 above.

<sup>193</sup> See paras 2.71-2.83 above.

<sup>194</sup> [1995] ICR 957 & see above paras 2.46-2.52.

<sup>195</sup> [1970] AC 1.

<sup>196</sup> Lord Pearce does not deal with the distinction between sick pay and disablement pensions. Lord Wilberforce says "...I cannot agree that it is easy to reason from one type of benefit to another. One cannot argue from non-deductibility of gifts to non-deductibility of the proceeds of insurance, nor from the non-deductibility of insurance to the non-deductibility of pensions. Accident insurances are not gifts or like gifts, they are essentially wagers: pensions, if insurance at all, are not insurance in the same sense as accident insurance, and mere use of the common word is not enough to produce a common principle." [1970] AC 1, 42.

<sup>197</sup> See para 2.20.

<sup>198</sup> [1970] AC 1, 16.

<sup>199</sup> [1996] PIQR Q26 (first instance) & [1997] 1 WLR 652 (CA). See paras 2.25 & 2.26 above.

see why he maintained a distinction in the way that the two were treated in the calculation of damages.<sup>200</sup>

2.108 *Hussain v New Taplow Paper Mills Ltd*<sup>201</sup> clearly demonstrates the fragility of the distinction between sick pay and disablement pension. The House of Lords deducted long-term sickness benefit from damages for loss of earnings because it was paid prior to the termination of employment, although apart from this detail it was indistinguishable from a disablement pension.<sup>202</sup> The decision comes close to treating differently two collateral benefits, which are by their nature very similar, because one is called disablement pension and the other is called long-term sickness benefit.

2.109 *Page v Sheerness Steel PLC*<sup>203</sup> is another good example of the difficult distinctions which the present rules for sick pay and disablement pensions produce. Payments of half pay for life under a permanent health insurance policy were deducted from damages for past and future loss of earnings, because they were indistinguishable in character from sick pay and because the plaintiff had not paid the insurance premiums. Yet these payments were at least as indistinguishable from disablement pension as they were from sick pay.

### **(3) Indemnity and non-indemnity insurance**

2.110 The question as to why indemnity insurance payments should trigger subrogation rights when non-indemnity insurance payments do not is a puzzling and difficult one. Yet this is a distinction which is found not only in common law jurisdictions, but also in civil law ones, notably France and Germany.<sup>204</sup>

<sup>200</sup> Cf Lord Morris, dissenting in *Parry v Cleaver* [1970] AC 1, 30-31, where he said: "Nor is anything achieved by saying that the plaintiff's police pension is something that he had earned. So he had. Most good positions and good entitlements have been earned. The arrangements concerning the pension were essentially a part and an integral part of his condition of employment. By his work and his labour he earned both his pay and his prospects of having a pension or of having other benefits. But it is with earnings and receipts that we are concerned."

<sup>201</sup> [1988] AC 514.

<sup>202</sup> *Ibid*, 530; Lloyd LJ in the Court of Appeal also relied on this reasoning when he said "...there is no logical distinction between sickness and short-term disability on the one hand and long-term disability on the other, so long as the employee remains in the service of the same employer. The payments, whether for short-term or long-term disability, are, in the words of Lord Pearce, a substitute for the capacity to earn. They are not, of course, wages as such. But they are in my opinion in the nature of wages. I shall therefore hold that they should be taken into account in reduction of damages" [1987] 1 All ER 417,428.

<sup>203</sup> [1996] PIQR Q26 (first instance) & [1997] 1 WLR 652 (CA); and see paras 2.25 & 2.26 above.

<sup>204</sup> In Germany, however, provision for contractual subrogation clauses in non-indemnity policies is possible, which dilutes the practical effect of the distinction. See para 3.38 below. Our understanding is, however, that such an agreement made here would be held to be champertous, and therefore void. Certainly our understanding is that contractual subrogation clauses are not included in non-indemnity insurance policies. But see John Birds "Contractual Subrogation in Insurance" (1979) JBL 124, especially at 132-133, which seems to suggest that contractual subrogation in a non-indemnity insurance policy is possible; Also see discussion of this issue in the US context in Spencer L Kimball & Don A Davis "The Extension of Insurance Subrogation" (1962) 60 Mich LR 841, 862-868; Uriel

2.111 As we have seen,<sup>205</sup> in theory indemnity insurance provides cover for specific heads of loss, while non-indemnity insurance provides for payment of a sum of money in the event of a particular contingency, irrespective of the actual loss to the insured. In fact the distinction between types of policy is often made on the basis of tradition. Accordingly life and personal accident insurance policies are not seen as indemnity insurance and yet they may indemnify the insured for a specific loss, for example in the case of accident policies which provide for payments to be made on an indemnity basis, “keyman” policies taken out by employers on the lives of their employees and life policies taken out by creditors on the lives of their debtors.<sup>206</sup>

2.112 Even where the distinction is real, the difference between indemnity and non-indemnity insurance would seem to be that the sum due under the latter is not limited by the amount of the loss suffered, not that non-indemnity insurance is nothing to do with loss. One might argue, therefore, that there is as much reason to give non-indemnity insurers a right of subrogation to the extent that payments by them meet loss as for indemnity insurers to have this right.<sup>207</sup>

2.113 As Mitchell says:

...it seems highly questionable whether it is a sensible principle which gives an insured the right to accumulate recoveries from his insurer and third parties where he has lost an arm, for example, but denies it to him where he has lost a piece of personal property, even though the loss of both results in economic loss to the insured. It seems strongly arguable that the courts should be more consistent and enforce the principle of indemnity even in the context of policies traditionally regarded as non-indemnity policies: once it is accepted that the loss of life or limb can be economically quantified, it makes no sense to treat policies taken out against such loss as *sui generis*.<sup>208</sup>

Procaccia “The Effect and Validity of Subrogation Clauses in Insurance Policies” (1973) ILJ 573; Omer Lee Reed Jr “Insurance Subrogation in Personal Injury Actions: The Silent Explosion” (1975) 12 Am Bus LJ 111; Donald J Srail (1978) 39 Ohio State LJ 621, 628-629; Eugene G Doherty “Priority of the Subrogation Interest in the Insured’s Personal Injury Recovery” (1992) 80 Illinois Bar Journal 224, 228.

<sup>205</sup> See para 2.18 above.

<sup>206</sup> C Mitchell *The Law of Subrogation* (1994), p 75.

<sup>207</sup> See for discussion of this issue H McGregor, “Compensation Versus Punishment in Damages Awards” [1965] MLR 629, 635-636; P S Atiyah “Collateral Benefits Again” [1969] MLR 397, 403-406; J Fleming “Collateral Benefits” *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, 17-21; Reuben Hasson “Subrogation in Insurance Law - A Critical Evaluation” (1985) 5 OJLS 416, 418.

<sup>208</sup> C Mitchell *The Law of Subrogation* (1994), p 75. Also see: *MacGillivray & Parkington on Insurance Law* (8th ed 1988), p 817 for the view that while modern accident policies are normally not indemnity policies, they can be; and discussion in M A Clarke *The Law of Insurance Contracts* (2nd ed 1994), pp 804-806; Spencer L Kimball & Don A Davis “The Extension of Insurance Subrogation” (1962) 60 Mich LR 841, 852-860; Reuben Hasson “Subrogation in Insurance Law - A Critical Evaluation” (1985) 5 OJLS 416, 418-419. A justification for providing subrogation rights only to indemnity insurers has been advanced that non-indemnity insurance is effectively a wager, at least to the extent that sums received exceed the loss sustained. (See Diplock LJ in *Browning v War Office* [1963] 1 QB 750, 769, where he says “That moneys receivable under an accident policy are not to be taken into account was decided by the Court of Appeal in *Bradburn v Great Western Railway Co* (1874)

LR 10 Ex. 1, C.A. and was approved by the House of Lords in *Gourley's* case [1956] AC 185 as a well-recognised exception to the general principle that the plaintiff in an action for negligence cannot recover more than he has lost. The type of policy which falls within the exception is not a contract of indemnity; otherwise the doctrine of subrogation would apply and there would be no question of the plaintiff's recovering his loss twice over. An accident insurance policy is a contract to pay a sum of money on a contingency; it is in the nature of a wager." ; also Lord Wilberforce in *Parry v Cleaver* [1970] AC 1, 42, where he says "Accident insurances are not gifts or like gifts, they are essentially wagers..." See para 2.105, n 196.) Yet the reason insurance may be non-indemnity is unlikely to be the somewhat distasteful idea that a person has bet on misfortune, but because of difficulties in predicting or valuing loss. Even if it could be shown that people take out non-indemnity insurance as a kind of wager, it is questionable if this is a practice which the law should condone. By the Gaming Act 1845 all contracts by way of gaming or wagering are null and void.



## **PART III**

# **OTHER JURISDICTIONS**

- 3.1 In this part, we provide a brief, non-exhaustive review of the relevant law in Scotland, Ireland, the United States, Canada, Australia and New Zealand, and in the civil law jurisdictions of France and Germany. This comparative section aims to increase the awareness of consultees of the approaches that are taken to similar problems in these other jurisdictions.

### **SCOTLAND**

#### **General Principles**

- 3.2 The law on the deductibility of compensating benefits in Scotland was codified by section 10 of the Administration of Justice Act 1982, which implemented for the most part the recommendations of the Scottish Law Commission.<sup>1</sup> Damages in Scotland are intended to be compensatory, and the Commission therefore sought to ensure that any award would put the pursuer in the position he or she would have been in had the injuries not been sustained, and that as far as practicable, no duplication would take place.<sup>2</sup>
- 3.3 The Commission considered that no single principle provided a ready solution to the problem of deduction, but thought it important to have regard to the purpose of those who contracted or made provision for collateral benefits, lest that purpose be frustrated.<sup>3</sup>
- 3.4 All of the provisions of section 10 of the Act are expressly subject to any agreement that may exist to the contrary. Furthermore, section 13(2) makes it clear that in respect of all the payments, benefits or pensions covered by section 10, references are to both cash benefits and benefits in kind.

#### **Specific Rules**

##### ***Charitable payments***

- 3.5 Section 10(f) of the Act provides that in the assessment of personal injury damages, no account shall be taken of “any payment of a benevolent character made to the injured person or to any relative of his by any person following upon

<sup>1</sup> Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions (1978) Scot Law Com No 51, paras 45-103. The Commission had, in an earlier report, examined the question of deductible benefits in relation to fatal accidents: see Report on the Law relating to Damages for Injuries Causing Death (1973) Scot Law Com No 31, paras 88-101; these recommendations were implemented by s 1(5) of the Damages (Scotland) Act 1976.

<sup>2</sup> (1978) Scot Law Com No 51, para 5. Cf eg *Watson, Laidlaw & Co v Pott, Cassels & Williamson* 1914 SC (HL) 18, 29.

<sup>3</sup> (1978) Scot Law Com No 51, paras 48-9. The Commission cited with approval Windeyer J's remarks in *National Insurance Company of New Zealand v Espagne* (1961) 105 CLR 569; see para 3.97 below.

the injuries in question”.<sup>4</sup> This subsection, however, is expressly made subject to section 10(iv), which provides that a deduction is to be made for “any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question, where such payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit.”

- 3.6 In its report, the Scottish Law Commission recommended that the general rule should be that benevolent payments be ignored in the assessment of damages.<sup>5</sup> It referred to English and Irish authority to this effect,<sup>6</sup> as well as the only relevant Scottish authority, *Dougan v Rangers Football Club Ltd*.<sup>7</sup> In making this recommendation it maintained its provisional view set out in its initial Memorandum.<sup>8</sup> The Commission had been influenced by the *National Insurance Company of New Zealand v Espagne*,<sup>9</sup> which laid stress on the intentions of the donor, and by the argument that deduction might discourage philanthropy and divert charity from its intended object.
- 3.7 The Commission examined separately the question of benevolent payments by the wrongdoer.<sup>10</sup> In its Memorandum, in accordance with *Dougan*, it took the view that such a payment should be ignored unless made expressly on account of damages. By the Report stage the Commission considered that donations by the wrongdoer directly to the injured person, or to members of his or her family, should be presumed to be on account of damages, in the absence of express words to the contrary. This would avoid discouraging defendants from benevolence. The Commission distinguished in this regard between direct payments by the defendant, and payments made through a trust or fund.<sup>11</sup>

<sup>4</sup> In *Martin v James & Andrew Chapman (Haulage Contractors) Ltd* 1995 GWD 2-77, appliances had been bought for the injured pursuer with money which was held in an account in the pursuer’s name, but had come from a benevolent fund. The court held that the money had been spent as the pursuer’s money, and should not be deducted from the damages awarded.

<sup>5</sup> (1978) Scot Law Com No 51, paras 54-59 & 64.

<sup>6</sup> *Liffen v Watson* [1940] KB 556; *Peacock v Amusement Equipment Co Ltd* [1954] 2 All ER 689; *Redpath v Belfast and County Down Railway Co* [1947] NI 167. The Commission also found *Parry v Cleaver* [1970] AC 1 to be ‘persuasive’.

<sup>7</sup> 1974 SLT (Sh Ct) 34.

<sup>8</sup> (1978) Scot Law Com No 51, paras 58 & 59.

<sup>9</sup> (1961) 105 CLR 569.

<sup>10</sup> (1978) Scot Law Com No 51, paras 60, 61 & 64.

<sup>11</sup> The draft Bill attached to the Report simply provided that “any payment of a benevolent character made to the injured person or to any relative of his by the responsible person...” was to be taken into account, clause 4(iv). However, in the accompanying explanatory notes, the Commission said of this clause that it was “so drafted as to ensure that, where the responsible person makes a payment into a relief fund from which the injured person or a member of his family ultimately benefits, the courts will ignore that payment in computing damages.” The final wording of the section is as set out in para 3.5 above.

### ***Insurance***

- 3.8 Section 10(a) of the Act provides that no account shall be taken in the assessment of personal injury damages of “any contractual pension or benefit (including any payment by a friendly society or trade union)”. This will include payments from private insurance policies.<sup>12</sup>
- 3.9 The Scottish Law Commission recommended this position for both life and accident insurance payments. It regarded life insurance policies as a form of investment, strongly analogous to the private means of a pursuer.<sup>13</sup> Although accident insurance could not be regarded as an investment in the conventional sense, the Commission regarded accident insurance payments as flowing from the underlying contract of insurance, the accident being merely the contingent event on which they were payable.<sup>14</sup> It was also thought that the law “would seem out of touch with the realities of life if the prudence of an injured person in effecting accident insurance principally benefited not himself but the person responsible for the injuries.”<sup>15</sup>

### ***Sick pay***

- 3.10 Section 10(i) of the Act provides that “any remuneration or earnings from employment” is to be taken into account in the assessment of damages for personal injury.<sup>16</sup> The Scottish Law Commission was of the view that when payments were received from an employer after an accident, an employee could not be regarded as having lost the wages or benefits received, and therefore should not recover damages for that loss.<sup>17</sup>
- 3.11 Where payments had been made by an employer on the condition that they were to be repaid in the event of an award of damages, the Commission recommended that there should be no deduction. It saw clear social advantages in framing the law so as not to discourage employers from conferring interim benefits on their injured employees.<sup>18</sup> The recommendation was implemented by section 10(e) of the Act, which states that no account shall be taken of “any payment made to the injured person or to any relative of his by the injured person’s employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries”.

<sup>12</sup> That insurance payments were non-deductible was established in *Forgie v Henderson* (1818) 1 Murray 410; cf *Adams v James Spencer & Co* 1951 SC 175, 188. Cl 4(a) of the draft Bill annexed to the Report expressly included “any payment under an insurance policy”, but the words were omitted when the clause was enacted as s 10(a) of the Act.

<sup>13</sup> See para 3.21 below.

<sup>14</sup> (1978) Scot Law Com No 51, para 71: “The pursuer will usually have assumed onerous obligations in the contract, and it would be unfair to deprive him of their counterpart.” Cf *Bradburn v The Great Western Railway Co* (1874) LR 10 Ex 1, 3.

<sup>15</sup> (1978) Scot Law Com No 51, para 69.

<sup>16</sup> This will include statutory sick pay: *Palfrey v GLC* [1985] ICR 437.

<sup>17</sup> (1978) Scot Law Com No 51, paras 62, 64. The Commission relied on *Metropolitan Police District Receiver v Croydon Corpn* [1957] 2 QB 154; cf paras 2.91 above & 5.5-5.6 below.

<sup>18</sup> (1978) Scot Law Com No 51, para 63.

### ***Disablement pensions***

- 3.12 Section 10(a) of the Act also applies to pensions arising from employment, including an incapacity pension received by an injured employee from a scheme to which he or she has not directly contributed.<sup>19</sup> The Scottish Law Commission considered that similar principles applied to all benefits privately contracted for and not arising out of state schemes for social security.<sup>20</sup>

### ***Retirement pensions***

- 3.13 Any contractual retirement pension will fall within section 10(a) of the Act.<sup>21</sup> Section 10(b) of the Act further provides that “any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies” is not to be taken into account.
- 3.14 The Scottish Law Commission reasoned that even if the pursuer did not obtain the benefit by virtue of a contract under which he or she assumed obligations, entitlement depended on the pursuer’s own work and participation in the scheme, and that payments were therefore analogous to those arising from private pensions. It also noted that it was rare for state retirement pensions to accrue simply in consequence of injuries from which a damages claim flows, and that they were therefore analogous to the private means of the pursuer. On either view, the Commission thought it inappropriate to deduct state pensions when computing claims for damages.<sup>22</sup>
- 3.15 We understand, however, that it is the practice in Scotland to take account of pension in receipt in the calculation of damages for loss of pension rights. It would be extremely odd if this were not so, as damages for loss of pension rights are, by definition, the difference between the pension which would have been received but for the injury, and the pension which is in receipt. Still, on the face of the statute, it is at least arguable that pensions should be ignored in the calculation of all heads of damages.

### ***Redundancy payments***

- 3.16 Section 10(d) of the Act states that “any redundancy payment under the Employment Protection (Consolidation) Act 1978 or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 81 of that Act had applied” is to be ignored in the assessment of damages for personal injury.
- 3.17 In recommending this provision, the Scottish Law Commission regarded redundancy payments as compensation for the disruption involved in a change of employment, rather than as compensation for loss of earnings.<sup>23</sup> ‘Severance pay’

<sup>19</sup> *Lewicki v Brown & Root Wimpey Highland Fabricators Ltd* 1996 SLT 145.

<sup>20</sup> (1978) Scot Law Com No 51, para 65.

<sup>21</sup> See paras 3.8-9 & 3.12 above.

<sup>22</sup> (1978) Scot Law Com No 51, paras 73-5.

<sup>23</sup> (1978) Scot Law Com No 51, paras 85-7.

payable on termination in recognition of length of service has, however, been deducted from damages.<sup>24</sup>

### ***Social Security benefits***

- 3.18 Section 10(c) of the Act states that “any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence” shall not be taken into account in assessing personal injury damages.<sup>25</sup> Under section 10(iii), however, such benefits “payable in respect of any period prior to the date of the award of damages” are to be deducted.
- 3.19 Section 10(ii) of the Act provides that “any unemployment benefit” is also to be deducted from damages. It is not entirely clear if this refers to past and future unemployment benefit. Certainly the Scottish Law Commission recommendation was for deduction of “unemployment benefits received and likely to be received” on the grounds that there was a direct causal connection between lost earnings and unemployment benefit received.<sup>26</sup> However, it appears that only benefits received prior to the date of judgment are taken into account.<sup>27</sup>

### ***Situations falling outside the scope of section 10***

- 3.20 It was not intended that section 10 of the Administration of Justice Act 1982 would be of comprehensive scope. The Scottish Law Commission expressed the view that it was neither practicable nor desirable to elaborate a comprehensive statutory code, since it would rapidly be overtaken by events such as the introduction of new state benefits.<sup>28</sup> Where the Act did not apply, the Commission thought it appropriate to allow the courts to apply the general principles of the law of damages.<sup>29</sup>
- 3.21 The Commission thought that it was undesirable specifically to affirm by statute the proposition that no account should be taken of an injured person’s private fortune or private means, partly because it considered it sufficiently clear already, and partly because it was reluctant to delimit precisely any exceptions to it.<sup>30</sup>

<sup>24</sup> *Duncan v Glacier Metal Co Ltd* 1988 SLT 479. The court held that severance pay was unrelated to redundancy, being payable on any termination of employment, and therefore did not fall within the terms of s 10(d).

<sup>25</sup> This probably includes income support payments: see *McEwan & Paton on Damages in Scotland* (August 1995) para 5.05, n 4.

<sup>26</sup> (1978) Scot Law Com No 51, paras 96-7.

<sup>27</sup> See, for example *McEwan & Paton on Damages in Scotland* (August 1995) para 5-05, n 9 and *The Laws of Scotland (Stair Memorial Encyclopaedia)* (1996), Volume 15, para 930, citing in support *Tennant v John Walker & Sons Ltd* 1989 SLT 143, OH.

<sup>28</sup> (1978) Scot Law Com No 51, para 50.

<sup>29</sup> For examples of how the common law has dealt with such instances, see *McEwan & Paton on Damages in Scotland* (August 1995) para 5-06. Most of the cases there cited were decided in favour of deductibility.

<sup>30</sup> (1978) Scot Law Com No 51, paras 51-3. The Commission noted that the means of the victim might be indirectly relevant to the calculation of damages, for example in assessment of the reasonableness of medical treatment. See also *Hartley v Sandholme Iron Co* [1974] 3

- 3.22 The Commission also recommended that any legislation should be drafted so as not to preclude the courts from taking into account corresponding foreign benefits, where appropriate. It recognised that some examination of the nature of the benefit in question would be undertaken in a domestic context, and could see no reason why such an enquiry would not be possible where the benefit had been received from another country.<sup>31</sup>

### **The Rights of a Provider of a Collateral Benefit**

- 3.23 When sums have been paid out under an indemnity insurance policy, a right of subrogation will accrue to the insurer. The insurer may take proceedings in the name of the insured for recovery of the payments made, and should the insured recover damages in his or her own action, some or all of the sum recovered may have to be paid over to the insurer.<sup>32</sup> In the case of non-indemnity insurance, no right of subrogation will exist unless specifically provided for by contract.
- 3.24 The rights of the provider of a collateral benefit were not discussed in great detail by the Scottish Law Commission. They considered whether there should be a right of subrogation in respect of certain social security benefits, but concluded that there should be no such right because of the administrative costs involved.<sup>33</sup>

## **IRELAND**

### **General Principles**

- 3.25 The Irish law on the deductibility of collateral benefits is contained in section 2 of the Civil Liability (Amendment) Act 1964, supplemented by case law. The general rule is one of non-deductibility of collateral benefits in assessment of the plaintiff's personal injury damages for pecuniary loss.<sup>34</sup>
- 3.26 Section 2<sup>35</sup> states that:

in assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death<sup>36</sup> account shall not be taken of -

All ER 475 (tax rebate received as a result of loss of earnings through injury deducted from damages for that loss).

<sup>31</sup> Cf *Berriello v Felixtowe Dock & Railway Co* [1989] 1 WLR 695; see para 2.101 above.

<sup>32</sup> See generally D Walker, *The Law of Delict in Scotland* (2nd ed 1981) pp 413-4.

<sup>33</sup> (1978) Scot Law Com No 51, paras 88-9. The benefits in question were those for industrial injury, industrial disability, sickness and invalidity.

<sup>34</sup> See eg J White *Irish Law of Damages for Personal Injury and Death* (1989) paras 4.10.03-4.10.04. The 'general rule' is subject to statutory exceptions in respect of social security benefits, contained in the Social Welfare (Consolidation) Act 1981.

<sup>35</sup> White, *op cit* para 4.10.05, states that s 2 only applies to money benefits and not benefits in kind. The deductibility of the latter will therefore be determined by the courts. Cf *Liffen v Watson* [1940] 1 KB 556; see para 2.11 above.

<sup>36</sup> Section 50 of the Civil Liability Act 1961 contains similar provisions in relation to actions for wrongful death.

(a) any sum payable in respect of the injury under any contract of insurance,

(b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury.

This strong legislative policy against deduction of collateral benefits argues in favour of a general rule of non-deduction in respect of benefits outside the scope of the statute.

### **Specific Rules**

#### ***Charitable payments***

- 3.27 Section 2(b) of the Act clearly applies to benevolent payments, which will therefore not be deducted. This will apply equally to voluntary benevolent payments by a defendant.

#### ***Insurance***

- 3.28 Where the plaintiff is the beneficiary under any policy of insurance, section 2(a) of the Act prevents the deduction from damages of any insurance payments he or she has received. This confirms the long-established position.<sup>37</sup> Even where a plaintiff is not a party to the insurance policy, it seems that insurance payments will be disregarded under section 2.<sup>38</sup>

#### ***Sick pay***

- 3.29 Sick pay will be taken into account in the assessment of damages for loss of earnings, because it effectively reduces the earnings which the plaintiff has lost. Where the contract of employment has terminated, however, further payments by the employer are in the nature of a disability pension and not sick pay,<sup>39</sup> and will therefore not be deducted because they are a 'pension' for the purposes of section 2(b) of the Act.

#### ***Disablement pensions***

- 3.30 Section 2(b) of the Act covers disability pensions, which will include all payments by employers in respect of injuries where the plaintiff's employment has terminated. Any such payment must therefore be disregarded in assessing personal injury damages. This would prevent Irish courts from holding, as in *Parry v Cleaver*,<sup>40</sup> that a disability pension was to be taken into account in reduction of a

<sup>37</sup> See eg *Woodman Matheson & Co Ltd v Brennan* (1941) 75 ILTR 34 (sum paid by plaintiff's insurers for repair of the property damaged by defendant's negligence not taken into account in assessment of damages).

<sup>38</sup> J White, *Irish Law of Damages for Personal Injury and Death* (1989) para 4.10.07. White argues that s 2(a) is merely descriptive, and that so long as the benefit in question is identifiable as the proceeds of a policy of insurance, it cannot be taken into account.

<sup>39</sup> See paras 3.30-3.31 below.

<sup>40</sup> [1970] AC 1.

claim for the loss of a retirement pension, because to do so would be to 'take into account' the disability pension.<sup>41</sup>

- 3.31 Section 306A<sup>42</sup> of the Social Welfare (Consolidation) Act 1981 creates a limited statutory exception in favour of the deduction of a state invalidity pension. The exception only applies, however, where the injuries were suffered in a motor vehicle accident where liability for such injuries is required to be covered by an approved policy of insurance.<sup>43</sup>

### ***Retirement pensions***

- 3.32 Section 2(b) of the Act also covers both private and state retirement pensions, with the effect that these will be ignored in the calculation of damages. State retirement pensions are not covered by the statutory exceptions contained in the Social Welfare (Consolidation) Act 1981.

### ***Redundancy payments***

- 3.33 There is no clear Irish authority as to the deductibility of redundancy payments. In Ireland there is a mandatory minimum redundancy payment imposed by statute, which is frequently exceeded by employers in recognition of length of service. It has been argued that both the mandatory and voluntary elements of such a payment are covered by section 2(b) of the Act, and are therefore not deductible.<sup>44</sup>

### ***Social Security benefits***

- 3.34 State social welfare payments are covered by section 2 of the Act, and usually therefore such benefits will not be taken into account. Under section 68 of the Social Welfare (Consolidation) Act 1981, however, injury and disablement benefits received or to be received within five years from accrual of the cause of action are to be deducted from any award for loss of earnings. Section 306A of the same Act mandates the deduction of disability benefits and invalidity pension payments from damages for injuries sustained in motor accidents.<sup>45</sup>

### **The Rights of a Provider of a Collateral Benefit**

- 3.35 Although in some cases social security benefits will be deducted from tort damages, no right of recoupment exists on behalf of the social security provider. Likewise, unless expressly provided for, no other benefit providers will have rights of recoupment, except that indemnity insurers will have automatic subrogation

<sup>41</sup> But see the practice in Scotland, para 3.15 above.

<sup>42</sup> Inserted by the Social Welfare Act 1984, s 12.

<sup>43</sup> See also para 3.34 below.

<sup>44</sup> See JWhite, *Irish Law of Damages for Personal Injury and Death* (1989) para 4.10.29, arguing that the mandatory element is a 'like benefit...payable under statute' and the voluntary element a 'gratuity'.

<sup>45</sup> See para 3.31 above. These provisions received strong judicial criticism in *O'Loughlin v Teeling* [1988] ILRM 617.

rights.<sup>46</sup> Where no deduction is made to take a benefit into account, therefore, the plaintiff will generally receive double recovery.

## **GERMANY AND FRANCE**

### **General Principles**

- 3.36 Both Germany and France have a comprehensive network of social security benefits, supported by widespread public and private health and accident insurance. As a result, many of the losses sustained by accident victims will be met in the first instance from sources collateral to the tortfeasor. Because a plaintiff claiming damages in tort should be restored to the position he or she was in before the tort, and should be neither worse nor better off as a result,<sup>47</sup> the general rule in both countries is that the plaintiff should not be able to cumulate tort damages and collateral benefits.<sup>48</sup> This is not achieved by deduction, however, but by extensive statutory subrogation rights and independent tort actions for third parties. Tort actions by victims are generally limited, therefore, to cases where collateral benefits have not fully compensated the victim.<sup>49</sup>

### **Specific Rules**

#### ***Charitable payments***

- 3.37 The general rule of non-cumulation does not extend to the receipt by the plaintiff of charitable gifts, whether from the plaintiff's employer or otherwise, and they will not be taken into account to reduce the tortfeasor's liability.<sup>50</sup> Furthermore, no right of subrogation for the donor will exist unless specifically provided for by agreement.

#### ***Insurance***

- 3.38 Payments under private insurance contracts are not deducted from damages for personal injury. In Germany, any tort claim which the recipient of indemnity insurance payments may have against a potential defendant is assigned by statute to the insurer. Automatic statutory assignment does not operate with respect to non-indemnity insurance such as life or fixed-sum health insurance, because it is

<sup>46</sup> Michael Corrigan & John A Campbell, *A Casebook of Irish Insurance Law* (1995), pp 57-68.

<sup>47</sup> See ' 249 BGB: "The person who is bound to make compensation must restore the situation which would exist if the circumstance making him liable to compensate had not occurred"; B S Markesinis, *The German Law of Torts* (3rd ed 1994) p 18. Cf Article 1382 of the French Civil Code, which provides that a person who causes damage to another through fault is liable to make *reparation integrale*, or full compensation, to the victim.

<sup>48</sup> See generally Markesinis, *op cit*, pp 909-911.

<sup>49</sup> For example, in Germany, no social security benefits are available for pain, suffering and other non-economic losses, and claims are regularly brought in respect of such loss. See generally W Pfennigstorf (ed) *Personal Injury Compensation* (1993) pp 65-98.

<sup>50</sup> See eg J Fleming, "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 13. Charitable payments are not regarded as compensating for the loss sustained by the accident victim and are therefore not deducted from damages.

not seen as compensating for loss actually sustained. Such non-indemnity insurers, however, may provide expressly in their policies for assignment of liability claims.<sup>51</sup>

- 3.39 In France, a distinction is drawn between ‘insurance of persons’, which includes life and accident insurance, and ‘insurance of loss’, which covers contracts of indemnity insurance. Although statutory subrogation rights have always operated in respect of the latter, subrogation is generally prohibited in contracts for the ‘insurance of persons’. Since 1992, however, subrogation has been permitted for the reimbursement of payments having an indemnitory nature, which would include the payment, for example, of medical expenses.<sup>52</sup> Insurance payments are usually suspended, however, during periods of hospitalisation and treatment financed by state social insurance carriers.<sup>53</sup>

### ***Sick pay***

- 3.40 In Germany, employers are legally obliged, but only for a relatively short period, to continue to pay the wages or salaries of employees absent from work through illness.<sup>54</sup> Employers will then have rights of subrogation to recover from the tortfeasor any sick pay they have paid to the victim. In France, a salary will be paid for seven days by the Sickness Insurance Fund, which will then have a right to recover the sum paid from the tortfeasor.<sup>55</sup>

### ***Pensions***

- 3.41 The social security systems in both countries provide disability pensions, and although these will not be deducted from the plaintiff’s damages, his or her tort action will be taken over by the provider of the payments, under the statutory subrogation provisions. Retirement pensions are either provided through state social security or private pension funds, and are similarly non-deductible.

<sup>51</sup> Such provisions are particularly common in non-indemnity health insurance policies. See W Pfennigstorf, “Liability Procedures and Alternatives in the Federal Republic of Germany”, *Geneva Papers on Risk and Insurance* vol 15 no 56 (June 1990), 292, 298.

<sup>52</sup> See Article L 131-2 of the French Civil Code, as amended in July 1992. The distinction that remains, therefore, is between indemnity insurance (‘insurance of loss’ and those matters covered by the exception in Article L 131-2), where a subrogated claim is possible; and non-indemnity insurance (the remainder of ‘insurance of persons’), where subrogation is prohibited.

<sup>53</sup> France also imposes a tax on vehicle insurance premiums (15% in 1991) to reflect some of the cost of treating accident victims.

<sup>54</sup> ‘ 616 BGB. ’ 616 II, repealed in 1994, provided for a six week minimum period of sick pay, and in practice the applicable collective agreements commonly adopt a similar timescale, albeit with numerous conditions and exceptions. In any event, after the initial period, accident victims have to rely on general health insurance payments of about 80% of previous earnings, which are payable for up to a year and a half after the accident.

<sup>55</sup> In some cases, the applicable collective agreement may provide for payment of this amount by the employer, who would then be reimbursed by the Sickness Insurance Fund. If the employer continues to pay wages after the initial seven day period, he or she will have a right to recover directly from the tortfeasor the amount of any wages paid.

### ***Social Security benefits***

- 3.42 Under the statutes of both countries establishing most social security programmes, including, for example, employee, civil service and veterans' benefit and compensation schemes, and most public welfare programmes, any tort claim available to the victim is expressly assigned to the social security provider. Such assignment only shifts to the benefit provider that portion of an injured person's claim which relates to the loss in respect of which the benefits are paid, and only in the amount of the benefits.

### **The Rights of a Provider of a Collateral Benefit**

- 3.43 The extensive subrogation rights which exist in Germany and France stem from the policy that no-one should receive an unjust benefit as a result of compensation paid from alternative sources, and that where possible the costs of risky activities should be internalised and spread through liability insurance.<sup>56</sup> Thus although the tortfeasor remains liable for loss which has been compensated from a collateral source, he or she is generally liable to the subrogated claim of the third party who has provided compensation.
- 3.44 The theoretical framework of subrogation rights is supplemented in both countries by loss-sharing and bulk-recoupment agreements between liability insurers and benefit providers. These arrangements aim to eliminate some of the costs attendant on subrogation, especially where the individual amounts involved are relatively small, by routine payment of an agreed percentage<sup>57</sup> of all reported claims under a certain amount.<sup>58</sup> Roughly half of the total amount collected through subrogation by social security providers is received through such agreements. The operation of these loss-sharing arrangements makes subrogation administratively workable and financially acceptable for the parties involved.
- 3.45 In France, the Sickness Insurance Fund is given a right, tantamount to subrogation, to recover from the tortfeasor the amount of any benefits paid or costs met by the Fund. However, the right will not apply to reduce the victim's damages for non-pecuniary loss.

## **THE UNITED STATES**

### **General Principles**

- 3.46 Although the primary aim of tort damages in the United States is compensatory, collateral benefits are ignored in the assessment of damages.<sup>59</sup> The plaintiff may

<sup>56</sup> See eg Pfennigstorf, *op cit*, 301; cf para 4.18 below.

<sup>57</sup> Typically in the region of 50% of the amount claimed.

<sup>58</sup> The maximum amount involved varies between agreements, but is usually around DM 30,000. Claims above the maximum will be handled individually on the basis of the actual facts. See generally W Pfennigstorf & D G Gifford, *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the USA* (1991) pp 134-6.

<sup>59</sup> This is the so-called 'collateral source rule', said to have originated in *The Propellor Monticello v Mollison* 58 US 152 (1854). The term 'collateral source' was not used until *Harding v Townshend* 43 Vt 536 (1871). See generally American Law Institute, *Restatement of the Law of Torts* (2d) (1979) ' 920 A; 22 Am Jur 2d Damages ' 566 & ff; P E Artzer, "Damages: The Collateral Source Rule in Retrospect" 7 Washburn LJ 321; "Unreason in

therefore recover compensation from the defendant for losses either completely or partially reimbursed from other sources.

- 3.47 The collateral source rule developed at a time when insurance was scarce, and was designed both to increase the deterrent effect of tort liability, and to prevent the defendant from receiving a windfall benefit as a result of the plaintiff's foresight in purchasing or providing for collateral benefits.<sup>60</sup> More recently, it has been justified on the grounds that without it the contingency fee system of legal costs, under which a plaintiff commonly pays his or her attorney between 25 and 50 per cent of damages awarded, would leave plaintiffs undercompensated.<sup>61</sup>
- 3.48 The collateral source rule is still accepted in much of America, although different states apply it to different extents. Alabama is the only state which has always rejected the rule in personal injury cases, espousing a strictly compensatory measure of damages.<sup>62</sup> In some other states,<sup>63</sup> the rule has effectively been abolished by statute, and it has been significantly modified in many others. Modifications have taken the form of restricting the rule to apply only to certain types of collateral source,<sup>64</sup> or only to certain types of action.<sup>65</sup> Success has been claimed for these changes, amongst others, in reversing the insurance availability

the Law of Damages: The Collateral Source Rule" (1964) 77 Harv LR 741. See also the discussion in our paper Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras A.67-A.77.

<sup>60</sup> See eg D A Goldsmith "A survey of the collateral source rule: the effects of tort reform and impact on multistate litigation" (1988) 53 J Air Law & Commerce 799, 800-801; *Restatement Torts 2d*, ' 920A, comment b.

<sup>61</sup> See eg American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) pp 164-5. The Institute recommended that the plaintiff's legal costs should instead form a recoverable head of damages, removing this justification for the collateral source rule.

<sup>62</sup> *Culver v Hill* 68 Ala 66 (1880); *Brigham & Co v Carlisle* 78 Ala 243 (1884); *Jones v Keith* 134 So 630 (1931). See B L Erdreich, "Damages - Collateral Source Doctrine" 14 Ala L Rev 148 (1961). But cf *Long v Kansas City Railroad* 54 So 2d 62 (1910), where no deduction was made on account of insurance payments from damages for destruction of property, the insurer being subrogated to the plaintiff's claim.

<sup>63</sup> Eg Alaska, Connecticut, Florida, Michigan, Minnesota and New York. Evidence of collateral compensation is not usually presented to the jury, but the award made by the jury may later be modified by the court on the basis of such evidence.

<sup>64</sup> In Colorado, for example, collateral benefits are deducted unless they result from a contract entered into and paid for by or on behalf of the plaintiff. In some states where most collateral benefits are deducted the plaintiff is nonetheless given credit for costs incurred within the previous three years in obtaining the benefits. See further D A Goldsmith, "A survey of the collateral source rule: the effects of tort reform and impact on multistate litigation" (1988) 53 J Air Law & Commerce 799, 809-816.

<sup>65</sup> A significant number of states do not apply the rule to medical malpractice actions, although some such limitations have been subject to constitutional challenge under the equal protection provisions of the 14th Amendment. Most challenges have been unsuccessful: eg *Pinillos v Cedars of Lebanon* 403 So 2d 365 (1981); *Bernier v Burriss* 497 NE 2d 763 (1986). But cf *Carson v Maurer* 424 A 2d 825 (1980); *Graley v Sataytham* 343 NE 2d 832 (1976). Other individual limitations on the rule exist in some states. See generally Goldsmith, *op cit*, pp 816-827. See also our Consultation Paper on Non-Pecuniary Loss, (1996) Consultation Paper No 140, paras 3.62 & 3.63.

crisis.<sup>66</sup> Change in some states has resulted, however, in an inconsistent application of the rule within America, and attendant problems especially in the area of inter-state choice of law.<sup>67</sup> Furthermore, in all cases where rights of subrogation exist, the rule will apply to ensure adequate recovery for both the victim and the collateral source.

- 3.49 While it would therefore be true to say that its application is in decline, complete abandonment of the collateral source rule has yet to occur, and in a significant number of states it remains the guiding principle in this area of the law.

### **Specific Rules**

#### ***Charitable payments***

- 3.50 Under the collateral source rule, gratuitous payments in cash or in kind are not deducted from damages for personal injury.<sup>68</sup> This extends to receipt of gifts from charities, whether private or public.<sup>69</sup> But even in those states which have modified or abolished the rule, such gifts are not taken into account in the assessment of damages. The justification offered for non-deduction in these circumstances is primarily that the donor intended to confer a benefit on the plaintiff rather than the tortfeasor.

#### ***Insurance***

- 3.51 In case law the collateral source rule applies to insurance payments, whether they result from a policy contributed to by the plaintiff or otherwise.<sup>70</sup> This generally applies to non-indemnity accident or life insurance in the same way as it does to medical or hospital insurance. All such payments are usually considered to be the proceeds of the separate contract of insurance, and therefore unrelated to the tort.<sup>71</sup> In some states which have modified the collateral source rule by statute, insurance payments received by the plaintiff are deductible. But often the plaintiff will be given credit for the amount he or she paid, in premiums, to secure those

<sup>66</sup> G L Priest, "The current insurance crisis and modern tort law" (1987) 96 Yale L J 1521, 1523.

<sup>67</sup> See Goldsmith, *op cit*, pp 829-833.

<sup>68</sup> *Restatement Torts 2d* 920A, comment c(3); see eg *Burke v Byrd* 188 F Supp 384 (1960).

<sup>69</sup> See eg *Grayson v Williams* 256 F 2d 61 (1958).

<sup>70</sup> *Restatement Torts 2d* 920A, comment c(1); *Isgett v Seaboard C L R Co* 332 F Supp 1127 (1971); 22 Am Jur 2d Damages " 586-7. Cf the position in Alabama, where medical expenses paid for by insurance are not recoverable at common law: *Jones v Keith* 134 So 630 (1931).

<sup>71</sup> See eg *The 'Atlas'* 93 US 302 (1876). See generally D E Ytreberg, "Collateral source rule: injured person's hospitalisation or medical insurance as affecting damages recoverable" 77 ALR 3d 415.

benefits,<sup>72</sup> and in some cases, insurance is regarded as something the plaintiff has 'paid for' and is not, therefore, deducted.<sup>73</sup>

### ***Sick pay***

- 3.52 The majority of American jurisdictions do not deduct from tort damages continued compensation from employers during periods of sickness or injury,<sup>74</sup> on the grounds that recovery is for loss of earning capacity, rather than actual wages lost.<sup>75</sup> Some states, however, provide either in the case law or in statute for deduction of such compensation from the plaintiff's damages, taking the view that it goes to reduce the plaintiff's recoverable loss.<sup>76</sup> Where the payment goes to reduce an employee's accumulated sick leave or annual leave allowance, it will not generally be deducted from the plaintiff's damages.<sup>77</sup>

### ***Pensions***

- 3.53 Generally, disability pensions are not deducted from damages for personal injury, even where the employer has contributed to the fund making the payments.<sup>78</sup> The most common explanation is that pensions represent another form of insurance, paid for by the plaintiff either directly through contributions from his or her salary, or indirectly through his or her work. In most states, payments from workers' compensation schemes<sup>79</sup> are also left out of account, because the provider of

<sup>72</sup> In Alaska, for example, all such evidence is heard by the court after the jury has made its award, and the court will then modify the level of the award accordingly. Evidence of *life insurance* receipts is not, however, admissible.

<sup>73</sup> See para 3.48 n 64 above. A similar approach is taken at common law in Vermont.

<sup>74</sup> See eg *Campbell v Sutliff* 214 NW 374 (1927); 22 Am Jur 2d Damages ' 574; R P Davis, "Collateral source rule: right of tortfeasor to mitigate opponent's damages for loss of earning capacity by showing that his compensation, notwithstanding disability, has been paid by his employer" 7 ALR 3d 516.

<sup>75</sup> See eg *Shea v Rettie* 192 NE 44 (1934).

<sup>76</sup> See eg *Ricciardi v US* 151 F Supp 765 (1957); *Drinkwater v Dinsmore* 80 NY 390 (1880); *Montgomery Railway v Mallette* 9 So 363 (1891); 22 Am Jur 2d Damages ' 575. In some states, such as Kentucky and Pennsylvania, a further distinction is drawn between gratuitous and non-gratuitous payments by employers, with only the latter being deducted; see eg *McGinley v US* 329 F Supp 62 (1971); *Bachelor v Morgan* 60 So 815 (1913).

<sup>77</sup> *Kagarise v Shover* 275 A 2d 855 (1971); *Sebren v Millers Mutual Fire Insurance Co* 182 So 2d 99 (1966); 22 Am Jur 2d Damages ' 576. The rationale for the rule is that the allowance is part of the plaintiff's contractual remuneration, and that the defendant's negligence should not deprive him or her of that benefit.

<sup>78</sup> See eg *Eichel v New York Central Railway Co* 375 US 253 (1963); *Haughton v Blackships, Inc* 462 F 2d 788 (1977); J Fleming, "The Collateral Source Rule and Loss Allocation in Tort Law" (1966) 54 Cal L R 1478.

<sup>79</sup> Workers' compensation schemes provide for the automatic payment of compensation to workers injured or disabled at work, whether through the negligence of the employer or otherwise, up to statutory maximum levels. Where such schemes apply, the employer is usually exempt from common law actions for negligence. Usually, the provider of the benefit will be subrogated to any tort claim the employee may have. See generally R C Miller "Third party tortfeasor's right to have damages recovered by employee reduced by amount of employee's workers' compensation benefits" 43 ALR 4th 849.

compensation under the scheme will usually have a right of subrogation in order to effect recoupment.<sup>80</sup>

### ***Social Security benefits***

- 3.54 State benefits are generally excluded from account in case law.<sup>81</sup> State medical benefits, such as Medicaid payments, are not deducted either,<sup>82</sup> because the provider of the benefits will usually have a right of subrogation.<sup>83</sup>

### **The Rights of a Provider of a Collateral Benefit**

- 3.55 Traditionally in America, subrogation was not considered an incident of insurance against personal injury, primarily because payments under such an agreement were seen as the reward for the recipient's past premium contributions. Such insurance is usually regarded as non-indemnitory in character, and rights of subrogation therefore inappropriate.<sup>84</sup> Although courts have not usually struck out contractual clauses conferring a right of subrogation in such cases,<sup>85</sup> such a right is not implied by law, and the practice of including express clauses is not widespread.
- 3.56 Subrogation does operate, however, in respect of workers' compensation payments.<sup>86</sup> In most statutes creating such compensation systems, the employer or insurer who is liable to pay the injured worker is given a right of recoupment through subrogation. Accordingly, when payments have been made to an employee under such a scheme, the provider may recover such monies from the tortfeasor.<sup>87</sup>
- 3.57 A number of other statutory compensation schemes have also created rights of subrogation for compensation funds.<sup>88</sup> Additionally, some courts have interpreted

<sup>80</sup> See eg *Feeley v US* 337 F 2d 924 (1964); cf *Williams v Brown* 265 SW 480 (1924). Such payments are not deducted in Ohio, even though the provider of the compensation has no right of subrogation: *Overland Construction Co v Sydnor* 70 F 2d 338 (1934).

<sup>81</sup> See eg *US v Price* 288 F 2d 448 (1961) (civil service benefits); *Palandro v Bollinger* 186 A 2d 11 (1962) (disability and rehabilitation benefits); *Williams v Pincombe* 309 So 2d 10 (1975) (welfare benefits); *Gypsum Carrier Inc v Handelsman* 307 F 2d 525 (1962) (unemployment benefits); R P Davis, "Collateral source rule: injured person's receipt of statutory disability unemployment benefits as affecting recovery against tortfeasor" 4 ALR 3d 535.

<sup>82</sup> See eg *Bennett v Haley* 208 SE 2d 302 (1974)

<sup>83</sup> See eg *Merritt, Chapman & Scott Corporation v Fredin* 307 F 2d 370 (1962).

<sup>84</sup> No clear line is drawn between fixed-sum accident insurance and medical or hospitalisation insurance, although in practice the latter is usually indemnitory in purpose and appearance. See J Fleming "The Collateral Source Rule and Loss Allocation in Tort Law" (1966) 54 Cal L R 1478, 1501-2; "Unreason in the Law of Damages: The Collateral Source Rule" (1964) 77 Harv LR 741, 743.

<sup>85</sup> But in some cases contractual subrogation rights have been struck out on the grounds that they infringe the traditional policy against the assignment of tort claims: see eg *Allstate Insurance Co v Druke* 576 P 2d 489 (1978).

<sup>86</sup> See para 3.53 above.

<sup>87</sup> Health insurers in the United States have recently become much more aggressive and more successful in pursuing subrogation claims. See for example "Breast Implant Manufacturers Settle Medical Subrogation Suit", *Business Insurance* 2 December 1996, pp 1-2.

<sup>88</sup> For example, the no-fault compensation schemes established in Virginia and Florida for victims of neurological birth injury. See further W Wadlington "Law reform and damages

the federal statutes governing medical benefits, such as Medicare and Medicaid, as granting rights of subrogation against beneficiaries' tort recoveries, and deduction of these benefits is not therefore appropriate.<sup>89</sup>

### **Critique and Reform Proposals**

- 3.58 In 1986, the US government and the City of New York published two separate studies on the insurance availability crisis.<sup>90</sup> The Department of Justice Report found a dramatic increase in both the number of tort lawsuits and the levels of damages awarded, and considerable uncertainty as to what standards of liability and causation applied in tort actions. It concluded from empirical evidence that tort law was the major cause of the high cost and increasing unavailability of insurance. Against this background, both reports recommended amendment of the collateral source rule in order to prevent, or at least limit, double recovery in tort claims.<sup>91</sup>
- 3.59 The Department of Justice Report reasoned that the collateral source rule might have been sensible at a time when collateral sources of income were funded by the plaintiff, but since many collateral benefits were now provided by the state or third parties, the effect of the rule was increasingly simply to give a windfall to plaintiffs. In the case of publicly funded benefits there could be no justification for thereby requiring citizens to pay the same compensation twice, as taxpayers and as consumers of products which caused injury. In respect of private sources of collateral benefits, subrogation complicated matters. Exercise of a subrogation right had the effect of preventing a windfall to the plaintiff, but in practice such rights were often not exercised. Collateral benefits should be deducted in the assessment of damages unless a third party was subrogated to the relevant portion of the plaintiff's claim and elimination of subrogation entirely may turn out to have little effect in practice and to be justified for the costs savings achieved.
- 3.60 At the time of the New York report the City had already reversed the collateral source rule in medical/dental malpractice cases and in personal injury or wrongful death suits by public employees against their employers. In those cases evidence of collateral benefits, other than life insurance, was now admissible and courts were required to reduce damages by the amount of such payments.

for medical injury in the United States" in S A M McLean (ed) *Law Reform and Medical Injury Litigation* (1995) p 89, 94, 97-8.

<sup>89</sup> Para 3.54 above; see eg *Rubin v Sullivan* 720 F Supp 840; American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) p 166. See also our paper *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, para A.62-A.70.

<sup>90</sup> US 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* (February 1986); State of New York Advisory Commission on Liability Insurance, *Insuring our Future* (April 1986). See generally D A Goldsmith, "A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multi-State Litigation" (1988) 53 J Air Law & Commerce 799, 827-9; but cf G L Priest, "The Current Insurance Crisis and Modern Tort Law" (1987) 96 Yale L J 1521, which argues at 1524 that "[t]he expansion of tort liability might well create opportunity, rather than crisis, for the insurance industry."

<sup>91</sup> US Department of Justice, *op cit*, 70-72; State of New York Advisory Commission on Liability Insurance, *op cit*, Volume 1, p 136.

3.61 The report saw the collateral source rule as based on an outmoded punitive and deterrent conception of tort law. When the barriers to liability had been great the actual costs of the rule were low because so few plaintiffs received damages. Now, however, as the report said:

To maintain the collateral source rule, with its deterrent and punitive purpose, in a system of liability which increasingly is focused on compensating the injured and spreading risks without regard to fault, couples divergent theories and results in the most expensive liability system: compensation to more plaintiffs and double payment when compensation is paid.<sup>92</sup>

3.62 The extra costs of the rule were not borne only by defendants, but also by those who contributed to liability insurance premiums, and by society generally, so far as higher damages awards curtailed the socially productive activities of defendants.<sup>93</sup> The report did not accept as a justification for the rule that actual double recovery rarely occurred because of the need to pay legal costs out of the damages award. Accordingly it recommended abolition of the rule, on the basis that this served both the goals of fairness and those of cost reduction. This recommendation was implemented in New York, although the full amount of the collateral benefit is not deducted if the plaintiff has paid to receive it. The plaintiff is given credit for insurance premiums paid for the two-year period immediately preceding the injury and for the future costs of maintaining the benefit.<sup>94</sup>

3.63 A further call for reform of the rule, which also contributed to the abrogation or abolition of the collateral source rule in various US jurisdictions, came in 1991 with the publication by the American Law Institute of its Project on Enterprise Responsibility for Personal Injury. According to this study, the double recovery which results from the collateral source rule is traditionally justified firstly on the basis that it aids deterrence of tortious conduct, and secondly because many tort victims receive no damages at all<sup>95</sup> and those who do are often under-compensated. Furthermore, it is said, some tort victims are legally obliged to reimburse the provider of a collateral benefit, in which cases the collateral source rule does not result in double recovery.

3.64 The Institute was unable to reach a clear conclusion about the impact of the rule or its reversal on deterrence, because data on the percentage of tort damages covered by collateral sources is inconsistent. Furthermore there is no research

<sup>92</sup> State of New York Advisory Commission on Liability Insurance, *Insuring our Future* (April 1986), 135.

<sup>93</sup> See para 4.25 n 44 below.

<sup>94</sup> D A Goldsmith "A survey of the collateral source rule: the effects of tort reform and impact on multistate litigation" (1988) 53 J Air Law & Commerce 799, 813.

<sup>95</sup> The suggestion seems to be that it is argued in favour of the collateral source rule that overcompensation of some tort victims is partly justified by the failure of the system to compensate others. We find this argument difficult to follow. Overcompensation of some tort victims does not in any way alleviate the absence of compensation for others. The implication seems to be that there is a free-standing value in the payment by tortfeasors of arbitrary amounts of damages. If we have correctly interpreted the argument being described we find this a highly questionable contention.

correlating changes in the collateral source rule with changes in accident rates. Danzon, however, provides some evidence that reversal of the collateral source rule reduced the frequency and severity of medical malpractice claims by about 15 per cent<sup>96</sup> and arguably there would be likely to be a similar effect in other fields, which would in turn have a negative impact on the deterrent effect of tort liability.

- 3.65 The Institute considered the compensatory role of the collateral source rule. They regarded tort law as a type of insurance for victims, which worked inefficiently because of high transaction costs. The collateral source rule compounded the inefficiency, because it provided duplicate insurance, when a victim would not choose insurance of the type which tort provided. This effect was potentially mitigated by contractual subrogation or reimbursement, as the victim may receive something from the provider of the benefit in exchange for the grant of a subrogation right. However in practice reimbursement was not sufficiently systematic to overcome the inefficient aspects of the collateral source rule.
- 3.66 Some would argue that distinguishing in this context between insurance purchased voluntarily and involuntarily is appropriate, because the plaintiff has paid for the former. The Institute disagreed because insurance purchased involuntarily is also paid for, albeit indirectly. Also, irrespective of who had paid for the insurance an insurer may have a reimbursement right, so that deduction of insurance from tort damages would make no difference to the plaintiff. The Institute concluded, therefore, that there was no justification for treating some insurance differently because it had been paid for.
- 3.67 The Institute analysed the effect of reversing the collateral source rule and prohibiting subrogation/reimbursement. Although theoretically first party insurers would have less opportunity to be reimbursed, the cost of first party insurance would be minimally affected. In addition, extrapolating from data for example as to the incidence of collateral benefits, the Institute concluded that reversing the rule would have a minimal effect on most claims. In particular it would not reduce the problem of the few very large verdicts which severely disrupt the insurance system. Accordingly, claimants would not forego bringing suit as a result of the rule's abolition and the Institute considered Danzon's estimate an outer limit and likely to relate to small claims with a marginal litigation value.<sup>97</sup> The only category of claimants which might be seriously harmed by a new collateral source rule were the small minority who had suffered extremely large economic losses, as the statistics indicated that it was only in this group of claims that there was a tendency for tort damages not fully to cover pecuniary loss.
- 3.68 The Institute concluded from this analysis as follows:

First, it is difficult to be definitive about how to approach the collateral source issue without firm data about the marginal effect of the common law collateral source rule on injury prevention. Second, if one assumes that the deterrent effect of the collateral source rule is

<sup>96</sup> "The Frequency and Severity of Medical Malpractice Claims: New Evidence" 49 *Law and Contemporary Problems* 57, 72, 77 (Spring 1986).

<sup>97</sup> American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) p 174.

modest, then the issue should turn on the role the rule plays in compensating victims. Third, at present the effect of the rule (where it still operates) is to promote additional compensation of successful plaintiffs, because subrogation by collateral sources is uncommon. By the same token, however, the absence of subrogation probably marginally decreases the amount of first-party health and disability insurance that is generally available by raising its cost.

Consequently the question is which category of victims to target. If one focuses on successful plaintiffs, the traditional collateral source rule, absent effective subrogation, promotes compensation but may produce duplicate compensation in some cases. But if one focuses on victims generally, a collateral source rule promotes compensation only if it is accompanied by effective subrogation, because subrogation can marginally reduce first-party insurance premiums.<sup>98</sup>

3.69 The Institute regarded there as being several options for reform. The first option would be reversal of the collateral source rule, and prohibition of subrogation or reimbursement arrangements. To avoid inequity between plaintiffs those who had directly or indirectly paid premiums for private insurance benefits would be given a credit equal to the amount of premiums paid in the two years immediately preceding injury. However life insurance and possibly other policies such as accidental dismemberment policies would be excluded, not being compensation for out of pocket loss and because they may have investment elements. The second alternative would be to rehabilitate the collateral source rule, including making subrogation more effective. The third approach would be to retain the rule, on the basis that it provides assistance to plaintiffs to pay their legal fees, and counterbalances the tendency of the system to provide less than full recovery to victims who have suffered especially severe injuries.

3.70 The Institute rejected the second option because of the intractable difficulty of making subrogation effective. It rejected the third because the problem of undercompensation should be addressed directly by other reforms. It therefore supported the first option and recommended that:

A plaintiff's tort recovery should be reduced by the amount of present and estimated future payments from all sources of collateral benefits except life insurance.... there must be a bar to any subrogation or reimbursement rights exercised by loss insurers...<sup>99</sup>

It summarised the case for this option as follows:

The duplicate recovery permitted by the current rule results in overinsurance for some injured victims and prevents the use of scarce dollars for nonduplicative compensation. Our proposal...for imposing liability on defendants for successful plaintiffs' attorneys' fees should more than counteract any loss in deterrence resulting from our proposal here. Finally...excluding reimbursement claims by loss

<sup>98</sup> *Ibid*, pp 175-176.

<sup>99</sup> *Ibid*, p 182.

insurers from the tort liability system would remove one troublesome feature from what is already a difficult settlement process.<sup>100</sup>

It observed, however, that its analysis applied with most force to the 95 per cent of cases in which economic losses were below \$100,000, as those with higher pecuniary losses were less likely to receive full compensation and so were in greater need for artificial increases to their damages. However, in the view of the Institute a rule which seemed inappropriate in the vast majority of cases should not be retained. Instead the particular problems encountered by this minority of claimants should be addressed directly.

## CANADA

### General Principles

- 3.71 In theory, Canadian courts apply a compensatory approach to the award of damages, and to the extent that a plaintiff has received compensation from a collateral source, he or she will not receive tort damages.<sup>101</sup> The Supreme Court of Canada has examined the question of the deduction of collateral benefits on two occasions in recent years. In *Ratyck v Bloomer*,<sup>102</sup> McLachlin J made it clear that:

... the purpose of awarding damages in tort is to put the injured person in the same position as he or she would have been in had the tort not been committed... . But he is not entitled to turn an injury into a windfall. ... The law of tort is intended to restore the injured person... rather than to punish the tortfeasor...<sup>103</sup>

And in *Cunningham v Wheeler*,<sup>104</sup> Cory J stated that:

... the plaintiff is not entitled to a double recovery for any loss arising from the injury.<sup>105</sup>

- 3.72 Nonetheless, there remain exceptions to this theoretical prohibition on double recovery. Benefits derived under 'private insurance' plans are not deducted, and there is some argument about how far this extends to benefits derived from employment contracts and collective bargaining agreements.<sup>106</sup>

<sup>100</sup> *Ibid*, p 179.

<sup>101</sup> See generally S M Waddams, *The Law of Damages* (2nd ed 1991) paras 3.1490-3.1540.

<sup>102</sup> (1990) 69 DLR (4th) 25. The case was decided by a 5-4 majority, the judgment of the majority being given by McLachlin J, and that of the minority by Cory J.

<sup>103</sup> (1990) 69 DLR (4th) 25, 40-41.

<sup>104</sup> *Cunningham v Wheeler; Cooper v Miller; Shanks v McNee* (1994) 113 DLR (4th) 1. This case was also decided by a bare majority, the majority judgment being delivered by Cory J, and that of the dissentients by McLachlin J.

<sup>105</sup> (1994) 113 DLR (4th) 1, 7.

<sup>106</sup> In particular the narrowness of the decisions in the two leading cases, and the discussion, in the judgments of Cory and McLachlin JJ in *Cunningham v Wheeler*, of the Supreme Court's earlier decision in *Ratyck v Bloomer* reveal considerable dispute within the Court about the ambit of the 'private insurance' exception. See further paras 3.78-3.82 below.

## Specific Rules

### *Charitable payments*

- 3.73 Gratuitous payments are clear exceptions to the rule against double recovery, and are not deducted.<sup>107</sup> This also applies to some types of state benefits which have been classified as gratuitous.<sup>108</sup> Unlike some other countries, however, Canadian courts will usually deduct voluntary payments of salary made by employers during the plaintiff's absence from work.<sup>109</sup> Likewise, ex gratia payments made by the defendant before an award of damages are to be deducted from that award.<sup>110</sup>

### *Insurance*

- 3.74 Where the plaintiff has private insurance he or she will be entitled to keep payments under the insurance policy in addition to tort damages, unless a right of subrogation exists for the insurer.<sup>111</sup>
- 3.75 Canada has widespread provincial health insurance, which will usually provide for the provincial health care provider to be subrogated to the plaintiff's rights.<sup>112</sup> Where this is the case, payments will obviously not be deducted from damages. In addition, where statutory schemes for compulsory first party motor insurance exist, they usually provide for deduction of any insurance payments from the plaintiff's damages against the responsible person.<sup>113</sup>

<sup>107</sup> See eg *Boarelli v Flanagan* (1973) 36 DLR (3d) 4, 8 (*per* Dubin JA). See also *Cunningham v Wheeler* (1994) 113 DLR (4th) 1, 41 (*per* McLachlin J). For an overview of the Canadian approach to gratuitous care provided to the plaintiff, see our paper Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras A.62-A.63.

<sup>108</sup> See eg *Hayre v Wälz* [1990] BCJ 2633 (Canada Pension Plan disability payments); *Irwin v Hamilton Civic Hospitals* [1991] OJ 2313 (Canada Pension Plan survivors' benefits); *Mochizuki v Poernbacher* [1991] BCJ 733 (Canada Health & Welfare benefits).

<sup>109</sup> *Johnson v Ashthorpe* [1991] BCJ 2253. Sheppard J held that where such payments were made, the plaintiff suffered no loss of income and therefore was not entitled to claim any loss of income. This is the same approach as that taken by the English courts: see paras 2.19-2.28 above. Cf paras 3.52 & 3.98 above & below.

<sup>110</sup> *Armstrong v Baker* (1992) 111 NSR (2d) 239.

<sup>111</sup> The question of insurance in the context of sick pay is discussed at paras 3.76-3.82 below. Note that although they accepted the 'private insurance' exception, the minority in *Cunningham v Wheeler* (1994) 113 DLR (4th) 1 would have limited it to non-indemnity insurance Cf approach taken in *Bristol & West v May & Merrimans (No 2)* [1997] 3 All ER 206 by Chadwick J (see paragraph 2.17 n 41 above & para 4.41 n 65 below).

<sup>112</sup> See J A Rendall, "Subrogation in medical and hospital insurance schemes: judicial philosophy versus legislative pragmatism" (1974) 6 Ottawa L Rev 291. Only in Alberta does a principle of deduction rather than subrogation apply: see Alberta Health Care Insurance Act 1980, s 16.

<sup>113</sup> See eg Ontario Insurance Act 1980 (as amended 1990) s 231 b(1)(a). The amendment to the Act was made following the *Final Report of the Ontario Task Force on Insurance* (1986). See further S M Waddams, *The Law of Damages* (2nd ed 1990) paras 3.1770-3.1810.

### ***Sick pay***

- 3.76 In *Chan v Butcher*,<sup>114</sup> the British Columbia Court of Appeal held that payments from a fund created and maintained by the employer, although equivalent to the wages the plaintiff would have earned, were rightly classified as insurance rather than pay, and were non-deductible. Macfarlane JA said:

the benefits in this case were intended to insure the employee against the risk of unemployment caused by illness or accident... . Surely when the risk becomes reality and benefits are paid... [they] ought to be regarded as in the nature of insurance.<sup>115</sup>

- 3.77 The distinction was important because unless the payments could be characterised as wages, the court was not prepared to see them as reducing the loss of wages for which the plaintiff claimed compensation.<sup>116</sup> In this case, therefore, the plaintiff recovered damages for loss of earnings even though she was paid her full salary throughout her absence from work.

- 3.78 In *Ratysh v Bloomer*,<sup>117</sup> the plaintiff had also received his full salary during his absence, paid voluntarily by his employer. A majority of the Supreme Court of Canada held, however, that he was not entitled to receive damages for loss of earnings unless he could prove that loss. McLachlin J said:

The argument that wages paid by an employer pursuant to a contract of employment are akin to insurance... cannot prevail... . [I]n such a case, no loss ever arises. ...[T]he argument rests on the assumption that the employee has in fact suffered a loss or actually contributed to the fund from which the earnings are paid, an assumption which... is far from self-evident.<sup>118</sup>

- 3.79 The general rule therefore appeared to be that wage benefits paid to a plaintiff unable to work were to be deducted from any claim for lost earnings, unless the employer or fund which paid the benefits was entitled to be reimbursed through subrogation,<sup>119</sup> or the benefits could be seen as insurance payments from a policy directly paid for by the plaintiff.<sup>120</sup> A succession of cases following *Ratysh v Bloomer*

<sup>114</sup> [1984] 4 WWR 363.

<sup>115</sup> *Ibid*, 368. Cf the observations of Lord Pearce in *Parry v Cleaver* [1970] AC 1, 37.

<sup>116</sup> Macfarlane JA said that “once the disability benefits have been characterised as in the nature of insurance, and not in the nature of wages, then the benefits are not *in pari materia*, and one is not to be deducted from the other. ... It is a loss of one kind and a gain of a different kind.” [1984] 4 WWR 363, 370.

<sup>117</sup> (1990) 69 DLR (4th) 25.

<sup>118</sup> *Ibid*, 53.

<sup>119</sup> *Ibid*, 54. The court also entertained the possibility that where sufficient moral or legal obligation existed on the plaintiff to repay the provider of the benefits, a trust might be imposed to effect such repayment.

<sup>120</sup> The majority in *Ratysh v Bloomer* (1990) 69 DLR (4th) 25 left this open (at pp 46-7, 54).

accepted the characterisation of such benefits as insurance,<sup>121</sup> and in *Cunningham v Wheeler*,<sup>122</sup> the Supreme Court was once again required to consider the question.

- 3.80 The case turned on the nature of the ‘private insurance’ exception, and the extent to which the employee needed to demonstrate that he or she had contributed to the disability plan under which benefits had been received. The majority were of the opinion that the ‘private insurance’ exception from the rule of deduction should apply “where evidence is adduced that an employee-plaintiff has paid in some manner for his or her benefits under a collective agreement or contract of employment”.<sup>123</sup> The earlier decision in *Ratyck v Bloomer*, where benefits received had been deducted, was explained on the grounds that in that case “there was no evidence put forward that the plaintiff had paid for the disability benefits.”<sup>124</sup>
- 3.81 It is significant, however, that in her dissenting judgment McLachlin J presented a very different interpretation of the ‘private insurance’ exception. She was not prepared to accept that *Ratyck v Bloomer* was “merely a ruling on evidentiary sufficiency”,<sup>125</sup> as Cory J had suggested. Instead, she regarded the decision as establishing a general rule of deduction, subject only to exceptions for charitable payments, and non-indemnity insurance and pensions. If the payment was in the nature of an indemnity then it should be deducted to prevent double recovery, regardless of whether or not the plaintiff had contributed to the plan,<sup>126</sup> unless it was established that a right of subrogation would be exercised.<sup>127</sup>
- 3.82 Nonetheless, it seems that the deductibility of these payments will depend on whether the plaintiff can show that he or she paid for them in some manner.<sup>128</sup>

<sup>121</sup> See eg *Azar v Farah* [1991] OJ 1910 (no deduction of benefits where shown plaintiff had paid by reduction of wages); *Carano v Brooks* (1990) 46 CCL 1291 (no deduction of payments from self-insurance scheme funded by both employer and employee); *Gosse v Sorab* [1991] BCJ 2530 (no deduction of payments where concessions shown to have been made in collective agreement in return for benefit scheme). But cf eg *Percival v Caron* [1991] OJ 859 (deduction of wages paid pursuant to a collective agreement); *Tonita v Insurance Corp of British Columbia* [1991] BCJ 220 (deduction of payments made by insurer at the direction of plaintiff’s employer, where no evidence of plaintiff’s contribution to fund).

<sup>122</sup> (1994) 113 DLR (4th) 1.

<sup>123</sup> *Ibid*, 12 (*per* Cory J).

<sup>124</sup> *Ibid*, 15 (*per* Cory J). *Ratyck v Bloomer* was simply regarded (at p 14) as having “placed an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits.”

<sup>125</sup> (1994) 113 DLR (4th) 1, 31.

<sup>126</sup> McLachlin J made it clear (*ibid*, at p 34) that in her opinion “[t]he plaintiff enjoys the benefits provided by the plan regardless of whether deduction of plan benefits from tort claims is required or not.”

<sup>127</sup> See generally (1994) 113 DLR (4th) 1, 32-41.

<sup>128</sup> The precise method or means of payment is of no consequence. Cory J gave (*ibid*, at p 15) a non-exhaustive list of possible contribution methods, which included trade-offs in the collective bargaining process, money forgone, direct contributions such as payroll deductions, and evidence that a payment by the employer was made on behalf of the employee in return for work done. It does not appear to be a difficult requirement to satisfy. In fact, Cory J was prepared (*ibid*, at p 20) to infer merely from the fact that a collective agreement was reached after a four-and-a-half month strike that “there must have been

Additionally, where a plaintiff can show that his or her sick-leave or holiday benefits have been reduced by the defendant's tort, the value of that reduction will not be deducted from the plaintiff's damages for loss of earnings, because "the employee who uses up his sick leave to get wages while he or she is off work loses the sick benefits and so should be compensated for them."<sup>129</sup>

### ***Pensions***

- 3.83 In general, pension benefits have been treated as analogous to insurance, and have not been deducted from tort damages.<sup>130</sup> State disability payments under the Canadian Pension Plan scheme have likewise been left out of account in calculating tort damages, on the ground that they are gratuitous.

### ***Social Security benefits***

- 3.84 Various social security benefits, such as survivors' benefits and Canadian Health and Welfare benefits, have been categorised as gratuitous and therefore are not deductible.<sup>131</sup> Canadian unemployment insurance payments are also non-deductible.<sup>132</sup> Providers of other social security benefits have statutory subrogation rights, so no deduction will be made, but double recovery will be avoided.<sup>133</sup>

### **The Rights of a Provider of a Collateral Benefit**

- 3.85 Third party rights of subrogation arise in some instances in Canada, notably under indemnity insurance contracts and in the case of some statutory benefits.<sup>134</sup> Where such rights exist, double recovery for the plaintiff may be avoided. If the benefit in question is in the nature of 'private insurance' the payment will be ignored, irrespective of the third party position. If the benefit is not insurance, "the issue of subrogation will be determinative"<sup>135</sup> of how the payment should be treated, in that

trade-offs made by the employees in return for the collateral benefits which were received." Cf McLachlin J's criticism of this approach as dangerously uncertain (*ibid*, at pp 38-9 & see para 2.17 n 46 above).

<sup>129</sup> *Cunningham v Wheeler* (1994) 113 DLR (4th) 1, 13 (*per Cory J*). See eg *Zivcic v Midway Grocery Ltd* [1991] OJ 704. Quantification of the value of sick leave has proved difficult, however: compare eg *Simpson v Ross* [1991] YJ 100 with *Carde v Gray* [1990] OJ 2147. In *Burse v Tiller* [1991] NJ 166, the court found that the plaintiff's sick-leave allowance would have disappeared at the end of the year in any case, and the full amount received was deducted.

<sup>130</sup> See eg *Guy v Trizec Equities Ltd* (1979) 99 DLR (3d) 243 (early retirement pension); *Irwin v Hamilton Civic Hospitals* [1991] OJ 2313 (survivor's pension).

<sup>131</sup> See eg *Boarelli v Flanagan* (1973) 36 DLR (3d) 4; *McLeod v Palardy* (1981) 124 DLR (3d) 506; *Wynne v Smith Brothers & Wilson Ltd* (1963) 43 WWR 254.

<sup>132</sup> *Jorgensen v Jack Cewe Ltd* (1980) 111 DLR (3d) 577.

<sup>133</sup> See paras 3.85-3.86 below.

<sup>134</sup> See para 3.84 above. The Ontario Law Reform Commission considered abrogating the subrogation provisions operating in favour of public health care providers in Ontario, but decided against it in the absence of detailed empirical analysis of whether the administrative savings would outweigh the loss of deterrence. See *Report on Compensation for Personal Injuries and Death* (1987) pp 192-3 and para 3.95 below. See also our paper *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, para A.60.

<sup>135</sup> *Cunningham v Wheeler* (1994) 113 DLR (4th) 1, 21 (*per Cory J*).

the existence of a right of subrogation will lead to non-deduction. The mere suggestion of such a right is not enough, however, nor is an expectation that the plaintiff will pass on the payment to the third party.<sup>136</sup> But if there is a right of subrogation, “[i]t does not matter whether [it] is exercised or not.”<sup>137</sup>

- 3.86 Where the tortfeasor has insufficient assets to meet both the subrogated claim and the claim of the plaintiff for other damages, the plaintiff’s claim will take priority.<sup>138</sup>

### **Critique and Reform Proposals**

- 3.87 The Ontario Law Reform Commission published their *Report on Compensation for Personal Injuries and Death* in 1987, in which they considered how the law relating to collateral benefits should be amended.<sup>139</sup> Although their recommendations were not implemented, their reasoning and conclusions are of interest.
- 3.88 They found the arguments in favour of the existing no-deduction rule to be that it was preferable that a tort victim double recover, than that the tortfeasor benefit from benevolence to or providence by the victim; that the injured person should not be deprived of benefits for which he or she had paid; that imposing the cost of activities on those who took part in them had a deterrent effect and finally that the rule helped to overcome under-compensation elsewhere in the tort system.
- 3.89 The main argument against the rule was that it led to double recovery contrary to the fundamental principle that a tort victim should be compensated for their loss, but no more than their loss. Furthermore, double recovery was a waste of resources, when many accident victims go undercompensated or not compensated at all.
- 3.90 The Commission considered that to focus on the benefit to the tortfeasor resulting from deduction misconstrued the essential goal of the tort system, which was corrective justice and not punishment. In relation to the “paid for” argument, when a person bought insurance, particularly indemnity insurance, he or she bought security and indemnity for loss, not the prospect of double recovery.
- 3.91 In addition, tort damages and collateral benefits were generally paid for not by individuals, but by “risk pools” comprising large sections of the public. Where there was a large measure of overlap between the two groups it was unfair that the same people should pay twice to compensate the same loss. Also it might be more appropriate for the pool which funded the collateral benefit to bear the loss, for example because it was the better loss-spreader, or because this avoided the costs involved in seeking reimbursement, for example through a subrogated claim.

<sup>136</sup> *Azar v Farah* [1991] OJ 1910. Cf *King v Packman* [1990] BCJ 2062 (subrogation intended but not validly executed plaintiff’s damages reduced by amount of benefits received from third party).

<sup>137</sup> *Cunningham v Wheeler* (1994) 113 DLR (4th) 1, 21 (*per* Cory J). Note that McLachlin J, dissenting, recognised that subrogation rights were rarely exercised and would have limited the subrogation exception to cases where it was established that the right would be exercised (*ibid*, at p 37) and see para 2.90 n 162 above.

<sup>138</sup> *Ledingham v Ontario Hospital Services Commission* [1975] 1 SCR 332.

<sup>139</sup> See Chapter 6, pp 179-194.

- 3.92 Indeed the existence of various mechanisms for the repayment of collateral benefits to their source, did not prevent double recovery. This was mainly because disability insurers and employers generally did not exercise their rights of subrogation. For insurers the costs of so doing were not worth the benefit. Employers saw the exercise of subrogation rights as impractical and costly, as well as potentially detrimental to employee relations. As for benefactors, they were unlikely to feel comfortable requesting reimbursement, however reasonable such a request might be.
- 3.93 The Commission concluded that, despite the absence of empirical evidence as to the extent of overcompensation, fundamental tort principle required that tort victims should be fully, but not doubly, compensated. On the other hand the goal of deterrence, and a general sense of justice and fairness, required that a wrongdoer be held liable to pay the full amount of the victim's loss. It therefore recommended that where a victim received an indemnity or an ex gratia payment in respect of any specific pecuniary loss claimed from the wrongdoer, the damages in respect of that loss should be held in trust for the collateral source.<sup>140</sup> The wrongdoer or his or her insurer should additionally be entitled to make payment of such amounts to the collateral source. This recommendation did not, however, cover future collateral benefits.
- 3.94 If a collateral benefit was not duplicative of an item of damages, it should be ignored. The Commission gave as examples a non-indemnity accident benefit payable without proof of loss or a gift not meant to meet a specific loss. Determination of this issue would be a question of fact.
- 3.95 It was right that gifts to meet a specific loss should be covered by the trust rule, even if a benefactor proved not in fact to want repayment, as he or she would be free to remake the gift. Public benefits should also be covered by the trust rule although the Commission recognised that there was a strong argument that mere deduction without reimbursement would be preferable:

since those persons who fund third party insurance sources are largely the taxpaying public, who also fund the public source, such a retransfer of the loss is wasteful and ultimately of benefit to no one.<sup>141</sup>

The Commission ultimately rejected this argument because first, theoretically at least, deduction is inconsistent with the deterrent aims of tort law, secondly, it may be significant that there is some difference between the relevant "risk pools" and

<sup>140</sup> See also *Ratych v Bloomer* (1990) 69 DLR (4th) 25, 52-4, where the Supreme Court considered the possibility of using a trust as a method of avoiding overcompensation of plaintiffs but ultimately rejected it as a general rule for collateral benefits. Such an approach was, however, taken by the Supreme Court in the context of gratuitous nursing care: see *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452; *Thornton v Board of School Trustees of School District No 57 (Prince George)* (1978) 83 DLR (3d) 480; *Arnold v Teno* (1978) 83 DLR (3d) 609. For further discussion, see our paper *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, paras A.62-A.63.

<sup>141</sup> Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death*, (1987), p 192.

thirdly there was insufficient information to assess the costs savings to be made by mere deduction of public benefits.

## AUSTRALIA

### General Principles

- 3.96 The basic aim of tort damages in Australia is stated to be compensatory. The general principle is that the benefits the plaintiff receives are to be taken into account in assessing his or her tort damages, but many collateral sources appear not to be taken into account.<sup>142</sup>
- 3.97 In the leading Australian case, *National Insurance Co. Ltd v Espagne*,<sup>143</sup> the High Court warned that while it was difficult to work out principles of general application, some generalisations had to be made. Windeyer J said:

...the decisive consideration is not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined ... by what ... the plaintiff had paid for [or] by the intent of the person conferring the benefit. The test is by purpose rather than by cause.<sup>144</sup>

He suggested, therefore, that as a general rule collateral benefits should not be deducted if they were received under a contract and the parties intended them to be provided in addition to rights in tort, or they were given as a windfall and intended to be in addition to tort damages. But he added that whether or not a given benefit should be deducted depended on the details of the particular contract, statute or scheme under which it was paid.<sup>145</sup>

### Specific Rules

#### *Charitable payments*

- 3.98 No deduction will generally be made for payments motivated by benevolence.<sup>146</sup> In *Volpato v Zachory*,<sup>147</sup> it was held that this rule should apply to benevolent payments made by employers, but the law is not settled, and it has been suggested that deduction of such payments is the better policy,<sup>148</sup> especially where the employer is the defendant.<sup>149</sup>

<sup>142</sup> See generally H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) ch 8.

<sup>143</sup> (1961) 105 CLR 569.

<sup>144</sup> *Ibid*, 600.

<sup>145</sup> *Ibid*, 599-600. For further discussion of this general principle, see H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) paras 8.1.14-8.1.16.

<sup>146</sup> *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569, 598-9, *per* Windeyer J.

<sup>147</sup> [1971] SASR 166. See also *Alley v Minister of Works* (1974) 9 SASR 306; *Beck v Farrelly* (1975) 13 SASR 17; F Trindade & P Cane, *The Law of Torts in Australia* (2nd ed 1993).

<sup>148</sup> See eg H Luntz, *Assessment of Damages for Personal Injuries and Death* (3rd ed 1990) paras 8.3.6-8.3.11; *Farmer v Griffiths* (1940) 63 CLR 603; *Hobbelen v Nunn* [1965] Qd R 105;

### ***Insurance***

- 3.99 No deduction will be made for insurance payments received,<sup>150</sup> on the ground that to do otherwise would be to penalise the plaintiff for his or her foresight and thrift.<sup>151</sup> Contracts of indemnity will usually include subrogation rights, and therefore deduction in such cases would be inappropriate.

### ***Sick pay***

- 3.100 Any contractual sick pay received as part of the plaintiff's ordinary wages is to be deducted from damages recovered, on the ground that it reduces his or her loss.<sup>152</sup>

### ***Disablement pensions***

- 3.101 Sums received from a contributory disability pension fund set up by the plaintiff's employer are regarded as insurance payments, and will not be set off against personal injury damages.<sup>153</sup> It has been suggested that such payments, like insurance or benevolence, should be seen as having been conferred independently of the possibility of seeking redress in tort from the wrongdoer.<sup>154</sup>

### ***Retirement pensions***

- 3.102 In general, courts will ignore such payments when assessing damages for loss of earning capacity, and no distinction has been made between schemes to which the employee contributes and those to which he or she does not.<sup>155</sup> The principle of

*Alcock v Hawkins* 20 December 1974 (unreported NSW SC); *Girdwood v Cap* (1981) 95 LSJS 492.

<sup>149</sup> See the discussion in H Luntz, *Assessment of Damages for Personal Injuries and Death* (3rd ed 1990) paras 8.3.18-8.3.19.

<sup>150</sup> *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569, where it was said (at p 588 *per* Windeyer J) that the rule had "stood too long and on too firm a foundation of policy and justice to be unsettled by demands for logical consistency." See also *Redding v Lee* (1983) 151 CLR 117; H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) paras 8.2.1-8.2.6.

<sup>151</sup> Luntz, *op cit*, para 8.1.9, objects that eg accident insurance is a means of purchasing cover against losses where no alternative means of recovery exists, rather than thrift, because if the injury never occurs the premiums are lost. Furthermore, it is prudent to insure against risks which might occur without giving rise to damages, as well as those which would. Given that insurance is therefore prudent, the plaintiff's 'foresight' provides no reason to keep insurance out of account where it has reduced his or her loss.

<sup>152</sup> *Graham v Baker* (1961) 106 CLR 340, disapproving *Francis v Brackstone* [1955] SASR 270, where contractual sick pay was treated as analogous to insurance, and therefore not deducted.

<sup>153</sup> *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569. This reasoning also extends to statutory invalidity pensions and armed services' pensions. But cf *Callaghan v William C Lynch Property Ltd* [1962] NSW 871 (invalidity pension not disregarded where unconnected to injury in question, because representative of plaintiff's reduced earning capacity before accident).

<sup>154</sup> *Ibid*, 573 *per* Dixon CJ.

<sup>155</sup> *Watson v Ramsay* [1960] NSW 462, 463 *per* Brereton J (affirmed [1962] SR (NSW) 359; (1961) 108 CLR 642.) See also *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569, 598 *per* Windeyer J.

non-deduction will also apply where the employer is the defendant.<sup>156</sup> Plaintiffs can claim loss of pension benefits as a result of early retirement through injury, and damages will only be awarded for that proportion of the pension which has been lost due to the premature receipt.

### ***Redundancy payments***

- 3.103 There is no Australian authority suggesting that redundancy payments, received by a plaintiff whose redundancy is a result of injury, are to be deducted from his or her damages received in respect of that injury.<sup>157</sup>

### ***Social Security benefits***

- 3.104 Since 1987, unemployment benefit is not payable during any period in respect of which an award of damages for lost earnings is received.<sup>158</sup> The Social Security Act 1991 makes provision in respect of a range of social security benefits, both for recovery of benefits from tort damages and for reduction in the rate of benefits paid where tort damages have been received. The Health and Other Services (Compensation) Act 1995 (Cth), amended by the Health and Other Services (Compensation) Amendment Act 1996, also makes provision for recovery of past health benefits and nursing home payments from those who recover tort damages.

### **The Rights of a Provider of a Collateral Benefit**

- 3.105 If payments are made under a policy of indemnity insurance, the insurer can claim a right of subrogation, and double recovery by the plaintiff may be avoided. Where other payments, such as continued salary during injury, are made on the condition that they be repaid should the plaintiff recover tort damages, they will not be deducted from such damages.<sup>159</sup>

## **NEW ZEALAND**

- 3.106 In New Zealand, a comprehensive no-fault accident compensation scheme has been in place since 1974,<sup>160</sup> and where compensation is available under the

<sup>156</sup> *Ramsay v Watson* (1961) 108 CLR 642; *State of South Australia v Heaven* (1978) 77 LSJS 18; *Gee v Commonwealth of Australia* [1982] ACLD 786; *Grego v Mount Isa Mines Ltd* [1972] QWN 33.

<sup>157</sup> But in *Clay v Freda* (1988) 144 LSJS 224 it was held that such payments should not be deducted where it was found that the redundancy would have occurred in any event and was not the result of the accident. Cf *Wilson v National Coal Board* 1981 SC (HL) 9; paras 2.64-2.69 above.

<sup>158</sup> Cf *Redding v Lee* (1983) 151 CLR 117 (unemployment benefits to be deducted in assessment of damages for loss of earning capacity). In Australia, workers' compensation is an important source of compensation for those injured at work. It seems that generally such payments are either deducted from tort damages, or the provider of them has a third party recovery right. See for example *Manser v Spry* (1994) 181 CLR 428 & *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1.

<sup>159</sup> See eg *Juranovich v McMahon* [1961] NSW 190. Cf *Treloar v Wickham* (1961) 105 CLR 102.

<sup>160</sup> The scheme was radically altered in 1992 to take account of its rising costs. For fuller accounts of the scheme and its background, see S Todd (ed), *Law of Torts in New Zealand* (2nd ed 1993) ch 2; K Oliphant, "Distant tremors: what's happening to accident compensation in New Zealand?", paper prepared for the Torts Section, SPTL Conference,

scheme, rights in tort have been abolished.<sup>161</sup> The question whether to deduct collateral benefits does not therefore arise in the majority of cases.<sup>162</sup>

3.107 Tort claims could still be brought where the loss in question is not covered by the wording of the scheme, especially where the injury occurs in circumstances outside the definition of 'accident' in the scheme.<sup>163</sup> Where tort damages *can* be claimed, the object of any award is in theory to place the victim in the position he or she would have been in had the tort not been committed. In practice, however, personal injury tort actions are very rare, and when they do arise, New Zealand courts generally follow English common law decisions.

## SUMMARY

3.108 It may be helpful briefly to summarise the rules in the other jurisdictions we have examined:

- (1) In Scotland there is deduction of charitable payments by the defendant, sick pay, social security benefits before the award of damages and unemployment benefit (although it seems that only past unemployment benefit will be deducted), but no deduction of charitable payments other than by the defendant, insurance, disablement pension, retirement pension, redundancy payments and social security benefits after the award of damages.
- (2) In Ireland the general rule is non-deduction, although sick pay is deducted.
- (3) The general rule in Germany and France is non-deduction, but there are extensive subrogation rights, which are enforced.
- (4) In the USA traditionally the general rule has been non-deduction, but this has been reversed or modified in a number of states.
- (5) In Canada there is deduction of charitable payments by defendants and of charitable payments of salary by employers, but non-deduction of other charitable payments, some social security benefits, insurance, disablement pensions and retirement pensions. The position in relation to sick pay is

14 September 1995; R Mahoney, "Trouble in Paradise: New Zealand's Accident Compensation Scheme" in S A M McLean (ed), *Law Reform and Medical Injury Litigation* (1995) p 31; R S Miller, "An analysis and critique of the 1992 changes to New Zealand's Accident Compensation Scheme" (1992) 5 Cant L R 1. Also see our consultation papers, *Liability for Psychiatric Illness* (1995) Consultation Paper No 137, Appendix 1, paras 22-27; *Damages for Personal Injury: Non-Pecuniary Loss*, (1996) Consultation Paper No 140, paras 3.33-3.37; *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, paras A.45-A.56.

<sup>161</sup> Accident Rehabilitation and Compensation Insurance Act 1992, s 14(1). The abolition extends to rights against third parties and actions by way of subrogation.

<sup>162</sup> Although exemplary damages can be claimed in addition to compensation under the scheme, the nature of such damages is such that the deductibility of collateral benefits is not an issue.

<sup>163</sup> Accident Rehabilitation and Compensation Insurance Act 1992, ss 3-4. Tort claims also remain, for example, in respect of pure economic loss and property damage.

that there should be deduction unless the benefits are recoverable by the third party or they can be seen as insurance payments.

- (6) In Australia sick pay is deducted, but not charitable payments (although it is not clear if this rule applies to the employer/defendant) insurance, disablement pensions, retirement pensions and redundancy payments. Also there is provision for a range of social security benefits to be recouped from tort damages and for benefits to be reduced where tort damages have been received.
- (7) In New Zealand there is a no-fault compensation scheme (but the rare cases brought at common law would probably follow the law of England and Wales).

It can be seen that there is no discernible general pattern for the treatment of collateral benefits, although certain features are relatively uniform, for example the non-deduction of charitable payments, certainly by persons other than the employer/defendant.

# **PART IV**

## **CONSULTATION ISSUES AND OPTIONS**

### **FOR REFORM I: DEDUCTION OR NOT?**

#### **1. INTRODUCTION**

- 4.1 We have seen that the present law on the deduction of collateral benefits is, on the face of it, inconsistent.<sup>1</sup> Some benefits are deducted and some are not. The law is also, in several respects, uncertain.<sup>2</sup> Moreover, the law in other jurisdictions is not only different to English law but is also different between jurisdictions.<sup>3</sup> We have also seen that reform of this area of the law has been recommended by reform bodies in some other jurisdictions.<sup>4</sup> In order to render the law fair and efficient, and to avoid the continuing need for litigation and appellate rulings, it may be thought that the time has come for a fresh start to collateral benefits. We therefore return to basics in examining what the law on collateral benefits ought to be.
- 4.2 One of the key causes for concern in the present law is the continuing flow of appeals. In our view this is a symptom of the uncertainties in the law with which litigants must grapple. We have borne in mind the need to formulate rules which are not only fair but which would be easy to operate and should therefore reduce the costs to litigants of dealing with the collateral benefits issue. **When responding we ask consultees to bear in mind, and where appropriate to comment on, the question of whether our suggestions for reform would be likely to save legal costs.**
- 4.3 In this Part we shall set out six main options for reform in relation to whether collateral benefits should be deducted or not in assessing damages for personal injury. When considering this issue consultees should bear in mind the linked question of the rights of providers of collateral benefits, which we address in Part V. The first two options (which we term “the deduction options”) are linked in that they flow from what we label “the proposition underpinning the deduction options”. The argument behind that proposition is detailed and complex and leads us to address all the essential issues of principle and policy that are relevant to reforming the law on collateral benefits. It is because of that that we can move on to set out much more briefly the remaining four options at the end of this Part. **Prior to hearing the views of consultees, we express no view as to which option for reform we prefer.**

#### **2. THE PROPOSITION UNDERPINNING THE DEDUCTION OPTIONS**

- 4.4 It may be helpful at the outset for readers to have a summary of the argument which will be explained in detail in this section: -

<sup>1</sup> See paras 2.94-2.113 above.

<sup>2</sup> See para 2.104 above.

<sup>3</sup> See Part III above, and particularly para 3.108.

<sup>4</sup> See paras 3.58-3.70 & 3.87-3.95 above.

- (a) Compensation, but no more than compensation, for those injured by a legal wrong should be seen as the primary purpose of tort law. Pursuit of this objective requires the deduction of collateral benefits in the assessment of damages where they meet the same loss.
- (b) The correctness of this conclusion is supported by a policy argument based on relevant empirical evidence. Tort damages reach very few victims of illness and injury and at a high cost. This cost is met by the large pool in society which contributes to liability insurance. Double compensation should be avoided, so that the cost to individuals and to society of tort compensation may be reduced, thereby potentially increasing the funds available in society to improve provision for disabled people.<sup>5</sup>
- (c) Policy arguments may override the case against double recovery which this analysis sets up. However, it is a matter for debate whether the policy arguments accepted by the courts for ignoring some collateral benefits in the assessment of damages withstand close scrutiny.
- (d) It follows that there is a case for saying (and we put it no higher than that) that, subject to the provider of the collateral benefit being able to recover its value from the victim or the tortfeasor, collateral benefits provided for the victims of personal injury should be deducted from damages which meet the same loss.

**(1) The objectives of tort law support deduction**

- 4.5 Underlying the tort system is the belief that those who have sustained harm due to a wrong should be restored to their pre-injury position and that the responsibility for that compensation should lie with the wrongdoer. It is a good in itself that tortious wrongdoers should be legally responsible for putting right the harm they have caused to others.<sup>6</sup> It follows that compensation, but no more than compensation, for injury caused by a wrong, is the primary function of tort law. We accept this conception of and justification for tort law and the primacy of the compensation aim which flows from it.
- 4.6 That there is a category of tort damages, namely exemplary damages, which are intended to punish the tortfeasor bolsters this conclusion. The existence of exemplary damages would be strange if the general tort measure of damages was designed to punish. Furthermore the jurisprudence concerning when such damages should be available would be incomprehensible.<sup>7</sup>

<sup>5</sup> See in respect of these two conclusions Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) discussed above at paras 3.87-3.95.

<sup>6</sup> D Howarth *Textbook on Tort* (1995), p 11.

<sup>7</sup> For a full discussion of exemplary damages and proposed reforms see our consultation paper, *Aggravated Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132. Also, in the context specifically of illness and injury, we see particular value in the existence of tort damages, because they embody a notion of full restoration, backed up by a system of quantification independent from political process. This is capable of setting a benchmark against which the compensation provided by other systems, such as social security or criminal injuries compensation, may be measured. Without the tort notion of

- 4.7 For some this corrective justice conception of tort law is incoherent: tort liability rules do not adopt a consistent or a defensible normative position.<sup>8</sup> In any event in the personal injury field it is argued that the tort system succeeds in compensating so few of its potential beneficiaries, that if restoration of those who have been wronged is its central aim, it has signally failed. These criticisms do not, however, suggest that tort law is not about corrective justice, but question whether it successfully achieves that aim.
- 4.8 If one applies this “corrective justice” theory of tort law to collateral benefits the conclusion is that collateral benefits should be deducted from tort compensation which meets the same loss. Full compensation is the aim, not overcompensation.
- 4.9 Press coverage of the settlement reached in June 1996 for 14 of the police officers who claimed damages for psychiatric illness sustained as a result of the Hillsborough disaster, suggests that the notion that overcompensation is difficult to justify is more than a dry point of legal theory. It was reported that:

...most of the relatives were denied compensation because they were unable to make a case of negligence. Joan Traynor, treasurer of the Hillsborough Family Support Group, said the size of the awards was “outrageous”. Mrs Traynor, who lost two sons in the disaster, said her doctor had advised her she was still suffering from the trauma. She added: “They will also have their pensions and everything else, won’t they? We have got nothing at all.”<sup>9</sup>

Whatever the tort rules for liability for psychiatric illness should be,<sup>10</sup> it is difficult to explain to a person who has been injured through no fault of their own, but who, for whatever reason, will not receive tort damages, that another person is entitled, not only to be compensated under the tort system but doubly compensated.<sup>11</sup>

- 4.10 Still, even if one accepts the compensatory aim, one might argue that, as full compensation is not achieved by present awards of damages,<sup>12</sup> the non-deduction

damages the level of assistance given to the injured and disabled beyond the tort system may be even more at the mercy of political imperative. (See R A Buckley, *The Modern Law of Negligence* (2nd ed 1993), p 410.)

<sup>8</sup> T Ison, *The Forensic Lottery* (1967), chapter 2; J Fleming “Is There a Future for Tort?” [1984] ALJ 131, 137-139; R A Buckley, *The Modern Law of Negligence* (2nd ed 1993) pp 398-399; P Cane, *Atiyah’s Accidents Compensation and the Law* (5th ed 1993), chapters 7 & 16.

<sup>9</sup> *The Independent* 4 June 1996; see also *The Times* 4 June 1996. See also P S Atiyah, *The Damages Lottery* (1997) p 62.

<sup>10</sup> For a full discussion of this issue, see our consultation paper, *Liability for Psychiatric Illness*, Consultation Paper No 137.

<sup>11</sup> When it is borne in mind that practically all injured people contribute to that double compensation, the potential for unfairness can be seen to be even greater.

<sup>12</sup> See Professor Genn’s empirical work for the Law Commission on the adequacy of damages, *Personal Injury Compensation: How Much is Enough?* (1994) Law Com No 225, for example pp 263-264.

of collateral benefits is justified as a means of meeting the shortfall.<sup>13</sup> We do not regard this as a rational way for the law to operate. If damages do not fully compensate, that should be addressed directly<sup>14</sup> and indeed we have proposed reforms of the law in other papers in order to achieve this.<sup>15</sup> One should not be relying on arbitrary amounts from collateral sources to fill in deficiencies in the principles of assessing damages.

4.11 Should the deduction of collateral benefits dictated by the compensation aim ever be displaced to achieve deterrence of undesirable conduct? In other words would it be wrong to deduct collateral benefits from damages to meet the same loss because this would reduce the overall damages bill and therefore lessen the deterrent effect of tort liability?

4.12 A number of criticisms have been made of deterrence as an objective of compensation in tort law.<sup>16</sup> First, it is said that much of the conduct which leads to tort liability cannot be deterred, for example split second errors of judgment while driving a car.<sup>17</sup> Secondly, it is likely that many potential tortfeasors know very little about tort liability rules. Thirdly, so few people claim or receive tort damages, that even detailed knowledge about tort liability may not affect behaviour. Fourthly, even if tort liability rules are known the deterrent message they give is confusing. For example, that there is only liability where the tort has led to injury and that the

<sup>13</sup> See for argument and counter-arguments eg J Fleming, *The Law of Torts* (8th ed 1992), p 245 where he says "...the practice is now firmly entrenched of allowing the plaintiff full recovery without any set-off for insurance proceeds, whatever the nature of the policy, probably for no other reason than a pervasive feeling that damages never fully compensate for the enormity of personal injuries."; J Fleming "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, pp 8-9; K Stanton, *The Modern Law of Tort* (1994), p 271. Also see the same argument and counter-arguments in the US context, eg in J Fleming "The Collateral Source Rule and Loss Allocation in Tort law" [1966] 54 California LR 1478, 1483 where he says "To anyone a little troubled by the notion that this might mean double recovery for the plaintiff, the stereotyped response has been that this is still better than letting the defendant profit, and that, in any event, the damages awarded to a plaintiff at least in personal actions never fully indemnify him for his loss, especially when account is taken of the fact that a large slice of it will find its way into the pocket of his attorney."; in "Unreason in the Law of Damages: the Collateral Source Rule" (1964) 77 Harvard Law Review 741, 750; in the American Law Institute's *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991), ch 6, pp 180-182 (in particular the latter argues against this proposition on the basis of a series of reforms designed to improve the adequacy of tort damages; see paras 3.63-3.70 above); also see rejection of this argument in State of New York Advisory Commission on Liability Insurance, *Insuring our Future* (April 1986), 136 (see paras 3.60-3.62 above) & Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) (see paras 3.87-3.95 above).

<sup>14</sup> See American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) for similar view, discussed at paras 3.63-3.70 above.

<sup>15</sup> See, eg, our paper on Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140; our Report on Structured Settlements (1994) Law Com No 224 etc. See para 1.8 above.

<sup>16</sup> See for example J Fleming "Is There a Future for Tort?" [1984] ALJ 131, 133-135; Markesinis & Deakin, *Tort Law* (3rd ed 1994), pp 36-38.

<sup>17</sup> A related point is that tort liability may increase the likelihood of accidents, for example by diverting attention from non tortious causes for accidents; P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993), pp 363 & 366.

degree of fault is irrelevant to the amount of compensation means that any deterrent message will be a mixed one. Fifthly, the vast majority of tort compensation is paid by insurance companies so that, even when successfully sued, it is not the tortfeasor who suffers “the penalty” which is meant to affect behaviour.

- 4.13 It has further been argued that empirical surveys disprove any real deterrent function performed by the tort of negligence. For example, in 1984 there was a study of medical injuries and malpractice in the State of New York by a team based at Harvard.<sup>18</sup> Following examination by doctors of the medical records of over 31,000 patients who had been discharged from fifty one hospitals randomly selected, it was found that 1 per cent of patients had been injured through medical negligence. It was found that one in eight of the victims of negligence brought a claim for damages, and of these half were successful. Harris says of these results:

The signal sent by tort law to the medical profession is that occasionally, in a symbolic way, they may be held liable for negligence, but that 94 per cent of the instances of negligence will not lead to liability.<sup>19</sup>

- 4.14 The Harvard study also surveyed doctors’ perceptions of the risk of being sued and of the impact of potential tort liability on the way they conducted their practice. The risk of being sued was over-estimated by three times. Doctors perceived a 45 per cent chance of being sued following a poor outcome to treatment irrespective of negligence, rising to 60 per cent if they thought they had acted negligently. However, doctors saw the effect of the tort system as a distraction, not as a factor influencing how they treated their patients. There was evidence that doctors did not modify their practices in the light of a malpractice suit. They did not believe the tort system could play a role in preventing medical mishaps. Reasons given for this view were the delay between the treatment and the finding of negligence and that claims usually concerned circumstances beyond the doctor’s control. Harris says:

They believed that patients sued when they needed money or were unhappy with a bad or unexpected outcome of their treatment. It was a ‘lottery’ in which some failures to achieve an acceptable standard of care were punished, but not others. The tort system appears to stigmatise many actions which the doctors did not consider to have been negligent, but at the same time missed a good number of cases where there was negligence. The signal which doctors received from the tort system was, therefore, strong but unfocused: they saw a significant risk of being sued, whether or not they had been negligent. The doctors felt a ‘malpractice’ environment, but its impact on them was at a general and unspecific level.<sup>20</sup>

<sup>18</sup> *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990), discussed in D Harris, “Evaluating the Goals of Personal Injury Law: Some Empirical Evidence”, in *Essays for Patrick Atiyah* (1991).

<sup>19</sup> D Harris, as above at p 301.

<sup>20</sup> D Harris, “Evaluating the Goals of Personal Injury Law: Some Empirical Evidence”, in *Essays for Patrick Atiyah* (1991) 303-304.

For some critics of the tort system, therefore, this type of empirical work reinforces theoretical scepticism about the deterrent effect of compensation.<sup>21</sup>

- 4.15 It should be noted here that the argument that payment of damages by liability insurers nullifies any deterrence would be countered if risk-differentiated insurance premiums were insisted on. Insurance companies may also encourage or require loss prevention measures.<sup>22</sup> However the use made of these tools is limited.<sup>23</sup>
- 4.16 There are other accounts of deterrence advanced by economists. A typical theory is that society aims, in order to meet the demands of economic efficiency, to achieve a cost-justified level of care, rather than to eliminate all accidents at any cost. In an imperfect world the market is unable to reach this outcome, so tort seeks to impose the cost of accidents on the person who is able to take effective precautions at the least cost.<sup>24</sup> On the other hand, many would disagree that the aim of tort law should be a purely economic one. Furthermore economic analysis relies on an unreal notion of information availability and decision-making quality. The distorting effect of the insurance market in diverting costs, largely without reflecting the risks of particular activities or actors in premiums charged, is also not dealt with.<sup>25</sup>
- 4.17 For our purposes in this paper, we are willing to accept that compensation for torts is bound to have some deterrent effect in some circumstances, for example through the effects of publicity. But as tort law in general has difficulty in deterring wrongdoing, the deterrent effect of damages being increased by the amount of collateral benefits must surely be negligible.<sup>26</sup> Accordingly we do not think that an approach to collateral benefits which diverges from that which the compensation aim dictates can be justified on the basis of the deterrence it achieves.
- 4.18 It is sometimes argued that the loss distribution which results from the operation of the modern tort system is an objective of tort. But to see loss distribution as an objective in itself, rather than a side effect which supports compensation, is

<sup>21</sup> That these conclusions were reached in respect of presumably one of the most deterrable groups of potential tortfeasors may be significant.

<sup>22</sup> P Cane, *Accidents, Compensation and the Law* (5th ed 1993), pp 339-342 & 369.

<sup>23</sup> *Ibid*, pp 369-374. Also see P S Atiyah "Accident Prevention and Variable Premium Rates for Work-Connected Accidents" (1975) 4 ILJ 1 & 89.

<sup>24</sup> K Stanton, *The Modern Law of Tort* (1994) p 12.

<sup>25</sup> *Ibid*, pp 12-16; also see J Fleming "Is There a Future for Tort?" [1984] ALJ 131, 133-135, for general discussion.

<sup>26</sup> See for example J Fleming "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 7 & M A Clarke *The Law of Insurance Contracts* (2nd ed 1994), pp 833-834; Also it is interesting to compare this conclusion to that of the American Law Institute in 1991 that any loss of deterrence resulting from reduction of tort damages by the amount of past or prospective collateral benefits would likely be only marginal and worth tolerating, although it is important to evaluate this conclusion in context, for example other measures recommended aimed at increasing the deterrent impact of tort law *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991), ch 6, pp 161-162. See paras 3.63-3.70 above.

problematic for a number of reasons.<sup>27</sup> The loss spread is haphazard, because of the limited reach of tort law. It is spread among groups on no particular rationale. Furthermore loss is spread at very high cost. In any event, in relation to collateral benefits, overcompensation is inconsistent with loss spreading, because by definition loss is inefficiently spread where a victim recovers the same loss twice.

4.19 Another function of tort law which should be considered is its role in providing a forum in which to test the reasonableness of new types of behaviour.<sup>28</sup> Again this may more accurately be said to be a beneficial side-effect of the existence of tort liability, than an objective in its own right. In any event in relation to collateral benefits this element of tort liability is arguably neutral, as it makes no difference to tort as a decision-making forum how damages are calculated, so long as the rules are not altered so as to affect how many claims go to trial. It seems unlikely that treatment of collateral benefits in damages calculations would have a significant effect in this way, although the views of practitioners on this point would be welcome.<sup>29</sup> For example, would the institution of ground-breaking litigation be affected by more deduction of collateral benefits?

4.20 Having surveyed the objectives of tort law, one can conclude by saying that the “corrective justice” theory underlying tort law dictates that collateral benefits be deducted from tort damages for the same loss;<sup>30</sup> and that this approach to collateral benefits is not inconsistent with, or displaced by, other theories as to the objectives of tort law.<sup>31</sup> We next consider a policy argument based on relevant

<sup>27</sup> See P Cane, *Accidents, Compensation and the Law* (5th ed 1993) pp 355-357 discussion of loss distribution; also J Stapleton “Tort, insurance and ideology” (1995) 58 MLR 820, 828.

<sup>28</sup> D Howarth “Negligence after Murphy: Time to Re-think” [1991] CLJ 58, 92-93.

<sup>29</sup> The American Law Institute referred to evidence that adoption of a collateral source offset in the USA reduced the frequency and severity of medical malpractice claims by about 15 % (citing Danzon, “The Frequency and Severity of Medical Malpractice Claims: New Evidence” 49 *Law and Contemporary Problems* 57, 72, 77 Spring 1986) but went on to conclude on further analysis that this was an outer limit and the cases likely to be concerned involved small sums, with a marginal litigation value: American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) pp 168-175. See further paras 3.63-3.70 above.

<sup>30</sup> Equally, where there is a finding of contributory negligence, it would be unprincipled to make a percentage reduction and then to deduct collateral benefits, because this would lead to a disproportionate reduction of the plaintiff’s damages. The correct approach to contributory negligence is to arrive at the total loss once collateral benefits have been deducted and then to reduce the award because of contributory negligence.

<sup>31</sup> J Fleming’s following brief reflection in “The Collateral Source Rule and Loss Allocation in Tort law” [1966] 54 *California LR* 1478 at 1483 on the collateral source rule in the USA in the light of tort theory is interesting: “...it might have been pointed out that the deterrent thrust of tort liability would hardly be impaired by hind-knowledge of a collateral contribution nor, for that matter, even by fore-knowledge that the cost might be lessened a little. Moreover, it might have been stressed that the amount of liability has never been proportioned to the degree of the defendant’s heinousness, but only to the fortuitous amount of the damage done - that a defendant would always get a “windfall” however negligent his conduct, if he happened to kill a bachelor without family commitments, in contrast to a young pater familias with long prospects and even longer progeny. Furthermore tort liability is fast shedding the last vestiges of any punitive function as policies of enterprise liability and loss distribution are increasingly pushing into the background individualistic notions of personal responsibility and guilt. Finally, and for good measure, it might have been added that so cavalier a compromise with the

empirical evidence which supports that conclusion before examining the reasons of policy which the courts have relied on for overriding the “compensation dictates deduction” approach.

## **(2) Empirical evidence of the workings of the tort system supports deduction**

- 4.21 The Royal Commission on Civil Liability and Compensation for Personal Injury chaired by Lord Pearson in 1978, provided statistics concerning injured people who had been treated in hospital or by a doctor and whose injury had led to at least four days’ incapacity for work or for other normal activities.<sup>32</sup> Six and a half per cent of accident victims recovered damages. The report found that on average for the years 1971 to 1976, the total compensation for injured people from all available sources was £827 million, at 1976 currency values. This sum includes payments of social security, tort damages, occupational sick pay, occupational pension, private insurance (excluding life insurance), criminal injuries compensation and other forms of compensation. The six and a half per cent of victims of injury who were successful in tort actions shared roughly a quarter of that money, that is £202 million out of £827 million.<sup>33</sup> According to the Oxford survey<sup>34</sup> in 1976 twelve per cent recovered damages.<sup>35</sup> The numbers varied by type of accident: twenty nine per cent of road accident victims; 19 per cent of work accident victims; 2 per cent of all other types of accident victims.<sup>36</sup>
- 4.22 This shows that tort compensation reaches a very small proportion of injured and disabled people. Not only do few accident victims recover tort damages, but accidental injury is a lesser cause of disability than congenital anomalies or disease. The Pearson Commission estimated that 10 per cent of disabled adults were disabled by injury, although the term injury is not given a precise meaning.<sup>37</sup> Although tort compensation may be sought by those suffering disease caused by human activity, the Oxford Study showed that tort reaches such a tiny proportion of those so injured that it can be said virtually to be confined to accident cases.<sup>38</sup>

fundamental axiom that the hallmark of tort damages is compensatory, is but a sad reflection of the fact that, in this instance at least, American courts have shown themselves less than equal to the task of responsible social engineering, allowing themselves to be distracted from urbane decisions about loss distribution by appeals to a simplistic and irrelevant morality.”

<sup>32</sup> (1978) Cmnd 7054-I, II & III, vol II, paras 467 ff.

<sup>33</sup> P Cane, *Atiyah’s Accidents, Compensation and the Law* (5th ed 1993), p 18, based on the Pearson Report Vol II table 158.

<sup>34</sup> D Harris, M Maclean, H Genn, S Lloyd-Bostock, P Fenn, P Corfield and Y Brittan, *Compensation and Support for Illness and Injury* (1984).

<sup>35</sup> *Ibid*, p 46.

<sup>36</sup> *Ibid*, p 51. The Pearson Commission also found that the numbers varied by type of accident.

<sup>37</sup> The Pearson Report, Vol II, para 35.

<sup>38</sup> D Harris, M Maclean, H Genn, S Lloyd-Bostock, P Fenn, P Corfield and Y Brittan, *Compensation and Support for Illness and Injury* (1984), p 327.

- 4.23 Tort compensation for personal injury is largely paid by insurance companies and therefore by the pool of relevant premium payers. The pool of contributors will vary between different types of insurance. In the case of road accidents compulsory insurance means that the majority of motorists share the cost of tort compensation, although in some cases the cost will be spread further, for example where vehicles are driven in the course of employment. In the case of employers' liability, because liability insurance premiums are tax deductible, the contributors will be the taxpayer, employees, customers and shareholders.<sup>39</sup> It is clear that the cost of tort compensation is spread amongst the members of diverse and large groups in society and is not generally paid by those found to have been careless. Some would argue that it should be viewed, like social security, as a part of the resources which society devotes to meeting the costs of injury and disablement.
- 4.24 The amount of damages is not the whole cost of the tort system as a mechanism for compensating victims of injury. Administrative costs are high. The Pearson Commission estimated that for the years 1971-6 the cost of making annual tort payments of £202 million averaged £175 million. This did not include the expense of running the courts to hear the few cases that went to trial. On this evidence administrative expenses are about 85% of the value of damages paid, or 45% of total costs.<sup>40</sup> Social security administrative costs are about 11 per cent of benefit paid (not including the expense of raising the relevant revenue).<sup>41</sup>
- 4.25 It has been argued that these facts place a burden on the tort system to justify its continued existence as a means of compensating the victims of illness and injury.<sup>42</sup> Our review of the law of damages is on the basis that the tort system will continue to exist, so full consideration of this argument is outside our terms of reference. In any event, we believe the tort system to be justified as a system of corrective justice.<sup>43</sup> Nevertheless, viewed as a subsidiary argument that is consistent with the conclusion in paragraph 4.20 above, we recognise the force of the contention that the damages burden should be reduced by the amount of collateral benefits so that money could thereby be released to contributors to liability insurance through lower premiums, which would in turn potentially increase the funds available to achieve better provision for the ill and injured.<sup>44</sup> Indeed it could be used to fund

<sup>39</sup> See P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) pp 330-342 for more detailed discussion of who pays the cost of tort compensation; also J Fleming "Is There a Future for Tort?" [1984] ALJ 131, 140-141.

<sup>40</sup> P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 338.

<sup>41</sup> The Pearson Report, Vol II, paras 669-673 and table 158.

<sup>42</sup> See for example P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) pp 337-342. Cane says "Higher relative costs can be justified only if the system in question delivers desired benefits additional to the amount of compensation paid out, and if the higher administrative costs are referable to those additional benefits"; also J Fleming "The Collateral Source Rule and Loss Allocation in Tort law" [1966] 54 California LR 1478, 1480-1481 & "Is There a Future for Tort?" [1984] ALJ 131, 139-140.

<sup>43</sup> See paras 4.5-4.10 above.

<sup>44</sup> See eg P Cane, *Atiyah's Accidents, Compensation and the Law*, (5th ed 1993) p 323, Cane says "...in so far as the tort and the non-tort compensation are paid for by essentially the same people, over-compensation should be avoided. This is particularly important when the source from which the compensation comes is the State. Public money should not be wasted by over-compensating some personal injury victims, particularly when so many

provisional recommendations favouring the injured or ill that we have put forward in other aspects of this damages project.

- 4.26 Whether or not this would in practice be the case depends to some extent on how much the damages burden would be reduced by a move to more deduction of collateral benefits. The research reviewed above<sup>45</sup> casts some light on this question, but knowledge is patchy and the prediction of future trends difficult. The Pearson Commission found that roughly a quarter of damages paid out were in respect of past pecuniary loss, and a further tenth in respect of future pecuniary loss and the remaining two thirds in respect of non-pecuniary loss. The collateral benefits which are presently ignored in the assessment of damages are charitable payments, insurance payments and pensions. We have not been able to find data on the incidence of charitable payments to tort victims, but Professor Genn's research for the Law Commission indicates that one in ten successful tort victims receive some form of insurance payment or payments. In addition the coverage of medical insurance is growing. The most significant benefit which is presently ignored may, however, be disablement pensions. That 86 per cent of full time male workers and 77 per cent of full time female workers belong to occupational or personal pension schemes suggests that a significant number in society are entitled to some form of ill-health pension if incapacitated from work as a result of a tort.<sup>46</sup> This is borne out by Professor Genn's finding that among victims who had retired since the accident, 42 per cent of those in band 1 and 67 per cent in bands 2-4 were receiving a pension from a previous employer.<sup>47</sup>
- 4.27 Sceptics of the notion that reducing damages (by deducting collateral benefits) could lead to a better use of insurance costs may argue that the savings would merely augment insurers' profits. However, it seems more likely that the deduction of collateral benefits would release funds to liability insurance contributors. In any

other deserving cases (such as victims of disease) receive much less. But in modern conditions, "public money" is not just money which is actually collected by the State in the form of taxes or social security contributions. Tort damages too are, for all practical purposes, paid out of public money, since they are mostly financed by road traffic and employers' liability insurance premiums which are paid by a very large proportion of the public and which have to be paid by law."; A similar argument was put by the State of New York Advisory Commission on Liability Insurance when it said "Nor are the costs of the collateral source rule borne exclusively by the defendants. Overcompensation of some plaintiffs inevitably means undercompensation of others because of the increased cost of insurance and the higher social overhead costs, as defendants are forced to curtail socially productive activities - the provision of municipal services, the manufacture of useful products - in order to pay additional tort damages.", *Insuring our Future* (April 1986) p 135. See paras 3.60-3.62 above; also Dunn LJ in *Lincoln v Hayman* [1982] 2 All ER 819, 822 said "To say that it is wrong that the tortfeasor should benefit from the payment of supplementary benefit seems to me to ignore the realities of personal injuries litigation. In the great majority of cases the damages will be paid by an insurance company, and the effect of not deducting supplementary benefit will be to increase premiums to employers and motorists..."; also Lord Bridge in *Hodgson v Trapp* [1989] AC 807, 823 (See para 2.81 above), K Stanton, *The Modern Law of Tort* (1994), p 270 & American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) discussed at paras 3.63-3.70 above.

<sup>45</sup> See paras 1.14 - 1.23 above.

<sup>46</sup> See para 1.21 above.

<sup>47</sup> See para 1.22 above.

event there is something artificial about characterising any decrease in insurance costs as for the benefit only of insurers. A decrease in costs would influence a business as a whole and lead at least to some benefit to contributors to liability insurance, if only in stalling premium increases (for example, which may result from increases in damages due to other of our recommendations).

- 4.28 This view is supported by the findings of the State of New York Advisory Commission on Liability Insurance, which said of this issue:

Although there has been too little experience to provide a basis for definitive proof of the precise direct effects of across-the-board tort reform, the considerable volume of work that has been done indicates that changes that limit or make more predictable the liability of defendants, or the money damages owed because of that liability, do exert downward pressure on prices and expansionary pressure on the propensity to write new business in insurance lines where problems have appeared. Over the full span of the business cycle, both the evidence and everything economists know about market behaviour suggests that these pressures will eventually be expressed in the average pricing and underwriting behaviour demonstrated by the market. However, the precise dimensions of the pressures, and precise timing of the process by which they become sufficient to overcome or reinforce other pressures, is unknown and unknowable at present and for the foreseeable future.<sup>48</sup>

- 4.29 In summary, the empirical evidence of the workings of the tort system can be seen as supporting the “compensation dictates deduction” approach: a wasteful element of the tort system could be eradicated with the costs saved used more wisely for the benefit of the ill or injured.

**(3) It is open to debate whether the policy arguments put for non-deduction of some collateral benefits withstand close scrutiny**

- 4.30 It is clear that policy arguments might override the case for deduction of collateral benefits that has so far been considered. However, given the case against double recovery, it is important that such policy arguments are carefully scrutinised, which we now propose to do. All of the arguments for ignoring some collateral benefits in the assessment of damages are to be found in Lord Reid’s seminal speech in *Parry v Cleaver*<sup>49</sup> and are as follows: -<sup>50</sup>

***The “wrongdoer should not be relieved” argument***

The wrongdoer should not be the one to benefit from the benevolence of friends, family and the public at large or from the plaintiff’s foresight in taking out insurance.

<sup>48</sup> State of New York Advisory Commission on Liability Insurance, *Insuring our Future* (July 1986), Volume II, 68-69. See paras 3.60-3.62 above.

<sup>49</sup> [1970] AC 1, 14.

<sup>50</sup> See also para 2.3 above.

### ***The “incentive argument”***

Deduction of benevolence from damages would stifle private charity: and one might argue, analogously, that deduction of insurance payments would discourage the taking out of insurance.

### ***The “paid for” argument***

The plaintiff has paid for insurance payments and should therefore keep them. In Lord Reid’s words, “Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money: if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest.”

### ***The “provider’s intentions” argument***

The intentions of the provider are not to relieve the tortfeasor. This reason for ignoring collateral benefits is implicit in the reasons given by Lord Reid for ignoring benevolence.<sup>51</sup> First, the citation from *Redpath v Belfast and County Down Railway*<sup>52</sup> used by him said that subscribers to a charity would be surprised to find that their contributions were made to relieve the tortfeasor. Secondly, Lord Reid’s obiter dicta about social security, cited above,<sup>53</sup> implied that the intention of the donor not to benefit the wrongdoer was relevant to how it should be treated in the assessment of damages.<sup>54</sup>

We now proceed to subject these arguments to careful scrutiny.

#### ***(a) The argument that the wrongdoer should not be relieved***

- 4.31 The concern that the wrongdoer should not be the one to benefit focuses on the position of the wrongdoer and not on the position of the victim. Yet the standard aim of tort damages is, and ought to be, to compensate the victim - by putting him or her into as good a position as if no tort had been committed - and not to punish the wrongdoer.<sup>55</sup> The position of the wrongdoer should, in general, therefore be irrelevant. On a compensatory analysis, there is no unfairness in damages being reduced by the amount of a charitable payment or an insurance payment which met a particular loss. Justifying a windfall to the victim on the basis that the wrongdoer should not be the one to benefit may be thought, therefore, to betray a desire to punish the wrongdoer.<sup>56</sup> While we accept that in exceptional cases

<sup>51</sup> This argument refers to the intention of the provider of the benefit, but it may be that the intention of the recipient of the payment coincides with that of the provider of the benefit.

<sup>52</sup> [1947] NI 167, 170.

<sup>53</sup> See para 2.78.

<sup>54</sup> See also Lord Morris at p 30 and Lord Pearce at p 37. Also see *Hussain v New Taplow Paper Mill Ltd* [1988] AC 514, 527-528 *per* Lord Bridge, but also 532; discussion in *Hodgson v Trapp* [1989] AC 822, 820 - 823 *per* Lord Bridge (see para 2.79 above); *McCamley v Cammell Laird* [1990] 1 WLR 963, 971.

<sup>55</sup> See para 1.5 n 5 above. See also paras 4.5-4.6 above.

<sup>56</sup> See Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) discussed at paras 3.87-3.95 above.

punitive damages can be awarded in tort,<sup>57</sup> the retention of collateral benefits, if they meet the same loss as tort damages, is in no sense linked to those exceptional cases.<sup>58</sup>

- 4.32 The force of the compensatory principle and the irrelevance of relieving the wrongdoer can readily be seen in relation to sick pay, where the courts have accepted that it would be quite wrong for a tortfeasor to have to pay damages for a loss which had been met from elsewhere. Yet the same point applies to other collateral benefits which meet the same loss as tort damages. An analogy from elsewhere within the law of damages may also illustrate the point: a tortfeasor is not required to pay damages for lost earnings to a victim who did not work because of private wealth (that is, one takes account of that source of income).
- 4.33 We would add that if the desire not to relieve the wrongdoer is concerned with avoiding the unjust enrichment of the tortfeasor (rather than betraying a willingness to punish the tortfeasor) this could be directly achieved by deducting the collateral benefit and affording the provider of the collateral benefit a restitutionary remedy against the wrongdoer for having discharged the wrongdoer's liability. We discuss this in Part V below.

***(b) The incentive argument***

- 4.34 The concern that deduction of benevolence would stifle charity is open to question. In the case of individual contributors to charitable funds (as opposed to donations by charities themselves to particular victims) it is unlikely that tort rules concerning such payments are known, which means that they are unlikely to have an effect on the decision to make a donation. If the rules are known, it is as arguable that benefactors are discouraged from donations where they anticipate recovery by the victim of tort damages, as that they are encouraged by this possibility. The donor might well think its money better spent in providing support

<sup>57</sup> Restitutionary damages (designed to strip away gains made by the tortfeasor) may also sometimes be awarded for torts but there is no link between such damages and the retention of collateral benefits by the plaintiff. In contrast, an argument can be mounted by the provider of the collateral benefit for a restitutionary remedy against the wrongdoer on the basis that where deducted the collateral benefit relieves the wrongdoer from liability: see paras 5.4-5.6 below.

<sup>58</sup> See for example Michael Flynn "Private Medical Insurance and the Collateral Source Rule: A Good Bet?" (1990) 22 *Tol LR* 39, 46 where he says of the collateral source rule: "Proponents cite punishment of the tortfeasor for unlawful acts as further justification of the Collateral Source Rule. Contending that this is a legitimate objective of tort law, they maintain that the Rule ensures a guilty party does not escape responsibility for wrongful conduct. Opponents label the proponent's punishment argument as primitive and archaic; awarding punitive damages, not the Collateral Source Rule, is the proper device for individual states to use to punish a tortfeasor. Their claim is that compensation and not punishment is the only legitimate goal of tort law. Circumventing state legislative authority or judicially creating punitive damages through the application of the Collateral Source Rule mistakenly legitimises punishment as a part of compensatory damages."; also J Fleming, *The Law of Torts* (8th ed 1992), pp 244-245, where he says "Once free of the notion that somehow the tortfeasor deserves punishment and should not escape his just due, there is really no reason why he should not take advantage of the fortuity that part or all of the injury has already been made good, even if as the result of the victim's own providence" & J Fleming "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 12.

to those with no prospect of recovering tort damages. Furthermore, where the rules concerning collateral benefits are known, this implies a level of sophistication which makes it realistic to anticipate that the payment would be made on terms which provided for the eventuality of tort damages being recovered.

- 4.35 A similar “incentive” argument might be made in relation to insurance, namely that by not deducting insurance receipts the courts seek to avoid discouraging the taking out of insurance cover. There are, however, serious questions to be asked about whether tort rules concerning collateral benefits work in this way. The types of insurance concerned are personal accident, permanent health and medical insurance. The figures canvassed above show that the tort rule that insurance is ignored in the calculation of damages has in fact not resulted in widespread purchase of these types of insurance.<sup>59</sup>
- 4.36 If non-deduction of insurance has not encouraged the purchase of policies, it is unlikely that deduction would discourage people from buying insurance. This is particularly noticeable in relation to personal accident insurance. As the only one of the three relevant types of policy which is non-indemnity insurance, the prospect of recovering tort damages in addition to insurance monies is the greatest here (because there is no possibility that the insurer will exercise subrogation rights in the event of a successful tort claim). Hence the argument that deduction of insurance payments from tort damages might discourage purchase of insurance is at its height. Yet the vast majority of personal accident insurance is provided incidentally to other policies, for example motor or travel insurance. “Stand-alone” personal accident insurance is rare. If people rarely buy this insurance under the present law, a change is unlikely to affect its incidence.
- 4.37 Furthermore the evidence considered earlier in the context of deterrence about general knowledge of tort liability rules suggests that if liability rules are not well-known and do not substantially affect behaviour, it is less likely that the rules for the assessment of damages are known, and highly unlikely that people would know that insurance receipts are ignored in the assessment of damages but that indemnity insurers may be able to reclaim the value of the payments made.<sup>60</sup>
- 4.38 It is also questionable if people should be encouraged to buy insurance with the incentive that they might receive double compensation. First, much of the relevant insurance is indemnity insurance. Hence the insurer has automatic subrogation rights which may prevent double recovery. Secondly, so few accident victims receive tort damages that it would seem sensible to ignore the possibility of double compensation in deciding whether or not to take out insurance.
- 4.39 In our informal enquiries of the insurance industry it was made clear to us that deduction of insurance payments would be most unlikely to discourage the purchase of insurance cover. Indeed far from using the argument that insurance may be recovered in addition to tort damages to encourage people to buy

<sup>59</sup> See paras 1.16-1.19 above. This may be thought unsurprising because factors other than the tort rules on collateral benefits, notably government policy on social insurance schemes, seem likely to have a significantly larger impact on behaviour.

<sup>60</sup> See paras 4.11-4.17 above.

insurance, salespeople emphasise that injuries are unlikely to be sustained in circumstances in which tort damages will be recovered.

**(c) *The paid for argument***<sup>61</sup>

- 4.40 At least at first sight it is a most appealing argument that someone who has been prudent enough to pay to receive a collateral benefit should not be “penalised” by there being a reduction of the damages that he or she would otherwise have received. Yet a counter-argument is that a plaintiff still receives the precise collateral benefit that he or she paid for: deduction of collateral benefits from damages which meet the same loss does not mean that plaintiffs are deprived of the fruit of their thrift, but that they do not receive that fruit twice.<sup>62</sup> As Atiyah said in 1969 when commenting on *Parry v Cleaver*<sup>63</sup> and specifically on the paid for justification for ignoring insurance receipts:

...it must be remembered - and this appears in danger of being forgotten in all discussions of the collateral benefits rule - that what is at issue is the amount of tort damages, not the question whether the plaintiff should get or keep his insurance payments. In this case the plaintiff was awarded his disability pension and there was no question of this being taken away from him. Similarly, if a plaintiff collects on a personal accident insurance policy, he receives and keeps his insurance money. The question at issue is how much *more* he should receive in tort damages. To argue that he “has paid” for his insurance payments is beside the point when it is not the insurance payments which are in issue.<sup>64</sup>

- 4.41 It should also be pointed out that the “paid for” argument is equally applicable to indemnity insurance. And yet in that context an indemnity insurers’ subrogation rights may mean that the insured does not recover more than his or her loss.<sup>65</sup>
- 4.42 A further point, with reference to the idea that the prudent should not be penalised in contrast to the spendthrift, is that whether or not a person buys

<sup>61</sup> See treatment of this issue in American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) discussed above at paras 3.63-3.70.

<sup>62</sup> See P S Atiyah “Collateral Benefits Again” [1969] MLR 397, 401-403 for the argument that the justifications in *Parry v Cleaver* [1970] AC 1 for the deduction of insurance and disablement pensions flowing from it are flawed.

<sup>63</sup> [1970] AC 1.

<sup>64</sup> P S Atiyah “Collateral Benefits Again” [1969] MLR 397, 403.

<sup>65</sup> See H McGregor, “Compensation Versus Punishment in Damages Awards” [1965] MLR 629, 635 where he says “...even if the thrift and foresight argument is stronger in the case of the accident insurance policy than it is in any of the other cases, it is still not a good enough reason for over-compensating the plaintiff and flying in the face of the cardinal principle of damages. After all, it is equally true of property insurance that the payment results from the plaintiff’s thrift and foresight: yet in property insurance the insured is always held to an indemnity and no more.” & M A Clarke *The Law of Insurance Contracts* (2nd ed 1994) p 805. But see *Bristol & West v May & Merrimans (No 2)* [1997] 3 All ER 206, 226 where Chadwick J argues that where an insurer has a subrogation right the justification for ignoring insurance does not flow from arguments justifying double recovery, because there is no double recovery. See para 2.17 n 41 above.

insurance is not necessarily determined by prudence or the absence of it. A range of different considerations may influence the prospective purchaser, including whether or not they can afford the policy<sup>66</sup> and whether or not it provides value for money. Indeed the more prudent course may be not to buy insurance if it does not represent good value for money.

4.43 Nevertheless, the person who has bought insurance does, on the face of it, appear to have lost money in comparison to the person who has not, because he or she has paid insurance premiums which turned out to be unnecessary.<sup>67</sup> However the statistical evidence reviewed earlier establishes that it was far more likely that the insured person would be injured in circumstances where tort compensation would not be available so that, at the time it was taken out, the insurance was a sensible investment.<sup>68</sup> Furthermore, even where damages are recoverable and insurance payments are deducted in their assessment, the insured person does reap some benefit from first party insurance, in the form of early receipt of compensation and peace of mind.<sup>69</sup> Our informal enquiries of members of the insurance industry support the view that what those who take out personal accident insurance pay for is security and peace of mind, not the prospect of double recovery.<sup>70</sup>

4.44 Does the “paid for” argument have added force if one switches focus from insurance proceeds to other collateral benefits? For example, in *Parry v Cleaver*<sup>71</sup> the heart of Lord Reid’s judgment was that disablement pensions are analogous to private insurance and that the analogous arguments for non-deduction apply. But it equally follows that the counter-arguments to non-deduction of insurance proceeds that we have just examined apply with equal force to disablement pensions. Moreover, if the “paid for” argument has force, one might think that it should apply also to contractual sick pay which is “paid for” by victims. Yet, in contrast to insurance proceeds and disablement pensions, sick pay is deducted in assessing personal injury damages.<sup>72</sup>

<sup>66</sup> See *Living in Britain; Results from the 1995 General Household Survey*, Office for National Statistics, Social Survey Division (ISBN 0 11 691550 1), p 69 & 121 in respect of pensions and medical insurance respectively. It was found that the higher their gross weekly income, the more likely men working full time and women working full or part time were to belong to their employer’s pension scheme, but there was no clear pattern by income for membership of personal pension schemes. Also there was considerable variation in private medical insurance cover by socio-economic group. People in the professional and employers and managers groups were most likely to be covered by insurance (22% and 23% respectively) but coverage went down to 4% or less in the manual groups.

<sup>67</sup> K Stanton, *The Modern Law of Tort* (1994) p 271.

<sup>68</sup> See M A Clarke *The Law of Insurance Contracts* (2nd ed 1994) p 805.

<sup>69</sup> P S Atiyah “Collateral Benefits Again” [1969] MLR 397, 402-3, H McGregor, “Compensation Versus Punishment in Damages Awards” [1965] MLR 629, 636 & J Fleming “Collateral Benefits” *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 12.

<sup>70</sup> See also paras 3.90 & 3.99 n 151 above.

<sup>71</sup> 1970 AC 1.

<sup>72</sup> See paras 2.19-2.28 above. Cf the approach to this issue taken in Canada, see paras 3.76-3.82 above.

4.45 The American Law Institute suggested a model for reform based on deduction of collateral benefits, but which sought to take account of the argument that tort victims who had bought collateral benefits should receive some reward for their foresight.<sup>73</sup> Its proposal was that the collateral source rule should be reversed, but that insured plaintiffs should be given a credit equal to the amount of premiums paid during the two years immediately preceding injury. The reasons for the two year limit were first, that it was administratively difficult to establish the payments made in the more distant past and secondly, that the plaintiff had received the benefit of the insurance coverage against the risk of injuries from non-tort sources in return for the past payments, including the payments within the two year

<sup>73</sup> See para 3.69 above. Also see Chadwick J in *Bristol & West v May & Merrimans (No 2)* [1997] 3 All ER 206, 226, where he said “One solution which the courts might have chosen to adopt in non-subrogation cases would have been to deduct from the damages otherwise payable the difference between the fruits of the insurance and the aggregate of the premiums paid, perhaps with compounded interest over the period of payment. That might be thought, on the one hand, to overcome the problem identified by Lord Reid - namely that the defendant is not to have the benefit of insurance for which the plaintiff has paid - while, on the other hand, avoiding the element of double recovery inherent in allowing the plaintiff to keep the whole of the fruits of the insurance as well as recovering from the defendant compensatory damages assessed without regard to those fruits. But the courts have not taken that route. They have preferred to allow an exception to the rule against double recovery.” Another model for the treatment of collateral benefits which takes some account of the “paid for” argument is provided by the 1996 version of the Criminal Injuries Compensation Scheme. Essentially the scheme provides for compensation for those who suffer personal injury, or for the dependants of a person who has died where the injury or death was directly attributable to a crime of violence (although the scheme also provides for compensation in other limited circumstances not involving a crime of violence). Awards in non-fatal cases may be made up of a tariff payment and compensation for loss of earnings after the first 28 weeks following injury. In addition, where the applicant lost earnings or earning capacity for longer than 28 weeks, or, if not normally employed was incapacitated to a similar extent, compensation may be payable for loss or damage to property on which the applicant relied as a physical aid, costs associated with NHS treatment, the cost of private health treatment, the cost of special equipment, adaptations to the applicant’s accommodation and of care. In fatal cases, an award may be made to the estate for funeral expenses. In addition certain individuals may be entitled to a tariff payment. The same individuals, if dependent on the deceased may also receive additional compensation for their dependency from the date of death. If under 18 a payment may be made for loss of parental services, made up of a tariff payment, and possibly an additional sum. The tariff payments of compensation are not subject to reduction to take account of any collateral benefit. All other aspects of an award are subject to deduction of past and future UK social security benefits, social security benefits or similar payments from the funds of other countries, payments under insurance arrangements (except where personally effected paid for and maintained by the personal income of the victim or in the case of a person under 18 years of age, by his parent, although this proviso is excluded where a claim is made for the cost of private health treatment, special equipment, adaptations to the applicant’s accommodation or care) and any pension accruing as a result of the injury or death (except where the pension rights accrue solely as a result of payments by the victim or a dependant). Pension is defined as any payment payable as a result of the injury or death in pursuance of pension or any other rights connected with the victim’s employment, and includes any gratuity of that kind and similar benefits payable under insurance policies paid for by the victim’s employers. In the case of compensation for loss of earnings or of dependency damages account will also be taken of any other pension, which has or will become payable during the period of loss, whether or not as a result of the injury.

period. The Institute also recommended that policy terms whereby insurance companies would obtain reimbursement through the tort claim should be void.<sup>74</sup>

- 4.46 While of great interest, such a measure is difficult to justify in terms of principle or practicality. From the tort perspective, premiums paid to guard against the consequences of future injury cannot be said to be a loss caused by a subsequent tort. From the restitutionary point of view, any unjust enrichment of the tortfeasor is measured by the amount of the liability discharged not by the amount of the premiums paid by the victim to the insurer.<sup>75</sup> Nor can one realistically say that the value of the collateral benefit is the insurance pay-outs net of the two-years' premiums paid. Aside from the lack of a justification in theory, there are practical problems with this reform suggestion. First it is not at all clear how damages under this head should be quantified, especially in relation to collateral benefits for which payment may have been in kind, such as sick pay. Secondly the plaintiff's entitlement would conflict with any right to recover the value of the collateral benefit which the provider might have, as the tortfeasor could not be held responsible for reimbursing both the collateral benefit and the payments made to secure it.

***(d) The “provider’s intentions” argument***

- 4.47 Again it might be thought axiomatic that the provider's intentions to benefit the victim and not to relieve the tortfeasor should be respected. And one way of achieving this is to ignore the collateral benefit in assessing damages. Nevertheless, counter-arguments can be posited. First, in many cases - even of insurance payments or charitable payments - the provider of the collateral benefit will have no intention with regard to the tortfeasor. Secondly, to say that the third party did not intend to relieve the tortfeasor is not in itself a justification for the victim's double recovery unless the provider also intended that double recovery.<sup>76</sup> Thirdly, if as seems likely one cannot avoid using an element of hindsight in ascertaining the provider's intentions, the provider's intention not to relieve the tortfeasor would be a good argument for ignoring all collateral benefits (including, for example, sick pay).
- 4.48 What if the third party can establish that it did intend the victim's double recovery (that is, that the payment should be in addition to tort damages)? We shall be

<sup>74</sup> *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991), ch 6, p 176-182 and see above paras 3.63-3.70.

<sup>75</sup> We deal later with the argument that the tortfeasor is unjustly enriched by the payment of the collateral benefit itself to the tort victim. See paras 5.4-5.6 below.

<sup>76</sup> See discussion in eg P Cane *Accidents, Compensation and the Law* (5th ed 1993) p 324, where he says "...donors sometimes intend the beneficiaries to receive some benefit in addition to their legal claims, and this may be a good reason for refusing to deduct the value of such donations from tort damages. On the other hand, most charitable donors probably give no thought to the question of whether the beneficiaries have legal compensation rights."; also H McGregor, "Compensation Versus Punishment in Damages Awards" [1965] MLR 629, 637, "But although the third party did intend to come to the aid of the plaintiff, can it emphatically be said that he intended him to have double recovery?"; J Fleming "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, pp 12-14; A S Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) pp 125-126.

seeking consultees' views on this issue.<sup>77</sup> Suffice it to say here that, if in general one considers that principle and policy favour deduction, one may not be willing to allow the third party's intentions to override the "compensation equals deduction" approach. That is, just as one would not allow a party's intention to override other principles applied in the assessment of damages<sup>78</sup> so one can argue that it should not be for third parties to subvert the nature of tort damages by insisting on double recovery.

- 4.49 It is clear however, that only collateral benefits which meet the same loss as tort damages should be deducted. The intention of the provider must be relevant in establishing whether or not a particular payment is analogous to tort damages. To this extent at least, the approach in jurisdictions where the appropriate treatment of a collateral benefit hinges on the purpose of the payment, notably Australia, must be correct<sup>79</sup> (albeit that one may not agree with the specific approach in other jurisdictions whereby the purpose of a payment can be defined by a provider's intentions that if tort damages are recovered they should be received in addition to the collateral benefit).<sup>80</sup>

<sup>77</sup> See paras 4.91-4.94 below.

<sup>78</sup> Eg an agreed damages clause is void as a penalty if it does not represent a genuine pre-estimate of loss.

<sup>79</sup> See paras 3.96-3.105 above, and in particular the classic exposition of this position in *National Insurance Co of New Zealand Ltd v Espagne* (1960) 105 CLR 569, 573 *per* Dixon CJ: "There are certain special services, aids, benefits, subventions and the like which in most communities are available to injured people. Simple examples are hospital and pharmaceutical benefits which lighten the monetary burden of illness. If the injured plaintiff has availed himself of these, he cannot establish or calculate his damages on the footing that he did not do so. On the other hand there may be advantages which accrue to the injured plaintiff, whether as a result of legislation or of contract or of benevolence, which have an additional characteristic. It may be true that they are conferred because he is intended to enjoy them in the events which have happened. Yet they have this distinguishing characteristic, namely they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him" and 599-600 *per* Windeyer J: "So far as any rules can be extracted I think they may be stated generally speaking, as follows: In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages. The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause."

<sup>80</sup> In this respect, intention is being used to define the tort damages, not to define the collateral benefit.

***(e) Conclusion on the policy arguments put for non-deduction.***

4.50 We recognise the force of Lord Reid’s policy reasoning for not deducting some collateral benefits. His reasoning has great intuitive appeal and has been taken up and applied by other great judges both here and elsewhere in the Commonwealth. Nevertheless we have sought to show that it is open to debate whether those policy arguments withstand close scrutiny. We suspect that the stance taken by consultees on this specific debate will largely determine which (if any) of the six options for reform (set out later in this paper) they prefer. The pivotal importance of the policy arguments put by Lord Reid for non-deduction cannot, therefore, be overstated.

**(4) General Conclusion**

4.51 It follows from the above three strands of argument- that the “compensatory principle” dictated by “corrective justice” dictates deduction,<sup>81</sup> that empirical evidence of the workings of the tort system can be seen as supporting deduction,<sup>82</sup> and that it is open for debate whether the policy arguments put for non-deduction of some collateral benefits withstand close scrutiny<sup>83</sup> - that there is a case for accepting (and we put it no higher than that) the following proposition: -

**Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the victim in the event of a successful tort claim, or to recover the value of the benefit from the tortfeasor by being subrogated to the victim’s undischarged tort claim, collateral benefits, unless essentially coincidental,<sup>84</sup> received by the victims of personal injury should be deducted from damages which meet the same loss. This is what we term “the proposition underpinning the deduction options”. We ask consultees whether they agree or disagree with that proposition. We would be particularly interested to hear views on our discussion of the policy arguments for non-deduction in paragraphs 4.30-4.50 above.**

**3. THE TWO DEDUCTION OPTIONS**

4.52 The two deduction options that we are about to consider are linked in that they flow from an acceptance of the above “proposition underpinning the deduction options”.

4.53 The “proposition underpinning the deduction options” relies on the notion that a collateral benefit meets the same loss as damages. Plainly it does not infringe the “compensatory” principle to ignore collateral benefits that compensate a different loss than damages. To take account of such benefits would be unfair to the tort victim as it would not be deducting like from like. Moreover, if a collateral benefit is intended to cover a particular loss, it should only be deducted from damages for that particular loss and not from the total damages awarded. Deduction of a

<sup>81</sup> See paras 4.5-4.20 above.

<sup>82</sup> See paras 4.21-4.29 above.

<sup>83</sup> See paras 4.30-4.50 above.

<sup>84</sup> See para 2.2 above.

collateral benefit intended only to meet one head of loss from others would leave the plaintiff undercompensated for those other heads of loss.<sup>85</sup>

- 4.54 In examining the options for reform which flow from the “proposition underpinning the deduction options”, it follows that one must decide whether each type of collateral benefit is concerned to compensate the same loss as tort damages and, if so, whether it is concerned to compensate a particular loss only.<sup>86</sup> We shall do this in relation to each main type of (private) collateral benefit in turn. In our view, this examination leads to two possible deduction options, the only difference between them turning on one’s approach to charitable payments, which we shall consider last.

**(1) Does the collateral benefit meet the same loss as tort damages?**

***(a) What is insurance for?***

- 4.55 There are three main types of insurance which may be relevant. These are personal accident insurance, permanent health insurance and medical expenses insurance.<sup>87</sup> The question is whether or not payments under these policies are to meet the same loss as tort damages.
- 4.56 In the case of permanent health insurance and medical insurance it is obvious that they meet the same loss as tort damages. Permanent health insurance provides cover for loss of earnings in the event of ill-health, whether caused by an accident or otherwise. The proportion of earnings covered varies between policies, although 100 per cent cover is unheard of, because this might be a disincentive to returning to work. If a claimant is unable to resume work the payments typically continue until retirement. Our understanding is that much of this type of insurance is purchased by employers to benefit their employees. As we have seen, it is not entirely clear if the rule that insurance is ignored applies to all insurance, whether or not the plaintiff actually paid for it.<sup>88</sup> However, *Page v Sheerness Steel PLC*<sup>89</sup> suggests that in respect of permanent health insurance, provided the employee has not paid him or herself for the policy, payments will be deducted from damages for loss of earnings.
- 4.57 Medical expenses insurance provides cover for private medical treatment, whether this is needed as a result of an accident or otherwise. Unlike permanent health

<sup>85</sup> It was one of the central objections to the recoupment scheme for social security benefits contained in the Social Security Administration Act 1992, that social security benefits were deducted from the total award of damages, leaving the plaintiff undercompensated for those heads of loss to which the benefits did not relate, in particular non-pecuniary loss. See Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, para 43. See now the Social Security (Recovery of Benefits) Act 1997, which alters the recoupment scheme to meet this objection. (See paras 1.6 n 7 & 2.71-2.72 above).

<sup>86</sup> We should make clear that whenever we refer to a collateral benefit, we mean the net sum received by the tort victim after deduction of any tax due.

<sup>87</sup> Consideration of life insurance does not arise, because it would only be relevant in the case of a fatal accident, which will be dealt with in a separate paper.

<sup>88</sup> See paras 2.17 and 2.104 above.

<sup>89</sup> [1996] PIQR Q26 (first instance) and [1997] 1 WLR 652 (CA) and see paras 2.25 & 2.26 above.

insurance, medical expenses insurance provides only short-term cover. In other words the insurer is liable to cover medical expenses for the duration of the policy (which is likely to be issued yearly) and not until the expenses cease.

- 4.58 Our understanding is that most claims on medical expenses insurance policies are made in respect of elective treatments, and not for treatment following an accident. Certainly accident and emergency services are not generally available privately. Also, most policies give the insured the option of receiving NHS treatment together with a cash payment from the insurer, instead of opting for private treatment at the insurers' expense.
- 4.59 It is clear that where an insurance payment meets medical costs occasioned by a tort, the payment is identical to tort damages for medical expenses. It is harder to categorise cash payments by a medical insurer which do not go to meet a specific medical expenses. Similarly, personal accident policies usually provide for specified but undefined lump sums to be paid in the event of death or injury, although they may also provide for periodic payments because of disablement causing pecuniary loss.<sup>90</sup> The question is whether these payments are comparable to tort damages at large.
- 4.60 It is possible to argue that insurance payments that are not related to particular losses are intended to compensate for losses not yet recognised by tort law; or that in any event they are intended to cover non-pecuniary loss which can never be excessive because quantification is imprecise and there is no objectively correct amount of compensation.<sup>91</sup> On the other hand one can say that tort damages are calculated on the basis that they provide full reparation. Although there are rare exceptions (eg divorce losses) it is unrealistic to imagine that insurance payments are to cover such exceptional losses rather than the primary losses, compensated by tort damages, suffered by the victim.<sup>92</sup> Similarly the quantification of non-pecuniary loss nowadays aims to achieve a measure of consistency according to a well-recognised tariff of values. Applying that tariff of values, an injured person who is entitled to keep an insurance payment on top of a full award for pain, suffering and loss of amenity is receiving "too much" compensation. If the scale of

<sup>90</sup> E R Hardy Ivamy, "Insurance", *Halsbury's Laws of England* (4th ed Reissue, 1994) pp 328-329.

<sup>91</sup> Hence different jurisdictions have different levels of damages.

<sup>92</sup> P Cane *Accidents, Compensation and the Law* (5th ed 1993) pp 323-324. Cane says "...much depends on what the compensation is for. If it is intended to replace something (like a lost income) with a measurable financial value, then there can be little justification for paying compensation more than once from more than one source. If, on the other hand, the compensation is for something with no measurable financial value such as pain and suffering, the argument against paying compensation from more than one source is less strong. Because nobody can say what value we should put on pain and suffering, it cannot be said that a person has been over-compensated by receiving money from more than one source. This argument also appealed to the dissenting minority on the Monckton Committee, who thought that full tort damages and social security payments should be payable to accident victims because compensation for disabilities could never be excessive. However, the argument is not very convincing, particularly because the assessment of what is an appropriate sum to pay for the disability is arrived at independently by each compensation system on the assumption that this sum will be the only compensation payable."

values for non-pecuniary loss is too low that should be addressed directly - we have examined this issue in our Consultation Paper on Damages for Personal Injury: Non-Pecuniary Loss<sup>93</sup> - and does not justify random overcompensation. This is not to deny that if an insurance payment is plainly intended to meet a particular type of loss the payment should be deducted only from damages for that head of loss.

***(b) What is sick pay for?***

- 4.61 This question poses no real difficulty. It is quite clear that sick pay,<sup>94</sup> whether contractual or voluntary, is intended to cover a loss of earnings. It therefore duplicates damages awarded for loss of earnings.

***(c) What are disablement pensions for?***

- 4.62 We should make clear, in the light of *Longden v British Coal Corporation*,<sup>95</sup> that by disablement pension we mean any pension received as a result of ill-health retirement up until normal retirement age or when the plaintiff would in any event have retired, whichever is the earlier. After that time we consider so-called pension receipts to be better labelled and viewed as retirement pensions, which we deal with in the next section.
- 4.63 Lord Pearce and Lord Wilberforce's second ground for their decision in *Parry v Cleaver*<sup>96</sup> relied on the idea that disablement pensions are not compensation for lost earnings because the plaintiff would not lose the pension if he or she received other earnings. The former said:

...one of the aspects of a Service pension, and even more so of a policeman's pension, is that they are not intended necessarily as any substitute for the capacity to earn. The familiar pattern is that a man may earn in a civilian employment when his service ends (whether prematurely or not) and thus enjoy both his pension and his civilian wage. His pension is thus a personal benefit additional to anything that he may be able to earn by way of wages. In this case the plaintiff would from the age of 48 be receiving his full pension as well as earning civilian wages.<sup>97</sup>

The latter said:

<sup>93</sup> (1995) Consultation Paper No 140.

<sup>94</sup> As payments by employers at times seem to straddle different categories of collateral benefits, namely sick pay, benevolence and insurance, there will be cases in which the category a payment falls into will be a factual issue to be resolved. In contrast to the present law, where resolution of this question may determine the difference between deduction and non-deduction, under option one (see below para 4.80) this issue will only matter where on the figures it makes a difference if the payment is deducted from loss of earnings only, or from the damages at large. One suggestion for distinguishing charitable payments by employers is to apply the Inland Revenue test for an "emolument of employment", see *Halsbury's Laws* (4th ed) vol 23 (reissue), para 658.

<sup>95</sup> [1995] ICR 957

<sup>96</sup> [1970] AC 1.

<sup>97</sup> *Ibid*, 38-39.

The appellant's pension, called an "ill-health award" is payable, under the Police Pensions Regulations, to a regular policeman who retires from the force on the ground that he is or was permanently disabled. He must, if he is to receive a pension, reckon at least ten years' pensionable service, and must have been disabled as the result of an injury received in the execution of duty. Disablement, in this context, must mean disablement which prevents him from continuing to work as a policeman, and it must often be the case, and be contemplated, that such disablement does not prevent him taking other paid employment. This may be for a wage which falls short of, equals, or exceeds his former policeman's pay, but there is nothing, in any of these events, to prevent him from drawing both his new wage and his pension. If, therefore, his earning capacity is reduced by his injury, there would seem no good reason why he should not recover damages for any loss of earning capacity as well as receiving his pension. This line of argument is consistent with, and supported by, that view of the matter which, I think rightly, regards the pension as representing the earnings, or reward of past saving, to the extent of his own contribution and his past service, as to the rest.<sup>98</sup>

- 4.64 An initial point to make is that whether or not this contention can be made depends on the terms of the disablement pension. While some schemes will be like the police pension in *Parry v Cleaver*,<sup>99</sup> others will provide for reduction of the disablement pension on receipt of earnings over a threshold. In those cases the disablement pension cannot be anything but compensation for lost earnings.
- 4.65 The central and difficult question is whether, in a factual situation like that in *Parry v Cleaver*,<sup>100</sup> it is correct to say that disablement pensions are not compensation for lost earnings.<sup>101</sup> We suspect that most people would be surprised to be told that a disablement pension, in the sense of a pension received until retirement age because a person was forced to leave their usual work owing to ill-health, was not meant to meet income loss,<sup>102</sup> even if some of the pension was in the form of a lump sum.<sup>103</sup> Furthermore, pensions, and particularly disablement

<sup>98</sup> *Ibid*, 42.

<sup>99</sup> [1970] AC 1.

<sup>100</sup> *Ibid*.

<sup>101</sup> See P S Atiyah "Collateral Benefits Again" [1969] MLR 397, 404 for discussion of this point.

<sup>102</sup> See Lord Morris, dissenting in *Parry v Cleaver* [1970] AC 1, 32, when he said: "If, under the terms of a contract of employment the time comes when instead of having full pay or half pay or sick pay a person retires with a pension, the loss which he suffers is the difference between the amount of his pay and the amount of his pension. If it is said that a pension is neither pay nor insurance benefit, then I would say that where there is no discretionary element, and where the arrangements leading to a pension are an essential part of the contract of employment, then the pension payments are very much more akin to pay than to anything else. Indeed it is often asserted that a pension is a form of deferred pay and is taken into account in fixing remuneration. A man would measure his loss by comparing what he used to get under his contract with what he now gets under his contract. That is the financial loss that he has suffered. That is the loss which the defendant should make good."

<sup>103</sup> See for example *Smoker v LFCDA* [1991] 2 AC 502, 509.

pensions, are generally so much lower than pre retirement earnings, that it would be rare for a person to exceed their pre-retirement income despite their disability, particularly given levels of unemployment. Professor Genn's research for us bears out this observation.<sup>104</sup>

- 4.66 In our view, therefore, disablement pension is compensation for lost earnings, even where the recipient can earn without forfeiting the pension.<sup>105</sup> The disablement pension is unlikely fully to replace earnings lost as a result of the injury. Equally the likelihood of a retirement job causing previous earnings to be exceeded is very slight, particularly in view of the victim's retirement on grounds of ill-health. Hence other earnings are likely merely to "top-up" the pension.
- 4.67 There is an issue which arises in relation to disablement pension, and to a much lesser degree retirement pensions, which is that there may be an option to commute a part of the pension into a lump sum. If deduction is favoured, it may still be thought unfair to deduct the whole lump sum in the same way as relevant periodical payments, because the lump sum is a capitalisation of a stream of income payments. Also those who chose not to take the lump sum would be in a better position to those who did not. There are several ways this could be dealt with. One would be to ignore the lump sum. Another would be to apportion it into pre and post retirement elements on the basis of the plaintiff's life expectancy.

***(d) What are retirement pensions for?***

- 4.68 Assuming that a retirement pension is a collateral benefit (that is, that the plaintiff would not have received it at that time, but for the actionable personal injury, because he or she had intended to defer retirement beyond normal retirement age) what head of damages, if any, does it duplicate?
- 4.69 It seems clear that retirement pensions are to meet income loss which results from stopping work. They fulfil the same function for retired people as earnings do for those in work. Therefore, by definition they are to meet the same loss as damages for loss of earnings.
- 4.70 However, there are investment elements to retirement pensions. It would be unlikely for there to be a provision limiting other income which might be earned without forfeiting the pension. Part of the pension might well be mandatorily or optionally payable as a lump sum. The question is whether the investment aspects of the retirement pension are so significant that retirement pension should not be seen as income replacement but as savings.

<sup>104</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, pp 263-264.

<sup>105</sup> If it is concluded that disablement pension is comparable to compensation for loss of earnings and should be deducted from damages for that head of loss, the question whether pension receipts pre normal retirement age should be deducted from loss of pension rights does not arise, as it would be wrong to double-deduct. Accordingly the controversy addressed by *Longden v British Coal Corporation* does not need to be resolved. However see J James Rowley "A Guide to Pension Loss Calculation" [1995] JPIL 107, 115-120 for discussion of the comparability of early receipts of pension to damages for loss of pension rights.

4.71 We think not. There is no certainty that a person will reach retirement age and therefore receive their retirement pension. In our view that a contributor cannot be sure of receiving any return on his or her contributions indicates conclusively that the investment elements of retirement pensions are not sufficient to override their primary function of providing an income in retirement.<sup>106</sup>

4.72 It is important to make clear that it is only where the retirement pension is a collateral benefit, that it should be deducted from damages for loss of earnings. If the pension would have been in receipt in any event, this is not the case. A retirement pension will only be a collateral benefit when the plaintiff had intended to defer retirement, but because of the accident was forced to take the pension earlier than intended. The amount of the collateral benefit will be the payments from the date of actual retirement until the date that the plaintiff would otherwise have retired. After that time there may be a claim for loss of pension rights, and, of course the pension in receipt would be relevant to that.

***(e) What are redundancy payments for?***

4.73 We agree with the conclusion in *Colledge v Bass Mitchells & Butlers Ltd*<sup>107</sup> that redundancy payments should be deducted from damages for loss of earnings, where but for the injury the victim would not have been made redundant. Although it may be difficult to pin down precisely what a redundancy payment is for,<sup>108</sup> it is at least closely analogous to compensation for future loss of earnings.<sup>109</sup>

***(f) What are charitable payments for?***<sup>110</sup>

4.74 It is possible to argue that charitable payments are intended to cover loss not recognised by tort damages or that, in any event, they are intended to cover non-pecuniary loss which can never be excessive because quantification is imprecise.<sup>111</sup>

<sup>106</sup> Retirement pension is also, of course, taken into account in the calculation of lost retirement pension (known as loss of pension rights). See paras 2.45 above. However, as we have seen (paras 2.53-2.61 above), *West v Versil Ltd and Others*, *The Times* 31 August 1996 raises questions about entitlement to damages for loss of pension rights, where it is the plaintiff who has exercised options which have led to a lower pension, even if the plaintiff has acted reasonably.

<sup>107</sup> [1988] 1 All ER 536.

<sup>108</sup> See at para 3.17 above the fine distinction made by the Scottish Law Commission's in saying that redundancy payments are compensation for the disruption involved in a change of employment, rather than compensation for loss of earnings, (1978) Scot Law Com No 51, paras 85-7.

<sup>109</sup> See *Mairs (Inspector of Taxes) v Haughey* [1994] 1 AC 303 in which Lord Woolf, on behalf of the House of Lords, discussed the nature of a redundancy payment. He said it had an element of compensating or relieving an employee for the consequences of not being able to continue to earn a living in his or her former employment, but was distinct from compensation for unlawful termination of employment and from deferred payment of wages.

<sup>110</sup> In the case of a gift in kind the question what it is for does not give rise to difficulty, because it will be obvious if it is to meet a loss for which tort damages would otherwise be payable and hence deductible.

<sup>111</sup> See P S Atiyah "Collateral Benefits Again" [1969] MLR 397, 404 where he says "We have suggested that it is easier to justify compensating a person more than once for these unmeasurable losses simply because it is impossible to prove that he is receiving "too

We have doubts about those arguments for the same reasons as we had doubts about them in relation to insurance payments.<sup>112</sup>

- 4.75 On the other hand, the further argument may be made that it is incorrect to regard a charitable donor as having an intention to meet any loss at all. Rather charitable payments are intended simply to express the donor's concern and sympathy. An analogy is where a person has died and mourners send flowers, make donations to charity or erect a memorial. Professor John Fleming put this argument as follows:

...gifts for an accident-victim are bestowed, not to cover his losses, but to console him or to express the donor's sympathy. Thus ordinarily it is quite alien to our way of thinking to inquire whether such gifts do or do not exceed the injury.<sup>113</sup>

- 4.76 On this analysis of a donor's intentions, a donor who knew full well that a victim would receive full compensation for all his or her losses would still wish the victim to have the charitable payment because his or her purpose in providing it was not to alleviate any loss.
- 4.77 A counter-argument is that this is simply an unrealistic and fictional assessment of a donor's intentions. One can rarely be sure of a donor's unexpressed intentions but the natural assumption would be that, where a payment is made to the victim, it is intended to meet the victim's non-pecuniary or pecuniary loss. The fact that the motive of the donor is to express his or her concern and sympathy is not inconsistent with saying that his or her intention is to meet the victim's loss.
- 4.78 We are also mindful that while different donors have different intentions it would be invidious to require an investigation of the particular donor's intentions in each case. It seems to us therefore that one could either assume that all charitable payments are to meet the same loss as tort damages (albeit that the donor may make clear which sort of loss he or she is concerned with) or one could assume that all charitable payments are not intended to meet the same loss as tort damages. These two approaches mark the difference between the two deduction options which we are now in a position to set out.

### ***(g) Conclusion***

- 4.79 Having examined whether the different types of (private) collateral benefit are to meet the same loss as tort damages, we can now set out the two deduction options on which we invite the views of consultees.

much," but even if it cannot be shown that a plaintiff is getting "too much," the question of priorities must not be forgotten. It is surely not justifiable to give compensation three times over to one disabled person for his loss of faculty, while denying any compensation for loss of faculty to many others similarly afflicted."

<sup>112</sup> See para 4.60 above.

<sup>113</sup> He noted however, that the charity may also not have intended cumulation by the plaintiff, so that "it would certainly be more conformable to the indemnitory ideal, and probably to the thinking of the donor if the gift were returned to him in case of a successful tort recovery" "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) Vol XI, Chapter 11, p 12-14; also J Fleming, *The Law of Torts* (8th ed 1992), p 245.

**(2) Option One**

4.80 **(a) Subject to the provisos set out in (c) and (d) below, charitable payments and insurance payments made in response to personal injury should be deducted from the total sum of damages for personal injury.**

**(b) Subject to the provisos set out in (c) and (d) below, sick pay, disablement pension payments, retirement pension payments<sup>114</sup> and redundancy payments made in response to personal injury should be deducted from personal injury damages for loss of earnings. In the case of sick pay and redundancy payments this merely restates the present law.**

**(c) A first proviso to (a) and (b) above is that where a collateral benefit is expressed to be on account of a particular loss it should be deducted only from damages for that loss.**

**(d) A second proviso to (a) and (b) above is that where the provider of the collateral benefit has a right (by contract or by operation of law) to recover the value of the benefit from the victim in the event of the victim recovering damages for the personal injury, or to recover the value of the benefit from the tortfeasor by being subrogated to the victim's undischarged tort claim, the collateral benefit should not be deducted from the damages.**

**We ask consultees whether they favour this option.**

4.81 The proviso contained in (d) above would mean that the main change from the present law in relation to insurance payments would be that personal accident insurance payments would be deducted from tort damages: indemnity insurance would continue to be ignored,<sup>115</sup> because the indemnity insurer has the right "to recover the value of the benefit from the tortfeasor by being subrogated to the victim's undischarged tort claim".<sup>116</sup> We should add that, if personal accident insurance payments are to be deducted, we consider that it should be the full amount of the payments that is deducted. **Nevertheless we would welcome the views of consultees as to whether, if insurance payments are to be deducted, they should be deducted net of insurance premiums for the two years prior to the accident, on the model suggested by the American Law Institute (which we have discussed at paragraphs 4.45-4.46 above).**

4.82 Before leaving option one, we wish to say something briefly about other collateral benefits. The "proposition underpinning the deduction options" would apply equally to them. The main category of "other" collateral benefits is social security benefits. As we mentioned above,<sup>117</sup> almost all social security benefits paid to

<sup>114</sup> So far as these are collateral benefits. See para 4.72 above. For the treatment of state retirement pensions, see para 4.84 below.

<sup>115</sup> Unless one were also to reform the law by removing an indemnity insurers' automatic subrogation rights see paras 5.27-5.31 below.

<sup>116</sup> An exception to this would be where a defendant-employer has taken out permanent health insurance for the victim-employee.

<sup>117</sup> See paras 1.6 n 7 & 2.71-2.72 above.

personal injury victims who successfully claim tort damages are recouped by the state pursuant to the Social Security Administration Act 1992 (or once it is brought into force, the new Social Security (Recovery of Benefits) Act 1997). While reform of the statutory recoupment scheme is outside our terms of reference<sup>118</sup> we are bound to make the point that, if one applies the “proposition underpinning the deductions options” it would follow that deduction of social security benefits covered by the recoupment provisions from damages for the same loss should not be limited to 5 years, as section 81 of the 1992 Act (and section 3 of the 1997 Act) provides.

**4.83 Although at this stage outside our terms of reference, it would be helpful for us to know whether consultees consider that social security benefits (within the recoupment scheme) to be awarded after five years should be deducted from tort damages to meet the same loss.**

4.84 As regards social security benefits excluded from recoupment (for example, invalid care allowance) the “proposition underpinning the deduction options” would mean that the social security benefit should be deducted from damages which meet the same loss. This would be in line with the House of Lords decision in *Hodgson v Trapp*.<sup>119</sup> In respect of state retirement pension, in the unusual cases where it is a collateral benefit, it should be deducted from damages for loss of earnings, contrary to *Hewson v Downs*.<sup>120</sup>

### **(3) Option Two**

4.85 This is the same as option one except that charitable payments would continue to be ignored in the assessment of damages. This exception would be best rationalised on the basis as examined in paragraphs 4.75-4.78 above, that charitable payments do not meet loss; or, at least, that sometimes they do not and that, to avoid investigation of an individual donor’s intentions, it is preferable to assume that all charitable payments do not meet loss and should therefore be ignored.

4.86 We should add in favour of this option that non-deduction of charitable payments (and other gifts) is practically universal in the other jurisdictions we have studied. It is particularly noteworthy that in France and Germany, where double recovery is generally rigorously avoided, gifts are nevertheless ignored and the benefactor is not given a subrogation right.

4.87 This option would, however, mean that the distinction between charitable payments and other types of collateral benefit would be crucial. Yet, as we have seen in the context of payments by employers,<sup>121</sup> it can be difficult to tell if a payment is charitable or for some other purpose.

<sup>118</sup> See para 1.7 above.

<sup>119</sup> [1989] AC 807. See paras 2.76-2.82 above.

<sup>120</sup> [1970] 1 QB 73. See para 2.42 above.

<sup>121</sup> See para 4.61 n 94 above.

- 4.88 It is also a matter for debate if a distinction should be made under this option between charitable payments by third parties (to be ignored) and charitable payments by the tortfeasor (to be deducted). That distinction has been drawn in some other jurisdictions, and there is some support for it in the case law in this country.<sup>122</sup> If, however, the best rationale for ignoring charitable payments in the calculation of damages is that they are not made to meet loss, this justifies ignoring the payment whoever has made it. On the other hand, it might be argued - but see our discussion of the “incentive argument” above - that nevertheless charitable payments by tortfeasors should be deducted from damages because otherwise this sort of charity would be discouraged.
- 4.89 **We ask consultees whether they would favour the option of reforming the law, as set out in paragraph 4.80 above, except that charitable payments would continue to be ignored in the assessment of damages.**

#### **4. FOUR OTHER OPTIONS**

- 4.90 The two deduction options so far considered flow from accepting what we termed, in paragraph 4.4 above, “the proposition underpinning the deduction options”. We have already asked consultees for their views on that argument and, in particular, on our discussion of the policy arguments for non-deduction in paragraphs 4.30-4.50 above. We anticipate that the four other options that we are about to consider will be of appeal only to those consultees who have rejected the “proposition underpinning the deduction options.” We would also anticipate that which, if any, of these options will be thought appealing, will turn on one’s view on the policy arguments put for non-deduction discussed in paragraphs 4.30-4.50 above.

##### **(1) Option Three – Deduction of Collateral Benefits Except Where the Provider Intended Them to be in Addition to Tort Damages**

- 4.91 In considering the policy arguments for non-deduction in paragraphs 4.30-4.50 above, we pointed out that it is arguable that, even if the third party did intend that the payment should be in addition to any tort damages, that intention should not override the “compensatory principle”. But one could also reasonably take the opposite view and argue that respect for the provider’s intentions requires one to ignore, in assessing tort damages, a collateral benefit that was intended to be in addition to tort damages.
- 4.92 The effect of adopting this option would be that the courts would be required to ignore, for example, a charitable payment or an insurance payment or sick pay where the court was satisfied that the provider intended the payment to be in addition to any tort damages.
- 4.93 Apart from the view that to respect the provider’s intentions undermines the arguments of principle and policy for not permitting double recovery explored in paragraphs 4.5-4.29 above, a difficulty with this option might be that the law would continue to be left in an uncertain state. That is, unless the provider’s intentions were expressed, it would be difficult to determine whether the provider had such an intention. Indeed one might take the view that, unless expressed, a

<sup>122</sup> See paras 2.13-2.14, 3.5-3.7, 3.73 & 3.98 above.

search for intention would be an entirely artificial exercise. On the other hand, it might be thought realistic to rely on a rebuttable presumption that, with regard to certain types of benefit (for example, charitable payments or insurance payments) the provider intended them to be in addition to tort damages (subject to a clear indication to the contrary); or conversely to rely on a rebuttable presumption that the provider did not intend the benefit to be in addition to tort damages unless the contrary intention was expressed.

- 4.94 **We ask consultees whether they would favour this option according to which option 1 or 2 above (and consultees should say which they prefer) would be qualified, and a collateral benefit ignored, where the provider intended it to be in addition to any tort damages. We would particularly welcome consultees' views as to whether adoption of this option would create unacceptable uncertainty or whether any uncertainty could be effectively overcome by the use of rebuttable presumptions of intention.**

#### **(2) Option Four - Reversal of the Rule on Disablement Pensions Only**

- 4.95 According to this option the law would remain as it is, except that disablement pensions,<sup>123</sup> would be deducted from damages for loss of earnings (unless either the payments had been made on account of a different head of loss, in which case they would be deducted only from damages for that loss, or the payments had been made conditionally or subject to a contractual repayment right, in which case they would be ignored).<sup>124</sup>
- 4.96 While, on one view, this option is too limited, adoption of it would have the merit of removing what appears to be the most striking inconsistency in the present law, namely that sick pay is deducted from damages whereas disablement pension is ignored.<sup>125</sup> It would entail acceptance that although disablement pensions have been paid for, they are to meet loss of earnings in the same way as sick pay, and should therefore be deducted from damages for loss of earnings. This option is based on the view that while the common law has largely adopted a satisfactory approach to the collateral benefits question - and, in particular, that benevolence and insurance should be ignored - the actual decision of the majority of the House of Lords in *Parry v Cleaver*<sup>126</sup> went the wrong way in ruling that the disablement pension was to be ignored. Those who favour this option may draw comfort from the fact that it is the option which, while achieving some worthwhile reform, comes closest to leaving the law to be developed by the judges in line with intuitively appealing reasoning that has held sway in this and most other jurisdictions.
- 4.97 **We ask consultees whether they would favour this option of reforming the law merely to the extent of ensuring that, like sick pay, disablement**

<sup>123</sup> In the sense of ill-health pensions up to the date of normal retirement. See para 2.29 n 68 above.

<sup>124</sup> These are the provisos (c) and (d) set out in para 4.80 above.

<sup>125</sup> See paras 2.104-2.109 above.

<sup>126</sup> [1970] AC 1.

**pensions would be deducted in assessing damages for loss of earnings (subject to the provisos (c) and (d) set out in paragraph 4.80).**

### **(3) Option Five – No Deduction**

4.98 This is the diametrically-opposed option to option one. According to this option one would ignore all collateral benefits. This is the position traditionally adopted in the United States.<sup>127</sup> In Ireland, too, practically all collateral benefits are ignored.<sup>128</sup> This is also the present position in English law in relation to collateral benefits in claims under the Fatal Accidents Act 1976.

4.99 A merit of this option would be that it would achieve consistency between collateral benefits and would render the law relatively simple and certain. On the other hand, it can be argued that this would be to take the law in the opposite direction to where it should be going. It would also require the startling conclusion that, for example, sick pay should be ignored in assessing damages. Although outside our immediate focus, followed logically through to state benefits, this option would require ignoring social security benefits contrary to legislative provisions applying in this country since 1948. Whatever one's stance on many of the other difficult arguments addressed earlier, we take the provisional view that to ignore collateral benefits is unacceptable as contradicting, without good reason, the justifiable compensatory aim of tort damages.

4.100 **Our provisional view is that we should reject this option of ignoring all collateral benefits in assessing tort damages. We ask consultees whether they agree.**

### **(4) Option Six – No Change**

4.101 A further (and very real) option is to make no statutory change to the present law. We have emphasised at various stages in this paper, how difficult we have found the issues raised. It may be argued from this that the present approach of the courts - whereby some collateral benefits are deducted and others (particularly, charitable payments and insurance payments) are ignored - represents as good a solution as any other to what is an intractable problem. One may also find convincing the influential arguments of policy put forward by Lord Reid in *Parry v Cleaver*<sup>129</sup> and discussed in paragraphs 4.30-4.50 above.

4.102 One might further argue that, in so far as there are improvements to be made, they are better made through common law developments rather than by statutory reform. In other words it may be thought that this is an area for which the flexibility of case-by-case decision-making is particularly useful. In retaining a common law solution we would also preserve links with the other common law jurisdictions.<sup>130</sup>

<sup>127</sup> See paras 3.46-3.70 above.

<sup>128</sup> See paras 3.25-3.35 above.

<sup>129</sup> [1970] AC 1.

<sup>130</sup> See generally Part III above.

- 4.103 On the other hand, we have seen that the present law contains many uncertainties and inconsistencies.<sup>131</sup> The law is complex and expensive appellate rulings are consistently required. Depending on one's views on the policy arguments involved, one may also regard the present law as being unfair. It may be argued therefore that some improvement by statute ought to be possible in accordance with the Law Commission's aim of making our law simpler, cheaper and fairer.
- 4.104 Indeed the continuing existence of so many uncertainties and inconsistencies in this area of the law may be seen as indicative that the common law is unable effectively to formulate a coherent body of rules to deal with collateral benefits. Here and elsewhere, those problems may even be multiplying, and at great cost particularly to litigants.<sup>132</sup> As courts are there to adjudicate on the issues between the parties before them, and not to undertake general reviews of the law, it can also be argued that they are not a decision-making forum in which appropriate account is likely to be taken of the wide-ranging policy issues relevant to collateral benefits.
- 4.105 **We ask consultees whether they would favour the option of rejecting statutory reform of the law on collateral benefits.**

<sup>131</sup> See para 2.104 above.

<sup>132</sup> See paras 2.94-2.113 and Part III above.

# **PART V**

## **CONSULTATION ISSUES AND OPTIONS FOR REFORM II: THE RIGHTS OF THE PROVIDER OF A COLLATERAL BENEFIT**

- 5.1 We have seen that under the present law the provider of the collateral benefit may have a right, by contract or by operation of law (that is, a restitutionary right), to recover the value of the benefit from the victim (in the event of the victim recovering damages) or from the tortfeasor by being subrogated to the victim's undischarged tort claim.
- 5.2 In this Part we look at several possible reforms of the rights of the providers of collateral benefits. We would welcome the views of consultees on the questions raised bearing in mind the need for a consistent approach to the options for reform in Part IV and to the questions raised in this Part.

### **1. SHOULD THE PROVIDER OF A “DEDUCTIBLE” COLLATERAL BENEFIT HAVE A NEW RIGHT TO RECOUP THE BENEFIT FROM THE TORTFEASOR?**

- 5.3 Where a collateral benefit is deducted (or, under a change in law, were to be) in assessing damages, should the provider have a right against the tortfeasor for having “discharged” the third party's liability? We consider this question in respect of all the specific benefits we have looked at, except for social security benefits, as the DSS recoupment scheme is outside our terms of reference.<sup>1</sup>

#### **(1) The argument of legal principle for a recoupment right**

- 5.4 A right of recoupment would be contrary to the principle that pure economic loss is not compensated in a negligence claim. However, the restitutionary principle of unjust enrichment arguably supports creation of a third party right to recover collateral benefits which meet a loss for which the tortfeasor would otherwise have been liable, where the third party acted under legal compulsion (or, possibly, necessity).<sup>2</sup>
- 5.5 As we have seen, in *Metropolitan Police District Receiver v Croydon Corp*<sup>3</sup> the Court of Appeal denied a restitutionary right for the recovery from the tortfeasor of payments of sick pay made to the victim pursuant to statutory obligation, because the tortfeasor's liability had not been discharged by the payments. In our view, with respect, this can be criticised as an over-technical approach. We tend to prefer the analysis of this issue by Slade J at first instance, for example when he said:

I have already held that the receiver, being compellable by law, has paid to Bowman £104 which he seeks to recover, and which the defendants were ultimately liable to pay, and that if Bowman had not

<sup>1</sup> See para 1.7 above.

<sup>2</sup> See para 2.91 above.

<sup>3</sup> [1957] 2 QB 154. See para 2.91 above.

received his wages from the receiver he could and would have recovered them from the defendants in the action which he brought in the Queen's Bench Division and he would have had his damages in that action increased by precisely £104. I am satisfied that the defendants are primarily liable to pay the £104 to Bowman because it is their negligence which has deprived the receiver of the whole of the consideration for this payment.<sup>4</sup>

- 5.6 In reality, as Slade J recognised, the tortfeasors had been relieved of part of their liability. On this view a tortfeasor is unjustly enriched at the expense of providers of collateral benefits who act under legal compulsion. Therefore prima facie employers who make contractual or statutory payments to tort victims should be given a restitutionary right to recover their outlay from the tortfeasor, as should insurers who make insurance payments to tort victims and those who provide pensions to tort victims. There is, however, no prima facie restitutionary case for a recoupment right for the providers of voluntary payments to tort victims, such as benevolence, as they do not act under legal compulsion.
- 5.7 A right of recoupment for providers of collateral benefits to meet losses resulting from a tort might be said to be analogous<sup>5</sup> to the NHS's right to recoup some of the costs of caring for road accident victims<sup>6</sup> and the DSS's right to recoup from tortfeasors social security benefits paid as a result of a tort.<sup>7</sup>

## **(2) The case against an automatic recoupment right**

- 5.8 The injustice which a restitutionary right of recoupment would be aimed at remedying would be that the collateral benefit provider who acts under legal compulsion (or, possibly, necessity) is forced to enrich the tortfeasor, when it is the latter who is primarily responsible for the sum paid.
- 5.9 However, in the case of collateral benefits to which the restitutionary argument of legal compulsion applies, namely contractual or statutory payments by employers, insurance and pensions, it may be that this injustice is adequately met by the possibility open to the third party of providing in their contract with the tort victim for repayment of the collateral benefit in the event of a successful tort claim by the victim (or indeed of making the payment conditional, which, in the event of the condition failing, would trigger a restitutionary right to repayment).
- 5.10 This is because these benefit providers receive consideration for agreeing to provide the benefits at issue and it is reasonable to expect them to consider repayment when they contract to provide the benefit. By definition these third parties are at least to some extent in the business of underwriting risk and

<sup>4</sup> [1956] 1 WLR 1113.

<sup>5</sup> An indemnity insurer's subrogation rights may in one sense be regarded as analogous but work on the different basis that, although the insurance payment is *not* deducted from tort damages and does not therefore discharge the tortfeasor's liability to the victim, the insurer is entitled to take over the victim's *live* rights. See paras 2.89-2.90.

<sup>6</sup> Road Traffic Act 1988, ss 157-158.

<sup>7</sup> Social Security Administration Act 1992, Part IV (but see the Social Security (Recovery of Benefits) Act 1997); See para 1.6 n 7 and paras 2.71-2.72 above.

therefore alive to the ramifications of so doing, including the possibility that another may be concurrently liable for the same loss.<sup>8</sup> If contractual provision for repayment is not made (or the payment is not made conditionally) this can be reflected in the charge made to assume the risk, or, in the case of employers, in the amount of risk underwritten.

- 5.11 The possibility of contracting for repayment also indicates a weakness in drawing an analogy between, on the one hand the NHS and the DSS and, on the other hand, employers and insurers. The NHS and the DSS do not bargain to undertake risk. Indeed contractual arrangements for repayment would be seen as undesirable and anomalous.<sup>9</sup>
- 5.12 In contrast, it may be that one could not reasonably expect the providers of charitable payments to provide for a right of repayment; and although such payments are not made under legal compulsion, it may be that a charitable donor could argue that the payment has been made under necessity and that that is sufficient in principle to justify recoupment from the tortfeasor.<sup>10</sup>

### **(3) Conclusion on principle**

- 5.13 We regard the argument of principle for and against an automatic recoupment right to be finely-balanced. While we see the force of the “unjust enrichment” argument for overruling *Metropolitan Police District Receiver v Croydon Corp*,<sup>11</sup> we also acknowledge (with the possible exception of charitable payments) that any “injustice” is weakened by the third party’s right to provide contractually for repayment of the collateral benefit (or by rendering the benefit conditionally).

### **(4) Policy issues**

- 5.14 Given that the argument of principle is finely-balanced, it follows that general policy considerations are crucial in determining whether there should be an automatic recoupment right.
- 5.15 There is a real question whether there would be any practical point in reforming the law in this way. Examination of the position in France and Germany is relevant here. In those jurisdictions, as we have seen, providers of collateral benefits have extensive subrogation rights. More importantly they enforce these rights, but largely by means of bulk recovery agreements. In other words liability insurers agree to pay a percentage of all claims by providers of collateral benefits, because securing an agreement in advance about the extent of the insurers’ liability saves the cost of litigating individual cases. Consequently the full burden of

<sup>8</sup> In the case of employers this is not their central business, but it is a corollary of employment contracts which provide fringe benefits.

<sup>9</sup> On the recoupment from the tortfeasor by the NHS of the cost of caring for tortfeasors, see generally our consultation paper, *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, paras 3.19-3.42.

<sup>10</sup> For necessity as a factor, alongside legal compulsion, grounding restitution where another’s liability is discharged see *Owen v Tate* [1976] QB 402; *The Zuhal K* [1987] 1 Lloyd’s Rep 151. See para 2.91 n 163.

<sup>11</sup> [1957] 2 QB 154.

compensating successful tort victims is put on liability insurers at a lower cost than individual subrogation claims would entail.

- 5.16 This is a possible model for reform in this country. Indeed the DSS recoupment scheme, although not based on the grant of subrogation rights, has a similar effect; that is, to ensure that the cost of social security to successful tort victims is met by liability insurers at minimal administrative expense.
- 5.17 It is, however, hard to predict how this type of reform would work in relation to non-state collateral benefits. We adverted briefly above to the present practice of providers of collateral benefits in respect of providing for recovery of their payments.<sup>12</sup> In our view it is significant that only patchy use is made of the means for repayment of collateral benefits which the present law already provides. This suggests that if the law were changed to provide for deduction of collateral benefits and if third parties were given a new recoupment right, again the probability is that that there would be little change to present practices.<sup>13</sup>
- 5.18 Even if providers of collateral benefits would enforce a new automatic recoupment right, there are still policy reasons which can be put against this option for reform.<sup>14</sup>
- 5.19 First, the transaction costs of allocating tort liability for personal injury are already very high<sup>15</sup> and are borne by large groups in society.<sup>16</sup> A recoupment right for third party providers of collateral benefits which was enforced<sup>17</sup> would increase costs still further.<sup>18</sup> Bulk recovery agreements of the French and German type might

<sup>12</sup> See paras 2.87-2.88.

<sup>13</sup> See paras 3.63-3.70 above for consideration of this sort of issue in American Law Institute, *Enterprise Responsibility for Personal Injury Volume II: Approaches to Legal and Institutional Change* (1991) and paras 3.87- 3.95 re Ontario Law Reform Commission *Report on Compensation for Personal Injuries and Death* (1987).

<sup>14</sup> See Reuben Hasson "Subrogation in Insurance Law - A Critical Evaluation" (1985) 5 OJLS 416, 425-428.

<sup>15</sup> See para 4.24 above.

<sup>16</sup> See para 4.23 above.

<sup>17</sup> Assuming that the technical issues involved in devising a workable general recoupment right could be resolved for example the danger that a third party right would adversely affect pursuit by tort victims of their own claims.

<sup>18</sup> Pfennigstorf & Gifford say of this issue: "The danger that the benefits of subrogation may be outweighed by the high cost of implementation has always been recognised and frequently expressed. In Sweden it was one of the reasons why subrogation was abolished for social security carriers. In other countries, efforts have been made to keep the costs to a minimum." W Pfennigstorf & D G Gifford, *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the USA* (1991), p 135; also Pfennigstorf says "Sweden apparently dispensed with subrogation primarily for pragmatic considerations relating to the relative costs and benefits of what in effect would amount to a shifting of costs among collectives (those contributing to social security and those contributing to motor vehicle liability insurance) that were to a large extent identical" W Pfennigstorf (ed) *Personal Injury Compensation* (1993) p 202; see also US 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* (February 1986) which observed at p 71 that "Further analysis may suggest that elimination of subrogation (that is, simply offsetting all

mitigate the cost of extensive subrogation, but would by no means extinguish it. Conclusion of such agreements would be a complicated, and therefore costly, process which would lead to a myriad of arrangements between individual employers, first party insurers and pension funds on the one hand and liability insurers on the other hand.<sup>19</sup> Even once agreement had been reached there would be continuing administrative costs. There is some experience in this country of agreements made in the shadow of subrogation rights, in the form of motor claims insurers' knock-for-knock arrangements, in which insurers agree to meet property damage claims by their own first party insured, to avoid the cost of pursuing subrogated claims.<sup>20</sup> However the scope in the motor claims context for economies of scale is clearly much greater than in respect of arrangements for bulk recovery of non-state collateral benefits.

- 5.20 Secondly, a general recoupment right which was enforced would undermine the empirical argument for deduction of collateral benefits made earlier, in the sense that deduction of collateral benefits would no longer potentially release funds in society to enable better provision to be made for the ill and injured, while the tort victim remained fully compensated in accordance with the tort measure of damages. Instead money would simply be diverted from those who fund liability insurance to the providers of collateral benefits.

#### **(5) Overall conclusion**

- 5.21 Under the present law, the decision of the Court of Appeal in *Metropolitan Police District Receiver v Croydon Corp*<sup>21</sup> stands in the way of the common law developing a general recoupment right for providers of collateral benefits. **We ask consultees whether:**

#### **(a) They agree with our provisional view that the reasoning of Slade J at first instance in *Metropolitan Police District Receiver v Croydon Corp*<sup>22</sup> is**

collateral sources against the award, and prohibiting subrogation arrangements) may have a limited effect and be justified on the basis of significant reductions in transaction costs." See para 3.59 above.

<sup>19</sup> Pfennigstorf gives a general description of the arrangements in Germany which illustrates the complexity involved: "Consequently, subrogation in German practice takes place, in most cases, through routine notice and bookkeeping transactions on the basis of wholesale settlement agreements between social security carriers and liability insurers (*Teilungsabkommen*, or loss sharing agreements). Some of these agreements were negotiated and concluded as group or franchise contracts between the respective trade organisations. They have not been joined by all members of the organisations, however. Some carriers and insurers have worked out their own terms, and some prefer to operate without a wholesale agreement. Agreements are most common between liability insurers and social health insurance carriers, somewhat less so with work accident carriers, and infrequent with carriers of old age, survivors, and disability benefits. In all, there are about 1800 individual agreements." *Liability Procedures and Alternatives in the Federal Republic of Germany*", *Geneva Papers on Risk and Insurance* vol 15 no 56 (June 1990) p 299.

<sup>20</sup> See for example Richard Lewis, "Insurers' Agreements not to enforce Strict Legal Rights: Bargaining with Government and in the Shadow of the Law" (1985) 48 MLR 275, 285-286; W Pfennigstorf & D G Gifford, *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the USA* (1991) p 136.

<sup>21</sup> [1957] 2 QB 154.

<sup>22</sup> [1956] 1 WLR 1113.

**to be preferred to that of the Court of Appeal: that is, that the payment under legal compulsion of a deductible collateral benefit does benefit the tortfeasor by discharging a liability of the tortfeasor.**

**(b) If they agree with (a) - and in the light of the arguments of principle and policy analysed in paragraphs 5.3-5.20 above - do they favour giving (i) charitable donors and/or (ii) those providing collateral benefits under a contract with the personal injury victim (for example, personal accident insurers and employers) a new statutory right to recoup the value of the collateral benefit from the tortfeasor (in the event that the collateral benefit is deducted in assessing damages).**

## **2. SHOULD THERE BE A NEW STATUTORY RIGHT TO RECOVER THE (NON-DEDUCTIBLE) PAYMENT FROM THE VICTIM IN THE EVENT OF A SUCCESSFUL TORT CLAIM?**

5.22 We have seen<sup>23</sup> that under the present law the general position is that the provider of the collateral benefit has a right to repayment only where that has been contracted for; or where the benefit was rendered conditionally on the victim not succeeding in a tort claim so that where that condition “fails” the provider has a claim in restitution grounded on “failure of consideration”. We have also seen that there is some uncertainty about the extent to which the condition, grounding “failure of consideration”, may be implied. For example, it is conceivable that a charitable donor could recover its money from the victim, in the event of a successful tort claim, on the ground that it was obviously a condition of the payment - albeit not expressed - that the victim should not receive, in addition to the payment, full damages from the tortfeasor.<sup>24</sup> As we have noted,<sup>25</sup> the danger of accepting arguments like this, however, is that those who have simply changed their minds about rendering gifts will be permitted to have restitution. Where the collateral benefit has been contracted-for, it may also be thought sufficient that the provider (e.g. an insurer or employer) could contract for repayment from the victim in the event of a successful tort claim.<sup>26</sup> We are reluctant to recommend legislative reform of an area of the common law, which is still developing. The law on restitution founded on unjust enrichment has only recently been authoritatively recognised.<sup>27</sup> Understanding of concepts such as “failure of consideration” in a non-contractual sense has only just begun. We believe that the common law of restitution is capable of developing in such a way as to afford full justice to the providers of collateral benefits in claims against the victim; in contrast to the recoupment question considered above, there is no appellate decision blocking the way of common law development.

5.23 It is also strongly arguable that if avoiding overcompensation of the victim and reimbursement of the provider of the benefit are thought to be important dual

<sup>23</sup> See paras 2.84-2.88.

<sup>24</sup> See para 2.86 above.

<sup>25</sup> See para 2.86 above.

<sup>26</sup> See paras 5.9-5.10 above.

<sup>27</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

aims, a rule of deduction plus a recoupment right for the provider of the collateral benefit would be preferable because it guarantees that the victim is not overcompensated. In contrast, relying on exercise of a repayment right to avoid overcompensation of the victim is dependent on the repayment right being enforced by the provider of the collateral benefit.

- 5.24 It should be noted that for a statutory right of recovery against the victim to operate fairly, it would have to be limited to providing for recovery of collateral benefits which met a loss for which tort damages had been paid. Otherwise there would be a danger that the tort victim would be left undercompensated for some heads of damage.
- 5.25 The Ontario Law Reform Commission was in effect favouring a repayment right against the victim through its proposal that damages in respect of the loss covered by the collateral benefit should be held in trust for the collateral source.<sup>28</sup> Our view that this position could in any event be naturally arrived at by the courts through common law development is borne out by the fact that the House of Lords in *Hunt v Severs*<sup>29</sup> reached a remarkably similar conclusion in respect of damages for nursing services. We should add that we would in any event be cautious about recommending that the collateral source had a proprietary right to repayment (though a trust) rather than having merely a personal right to repayment (through an action for money had and received). One should point out, however, that a novel feature of the Ontario proposal was that the wrongdoer might elect to pay direct to the collateral source the damages covering the collateral benefit. To this extent therefore, the proposal combines a repayment right with a form of recoupment.
- 5.26 **We ask consultees whether they agree with our provisional view that the collateral source's right to repayment from the victim in the event of a successful tort claim should be left to common law development and does not require legislative reform. We would also be grateful for views on the Ontario Law Reform Commission's proposals that damages covering the collateral benefit should be held by the victim on trust for the collateral source but that the wrongdoer should additionally be entitled to make payment of such amounts direct to the collateral source.**

### **3. WHAT SHOULD BE DONE ABOUT INDEMNITY INSURERS' SUBROGATION RIGHTS?**

- 5.27 What should be done about the distinction made between indemnity and non-indemnity insurers in the grant of subrogation rights?<sup>30</sup> Should indemnity insurers' automatic subrogation rights be abolished, particularly given that we have already pointed out the difficulties in drawing the distinction between indemnity and non-

<sup>28</sup> See paras 3.87-3.95 above.

<sup>29</sup> [1994] 2 AC 350; see also paras 2.16-2.29 and 3.43-3.58 of our paper *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144.

<sup>30</sup> See paras 2.18 & 2.89-2.90 above.

indemnity insurance?<sup>31</sup> Alternatively, should an indemnity insurers' subrogation rights be extended to other providers of collateral benefits?

- 5.28 We have seen that indemnity insurers have the automatic right to take over the victim's claim by "simple" subrogation. Technically, the tortfeasor's liability to the victim is not discharged by the payment by the insurer to the insured. The justification for this type of subrogation right appears to be that it is one way of bringing about the result that the victim is not overcompensated while enabling the provider to be reimbursed by the tortfeasor.<sup>32</sup> Moreover, simple subrogation carries the possible advantage over recoupment that it does not require two separate claims by the victim (and hence, potentially, two sets of proceedings) against the tortfeasor.
- 5.29 A number of arguments can, however, be raised for removing, or, at least not extending, this type of subrogation as it exists in the present law. First, the distinction drawn between indemnity and non-indemnity insurance (where simple subrogation rights do not exist) is a difficult one.<sup>33</sup> Secondly, there is a risk that indemnity insurers' subrogation rights cause overcompensation in the sense that their justification is dependent on the insurer choosing to exercise its subrogation right.<sup>34</sup> It follows that, as a matter of policy, they may undermine the empirical argument that deduction might potentially release funds for the provision of assistance to all who are ill or disabled. Thirdly, it may be thought sufficient that the indemnity insurer has the opportunity to provide contractually for repayment from the victim in the event of a successful tort claim.<sup>35</sup> Fourthly, if avoidance of overcompensating the victim and reimbursement of the provider by the tortfeasor are thought to be important dual aims it is arguable that a rule of deduction allied with affording a recoupment right to the provider of the collateral benefit would be a preferable route forward in that it guarantees that the victim is not overcompensated and does not therefore run foul of the empirical argument for deduction.
- 5.30 However, even if the above arguments were thought to be persuasive, we take the view that the issue as to whether an indemnity insurer's automatic subrogation rights should be abolished goes beyond what can legitimately be considered within a paper on damages for personal injury. In particular, the commonest type of indemnity insurance is property insurance and we could not sensibly consider the abolition of automatic rights of subrogation for indemnity insurers without a detailed examination of property insurance. Moreover, such a radical step would require more knowledge than we at present have of the practice of insurers, and we would need to consider very carefully the views of a wide range of interests within the insurance community.<sup>36</sup>

<sup>31</sup> See paras 2.110-2.113 above.

<sup>32</sup> See para 2.90 above.

<sup>33</sup> See paras 2.110-2.113 above.

<sup>34</sup> See para 2.90 above.

<sup>35</sup> See paras 5.9-5.10 above.

<sup>36</sup> See discussion of this issue by the Australian Law Reform Commission in *Insurance Contracts* (ALRC No 20, 1982), pp 184-193.

5.31 **We ask consultees whether they agree that we should not recommend abolition of automatic subrogation rights for indemnity insurers. We would also welcome the views of consultees generally on (a) the justification for such subrogation rights; and (b) whether such rights should, or should not, be extended to the providers of other collateral benefits.**

## **PART VI**

# **SUMMARY OF THE ISSUES ON WHICH WE INVITE RESPONSES**

- 6.1 We set out below a summary of our questions on which we invite the views of consultees.
- 6.2 When responding we ask consultees to bear in mind, and where appropriate to comment on, the question of whether our suggestions for reform would be likely to save legal costs. (paragraph 4.2)

### **DEDUCTION OR NOT?**

- 6.3 We would also ask consultees to bear in mind when considering whether collateral benefits should or should not be deducted from damages for personal injury the linked questions of the rights of providers of collateral benefits (summarised in paragraphs 6.14-6.17 below). (paragraph 4.3)
- 6.4 Prior to hearing the views of consultees, we express no view as to which of the six options for reform we prefer. (paragraph 4.3)

### **The proposition underpinning the deduction options (options one and two)**

- 6.5 Subject to where the provider of the collateral benefit has a right to recover the value of the benefit from the victim in the event of a successful tort claim, or to recover the value of the benefit from the tortfeasor by being subrogated to the victim's undischarged tort claim, collateral benefits, unless essentially coincidental,<sup>1</sup> received by the victims of personal injury should be deducted from damages which meet the same loss. This is what we term "the proposition underpinning the deduction options". We ask consultees whether they agree or disagree with that proposition. We would be particularly interested to hear views on our discussion of the policy arguments for non-deduction in paragraphs 4.30-4.50 above. (paragraphs 4.4-4.51)

### **Option One**

- 6.6 (a) Subject to the provisos set out in (c) and (d) below, charitable payments and insurance payments made in response to personal injury should be deducted from the total sum of damages for personal injury.
- (b) Subject to the provisos set out in (c) and (d) below, sick pay, disablement pension payments, retirement pension payments<sup>2</sup> and redundancy payments made in response to personal injury should be deducted from personal injury damages for loss of earnings. In the case of sick pay and redundancy payments this merely restates the present law.

<sup>1</sup> See para 2.2 above.

<sup>2</sup> So far as these are collateral benefits. See para 4.72 above. For the treatment of state retirement pensions, see para 4.84 above.

(c) A first proviso to (a) and (b) above is that where a collateral benefit is expressed to be on account of a particular loss it should be deducted only from damages for that loss.

(d) A second proviso to (a) and (b) above is that where the provider of the collateral benefit has a right (by contract or by operation of law) to recover the value of the benefit from the victim in the event of the victim recovering damages for the personal injury, or to recover the value of the benefit from the tortfeasor by being subrogated to the victim's undischarged tort claim, the collateral benefit should not be deducted from the damages.

We ask consultees whether they favour this option. (paragraphs 4.52-4.80).

- 6.7 We would welcome the views of consultees as to whether, if insurance payments are to be deducted, they should be deducted net of insurance premiums for the two years prior to the accident, on the model suggested by the American Law Institute (which we discuss at paragraphs 4.45-4.46). (paragraph 4.81)
- 6.8 Although at this stage outside our terms of reference, it would be helpful for us to know whether consultees consider that social security benefits (within the recoupment scheme) to be awarded after five years should be deducted from tort damages to meet the same loss. (paragraphs 4.82-4.83)

### **Option Two**

- 6.9 We ask consultees whether they would favour the option of reforming the law, as set out in paragraph 4.80 above, except that charitable payments would continue to be ignored in the assessment of damages. (paragraphs 4.85-4.89)

### **Option Three – Deduction of Collateral Benefits Except Where the Provider Intended Them to be in Addition to Tort Damages.**

- 6.10 We ask consultees whether they would favour this option according to which option 1 or 2 above (and consultees should say which they prefer) would be qualified, and a collateral benefit ignored, where the provider intended it to be in addition to any tort damages. We would particularly welcome consultees' views as to whether adoption of this option would create unacceptable uncertainty or whether any uncertainty could be effectively overcome by the use of rebuttable presumptions of intention. (paragraphs 4.91-4.94)

### **Option Four – Reversal of the Rule on Disablement Pensions Only**

- 6.11 We ask consultees whether they would favour this option of reforming the law merely to the extent of ensuring that, like sick pay, disablement pensions would be deducted in assessing damages for loss of earnings (subject to the provisos (c) and (d) set out in paragraph 4.80). (paragraphs 4.95-4.97)

### **Option Five – No Deduction**

- 6.12 Our provisional view is that we should reject this option of ignoring all collateral benefits in assessing tort damages. We ask consultees whether they agree. (paragraphs 4.98-4.100)

### **Option Six – No Change**

- 6.13 We ask consultees whether they would favour the option of rejecting statutory reform of the law on collateral benefits. (paragraphs 4.101-4.105)

### **THE RIGHTS OF THE PROVIDER OF A COLLATERAL BENEFIT**

- 6.14 In submitting their views on the questions raised here, we ask consultees to bear in mind the need for consistency with their preferred option (1-6) on the question as to whether the collateral benefit should be deducted or not. (paragraph 5.2)

### **Should the Provider of a “Deductible” Collateral Benefit Have a New Right to Recoup the Benefit From the Tortfeasor?**

- 6.15 We ask consultees whether:
- (a) They agree with our provisional view that the reasoning of Slade J at first instance in *Metropolitan Police District Receiver v Croydon Corp*<sup>3</sup> is to be preferred to that of the Court of Appeal: that is, that the payment under legal compulsion of a deductible collateral benefit does benefit the tortfeasor by discharging a liability of the tortfeasor;
  - (b) If they agree with (a) - and in the light of the arguments of principle and policy analysed in paragraphs 5.3-5.20 above - do they favour giving (i) charitable donors and/or (ii) those providing collateral benefits under a contract with the personal injury victim (for example, personal accident insurers and employers) a new statutory right to recoup the value of the collateral benefit from the tortfeasor (in the event that the collateral benefit is deducted in assessing damages). (paragraphs 5.3-5.21)

### **Should There be a New Statutory Right to Recover the (Non-Deductible) Payment from the Victim in the Event of a Successful Tort Claim?**

- 6.16 We ask consultees whether they agree with our provisional view that the collateral source’s right to repayment from the victim in the event of a successful tort claim should be left to common law development and does not require legislative reform. We would also be grateful for views on the Ontario Law Commission’s proposals that damages covering the collateral benefit should be held by the victim on trust for the collateral source but that the wrongdoer should additionally be entitled to make payment of such amounts direct to the collateral source. (paragraphs 5.22-5.26)

### **What Should be Done about Indemnity Insurers’ Subrogation Rights?**

- 6.17 We ask consultees whether they agree that we should not recommend abolition of automatic subrogation rights for indemnity insurers. We would also welcome the views of consultees generally on (a) the justification for such subrogation rights; and (b) whether such rights should, or should not, be extended to the providers of other collateral benefits. (paragraphs 5.27-5.31)

<sup>3</sup> [1956] 1 WLR 1113.

**OTHER QUESTIONS**

- 6.18 In addition to the questions which have been raised for consultation consultees are invited to comment, with reasons, on any other aspects of the law covered by this paper which they regard as being in need of reform.