

The Law Commission

(LAW COM No 262)

DAMAGES FOR PERSONAL INJURY: MEDICAL, NURSING AND OTHER EXPENSES; COLLATERAL BENEFITS

Item 1 of the Seventh Programme of Law Reform:

Damages

November 1999

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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When the terms of this report were agreed on 8 September 1999, Professor Andrew Burrows was also a Commissioner.

The text of this report is available on the Internet at:

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GENERAL INTRODUCTION

This report draws together our conclusions on the subject-matter of two consultation papers concerned with damages for personal injury. The first was Damages for Personal Injury: Medical, Nursing and Other Expenses.¹ The second was Damages for Personal Injury: Collateral Benefits.² Together with our report on Claims for Wrongful Death,³ they conclude the Law Commission's Programme of Work on Damages.

The decision to publish a single report covering both expenses and collateral benefits has been taken for two main reasons.⁴ First, the subject-matter of the two consultation papers is closely linked. For example, on one approach (which in the event we reject: see paragraph 9.5 below) the gratuitous provision of services by a third party should be treated in the same way as the provision of (other) collateral benefits. Secondly, we have ultimately made only one set of linked recommendations for *legislation* (dealing with the House of Lords' decision and reasoning in *Hunt v Severs*⁵) arising out of these two consultation papers. With only one relatively limited Bill being in mind, it has been possible to deal with some issues in less detail than would have been necessary if wide-ranging legislation were being recommended.

The lay-out of this report flows from the fact that two separate consultation papers were issued. It is divided into two sections. The first (Section A) deals with medical, nursing and other expenses and comprises Parts I-VIII. The second (Section B) deals with collateral benefits and comprises Parts IX-XIII.⁶ The draft Bill dealing with *Hunt v Severs* is to be found in Appendix A. Appendix B lists consultees who responded to the two consultation papers.

We have been helped by a large number of people in our work on this report. In particular, Harvey McGregor QC has given us the benefit of his unrivalled expertise on many issues and, having been leading Counsel in a number of the important cases, has given us insights that we would not otherwise have gleaned.

¹ (1996) Consultation Paper No 144.

² (1997) Consultation Paper No 147.

³ (1999) Law Com No 263.

⁴ An incidental advantage of our recommendations in these two areas being merged in a single report is that readers, interested in the general approach to legislation of the Law Commission, have the opportunity of seeing a wide range of reasons why the Law Commission may not favour legislation. In the area of damages, the interplay between common law development by the courts and legislation is an intriguing and difficult one. It will be seen that we have adopted a minimalist approach to legislation in this area, as in several others relating to reform of the common law. See A Burrows, *Understanding the Law of Obligations* (1998) p 166.

⁵ [1994] 2 AC 350.

⁶ As we are concerned that the point might otherwise be lost, we refer readers (especially Government officials) now to para 9.10 below: we there draw attention to the contention that wide-ranging deduction of collateral benefits is an acceptable way (which does not unduly prejudice claimants) of cutting the costs of the tort system.

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THE LAW COMMISSION

DAMAGES FOR PERSONAL INJURY: MEDICAL, NURSING AND OTHER EXPENSES; COLLATERAL BENEFITS

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THE LAW COMMISSION

Item 1 of the Seventh Programme of Law Reform: Damages

DAMAGES FOR PERSONAL INJURY: MEDICAL, NURSING AND OTHER EXPENSES; COLLATERAL BENEFITS

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

SECTION A DAMAGES FOR PERSONAL INJURY: MEDICAL, NURSING AND OTHER EXPENSES

PART I INTRODUCTION TO MEDICAL, NURSING AND OTHER EXPENSES

- 1.1 The Law Commission's Seventh Programme of Law Reform was introduced in June 1999. This included, as had the previous two programmes of work,¹ an item recommending that an examination be made of "the principles governing, and the present effectiveness of, damages for monetary and non-monetary loss, with particular regard to personal injury litigation." Among other matters, we were asked to give specific consideration to "awards to cover medical, nursing and other expenses incurred by the claimant".²
- 1.2 In 1996, we published a Consultation Paper³ on damages for medical, nursing and other expenses in which we explored several issues (and made provisional recommendations) relating to this head of pecuniary loss. For example, we examined whether or not reform should be made to the statutory provision⁴ which ensures that the possibility of avoiding medical expenses by using the National Health Service (NHS) is disregarded in assessing damages for private medical

¹ 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.

² Seventh Programme of Law Reform (1999) Law Com No 259, item 1.

³ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144.

⁴ Section 2(4) of the Law Reform (Personal Injuries) Act 1948.

treatment.⁵ We also raised questions about compensation where care is provided to the injured claimant gratuitously by third parties or by the defendant.⁶ We further considered the possibility of a mechanism whereby the NHS could recoup the costs of treatment provided to injured claimants from tortfeasors.⁷ Additional matters that we considered included the appropriate method by which to assess accommodation expenses⁸ and how to deal with losses arising out of a divorce caused by an actionable personal injury.⁹ As noted in the Consultation Paper, these issues raise questions of wide-ranging interest and importance. This was evidenced by the extensive media interest which followed publication of the Consultation Paper, particularly with respect to NHS recoupment.¹⁰

1.3 We received 142 responses to the Consultation Paper from a wide range of individuals and organisations representing a broad spectrum of interests. We are most grateful to those consultees. Their responses have significantly contributed to the formulation of our final policy.

1.4 We should emphasise that we have ultimately recommended very few *legislative* reforms in this section. This has been for a variety of different reasons which it may be useful to list at the outset:

- (i) in some areas (for example, in relation to section 2(4) of the Law Reform (Personal Injuries) Act 1948 and damages for divorce losses) we have concluded, after careful consideration of consultees' views, that no reform is needed.
- (ii) in some areas we have rejected *legislative* reform on the grounds that the common law is being developed by the courts in a way that is generally satisfactory (for example, in relation to interest on damages for past pecuniary loss; the effect of contributory negligence on damages for Court of Protection fees; and damages for financial advice).
- (iii) in the area of accommodation expenses, the most promising of the possible options for reform seems to us - when worked through in detail - to involve such complexity as to be virtually unworkable in practice. Overall, therefore, it would not be an improvement on the common law.

⁵ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.2-3.18.

⁶ *Ibid*, at paras 3.43-3.72.

⁷ *Ibid*, at paras 3.19-3.42.

⁸ *Ibid*, at paras 3.81-3.97.

⁹ *Ibid*, at paras 3.104-3.111.

¹⁰ See, for example: *Evening Standard*, 12 December 1996, p 1; *The Guardian*, 12 December 1996, p 10; *Daily Express*, 12 December 1996, p 25; *Daily Mail*, 13 December 1996, p 5; *Daily Mirror*, 13 December 1996, p 7; *Daily Telegraph*, 13 December 1996, pp 27 & 35; *Evening Standard*, 13 December 1996, p 35; *Financial Times*, 13 December 1996, p 21; *The Independent*, 13 December 1996, p 6; *Yorkshire Post*, 13 December 1996, p 10; *The Times*, 14 December 1996, p 18; *Daily Mail*, 19 December 1996, p 53; *The Times*, 19 December 1996, p 17; *The Independent*, 21 December 1996, p 13.

- (iv) as regards a recoupment right for the NHS, while we have set out our views, we have not laid down legislative recommendations because of the political nature of the issue.
- 1.5 In general terms, we have also borne in mind that it has become increasingly difficult to find Parliamentary time for the implementation of our reports. Parliamentary time is precious and it is imperative that recommendations for legislative law reform are confined to where they are clearly - rather than marginally - required.
- 1.6 In this section, we therefore recommend legislation only in relation to gratuitous services provided for the injured person. Our draft Bill would reverse the actual decision of the House of Lords in *Hunt v Severs*¹¹ (according to which there can be no damages for care provided by the tortfeasor). On the other hand, it builds on, while clarifying and slightly departing from, their Lordships' reasoning on the general approach to gratuitous services (so that the claimant would be under a duty to account to the carer for the damages awarded for past services).
- 1.7 We shall now summarise our thinking on each of the main areas covered in this section.
- 1.8 As regards medical expenses, we have reached the conclusion, in accordance with our provisional view, that section 2(4) of the Law Reform (Personal Injuries) Act 1948 should not be amended.¹² Many of our consultees insisted on the need to preserve the claimant's choice of treatment. We agree, having come to the view that neither the duty to mitigate, nor the fact that claimants may use the NHS after having obtained damages for private care, justifies a change in approach.
- 1.9 On the controversial issue of a recoupment right for the NHS, we have not laid down any detailed legislative recommendations. This is because of the political nature of the subject matter. Indeed it is an area where there has been recent legislation (extending recoupment in road traffic cases) which has drawn on the responses to our Consultation Paper. However, we have set out our view, from a legal perspective, that the NHS should have a right to recoup (subject to a cost-benefit analysis pointing to the opposite conclusion). Moreover that right should not be restricted to those compulsorily insured and should take into account the contributory negligence of the victim.¹³
- 1.10 On gratuitous care, we maintain our provisional view that the loss suffered should be regarded as that of the carer and not the claimant; and that the carer should have a legal entitlement to the claimant's damages for past (but we think not future) care (through imposition of a personal obligation to account on the claimant, rather than through creation of a trust).¹⁴ To this extent we agree with the general reasoning of *Hunt v Severs*, which we recommend should be

¹¹ [1994] 2 AC 350.

¹² See para 3.18 below.

¹³ See para 3.43 below.

¹⁴ See paras 3.62 and 3.66 below.

legislatively built on, clarified and slightly departed from.¹⁵ On the other hand, we recommend that the actual decision in *Hunt v Severs* be legislatively reversed to ensure that, where gratuitous care is provided by the defendant, the same approach to damages will apply as where the carer was not the defendant.¹⁶ We make analogous recommendations for legislative reform in respect of other gratuitous services rendered to the claimant, for example assistance to the claimant with work in the home¹⁷ and visiting the claimant in hospital.¹⁸

1.11 Our approach is based on the view that there are important policy reasons which clearly justify the award of damages for gratuitous care (and other services), and that these are in play even where the carer is the defendant. In particular, entitlement to such damages facilitates the adoption of the most appropriate care regime for a person who has been wrongfully injured. Not only does this do justice to the wrongfully injured claimant, it is surely a desirable policy objective in a number of other ways. For example this aspect of tort law may be regarded as acknowledging the vital role played by voluntary carers in our society. Moreover, and paradoxically, the availability of damages for gratuitous care reduces the costs of the tort system. This is because denying damages for gratuitous care encourages the use of commercial care, since damages are recoverable for the cost of such care and generally at a higher rate than would be awarded for gratuitous care. Even were commercial care not engaged, denying recovery for the “cost” of gratuitous care has another undesirable effect in encouraging victims and their carers to enter into ‘sham’ contracts in an attempt to secure an award.

1.12 Hence it is clear that costs considerations are central to our recommendations regarding gratuitous services generally, and specifically to our proposed legislation to reverse the decision in *Hunt v Severs* denying damages for gratuitous services to a tortfeasor-carer. Many of our consultees¹⁹ have confirmed that a practical consequence of that decision is that claimants who would normally be cared for gratuitously by the tortfeasor are advised to engage commercial care, in respect of which they recover damages and at higher rates than would generally be awarded for gratuitous care. The effect of our proposed legislation would be to reduce awards in such cases. We also believe that our reform would reduce costs in other ways. Not only would it create greater certainty, but it would save the time and expense of further litigation on aspects of *Hunt v Severs* which we believe is otherwise likely (for example, about the nature of the trust imposed).

¹⁵ [1994] 2 AC 350.

¹⁶ See para 3.76 below.

¹⁷ See paras 3.91 and 3.93 below.

¹⁸ See paras 3.98 and 3.100 below.

¹⁹ For example, Lord Bingham of Cornhill said of the House of Lords decision in *Hunt v Severs*: “It never seemed to me, however, that the House began to face up to the policy argument, that if plaintiffs could not recover for the cost of gratuitous services by a defendant-carer, there would then be an overwhelming incentive to employ outsiders at commercial rates, with inevitable disadvantage to the plaintiff and a greatly increased bill for the insurer”. A QC specialising in personal injury stated: “All plaintiffs’ lawyers who understood the reasoning got a good laugh out of *Hunt v Severs*, the common view being that insurers had shot themselves in the foot”.

- 1.13 In our Consultation Paper we considered the method of assessment currently used by the courts in awarding damages for accommodation expenses²⁰ and raised the possibility of an alternative method of assessment.²¹ Following the responses we received from consultees, we have come to the view that neither the approach currently used, nor the alternative approach suggested in the Consultation Paper, are entirely satisfactory. Nevertheless, while we have explored an alternative suggestion - of the defendant being bound to pay the full extra capital cost of purchasing new accommodation in return for receiving a charge over the property purchased - we have ultimately concluded that the complexity of such a scheme would render it virtually unworkable in practice. We are therefore not convinced that it would represent an improvement on the admittedly imperfect common law approach.²²
- 1.14 Following the decision of the Court of Appeal in *Pritchard v Cobden*,²³ damages are not recoverable for losses arising out of a divorce that has been foreseeably caused by actionable personal injury. We examined this position in our Consultation Paper.²⁴ Having considered the responses of consultees, we recommend that no reform is needed here.²⁵
- 1.15 There are a number of supplementary (non-legislative) recommendations in this report, which relate to the damages awarded in respect of fees charged by the Court of Protection and the costs of financial advice.²⁶ In addition, we have considered the position in respect of interest awarded for pecuniary losses. At present, interest is generally awarded by using the half-rate approach: we recommend that the courts should be more willing to award interest at the full rate where the claimant is able to establish discrete items of loss incurred on an identified date.²⁷
- 1.16 We wish to draw attention to two major developments since the publication of the Consultation Paper, one legal and one extra-legal. The first, which is directly relevant to this paper, was the decision of the House of Lords in *Wells v Wells*.²⁸ This principally laid down that in calculating future pecuniary loss in personal injury cases, the relevant discount rate (the discount being necessary because the claimant receives the damages as a capital sum) is the Index-Linked Government

²⁰ The current method of assessment laid down by *Roberts v Johnstone* [1989] QB 878 treats the claimant's loss in purchasing accommodation as a continuing annual loss, being the loss of use of capital calculated by reference to the rate of return on a risk-free investment.

²¹ The discounted cash-flow method was suggested as an alternative. This approach treats the purchase of accommodation as an immediate capital loss to the claimant, but takes into account the eventual windfall that will accrue to the claimant's estate.

²² See para 4.17 below.

²³ [1988] Fam 22.

²⁴ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.104-3.111.

²⁵ See para 6.34 below.

²⁶ See paras 5.3, 5.10 and 5.15 below.

²⁷ See para 7.16 below.

²⁸ [1999] 1 AC 345.

Stock (“ILGS”) rate, which was decided to be three per cent. This contrasted with the traditional discount rate of four and a half per cent.

1.17 The second development is the increasing emphasis being placed by insurers, employers, medical practitioners and personal injury lawyers on rehabilitation.²⁹ Although not always easy to “pin-down”, the basic message of those emphasising rehabilitation is that greater efforts should be made to encourage and assist injured people to return to work. This is presented as having benefits for all. In particular, rehabilitation would mean that claimants would receive lower damages, in that if they return to work they will not require (as much) compensation for loss of earnings. This is of benefit to insurers and defendants. Moreover, the outcome is better for claimants, on the argument that being in work is more fulfilling than being branded as physically incapable of work. And from the State’s point of view, it can be argued that rehabilitation not only enhances injured people’s self-esteem but also cuts social security costs. While not directly affecting the legal issues discussed in this report, we think it right to draw attention to rehabilitation, not least because it may be that damages for the medical costs of rehabilitation will increasingly be claimed. Certainly we accept that such costs are normally reasonable to incur and therefore recoverable. However, it seems unlikely at this stage (particularly when facilities for, and understanding of, rehabilitation in this country are at a relatively undeveloped level compared, for example, to Germany) that failing to seek out, or refusing, rehabilitation would be regarded as failing in one’s duty to mitigate one’s loss (of earnings).

1.18 The remainder of Section A is arranged as follows. Part II sets out the present law on damages for medical, nursing and other expenses. In Parts III to VII we consider whether reform is needed. Part VIII summarises our recommendations (which, as we have explained above, are largely non-legislative) in relation to damages for medical, nursing and other expenses. Appendix A, at the end of this Report, contains our Damages for Personal Injury (Gratuitous Services) Draft Bill.

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²⁹ An ABI/TUC conference on “Rehabilitation: Getting People Back to Work” was held on 22 June 1998, and chaired by Professor Burrows of the Law Commission. This was also a major theme of the APIL/FOIL conference in October 1998. Rehab UK, a registered charity, was established in December 1994 and as part of this, the Disability Assessment Unit (DAU) was launched in December 1996.

³⁰ We have considered whether the draft Bill complies with the European Convention on Human Rights and, in our view, it does so comply.

PART II

THE PRESENT LAW ON MEDICAL, NURSING AND OTHER EXPENSES

1. MEDICAL AND NURSING EXPENSES

(1) The general position

- 2.1 A claimant is entitled to recover any medical and nursing expenses, and any other costs of care that have reasonably been incurred or will reasonably be incurred as a result of injuries arising from a tort.¹ Where expenses have not been incurred because the claimant has used the NHS or has received free care from a local authority, damages are not available for costs that would have been incurred had the claimant used private care.² Moreover, when a claimant is in a private hospital, ordinary living expenses, such as the cost of food and board, will be deducted from damages for the cost of care.³ Similarly, by section 5 of the Administration of Justice Act 1982, any saving to an injured claimant attributable to his or her maintenance, either wholly or partly, at public expense in a hospital, nursing home or other institution, will be set off against damages recoverable for loss of earnings.
- 2.2 Recovery can be made only in respect of those expenses which are reasonable. However, where private medical expenses have been incurred, section 2(4) of the Law Reform (Personal Injuries) Act 1948 requires that the possibility of having avoided such expenses through the use of facilities provided by the NHS, is to be disregarded in assessing reasonableness.⁴ In determining the reasonableness of expenses, a wide range of factors are considered, for example, whether or not treatment was taken under a doctor's advice. It is arguable that where a claimant chooses private care by a particular provider which is more expensive than other providers within the private sector, the expense may be unreasonable even though having the treatment itself is viewed as reasonable. In such instances, the claimant will bear the burden of proving that the more expensive treatment is in fact reasonable.⁵

(2) Section 2(4) of the Law Reform (Personal Injuries) Act 1948

- 2.3 Section 2(4) of the Law Reform (Personal Injuries) Act 1948 states that:

In an action for damages for personal injuries...there shall be disregarded, in determining the reasonableness of any expenses, the

¹ See generally, J Munkman, *Damages for Personal Injuries and Death* (10th ed 1996) p 75 ff; *McGregor on Damages* (16th ed 1997) para 1653 ff.

² *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617, 635; *Cunningham v Harrison* [1973] QB 942, 957; *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 188.

³ See *Shearman v Folland* [1950] 2 KB 43, 50-51; *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 191-192.

⁴ See paras 2.3-2.7 below.

⁵ See *Rialas v Mitchell* (1984) 128 SJ 704.

possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service... .

- 2.4 Section 2(4) therefore ensures that a claimant can claim damages for the cost of private treatment even though NHS treatment is available. Despite this our own empirical research⁶ shows that only a very small percentage of claimants use private medical treatment exclusively, although a significant proportion receive some private care. The reasons given for the use of private care included the need to obtain a medical report for use in a compensation claim, as well as perceived differences in the speed and quality of treatment.
- 2.5 Prior to the enactment of section 2(4), the Beveridge Report⁷ recognised the argument that a claimant should not be permitted to recover damages for special expenses beyond the treatment that was generally available through public health care (although it did not make a formal recommendation on the issue). However, the Monckton Committee⁸ took the view that such a rule would force the judiciary to make arbitrary decisions about the merits of State-provided and private care, in addition to infringing the claimant's freedom to choose private care. The findings of the Monckton Committee led to the enactment of section 2(4).
- 2.6 The limits of section 2(4) have been clarified in the case law. In *Harris v Brights Asphalt Contractors Ltd*,⁹ Slade J stated that recovery could not be made where the loss would never be incurred. If the expense was incurred and was reasonable, then section 2(4) would not act to impeach the claimant's right to recovery. In *Cunningham v Harrison*,¹⁰ Lawton LJ approved the dictum of Slade J and reduced the award in light of the fact that private care would not always be available. Lawton LJ made it clear that section 2(4) ensured that it was not open to the defendant to argue that the expenses could have been avoided through use of the NHS, but did allow the defendant to argue that the claimant was unlikely to incur the expenses. Similar issues arose in *Lim Poh Choo v Camden & Islington Health Authority*.¹¹ The House of Lords approved the earlier interpretations of section 2(4), but on the facts the award was not reduced, even though there were doubts as to whether treatment would always be available outside the NHS.¹² A "balance of probabilities" test was applied in *Woodrup v Nicol*¹³ in order to determine the likelihood of the claimant making use of private care. Russell LJ emphasised that the test was not an attempt to reintroduce arguments prohibited by section 2(4) but rather was a clear restatement of the law:

⁶ See Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225 pp 145-146 and Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 2.9.

⁷ Social Insurance and Allied Services (1942) Cmd 6404, para 262.

⁸ Final Report of the Departmental Committee on Alternative Remedies (1946) Cmd 6860, paras 55-56.

⁹ [1953] 1 QB 617.

¹⁰ [1973] QB 942, 957.

¹¹ [1980] AC 174.

¹² *Ibid*, at 188.

¹³ [1993] PIQR Q104.

...if, on the balance of probabilities, a plaintiff is going to use private medicine in the future as a matter of choice, the defendant cannot contend that the claim should be disallowed because National Health Service facilities are available. On the other hand, if, on the balance of probabilities, private facilities are not going to be used, for whatever reason, the plaintiff is not entitled to claim for an expense which he is not going to incur. That view, in my judgment, is amply borne out by authority.¹⁴

- 2.7 The scope of section 2(4) is therefore not in doubt and we maintain our view that the courts have adopted a clear, uniform and correct interpretation of section 2(4).¹⁵

(3) Recoupment of costs by the National Health Service

- 2.8 In general, the NHS has no right to recoup from a defendant the costs of medical treatment provided to an injured claimant.¹⁶ There is however one exception to this general rule which arises in the case of motor vehicle accidents. This exception has existed for more than 30 years. Prior to the Road Traffic (NHS Charges) Act 1999,¹⁷ the exception was contained in sections 157 and 158 of the Road Traffic Act 1988. Where compensation is paid following a motor accident which causes injury or death, section 157 of the Road Traffic Act 1988 places the compensator under an obligation to pay the reasonable expenses incurred by a hospital in treating the victim's injuries. In addition, section 158 applies where emergency treatment is given, and requires the person using the vehicle at the time of the accident to pay a fee and mileage allowance to the practitioner who administered emergency treatment. The Road Traffic (NHS Charges) Act 1999 now excludes NHS hospitals from sections 157 and 158 of the Road Traffic Act 1988. The recovery of NHS charges in respect of treatment received by victims of motor vehicle accidents in NHS hospitals is now governed by the new Act. However, under the 1999 Act, there is no provision allowing NHS hospitals to recover the emergency treatment fee (which previously they could recover under section 158 of the 1988 Act). As the 1999 Act only excludes the NHS from sections 157 and 158, these provisions will still apply to non-NHS-not-for-profit hospitals and general practitioners (the latter of whom can recover the emergency treatment fee).

- 2.9 The obligation to pay NHS charges arises where a payment is made, in respect of the death or injury of any person arising from the use of a motor vehicle, by an

¹⁴ [1993] PIQR Q104, Q114.

¹⁵ See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 2.14.

¹⁶ See paras 10.58-10.78 below for our discussion of the present law regarding third party providers of (other) collateral benefits.

¹⁷ The Road Traffic (NHS Charges) Act 1999 came into force on 5 April 1999, and the new tariff scheme will apply for accidents which occur on or after 2 July 1997 (the date on which the Chancellor announced in his Budget speech the Government's intention to make the recovery of NHS charges more effective): see s 3 of the Road Traffic (NHS Charges) Act 1999, the Road Traffic (NHS Charges) Regulations 1999 SI 1999 No 785 and the Road Traffic (NHS Charges) Act 1999 (Commencement No 1) Order 1999 SI 1999 No 1075.

authorised insurer pursuant to a properly issued policy.¹⁸ Thus, liability under the Act is based on fault, although the obligation arises regardless of whether or not liability is admitted.¹⁹ Liability has been extended by the 1999 Act to include compensation paid by the MIB.²⁰

- 2.10 The 1999 Act makes important changes to update the amounts recoverable by the NHS and to make collection more effective. In particular, the Act creates a tariff system to calculate the sums payable. The tariff is contained in regulations²¹ and can be updated as necessary. Initially a flat rate fee of £354 will apply for out-patient treatment (regardless of the actual number of out-patient attendances). A daily rate of £435 will apply for in-patient treatment. A ceiling of £10,000 has been imposed upon any single claim for recovery of NHS costs.
- 2.11 The Act makes use of a central administrative body, the Compensation Recovery Unit. The Unit, as part of the Benefits Agency, is already active in the recoupment from tortfeasors of social security benefits paid in respect of tortious injuries, pursuant to the Social Security (Recovery of Benefits) Act 1997 (which replaced Part IV of the Social Security Administration Act 1992). The compensator is required to notify the Department of Social Security of any claim against him or her. The Compensation Recovery Unit must then provide a certificate setting out the recoverable benefits²² for a period of up to five years from the date of accident. The defendant is required to pay to the DSS the full certified sum, but is entitled to set off certain benefits against certain heads of damages (excluding damages for pain and suffering and loss of amenity). The Road Traffic (NHS Charges) Act 1999 provides for a similar scheme to apply to NHS recoupment, although no provision is made for set off, since the claimant is not entitled to damages for the cost of NHS care.²³
- 2.12 One further change brought about by the 1999 Act is the introduction of a scheme for review which closely resembles that found in the Social Security (Recovery of

¹⁸ Road Traffic (NHS Charges) Act 1999, s 1(3).

¹⁹ Section 1(9). Liability reflects that under s 157 of the Road Traffic Act 1988. This contrasts with liability to pay the emergency treatment fee under s 158 which is not based on fault and arises regardless of any compensation payments being made.

²⁰ Road Traffic (NHS Charges) Act 1999, s 1(3)(d).

²¹ Road Traffic (NHS Charges) Regulations 1999 SI 1999 No. 785.

²² "Recoverable benefits" are defined in s 1(4)(c) as "any listed benefit which has been or is likely to be paid as mentioned in ss (1)(b)." Section 1(1)(b) describes benefits "paid to or for [the plaintiff] during the relevant period in respect of the accident, injury or disease." Under s 29, "listed benefits" are those listed in column 2 of schedule 2, prescribed by the Secretary of State. These are: disability working allowance, disablement pension payable under s 103 of the 1992 Act, incapacity benefit, income support, invalidity pension and allowance, jobseeker's allowance, reduced earnings allowance, severe disablement allowance, sickness benefit, statutory sick pay, unemployability supplement, unemployment benefit, attendance allowance, care component of disability living allowance, disablement pension increase payable under s 104 or 105 of the 1992 Act, mobility allowance, mobility component of disability living allowance. See paras 10.48-10.51 below.

²³ But cf para 2.1 above. Also see further para 2.14 below.

Benefits) Act 1997, as amended by the Social Security Act 1998.²⁴ Previously, the Road Traffic Act 1988 did not provide any form of review or appeals procedure. Certificates will now be open to internal review by the Secretary of State which can be initiated either by the Compensation Recovery Unit or by a compensator.²⁵ Specific grounds of appeal against a certificate of NHS charges are set out in the Act but, as with the appeals procedure for social security recoupment, resort to the appeals procedure can only be had once liability to pay the NHS charges has been fully discharged.²⁶

- 2.13 Adding the recoupment of NHS charges in road traffic accident cases to the system already in place for the recoupment of social security benefits has the advantage of alleviating the problems previously encountered in collecting NHS charges (which relied on individual hospitals to undertake the task). Moreover, costs and inconvenience will be minimised because the Compensation Recovery Unit is established and familiar to the insurance industry.
- 2.14 Although strong analogies can be drawn between NHS recoupment and social security recoupment, the fact that social security benefits are deducted from some of the damages recovered by the claimant is an important distinction. Set-off of recouped NHS costs from the claimant's damages would be inappropriate because he or she has no claim for damages to cover the cost of NHS care.²⁷

(4) Care provided free of charge to the claimant by relatives or other private parties

(a) The general position

- 2.15 Our empirical research²⁸ has shown that the majority of personal injury claimants rely on care provided gratuitously by family members and friends. Often simple daily tasks such as bathing, eating and dressing can no longer be performed without assistance. With a modest percentage of injured claimants receiving skilled nursing care, the burden of providing such care has fallen on unpaid individuals, usually members of the claimant's close family.

²⁴ The procedure for appeals to the "unified" appeals tribunal created by the Social Security Act 1998 is set out in ss 38-45 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI 1999 No 991 (made on 26th March 1999 under s 16 of the 1998 Act). Under s 39, any party to the appeal is entitled to an oral hearing. The appeal tribunal has the power to require medical examinations of appellants in particular cases, and the power to summon witnesses to answer questions or to produce documents. Under s 1(2) of the regulations, this procedure comes into effect at different times as regards different benefits, but will be in full effect by 29th November 1999.

²⁵ Road Traffic (NHS Charges) Act 1999, s 6.

²⁶ Road Traffic (NHS Charges) Act 1999, s 7.

²⁷ This difference means that the certificate in the case of social security benefits must be obtained before settlement whereas the application for a certificate in respect of NHS charges can be made before or after compensation is paid.

²⁸ See Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225 pp 48-50 and Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 2.16.

- 2.16 As a general rule, claimants are entitled to recover damages for the gratuitous care provided by friends and family.²⁹ But the question of who suffers the loss when gratuitous care is provided has caused difficulty. If the loss is classified as that of the gratuitous carer, he or she has no claim against the defendant for damages for the loss. If the loss is classified as that of the claimant, while damages may be awarded, this can be expected to result in a windfall, since the claimant will receive both the care and the damages. The courts have adopted several approaches to resolve this dilemma.
- 2.17 In *Roach v Yates*,³⁰ *Schneider v Eisovitch*,³¹ and *Watson v Port of London Authority*,³² the courts considered that there was an obligation on the claimant to pay for the care provided. This enabled them to award damages on the basis that the loss was the claimant's. However, it was unclear what form the obligation must take in order to justify an award of damages. In *Roach v Yates*³³ the existence of a moral obligation seemed sufficient. In *Schneider v Eisovitch* an undertaking to reimburse the carer was required, although there was no need for a legally enforceable contract.³⁴ Megaw J in *Watson v Port of London Authority* cited *Schneider v Eisovitch* with approval, but considered a "firm undertaking" unnecessary.³⁵
- 2.18 The discrepancies in defining the nature of the claimant's obligation to repay the carer were unresolved when in *Donnelly v Joyce*³⁶ the Court of Appeal rejected the approach taken in the earlier cases. It was held that the claimant could recover the cost of care because the loss could truly be represented as the claimant's loss. Megaw LJ articulated this point in his judgment:

The plaintiff's loss...is not the expenditure of money...to pay for the nursing attention. His loss is the existence of the need for...those nursing services.³⁷

- 2.19 The approach in *Donnelly v Joyce* was followed by the Court of Appeal in *Housecroft v Burnett*.³⁸ It was, however, rejected by the House of Lords in *Hunt v Severs*,³⁹ where *Donnelly v Joyce* was overruled. The House of Lords instead adopted the reasoning of Lord Denning MR obiter in *Cunningham v Harrison*,⁴⁰ a

²⁹ See *Hunt v Severs* [1994] 2 AC 350.

³⁰ [1938] 1 KB 256.

³¹ [1960] 2 QB 430.

³² [1969] 1 Lloyd's Rep 95.

³³ [1938] 1 KB 256, 263, *per* Greer LJ.

³⁴ [1960] 2 QB 430, 440, *per* Paull J.

³⁵ [1969] 1 Lloyd's Rep 95, 102.

³⁶ [1974] QB 454.

³⁷ *Ibid*, at 462.

³⁸ [1986] 1 All ER 332. The approach has also been adopted by the High Court of Australia; see *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 141 ALR 37. See further discussion at para 2.30 below.

³⁹ [1994] 2 AC 350.

⁴⁰ [1973] QB 942, 952.

case heard by a differently constituted Court of Appeal the day before *Donnelly v Joyce*. Lord Denning argued that the claimant should be entitled to recover damages for the cost of care provided gratuitously, but should hold those damages on trust for the carer. The House of Lords, with Lord Bridge giving the only speech, agreed with Lord Denning's approach. In particular it was reasoned that the loss should be regarded as the carer's.⁴¹

2.20 It was noted by Lord Bridge in *Hunt v Severs* that the decision reached by the House of Lords was similar to the position under Scottish law. Section 8 of the Administration of Justice Act 1982 had implemented the Scottish Law Commission's recommendation that the claimant be under a legal obligation to account to the carer for damages for services provided.⁴² Two main factors underpinned the Scottish Law Commission's recommendation: first, disagreement with the principle in *Donnelly v Joyce* as the loss was viewed not as the claimant's but as the carer's; and secondly, the inability to enforce a mere moral obligation.

2.21 Despite analogies which were drawn with the Scottish position, the trust approach had been the subject of criticism by the Pearson Commission⁴³ long before the issue reached the House of Lords in *Hunt v Severs*. The Pearson Commission was concerned about instances where several people provide care: complications would arise in relation to the trust fund which the claimant would hold for each. In any event, the Pearson Commission accepted the reasoning of Megaw LJ in *Donnelly v Joyce*. They also considered that formal repayment provisions were unnecessary because most cases involved a single family income.

2.22 The application of the trust approach to situations arising outside the gratuitous care context has been considered by the Court of Appeal in two recent decisions. These cases suggest that the courts are not at present willing to take on board a wide application of the trust approach outside the context of care and domestic assistance.⁴⁴ In *Dimond v Lovell*⁴⁵ the claimant suffered damage to her car as a result of a motor vehicle accident. She entered into a contract with 1st Automotive Ltd, a company which specialised in hiring replacement cars to victims of torts. The relevant contract permitted the claimant to postpone payment for the hire car until her action for damages had been concluded. In addition, the contract gave 1st Automotive the entitlement to conduct any litigation necessary to recover damages.

⁴¹ See below paras 2.26-2.29 and 3.44-3.100 for further discussion of *Hunt v Severs*, including the point at para 3.56 that Lord Bridge did not distinguish between damages for past and future services. See also paras 10.58-10.78 below for our discussion of the present law regarding third party providers of (other) collateral benefits.

⁴² See *Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services (2) Admissible Deductions (1978)* Scot Law Com No 51, paras 21-23.

⁴³ (1978) Cmnd 7054, vol 1 para 347-349.

⁴⁴ But cf the decision of the Court of Appeal in *Davies v Inman* [1999] PIQR Q26. In that case the claimant's employer advanced wages to him during absence owing to injury, subject to the claimant's undertaking to refund the advance from damages recovered. It was found that interest should nonetheless be paid on the claimant's damages for lost earnings, and that the effect of *Hunt v Severs* was that the interest would be held by the claimant on trust for his employer. See also para 10.12 below.

⁴⁵ [1999] 3 All ER 1.

2.23 Overturning the decision at first instance, the Court of Appeal found that the agreement fell within the ambit of the Consumer Credit Act 1974 and that it was unenforceable due to a failure to comply with the terms of the Act. The Court was faced with the question whether damages could be recovered for the cost of the hire car, although the claimant had no legal liability to pay for it. The claimant's argument was based on the decision in *McAll v Brooks*,⁴⁶ where, on similar facts, the Court of Appeal awarded damages for the cost of the replacement car. However, *McAll v Brooks* had been decided following the approach in *Donnelly v Joyce*. Since the reasoning in *Donnelly v Joyce* had been disapproved in *Hunt v Severs*, Sir Richard Scott VC (who gave the main speech) found that the authority of *McAll v Brooks* had been undermined. He gave the following statement of the law following *Hunt v Severs*:

If a plaintiff has received a benefit from a third party that has, in the event, met his need with no cost to himself, be it a need for care services or a need for a replacement vehicle, the court may allow an award of damages in order to enable the plaintiff to recompense the third party. The plaintiff will then hold the amount of the award in trust for the third party. But if the circumstances of the case do not permit a trust for the third party to be imposed on the damages, the plaintiff cannot recover the damages.⁴⁷

2.24 Sir Richard Scott VC concluded that on the facts a trust could not be imposed. The hire car had been provided in the course of a business, not out of benevolence, and equity would not step in to provide a remedy where a contract failed to comply with statutory requirements. No damages should, therefore, have been awarded.

2.25 In *Hardwick v Hudson*,⁴⁸ the claimant suffered a personal injury. He claimed damages for the gratuitous work done by his wife in the garage which he co-owned. Before the accident, the wife had worked in the garage for two days a week. After the accident, she worked an extra twenty hours a week without pay. In considering whether the trust approach could apply to provide damages for the wife's gratuitous work, Colman J stated the reasons for giving compensation subject to a trust:

...the law extends the scope of compensation to the provision of gratuitous caring services no doubt because, had those services been contractually provided... the reasonable cost incurred would have been recoverable as damages... and because the services are likely to have been provided due to ties of relationship or friendship between the victim and the carer in circumstances in which, because of the environment of love and affection, the entering into of a formal contract would not normally be contemplated. The consideration that personal physical care can often be most effectively and economically

⁴⁶ (1984) RTR 99.

⁴⁷ [1999] 3 All ER 1, 17-18.

⁴⁸ [1999] 3 All ER 426.

provided by a family member or close friend is also a strong reason for encouraging the saving of losses by this means.⁴⁹

However, he concluded that damages for the wife's loss should not be awarded on these facts. The services of the wife could have been contracted for; by receiving the services gratuitously, the business made savings in costs, (for example, in not having to pay national insurance contributions). Given that the decision not to contract for the services had been commercially motivated, no damages for the services should be awarded. Brooke LJ made a speech to similar effect, but also agreed with Colman J on this point.

(b) Care provided by the defendant

- 2.26 Situations will arise where the defendant is the provider of the gratuitous care to the claimant. This most commonly happens where the claimant is a passenger in a car driven by the defendant, the claimant and defendant being in a close familial relationship, such as husband and wife.
- 2.27 This was the actual position in *Hunt v Severs*. The Court of Appeal had followed the approach in *Donnelly v Joyce*, which regarded the claimant as having suffered the loss.⁵⁰ Damages were awarded to the claimant for the gratuitous care provided by the defendant. It was thought that otherwise claimants would be encouraged to seek commercial care or the gratuitous services of a third party, even though the defendant was in a position to give the best care. Alternatively, claimants might be compelled to enter into contracts for services with their carers.
- 2.28 In the House of Lords Lord Bridge made clear that damages should not be recovered where the defendant was the gratuitous carer.⁵¹ Normally, damages for gratuitous care could be recovered by the claimant to be held on trust for the carer. However, where the defendant was the provider of the gratuitous care, recovery was denied because of the circularity of the claimant recovering damages only to hold them on trust for the defendant.
- 2.29 Lord Bridge rejected the argument that recovery was justified in such circumstances because of the insurance position.⁵² To allow such an argument would be a departure from the common law approach of ignoring insurance when considering the question of liability. Such a departure could only be properly effected by Parliament. Support was drawn from several Australian authorities.⁵³ In all but one case⁵⁴ the Australian courts did not place any significance on the fact

⁴⁹ [1999] 3 All ER 426, 435-436.

⁵⁰ [1993] QB 815.

⁵¹ [1994] 2 AC 350, 363.

⁵² *Ibid*, at 363.

⁵³ See *Gowling v Mercantile Mutual Insurance Co Ltd* (1980) 24 SASR 321; *Jones v Jones* [1982] Tas R 282; *Gutkin v Gutkin* [1983] 2 Qd R 764; *Maan v Westbrook* [1993] 2 Qd 267; *Snape v Reid* (1984) Aust Torts Rep 80-620; *Motor Accidents Insurance Board v Pulford* (1993) Aust Torts Rep 81-235.

⁵⁴ The case of *Lynch v Lynch* (1991) 25 NSWLR 411 provides an exception to the general approach, but related to a particular statutory compulsory insurance scheme. Further, it has subsequently not been followed: see for example *Motor Accidents Insurance Board v Pulford* (1993) Aust Torts Rep 81-235.

that it would be the defendant insurers and not the defendant who would pay the damages.

- 2.30 However, the recent High Court of Australia decision in *Kars v Kars*⁵⁵ disapproved *Hunt v Severs*, and preferred the principle of *Donnelly v Joyce*, which was regarded as embedded in Australian authority.⁵⁶ The loss was regarded as the claimant's need for services and it was entirely a matter for the claimant whether the damages recovered should be used to compensate the carer.⁵⁷ The proposition that allowing recovery would involve payment by the tortfeasor twice over, once in damages and once in the provision of services, was rejected as artificial where insurance is compulsory. This is because the damages would be paid by the compulsory insurer and not the defendant.⁵⁸

(c) The quantum of damages

- 2.31 The leading case on quantum of damages for gratuitous care, *Housecroft v Burnett*,⁵⁹ was decided under the approach in *Donnelly v Joyce* and its application remains uncertain in the light of *Hunt v Severs*. Two "extreme solutions"⁶⁰ were identified: the loss could be assessed at the full commercial rate for services or at nil (because the care was provided free of charge and so the claimant incurred no loss). Both of these extremes were found to be unsatisfactory. O'Connor LJ instead took a mid-position, whereby the loss should be assessed as that which would make reasonable compensation to the carer, with the commercial rate as a ceiling.⁶¹
- 2.32 In practice the courts have tended to award the commercial rate discounted by between a third and a quarter.⁶² In exceptional cases the courts have not applied a discount, or have awarded costs exceeding the commercial rate, for example to compensate for earnings lost by the carer.⁶³

⁵⁵ (1996) 141 ALR 37.

⁵⁶ The High Court did acknowledge that there were cases supporting the argument that insofar as the claimant's needs were met by the defendant providing care, the defendant's liability should be reduced (see n 53 above). However, as the High Court noted, other cases rejected the argument and preferred *Donnelly v Joyce*. See for example *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327; *Lynch v Lynch* (1991) 25 NSWLR 411; *Rosecrance v Rosecrance* (1995) 105 NTR 1 at 38.

⁵⁷ (1996) 141 ALR 37, 40, *per* Dawson J.

⁵⁸ (1996) 141 ALR 37, 56, *per* Toohey, McHugh, Gummow, Kirby JJ. In his separate concurring judgment Dawson J did not rely on the fact of insurance.

⁵⁹ [1986] 1 All ER 332.

⁶⁰ *Ibid*, at 342, *per* O'Connor LJ.

⁶¹ *Ibid*, at 343.

⁶² See *Nash v Southmead HA* [1993] PIQR Q156 where Allott J applied a one-third discount to the commercial rate and *Maylen v Morris* (unreported, 21 June 1988) where the Court of Appeal refused an appeal by the defendant against the 25% discount set by Mann J, as it was anticipated that the claimant's mother might not be able to cope with caring for the claimant due to old age.

⁶³ See *Woodrup v Nicol* [1993] PIQR Q104; *Lamey v Wirrall HA* (1993) Kemp & Kemp, *The Quantum of Damages*, vol 2 para A4-120 (Morland J); *Hogg v Doyle* (unreported, 6 March 1991), see Kemp & Kemp, *The Quantum of Damages*, vol 1 para 5-024.

2.33 It is unclear what effect the shift of approach in *Hunt v Severs* will have on the quantum of damages for gratuitous care. Awards exceeding the commercial rate may become more frequent because reasonable compensation for the carer should now be regarded as the purpose of the award. Nevertheless, the duty to mitigate is likely to act as a measure of control, for example where the cost of foregone employment is well beyond the cost of commercial care. The change may also be of limited impact since reasonable compensation for the carer has always been a factor influencing quantum. Moreover, where there is no loss of earnings the only available starting point for assessment will still be the commercial rate.

(5) Loss of the claimant's ability to do work in the home

2.34 The loss of ability to do work in the home is a recoverable head of damages and includes "services" such as general housekeeping, gardening and maintenance. The leading case of *Daly v General Steam Navigation Co Ltd.*,⁶⁴ while recognising that such loss can be recovered, differentiated between past and future loss. As regards future loss, once the claimant establishes that his or her ability to do work has been impaired, damages are treated as a future pecuniary loss based upon the cost of hiring commercial services, regardless of whether or not the claimant intends to engage them. The position for past loss is different. It will only be treated as a pecuniary loss if the claimant actually engaged commercial services, or if the person giving the services had to give up paid employment to provide them. In the latter instance, the loss is treated as that of the claimant, in line with the general approach in *Donnelly v Joyce*.⁶⁵ However, pursuant to *Hunt v Severs*,⁶⁶ the loss will now be treated as that of the service-provider and, although the claimant can still recover damages in respect of such loss, they will be held on trust for that person. It was further held by the Court of Appeal in *Daly v General Steam Navigation Co Ltd.* that, where the past loss did not amount to a pecuniary loss, the claimant's inability to do work in the home should be considered as part of the award for non-pecuniary loss. This would arise where the claimant did not engage professional services or receive the assistance of a friend, but instead chose to struggle on with the work.⁶⁷

2.35 Damages under this head may become increasingly important in the light of the House of Lords decision in *R v Gloucestershire CC, ex parte Barry*.⁶⁸ The claimant had been receiving home care for needs assessed under section 2(1) of the Chronically Sick and Disabled Persons Act 1970. The council subsequently withdrew those services due to reductions in the funds provided by central government, even though the claimant's needs remained the same. An action for judicial review was brought against the Council, but the House of Lords ruled that the needs of claimants to be provided with home care could be balanced against

⁶⁴ [1981] 1 WLR 120.

⁶⁵ [1974] QB 454.

⁶⁶ [1994] 2 AC 350.

⁶⁷ The Court of Appeal in *Daly* added the damages awarded by Brandon J for pecuniary loss for past incapacity to do work in the home to the award for non-pecuniary loss: see [1981] 1 WLR 120, 128, *per* Bridge LJ.

⁶⁸ [1997] AC 584.

the available resources and the cost of such services to the local authority. As a result, fewer claimants may now receive state funded help in the home.

(6) Hospital visits

- 2.36 Costs that are reasonably incurred by relatives in visiting the claimant while in hospital are recoverable by the claimant but do not include foregone earnings.⁶⁹ Following *Hunt v Severs*,⁷⁰ the damages recovered by the claimant must be held on trust for the visitor who incurred the expense. No recovery can be made where the tortfeasor is the visitor.

2. ACCOMMODATION COSTS

(1) Introduction

- 2.37 When a claimant has been seriously injured but wants to remain living at home, it may be that his or her accommodation will need to be altered in some way. For example, the property may need to be adapted to allow the claimant to use a wheelchair by the introduction of ramps or the widening of doorways. Specialised equipment may need to be installed and additional storage space may be required. An extension may be necessary to house a resident nurse or carer. Inevitably, in some cases the claimant's existing house will be unsuitable for these kinds of adaptation, or the claimant may not own property of his or her own. It may therefore be reasonable for him or her to move to new accommodation. Just as with other expenses, the essential prerequisite to the recovery of accommodation costs is reasonableness.⁷¹

(2) Purchase of new property

- 2.38 Acquiring new accommodation will obviously involve an immediate capital cost to the claimant. But the primary concern evident in the case law is that to award the claimant the full amount of this capital cost would be to overcompensate him or her, because the capital value of the property would pass on death to his or her estate. In *George v Pinnock*,⁷² the claimant had suffered severe brain damage in a traffic accident. By the time of the trial she had moved from her rented accommodation into a bungalow which had been purchased with an interim payment. At the trial, no money was awarded for the accommodation, but the claimant argued on appeal that all or part of the purchase price should have been recoverable because the property had been acquired to meet her needs arising

⁶⁹ See *Walker v Mullen*, The Times 19 January 1984.

⁷⁰ [1994] 2 AC 350.

⁷¹ The courts' approach to the requirement of reasonableness in the area of house purchases has not been particularly restrictive. Once it has been established that either new accommodation, or alterations to existing accommodation, are reasonably necessary, claimants are given relative freedom to choose the exact property or the precise nature of the alterations: see e.g. *Willett v North Bedfordshire Health Authority* [1993] PIQR Q166, Q173-Q174.

⁷² [1973] 1 WLR 118.

from the accident. Orr LJ⁷³ refused to award her the capital sum because she “still has the capital in question in the form of the bungalow.”⁷⁴

- 2.39 The approach of the courts has instead been to regard the loss not as a capital loss but as the loss of an annual sum. In *George v Pinnock*, Orr LJ said:

I do not think it makes any difference... whether the matter is considered in terms of a loss of income from the capital expended on the bungalow or in terms of annual mortgage interest which would have been payable if capital to buy the bungalow had not been available. The plaintiff is, in my judgment, entitled to be compensated to the extent that this loss of income or notional outlay by way of mortgage interest exceeds what the cost of her accommodation would have been but for the accident.⁷⁵

- 2.40 Orr LJ did not lay down any precise formula which took account of the principle he had identified, but subsequent cases dealing with the same issue took the view that an appropriate method would be to apply a multiplier to an annual ‘cost’ arrived at by taking a percentage of the full capital expenditure. In *Chapman v Lidstone*,⁷⁶ the claimant had, because of her injuries, purchased a bungalow for £20,000 more than she would have spent on a new house. Forbes J took as the percentage for the calculation the annual interest rate on the claimant’s mortgage. The difficulty with this approach, as is evident from the result in *Chapman v Lidstone*, was that if a relatively high interest rate and a relatively large multiplier were used, the court could arrive at a figure hardly different from the full capital cost which it had refused to award.⁷⁷

- 2.41 In the leading case of *Roberts v Johnstone*⁷⁸ the Court of Appeal acknowledged this problem and reconsidered the rate which should be used. The claimant had been severely brain-damaged at birth and had moved with her adoptive parents into more appropriate accommodation, which had been purchased with an interim payment. Giving the judgment of the court, Stocker LJ pointed out that, given the multiplier which had been selected, using the mortgage rate would allow recovery in excess of the capital expenditure.⁷⁹ The claimant suggested that where this was the case, the full capital expenditure should act as a ceiling to the award.

- 2.42 The Court of Appeal rejected this argument, and held instead that a two per cent rate should be used. This was the rate which, for the purposes of calculating interest on damages for non-pecuniary loss, had been regarded, in *Wright v British*

⁷³ Buckley and Sachs LJ agreed with Orr LJ.

⁷⁴ [1973] 1 WLR 118, 125.

⁷⁵ *Ibid.*

⁷⁶ Unreported, 3 December 1982.

⁷⁷ In *Chapman v Lidstone* the claimant’s mortgage rate, net of income tax relief, was taken to be 7%. Forbes J therefore used an ‘annual cost’ of 7% of the capital expenditure, or £1,400. To this he applied a multiplier of 14, resulting in an award of £19,600, only £400 less than the full capital cost.

⁷⁸ [1989] QB 878.

⁷⁹ The accepted multiplier was 16, and the net mortgage rate had risen to 9.1%.

Railways Board,⁸⁰ as a real rate of return on a risk-free investment.⁸¹ Stocker LJ said that:⁸²

...where the capital asset in respect of which the cost is incurred consists of house property, inflation and risk element are secured by the rising value of such property particularly in desirable residential areas, and thus the rate of 2 per cent would appear to be more appropriate than that of 7 per cent or 9.1 per cent, which represents the actual cost of a mortgage loan for such a property.

We are reinforced in this view by the fact that in reality in this case the purchase was financed by a capital sum paid on account on behalf of the defendants by way of interim payments, and thus it may be appropriate to consider the annual cost in terms of lost income and investment, since the sum expended on the house would not be available to produce income. A tax-free yield of 2 per cent in risk-free investment would not be a wholly unacceptable one.

- 2.43 The two per cent rate came to be accepted as the general rule for all cases, but was recently reconsidered by the House of Lords in *Wells v Wells*.⁸³ The claimant in that case claimed the full pre-trial cost of purchasing an appropriate property with a larger mortgage than would otherwise have been necessary. The House of Lords restored the decision of Collins J at first instance⁸⁴ that a three per cent rate should be used in the calculation because that represented the current return on investment in Index-Linked Government Securities (“ILGS”). Lord Lloyd said that:⁸⁵

...in *Wright v British Railways Board* Lord Diplock chose the return on ILGS as the first... of the two routes by which courts can arrive at the appropriate or ‘conventional’ rate of interest for forgoing the use of capital. At that time the net return on 15-year and 25-year index-linked stocks was two per cent. I can see no reason for regarding two per cent as sacrosanct now that the average net return on ILGS has changed. The current rate is three per cent. This therefore is the rate which should now be taken for calculating the cost of additional accommodation.

Lord Lloyd went on to say that the rate to be used would be kept up to date by the exercise by the Lord Chancellor of his powers under section 1 of the Damages Act

⁸⁰ [1983] 2 AC 773, approving *Birkett v Hayes* [1982] 1 WLR 816.

⁸¹ The assumption in *Roberts* was therefore that house prices would not increase in real terms, and that by purchasing a house the claimant had lost the ability to invest risk-free.

⁸² [1989] QB 878, 892.

⁸³ [1999] 1 AC 345 (decided jointly with the appeals in *Thomas v Brighton Health Authority* and *Page v Sheerness Steel*).

⁸⁴ [1996] PIQR Q44. The Court of Appeal had reversed this decision in favour of the traditional two per cent rate: see [1997] 1 WLR 652.

⁸⁵ [1999] 1 AC 345, 380. Lords Steyn, Hope, Clyde and Hutton agreed with Lord Lloyd on this point.

1996.⁸⁶ This makes clear the link between the rate to be used in this calculation and the rate generally used to discount damages for future loss.

- 2.44 The multiplier used in this calculation appears to be assessed in a similar way to that used to calculate multipliers for other types of expenditure. Factors specific to a particular claimant's situation may necessitate adjustments to this multiplier. For example, the fact that certain modifications do not need to be undertaken until some point in the future might lead to a reduction in the multiplier.⁸⁷ The date at which the claimant would have bought a house in any event might also have to be considered.⁸⁸

(3) Adaptation of property

- 2.45 In some cases the claimant will not purchase new accommodation, and, instead, existing property may have to be adapted. Alternatively, property which is specifically purchased for the claimant may need to be altered. These adaptations may increase the market value of the property. In *Roberts v Johnstone*⁸⁹ it appears that, although the Court of Appeal allowed the claimant's claim for the cost of alterations, she was required to give credit for the increase in market value. In *Willett v North Bedfordshire Health Authority*,⁹⁰ however, the cost of alterations was regarded as part of the capital cost of the property and was included in the two per cent calculation. Hobhouse J said that:

...in *Roberts v Johnstone* a similar item was not included in the capital value allowance of the property. The matter does not appear to have been the subject of argument... I consider there is no escape from the logical and proper approach of treating appropriate capital expenditure which is incurred after the purchase which enhances the value of the house in the same way as expenditure which is incurred in the acquisition of the house itself. Any other approach produces not only mathematically and logically inaccurate results but also an unjust result.

- 2.46 Where the alterations do not enhance the value of the house, their cost will presumably be added to the damages. It has been suggested that where the alterations reduce the value of the property, the amount of the reduction should be recoverable and the reduced value of the house should be used in the interest

⁸⁶ Section 1 enables the Lord Chancellor to prescribe by order a rate of return to be taken into account by a court in calculating damages for future pecuniary loss in a personal injury action. The Act implemented, in an amended form, recommendations made in our Report on Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224.

⁸⁷ See e.g. *Willett v North Bedfordshire Health Authority* [1993] PIQR Q166, Q173.

⁸⁸ At first instance in *Thomas v Brighton Health Authority* [1996] PIQR Q44, Collins J found that the claimant would have purchased a house as expensive as his new accommodation by the time he was 30, and adjusted the multiplier accordingly. The question was not considered directly in either the House of Lords or the Court of Appeal.

⁸⁹ [1989] QB 878.

⁹⁰ [1993] PIQR Q166. See also *Almond v Leeds Western Health Authority* [1990] 1 Med LR 370.

calculation.⁹¹ We are not aware, however, of any authority directly supporting this view.

3. THE MANAGEMENT OF THE CLAIMANT'S AFFAIRS

(1) Court of Protection

- 2.47 A claimant who is under the jurisdiction of the Court of Protection can recover from the defendant the fees charged by the receiver and the Court of Protection for the management and administration of the capital fund comprising the damages awarded.⁹² The Court of Protection Rules 1994 set out the fees that can be charged and include, among others, a commencement fee and an annual administration fee.⁹³ In addition, the Rules provide for the remuneration of receivers, whether they be private individuals or the Public Trustee.⁹⁴ The fees can be categorised into those which are fixed and those which are variable. Fixed fees are pre-set amounts which are determined without regard to the damages award. Variable fees are dependent on the level of the capital fund of damages and the income produced from that fund.
- 2.48 A significant proportion of the fees recoverable in respect of the Court of Protection is the annual administration fee. It is a variable fee which is based on the "clear annual income" from the assets and therefore can only be calculated once damages under all other heads have been determined.⁹⁵ Over the claimant's life, as the damages are used and the capital value of the fund decreases, so too should the variable fees charged by the Court of Protection. In *Roberts v Johnstone*,⁹⁶ Allott J accepted this reasoning and applied a "broad brush" approach to the discounting of the damages for Court of Protection fees to take account of the falling capital in the fund, while rejecting the defendant's argument that the amount should be halved. There was no appeal from the first-instance judgment on this point.
- 2.49 A degree of uncertainty surrounds the issue of contributory negligence and its effect on the damages awarded in respect of Court of Protection fees. In *Ellis v Denton*,⁹⁷ the award in respect of Court of Protection fees was held to be exempt

⁹¹ See e.g. Kemp & Kemp, *The Quantum of Damages*, vol 1 para 5-049.

⁹² See *Futej v Lewandowski* (1980) 124 SJ 777, approved by the Court of Appeal in *Rialas v Mitchell* (1984) 128 SJ 704.

⁹³ The Court of Protection Rules 1994, SI 1994 No 3046 replaced the Court of Protection Rules 1984, SI 1984 No 2035. Part XVIII of the Rules was made pursuant to s 106(5) of the Mental Health Act 1983 and deals with the charging of fees by the Court of Protection.

⁹⁴ Rule 45 provides for the remuneration of private receivers. Rule 83 deals with the receivership fees where the Public Trustee is appointed as receiver.

⁹⁵ Where the Public Trustee has been appointed as receiver, the annual administration fee is not payable: see r 78(3). However, the receivership fees applicable where the Public Trustee is receiver are assessed by reference to the clear annual income: see r 83(2).

⁹⁶ Unreported, 25 July 1986; quoted in Kemp & Kemp, *The Quantum of Damages*, vol 1 para 5-055.

⁹⁷ Unreported, 30 June 1989; noted in Kemp & Kemp, *The Quantum of Damages*, vol 2 C2-002.

from any reduction for contributory negligence. The reasoning is apparent from the following passage from *Kemp & Kemp*:

The judge [Rougier J] allowed the Court of Protection fees in full on the basis that these fees were awarded to manage a fund of damages which had already been reduced by 30 per cent for contributory negligence. He held that, to reduce the Court of Protection fees as well by 30 per cent would have resulted, in effect, in an element of double reduction.⁹⁸

It is unclear whether the fees in question were fixed or variable or comprised both.

2.50 In *Cassel v Riverside Health Authority*⁹⁹ liability had been agreed by the parties at ninety per cent (although it is unclear what the basis of this reduction was and it seems unlikely that it had anything to do with contributory negligence). Rose J assumed, without any explanation, that the Court of Protection fees were not subject to the 10 per cent reduction.¹⁰⁰ In the Court of Appeal¹⁰¹ it appears that the parties agreed that, as regard the fixed fees, this was incorrect; and the Court indicated that it agreed with the parties. Ralph Gibson LJ rejected the idea that Court of Protection fees are more akin to costs and therefore should not be subject to any reduction. In applying a reduction to the award in respect of Court of Protection fees he stated:

...it is clear that these costs do form part of the plaintiff's damage claim and are subject to the 10 per cent reduction... The sums were claimed as part of the damages. They are not costs of the proceedings in the sense of cost of proving the right to damages but are part of the plaintiff's damages to which he is entitled as a result of the injury suffered by him.¹⁰²

The judgment of Ralph Gibson LJ suggests that in applying the reduction, he had in mind only fixed fees:

[Counsel for the defendants] submitted that the 10 per cent reduction should be applied to the award for the costs of the professional receiver... and to the Court of Protection basic fee... He did not contend for any reduction of the Court of Protection additional fees as those fees depended upon the size of the fund after deduction of the 10 per cent from what would have been the full award.¹⁰³

2.51 But dicta from Rose J at first instance seem to contradict what Ralph Gibson LJ perceived to be the nature of the fees in question. Rose J specifically considered the question whether or not the multiplier used to calculate both the Court of Protection fees and the receiver's fees should be reduced to reflect the diminishing

⁹⁸ See *Kemp & Kemp, The Quantum of Damages*, vol 2 para C2-002.

⁹⁹ [1992] PIQR, Q1.

¹⁰⁰ *Ibid*, at Q16.

¹⁰¹ [1992] PIQR Q168.

¹⁰² *Ibid*, at Q182.

¹⁰³ [1992] PIQR Q168, Q182.

capital fund over the years. He concluded that the multiplier in respect of the professional receiver's fees should not be reduced because the fees were not related to the "clear annual income" and that the professional receiver's responsibilities would not diminish over the years.¹⁰⁴ However, in respect of the Court of Protection fees, a reduced multiplier was applied to reflect the fact that the fees charged would be linked to the "clear annual income" from the capital fund.¹⁰⁵ On Rose J's interpretation, only the professional receiver's fees were fixed.

- 2.52 Claimants will be able to recover fees incurred as a result of instructing solicitors in applications to and dealings with the Court of Protection, provided such fees are reasonably incurred.¹⁰⁶ The cost of administering trusts, comprising damages awarded, which lie outside the jurisdiction of the Court of Protection, are also recoverable by the claimant.¹⁰⁷

(2) Financial Advice

- 2.53 Where the damages awarded are not administered by the Court of Protection, professional advice is often required to ensure that the award is prudently invested. The fees charged in respect of such past and future services appear to be recoverable by the claimant in an award for damages, although this position is not entirely certain.¹⁰⁸ The House of Lords in *Wells v Wells*,¹⁰⁹ in deciding that, in assessing damages one is entitled to assume that the claimant will invest in index-linked government securities, seemed to accept that the cost of financial advice was recoverable. Lord Clyde in his speech gave some indication of how the decision would in practice affect damages recoverable under this head:

On this approach the problem which was raised of the need to allow for the costs and charges involved in the management of an investment portfolio substantially disappears. There is certainly no likelihood of costs and charges being regularly involved on the scale which would probably apply to the management of a portfolio of equities. The assumption would be that the index-linked investment would be held

¹⁰⁴ [1992] PIQR Q1, Q17.

¹⁰⁵ Both the 1984 and the 1994 Rules refer to the "clear annual income at the disposal of the patient". Rose J indicated that in order to decide whether or not to make a reduction to reflect the diminishing value of the fund, it first had to be known whether the Court of Protection charged fees by reference to the clear annual income earned on the capital or by reference to the clear annual income as distributed to the patient. He affirmed that the former interpretation was in fact the one applied by the Court of Protection. See *Cassel v Hammersmith and Fulham Health Authority* [1992] PIQR Q1, Q17.

¹⁰⁶ In *Hodgson v Trapp* [1988] 1 FLR 69, Taylor J awarded past costs but not future costs under this head. This part of the award was not directly challenged on appeal to the House of Lords.

¹⁰⁷ See *Bell v Gateshead AHA* (unreported, 22 October 1986); see Kemp & Kemp, *The Quantum of Damages*, vol 1 para 5-052.

¹⁰⁸ Russell J in *Francis v Bostock*, *The Times* 8 November 1985, refused to award such damages on the grounds that it was too remote and the court was not concerned with the disposal of awards once made. But in *Anderson v Davis* [1993] PIQR Q87, R Bell QC did not follow the decision and treated the costs as analogous to Court of Protection fees.

¹⁰⁹ [1999] 1 AC 345. See also Lord Lloyd's judgment at 373.

to maturity. In relation to such investments such costs and charges as there would be may for practical purposes be ignored.¹¹⁰

- 2.54 If the award is under the jurisdiction of the Court of Protection, recovery cannot be made for the fees of professional advisers apart from a receiver.¹¹¹

4. LOSSES ARISING OUT OF THE CLAIMANT'S DIVORCE

- 2.55 It may happen that the claimant's injuries lead to his or her divorce. A variety of losses to the claimant may arise as a result of the divorce, including the legal and administrative costs of the procedure, and any financial arrangements which may be ordered by the court or agreed between the parties to the marriage. The claimant may also be said to have suffered some loss of a non-pecuniary nature in the loss of his or her marriage. Although all these losses go beyond 'expenses' in the strict sense, they are conveniently dealt with in this report.

- 2.56 Under the present law, a claimant is not entitled to recover damages for losses arising from divorce, even if the divorce was an obviously foreseeable consequence of the injuries he or she sustained. In *Pritchard v J H Cobden Ltd*,¹¹² the Court of Appeal declined to follow its earlier decision in *Jones v Jones*,¹¹³ where the claimant had recovered the loss represented by a lump sum order against him for his former wife's accommodation, and refused to award damages for these losses.

- 2.57 Prior to *Jones v Jones* one claim of this kind had been rejected because causation was not found to be proven.¹¹⁴ In *Jones*, however, it was conceded by the defendant that the claimant's marriage had broken down because of the injuries he had suffered and his resultant change of personality. At first instance Stocker J accepted that a claim for financial loss arising from the divorce would be possible in principle, but refused to speculate as to the outcome of the claimant's divorce settlement and the loss it might occasion him.¹¹⁵

- 2.58 When the divorce was finalised some months later, the claimant appealed against Stocker J's decision, claiming that the sum of £25,000 which he had been ordered to pay his former wife for accommodation had been caused by the divorce. He also argued that he should receive some sum in respect of the periodical maintenance payments he had been ordered to pay, because it was more expensive for him to maintain two family units than one. The Court of Appeal disagreed with the defendant's arguments that claims of this kind should be rejected on policy

¹¹⁰ [1999] 1 AC 345, 397. Lord Lloyd, at p 374, indicated that one per cent per annum could be saved by investing in ILGS as this would obviate the need for continuing investment advice.

¹¹¹ See *Cunningham v Camberwell HA* [1990] 2 Med LR 49.

¹¹² [1988] Fam 22.

¹¹³ [1985] QB 704.

¹¹⁴ *Ward v Waltham Forest HA* (unreported, 24 March 1983). Cf *Antell and Ozolins v Simons* (1976) 26 RFL 304 (a decision of the Supreme Court of British Columbia).

¹¹⁵ He did, however, expressly include in the claimant's award of £27,000 for non-pecuniary loss an element for emotional pain resulting from the break-up of the marriage: see [1985] QB 704, 708, *per* Dunn LJ. This part of the award does not appear to have been challenged on appeal.

grounds, and awarded the claimant damages in respect of the lump sum for accommodation.¹¹⁶ His claim for damages for the maintenance payments was rejected, however. In the court's opinion, there were too many imponderables involved to be sure that it was more expensive for the claimant to maintain two families than one.¹¹⁷

2.59 In *Pritchard v Cobden*¹¹⁸ the defendants again conceded that the breakdown of the claimant's marriage had been at least partially caused by his injuries. The claimant's claim for damages against the defendants and his wife's application for financial relief in the matrimonial proceedings were heard together at first instance by Swinton Thomas J. He ordered that the claimant should pay his wife £50,000 as a 'clean-break' maintenance settlement, and increased her share in the matrimonial home from one-half to two-thirds (ordering the claimant to move into alternative accommodation); the claimant was also ordered to pay £50 per week in respect of his children.¹¹⁹ Swinton Thomas J then awarded the claimant damages to reflect the reduction in his share of the matrimonial home, the loss of use of the money he had spent on a new house, the costs of moving from one to the other, and the cost of running his new home.¹²⁰ No sum was awarded in respect of the maintenance settlement or the periodic payments.¹²¹

2.60 On the defendants' appeal, the Court of Appeal did not consider *Jones v Jones* to be binding authority because argument had not been heard on the issue of principle.¹²² The appeal was allowed, the Court of Appeal relying on three principal arguments. First, it was argued, no 'loss' was involved in orders made under the Matrimonial Causes Act 1973 for the redistribution of matrimonial assets. Sir Roger Ormrod said that "these orders neither add to nor reduce the total of the assets available to the spouses before the divorce; they merely redistribute them."¹²³

¹¹⁶ Peculiarly, the claimant did not receive the full £25,000, because it was discounted to take account of the possibility that he might have given his wife a capital sum out of his damages had the couple remained together. In *Pritchard v Cobden* [1988] Fam 22, 38, *per* O'Connor LJ, this was described as "an immaterial deduction which seems to have had no evidential basis."

¹¹⁷ In particular, the court mentioned the possibility that the claimant's former wife might remarry, and noted that it had heard no evidence on the claimant's obligations before the divorce, nor on the effects of tax on the situation.

¹¹⁸ The first instance decision is unreported, but is discussed in the decision of the Court of Appeal: [1988] Fam 22.

¹¹⁹ See the judgment of O'Connor LJ in the Court of Appeal: [1988] Fam 22, 29.

¹²⁰ [1988] Fam 22, 29 and 41-44.

¹²¹ It is not clear whether the £60,000 awarded in respect of non-pecuniary losses, reduced to £50,000 on appeal, included any sum to reflect the loss of the marriage similar to that awarded in *Jones v Jones*; see para 2.57, n 115 above. The Court of Appeal do not mention the point.

¹²² See [1988] Fam 22, 40, *per* O'Connor LJ, 49, *per* Sir Roger Ormrod. The court's refusal to follow *Jones v Jones* has been described as "a curious side-stepping of an authoritative precedent": S Juss, "An 'Unusual Claim' in the Court of Appeal" [1987] CLJ 210, 212.

¹²³ [1988] Fam 22, 47.

- 2.61 Secondly, it was said that allowing recovery for these ‘losses’ would produce ‘infinite regress’. Sums awarded for personal injury damages would be part of the total assets to be considered in the matrimonial proceedings. But if those sums themselves depended on the outcome of the matrimonial proceedings, the court argued, circularity was inevitable.¹²⁴ The third main argument advanced by the Court of Appeal was that the court deciding the quantum of damages in the personal injury action might have to try to foresee what the outcome of future matrimonial proceedings would be.¹²⁵
- 2.62 These three arguments led the court to the conclusion that, even though it had been conceded that the divorce and the loss it caused to the claimant were foreseeably caused by the claimant’s injuries, damages for those losses could nonetheless not be recovered. O’Connor and Croom-Johnson LJ, in a joint judgment, described them as ‘too remote’, and concluded that:

...in the public interest the court should not include this head of damage, the investigation of which involved the conflict and expense to which we... have referred and [which] is not only of its nature highly speculative but, in an age where breakdown of marriage is all too common, is also open to abuse.¹²⁶

Sir Roger Ormrod was not prepared to attach a ‘label’ to the reason for the exclusion of this claim, but talked of remoteness, lack of causation, and the general rule against recovery of consequential economic loss.¹²⁷ The court also suggested that such awards would act as an incentive to divorce sooner rather than later.

5. INTEREST ON DAMAGES FOR PECUNIARY LOSS

- 2.63 The principle of full compensation prescribes that the claimant is entitled to compensation for loss suffered as a result of delay in receiving damages. Interest is only recoverable in respect of *past* and not *future* pecuniary loss,¹²⁸ because no delay will arise where the loss or expense is met by the award of damages before it has been incurred. The judicial power to award interest is contained in section 35A of the Supreme Court Act 1981 and section 69 of the County Courts Act 1984.¹²⁹ Interest is compulsory for personal injury damages in excess of £200, but the court has a discretion to determine the portion of the total sum which will be subject to an award of interest, as well as the relevant rate and the period for which interest is to be awarded.
- 2.64 *Jefford v Gee*¹³⁰ set down the method to be used in calculating interest on damages for pre-trial pecuniary loss. The Court of Appeal held that, normally, interest on

¹²⁴ *Ibid*, 39, *per* O’Connor LJ, 48, *per* Sir Roger Ormrod.

¹²⁵ *Ibid*, 39, *per* O’Connor LJ, 48-49, *per* Sir Roger Ormrod.

¹²⁶ *Ibid*, at 40.

¹²⁷ *Ibid*, at 48

¹²⁸ *Jefford v Gee* [1970] 2 QB 130, 147, *per* Lord Denning MR.

¹²⁹ Previously the power could be found in s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934, amended by s 22 of the Administration of Justice Act 1969.

¹³⁰ [1970] 2 QB 130.

the whole amount of loss is payable from the date of the accident to the date of trial at half the average rate on the special account over that period. This represents a rough substitute for awarding interest on each pecuniary loss for the period from when it was suffered until trial at the full average rate (on the special account) over that period. The rate of interest on the special account is currently eight per cent.¹³¹

- 2.65 The interest rate applied to pecuniary loss can be contrasted to the position in respect of non-pecuniary loss. Following *Wright v British Railways Board*,¹³² a rate of two per cent is applied to damages for non-pecuniary loss. However, this position may be altered in light of the recent House of Lords decision in *Wells v Wells*.¹³³ The variance in the interest rates applicable to pecuniary and non-pecuniary losses can be attributed to the fact that an award of damages for *past* pecuniary loss does not itself take account of inflation, whereas damages for non-pecuniary loss are awarded in the value of money at the date of trial.¹³⁴
- 2.66 Several cases since *Jefford v Gee* have attempted to establish the circumstances under which a departure from the normal method of interest calculation is warranted. These cases have sought to distinguish *Jefford v Gee* on the ground that the loss encountered was ongoing. In *Ichard v Frangoulis*¹³⁵ interest at the full rate was awarded on special damages. The fact that the loss occurred shortly after the accident held sway with the judge, who distinguished *Jefford* because the loss in that case was a continuing loss of earnings.¹³⁶ Similar reasoning was adopted by the Court of Appeal in the case of *Prokop v Department of Health and Social Security*.¹³⁷ Once again interest was awarded at the full rate. May LJ was of the opinion that the judgment in *Jefford* indicated that the half-rate method of interest calculation was only to be applied to periodical losses continuing from the date of accident to the date of trial. Such an interpretation accorded with mathematical common sense.
- 2.67 Not all subsequent cases have sought to restrict the application of the half-rate approach. The Court of Appeal in *Dexter v Courtaulds Limited*¹³⁸ advocated a wide application of the half-rate approach. However, Lawton LJ did acknowledge certain exceptions to *Jefford*.¹³⁹ Most of these exceptions would arise where the trial took place many years after the loss ceased. Lawton LJ intended these

¹³¹ 8% has been the applicable rate since 1 February 1993, as set periodically by the Lord Chancellor in concurrence with the Treasury: Court Fund Rules 1987, r 27; Supreme Court Practice 1999 vol 1 paras 6/L/11-6/L/16.

¹³² [1983] 2 AC 773.

¹³³ [1999] 1 AC 345. See Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com 257, paras 2.56-2.57.

¹³⁴ See Damages for Personal Injury: Non-Pecuniary Loss (1999) Law Com No 257, paras 2.29-2.58.

¹³⁵ [1977] 1 WLR 556.

¹³⁶ *Ibid*, at 558.

¹³⁷ [1985] CLY 1037.

¹³⁸ [1984] 1 WLR 372.

¹³⁹ *Ibid*, at 376-377.

exceptions to be applied only in the narrowest of circumstances and only where they were specifically pleaded. Oddly though, the Court of Appeal made no mention of its earlier decision in *Prokop v DHSS*.

- 2.68 The recent Court of Appeal decision in *Hobin v Douglas*¹⁴⁰ represents another departure from the approach in *Jefford v Gee*. Roch LJ, in giving the Court of Appeal's judgment, upheld Colman J's approach and stated:

There can be no doubt that it is open to the Judge to depart from the *Jefford v Gee* approach in an appropriate case.

- 2.69 Roch LJ drew support for his statement from *Prokop v DHSS* but no mention was made of the decision in *Dexter v Courtaulds*. Emphasis was placed on the fact that a loss of profits was suffered over a relatively short defined period of time and that the losses were substantially greater in the years immediately prior to the trial than they had been in the years immediately following the accident. The method used by Colman J, which was described by Roch LJ as taking an "actuarial basis" rather than the normal "rough and ready approach," was to award interest for each separate year up to the end of that year at half rate and thereafter at the full rate. If the *Jefford v Gee* approach had been used, the claimant would have been overcompensated. In this instance, on the Court of Appeal's view, the actuarial basis of assessment produced a more accurate and fairer result and Colman J could not be said to have exercised his discretion on any erroneous principle.

¹⁴⁰ Unreported, 19 October 1998: noted in *The Independent* 26 October 1998.

PART III

REFORM I: MEDICAL AND NURSING EXPENSES

1. SECTION 2(4) OF THE LAW REFORM (PERSONAL INJURIES) ACT 1948

(1) Generally

- 3.1 Section 2(4), as we have seen,¹ provides that where a claimant claims damages for medical expenses, it may not be argued that the expenses incurred were unreasonable simply because they could have been avoided by making use of free care available from the National Health Service. In our Consultation Paper we considered arguments for and against the retention of section 2(4), and reached the provisional view that it should not be reformed or repealed.²
- 3.2 More than four-fifths of our consultees agreed with that provisional view. Adrian Hamilton QC's argument that "the injured plaintiff ought to be able to choose private health care, without having to justify that choice" was a typical response. And the Healthcare Lawyers Association, an association of lawyers specialising in medical defence work, argued that changes to section 2(4) would not be in the interests of the injured victims or the NHS. Without the freedom of choice offered by the current law, the Association said, "the risk of incurring irrecoverable private medical costs may inhibit seriously injured plaintiffs... from making the best possible initial arrangements... thus adversely affecting that plaintiff's ultimate recovery". Greater strain would also be placed on NHS resources because "plaintiffs who might otherwise have sought private treatment will have recourse to NHS treatment in the short or long term." Concern was also expressed that the repeal of section 2(4) "may lead to exclusions in private medical insurance policies excluding private care for injuries arising from tortious acts, because of concerns by private medical insurers that their outlay may not be recoverable from the tortfeasor."
- 3.3 Consultees also questioned the assumption that the NHS would remain completely free of charge to patients. Professor Michael Jones, for example, said that "there is no guarantee that judgments made today about what treatments or services will be available under the NHS will be correct in five or ten years' time. The NHS is only just beginning to engage in a serious debate about rationing resources". Another key consideration was that repeal of section 2(4) might mean less certainty in the assessment of damages, and lead to more argument and increased litigation over whether or not private medical care was reasonable for a particular claimant.

¹ See paras 2.3-2.7 above.

² See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.2-3.18.

- 3.4 Nevertheless, since its introduction over fifty years ago section 2(4) has been the target of criticism from the judiciary and academics alike.³ Both the Pearson Commission and the Scottish Law Commission have recommended its reform, and several of our consultees also criticised the current state of the law.⁴

(2) Claimants using NHS facilities having obtained damages for private expenses

- 3.5 One particular concern was that claimants might abuse the provision by claiming damages for private care, and then avoid any expense by making use of free NHS facilities. This problem does not arise in relation to past medical expenses, where the claimant will have to prove that he or she has in fact incurred the expense before damages will be awarded.⁵ But there is of course no obligation on a claimant who has been awarded damages for *future* medical expenses actually to spend the award on private treatment.
- 3.6 The case law suggests, however, that the courts are usually careful in assessing the claimant's real intention in cases where a sum is claimed for future private medical expenses.⁶ Several consultees suggested that the usual approach is, in the words of Piers Ashworth QC, simply to "assume that treatment will be obtained in the future under the same regime as in the past", and so "a plaintiff who has always obtained medical treatment under the NHS will therefore have difficulty in persuading a judge that in future he will go privately." But Brooke LJ, for example, told us that particularly in large claims, some sum for private health care is usually considered reasonable, and the Association of British Insurers expressed some concern that "it appears that claims are increasingly constructed on the basis that if there is a risk of medical treatment it is claimed on the basis that private medical treatment will inevitably be required".
- 3.7 Even if awards for private health care are increasingly frequent, however, this does not necessarily mean that the system is being abused. As Professor Richard Buckley said in his response, "private health care is no longer merely an eccentric preference of the very wealthy". Moreover, the majority of our consultees did not seem to think that significant abuses were occurring in practice, and we remain unconvinced that this is a real problem.
- 3.8 Another criticism, made in particular by the Medical Defence Union, was that even though section 2(4) does not prevent a defendant from arguing that a

³ See e.g. *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 188, *per* Lord Scarman; P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) p 125; A Ogus, *The Law of Damages* (1973) p 175.

⁴ For evidence of more recent debates which indicate the topical nature of s 2(4) of the Law Reform (Personal Injuries) Act 1948, see *Letters to the Editor, The Times* 21 January 1999 and 3 February 1999.

⁵ The effect of s 2(4) in this context is, of course, to prevent the defendant from arguing that the claimant should have taken advantage of free treatment on the NHS rather than incurring the costs of private health care.

⁶ *Cunningham v Harrison* [1973] QB 942; *Lim Poh Choo v Camden & Islington HA* [1980] AC 174; *Harris v Brights Asphalt Contractors* [1953] 1 QB 617; *Woodrup v Nicol* [1993] PIQR Q104. See para 2.6 above.

claimant will not in fact incur private medical costs, the use of a ‘balance of probabilities’ test means that many more claimants are successful in claiming damages for such costs than will actually incur them.⁷ But as we recognised in the Consultation Paper,⁸ some element of prediction of future loss, and the attendant risk of over- or under-compensation, is necessarily inherent in a system which awards lump-sum damages.

- 3.9 We suggested in the Consultation Paper that a possible solution to these concerns might be to require an undertaking from the claimant that he or she would actually use damages awarded to meet the costs of private medical treatment for that purpose. This suggestion did not find favour with consultees. As we had anticipated, it begs the question of who would enforce the undertaking and how this could be done. Solicitors Nabarro Nathanson said that “this would cause further administrative difficulties post settlement and would require a defendant to monitor the way in which the plaintiff utilises his or her damages.”
- 3.10 Ultimately, we remain of the opinion that the objections to section 2(4) considered here could equally be directed at any assessment of future expenses. The law has adopted a system which generally uses once-and-for-all assessment and lump sum compensation. There are good reasons for this choice, including the advantages to both parties of finality in litigation, but its corollary is that once damages have been recovered, a claimant is free to spend them as he or she wishes. We have previously considered the advantages and disadvantages of compensation by lump sum or reviewable periodic payments.⁹ A general reconsideration of this issue is outside the scope of this report and it would be odd to move to a system of reviewable periodic payments solely in relation to the future costs of a claimant’s medical care.

(3) The duty to mitigate

- 3.11 It is settled law that a claimant may not recover damages in respect of loss which he or she ought to have avoided incurring.¹⁰ This principle, which forms part of the law of both contract and tort, is referred to as the claimant’s duty to mitigate his or her loss. In the context of medical treatment, it might be thought to suggest that if a claimant requires care which is available for free on the NHS, he or she ought not to increase his or her loss by choosing to have private treatment. But by

⁷ See especially *Woodrup v Nicol* [1993] PIQR Q104; para 2.6 above. James Rowley, a barrister, also criticised the ‘balance of probabilities’ test, but because it denied any recovery to claimants who might need some medical care but were unable to show that it was more likely than not.

⁸ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.11.

⁹ Structured Settlements and Interim and Provisional Damages (1992) Consultation Paper No 125, paras 2.3-2.42 and paras 3.14-3.21; Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, paras 2.1-2.48 and paras 3.1-3.160. See also Personal Injury Litigation-Assessment of Damages (1971) Working Paper No 41; Personal Injury Litigation-Assessment of Damages (1973) Law Com No 56.

¹⁰ See e.g. *British Westinghouse Electric v Underground Electric Railways Co of London* [1912] AC 673, 689, *per* Viscount Haldane. This case concerned a breach of contract but the principle is the same in tort. See also *McGregor on Damages* (16th ed 1997) para 296 ff.

virtue of section 2(4), the availability of NHS care as an alternative must be disregarded, and several consultees criticised the law for this reason.

- 3.12 To argue successfully that a claimant should mitigate his or her loss by using NHS treatment rather than incurring the expense of private care, it would be necessary to consider the differences between NHS treatment and private treatment. Even if it is assumed that the quality of the actual medical care is comparable as between the two,¹¹ some differences assuredly exist. In particular, private treatment may often be available sooner,¹² and may offer accommodation which is more private and more comfortable.¹³ Private patients may also benefit from greater choice in the time and location of their treatment, and in the specialist who will provide it.¹⁴
- 3.13 Much more than in other areas where the duty to mitigate applies, it seems to us that these advantages are very closely connected with ensuring that the claimant is returned to a position as near as possible to his or her pre-accident state.¹⁵ In any event, the standard of reasonableness demanded of the claimant in fulfilling the duty to mitigate is not generally a high one,¹⁶ and the onus of proof may also be on the defendant to show that the claimant has acted unreasonably.¹⁷ In our view, therefore, it does not contravene the duty to mitigate to allow the claimant a free choice between NHS and private treatment. The latter may offer the claimant

¹¹ Our consultees seemed generally to think that this could be assumed. Professor Michael Jones pointed out that “often the same doctors will give both private and NHS treatment” and thought that “the standard of medical treatment provided by the NHS is as good as that provided privately.” It was also noted that some treatment, particularly emergency care and complex surgery, may not be available privately.

¹² The length of NHS waiting lists was repeatedly cited by consultees as a primary concern. Professor Michael Jones said that “it is not uncommon for a procedure which a doctor says will involve a six or nine month wait under the NHS to be available within two or three weeks privately, often provided by the same doctor and sometimes using the same NHS facilities.”

¹³ See also J A Jolowicz, “Compensation for Personal Injury and Fault” in D K Allen, C J Bourn and J H Holyoak, *Accident Compensation after Pearson* (1979) p 64.

¹⁴ Even those consultees who felt that in principle s 2(4) was inconsistent with a duty to mitigate accepted that in most cases courts would find that the advantages offered by private treatment made the expense of such treatment reasonable. Thus Dyson J said: “In the real world ...it will only be in comparatively few cases that a court will decide that this involves a breach of the duty to mitigate.”

¹⁵ As we observed in the Consultation Paper, in some cases private treatment may also have the effect of reducing the claimant’s loss under another head, for example by allowing him or her to choose to be treated at a time which does not conflict with his or her work commitments and thereby cause a loss of earnings: see *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, para 3.8 n 16.

¹⁶ For an example in the context of the law of contract see *Banco de Portugal v Waterlow* [1932] AC 452, 506, *per* Lord Macmillan. Along similar lines, Professor Andrew Tettenborn argued in his response to the Consultation Paper that the availability of free alternatives did not generally preclude recovery in tort: “Suppose you negligently write off my car, and my elderly uncle offers to give me his own identical model as a replacement. Has it ever been suggested that I must take up his offer, and if I do not I lose my claim against you for the car’s value on the ground of failure to mitigate?”

¹⁷ *Roper v Johnson* (1873) LR 8 CP 167; but *cf Selvanayagam v University of West Indies* [1983] 1 WLR 585.

additional benefits, to which the claimant is entitled provided that the expenditure is not unreasonable in itself.

(4) Suggestions for reform

3.14 In 1978, the Pearson Report recommended that:¹⁸

...section 2(4) of the Law Reform (Personal Injuries) Act 1948... should be repealed; and that in [its] place it should be provided that private medical expenses should be recoverable in damages if and only if it was reasonable on medical grounds that the plaintiff should incur them.

3.15 The Scottish Law Commission, meanwhile, suggested¹⁹ that a better replacement for section 2(4) would be the application of the ordinary test of reasonableness. Those consultees who disagreed with our provisional recommendation that the section should not be reformed tended to favour this view, rather than the more restrictive 'medical grounds' test proposed in the Pearson Report.²⁰

3.16 As we have indicated, private treatment offers advantages which are more than merely 'medical' in nature, and of which claimants ought to be entitled to take advantage. With respect, therefore, we disagree with the recommendation of the Pearson Commission. But we do not think that a simple test of reasonableness provides an acceptable alternative to section 2(4). The Law Society expressed the view that this test would be difficult to apply in practice, and we agree. It would also involve courts in making the kind of 'difficult and invidious' comparison between the respective merits of NHS and private care to which the Monckton Committee referred.²¹

3.17 Nor can we support the suggestion, made by several of our consultees, that claimants ought to be entitled automatically to the full cost of private care. Section 2(4) as it stands does not entitle a claimant to unlimited private treatment: the costs claimed must still be reasonable. This limitation is in line with the general principles of recovery in claims for expenses (in particular, the duty to mitigate), and we see no reason why medical or nursing expenses should be treated differently in this respect.

3.18 **We therefore recommend, in accordance with our provisional view and reinforced by the support of the vast majority of our consultees, that section 2(4) of the Law Reform (Personal Injuries) Act 1948 should not be repealed or reformed.**

¹⁸ Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054, para 342.

¹⁹ Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services (2) Admissible Deductions (1978) Scot Law Com No 51, paras 81-83.

²⁰ Several consultees indicated that a similarly restrictive test is operated by the Criminal Injuries Compensation Authority in deciding claims by the victims of crime for the cost of future medical care.

²¹ See para 2.5 above.

2. RECOUPMENT OF COSTS BY THE NATIONAL HEALTH SERVICE²²

- 3.19 In general, the NHS is unable to recoup the cost of treatment provided to tort victims from tortfeasors. However, there is an exception to this rule in motor accident cases, in which the NHS does have the right to recoup the cost of the treatment provided to a tort victim from the tortfeasor. This scheme was previously given effect under sections 157 and 158 of the Road Traffic Act 1988, and is now provided for under the Road Traffic (NHS Charges) Act 1999.²³
- 3.20 In the Consultation Paper²⁴ we examined in detail the controversial question of whether the NHS should be given a general right to recoup the costs of medical treatment from the tortfeasor.²⁵ The controversial nature of this issue was demonstrated by the huge media interest that our Consultation Paper provoked. As acknowledged in the Consultation Paper, much of the controversy is due to the party political nature of the subject matter, but we remain convinced that a legal analysis of the issue is beneficial.
- 3.21 Strong views were expressed on both sides. Forty-eight per cent of consultees were generally in favour of recoupment, while thirty-two per cent of consultees were generally against it. A further twenty per cent of consultees did not adopt a firm position. In view of the wide scope of the subject, the Consultation Paper set out four questions, for three of which we gave a provisional view.²⁶ Although it was noticeable that consultees tended to deviate from the structure of the questions asked, there was majority support for each of our provisional views. It should be noted that our approach in this section of the paper differs slightly from that elsewhere, in that we do not make detailed recommendations. The reasons for this will become apparent. Instead, we set out the position taken in the Consultation Paper alongside a discussion of the responses from consultees, following which we provide some concluding remarks as observations.

²² See paras 12.1-12.36 below for our discussion of possible reform to the law regarding third party providers of (other) collateral benefits.

²³ See paras 2.8-2.14 above.

²⁴ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.19-3.42.

²⁵ We distinguished NHS care from services provided by local authorities under the Health and Social Services and Social Security Adjudications Act 1983. Section 17 allows the local authority to recover such charge (if any) as it thinks reasonable from the recipient of the services. Following the Court of Appeal decision in *Avon CC v Hooper* [1997] 1 All ER 532, in assessing the sufficiency of the recipients' means to pay an amount in respect of the services received, a claim in negligence is to be included. As a result, where local authorities can levy a charge, they are likely to do so if the recipient has an action for personal injury. The claimant will have to claim these expenses (both past and future) in a similar manner to expenses incurred when commercial services are engaged. See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 2.2, n 9. See further Stephen Stewart QC, "Recovery of the Cost of Local Authority Services" [1999] JPIL 27.

²⁶ Provisional views were formed on whether the NHS should have a recoupment right as a matter of legal principle and, if a recoupment scheme were to be introduced, on the form of the NHS claim, as well as on the administrative arrangements that should be adopted. No view was taken on whether or not policy and practical considerations override the case for recoupment by the NHS.

(1) The argument from legal principle

- 3.22 We asked consultees whether or not the NHS should as a matter of legal principle recover from the tortfeasor costs resulting from the tort (or other legal wrong). We came to the provisional view that they should. The argument from the restitutionary principle of unjust enrichment²⁷ asserts that in providing free care under legal compulsion, the NHS in effect discharges part of the tortfeasor's liability.²⁸ As such, the tortfeasor is unjustly enriched at the expense of the NHS and so the NHS should have a restitutionary right against the tortfeasor to recover those expenses. More than three-quarters of consultees responding to this particular issue were in agreement with our provisional view. For the most part consultees expressed agreement with the arguments set out.
- 3.23 Further support was drawn by the majority in favour of recoupment from the analogies outlined in the Consultation Paper. The NHS is able to recover the costs of treatment provided to victim of motor accidents under the Road Traffic (NHS Charges) Act 1999. Another analogous situation exists in the recoupment scheme established by the Social Security (Recovery of Benefits) Act 1997.²⁹ A further and striking analogy can be drawn with the position of private medical insurers, who have automatic subrogation rights enabling them to recoup money paid out to a tort claimant for private treatment. Consultees were particularly persuaded by this argument by analogy for NHS recoupment.
- 3.24 We would also point out that resting recoupment on the tortfeasor's unjust enrichment at the expense of the NHS (rather than seeking to compensate the NHS for a wrong done to it) means that there is a principled difference between the recoupment that we are here considering and the non-recovery of costs for the treatment of self-inflicted illness (due to, e.g. smoking or alcohol). The latter does not involve a tort (or other civil wrong) and so there is no question of the NHS "enriching" the wrongdoer by relieving his or her liability to pay damages. Similarly, the case of the NHS is distinct from other emergency services (e.g. the police and fire brigade) in that, if it were not for the NHS, the defendant would be liable for the cost of similar services, available elsewhere at a price. In contrast, the services provided by the police and fire brigade in response to a tort are rarely, if

²⁷ For acceptance of the principle against unjust enrichment in English law, see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 1 AC 669. Buxton LJ, in his response to the Consultation Paper, thought that these cases were too far away from the present facts to suggest that a tortfeasor is here unjustly enriched. He asserted that in any event "there is no general principle of unjust enrichment in English law," but if there was "there would of course be no need for law reform".

²⁸ In *Metropolitan Police District Receiver v Croydon Corpn* [1957] 2 QB 154, the Court of Appeal denied a restitutionary right to recover from the tortfeasor sick pay, paid to the victim pursuant to statutory obligation: the payments could not be said to have discharged any liability of the defendant because, to the extent that the victim had received sick pay (which is deductible from tort damages), the defendant's liability had never arisen. This can be criticised as an over-technical approach and is to be contrasted with the judgment of Slade J at first instance. Slade J considered that in reality, the tortfeasors had been relieved of part of their liability. See A Burrows, *The Law of Restitution* (1993) p 218. The first-instance decision is reported at [1956] 1 WLR 1113.

²⁹ Formerly Part IV of the Social Security Administration Act 1992. See also para 2.11 above and paras 10.48-10.51 below.

ever, available elsewhere, so that the police or fire brigade are not “enriching” the wrongdoer by relieving his or her liability to pay for the cost of those services.

- 3.25 Despite strong support for the case for NHS recoupment, several consultees remained unconvinced by the argument from legal principle. Various arguments were put forward by the twenty-one per cent of consultees who disagreed with our provisional view. Some argued that one could not helpfully isolate the issues of principle and policy. The general principle against recovery of pure economic loss was also raised in objection. But as an alternative to unjust enrichment reasoning, one can argue that this is an area where, exceptionally, pure economic loss suffered by a limited class of claimant (the NHS) should be recoverable in tort.

(2) Policy and practical objections to recoupment

- 3.26 A wide variety of views were expressed by consultees in response to our question whether policy or practical considerations militated against the introduction of a right of recoupment by the NHS. In our Consultation Paper, we put forward a number of arguments which could stand in the way of a recoupment right. Particular consideration was given to the argument that recoupment would be pointless as it would only result in shifting sums from those contributing to liability insurance to taxpayers, bearing in mind that there is a significant overlap between these two groups. Consideration was also given to the cost of recoupment and the difficulties encountered in placing monetary values on NHS treatment, where we emphasised the need to undertake a detailed cost-benefit analysis. We suggested alternative arguments against recoupment in the possibility that settlements would be hindered and that it would result in unnecessary treatment.
- 3.27 Circularity was addressed by some consultees, who felt that recoupment would be rendered meaningless as it would only entail “taking with one hand to give back with the other”. The overlap between taxpayers and those purchasing insurance was noted.³⁰ Possible adverse consequences for the claimant resulting from NHS recoupment were a concern of several consultees. In particular, consultees felt that recoupment should not result in either a reduction in damages recoverable by the claimant, nor a deviation in the standard of care to be expected. Possible interferences with patient confidentiality and the hindering of settlements, as well as increased litigation, were also mentioned. Consultees were concerned not only by possible adverse consequences for the claimant, but also by possible adverse consequences for the NHS. For example, recoupment could be seen as contrary to the main purpose of the NHS to provide care free of charge to all. Moreover, some consultees highlighted additional risks, such as the undertaking of unnecessary treatment in order to recover the costs, or the encouragement of a better standard of care for patients with possible tort claims. A few consultees were of the view that the tort system provided a poor basis for NHS recoupment. These consultees pointed to elements such as “the litigation lottery,” and the limited range of the tort system despite its high costs. Consultees were also concerned about the position of uninsured defendants. Others were wary that a recoupment scheme

³⁰ Professor Jolowicz and solicitors Nabarro Nathanson in particular made reference to the fact that those taking out insurance also pay taxes, the latter indicating that recoupment would represent nothing more than another form of taxation.

could see a growing influence exerted by insurers over the treatment provided to patients.

- 3.28 On the other hand, increased deterrence and improved risk management were cited as advantages which might follow from NHS recoupment. A further benefit was seen in extra services being provided by the NHS through the use of the money recouped.
- 3.29 In the Consultation Paper, we emphasised that a detailed cost-benefit analysis was necessary before any form of recoupment could be endorsed. We acknowledged that the costs of recoupment might outweigh the arguments for it. The majority of consultees were unable to come to a view on whether the sums recouped would cover administrative costs. There was general agreement among consultees that any proposed scheme should undergo a cost-benefit analysis.
- 3.30 Consultees presented several suggestions for making recoupment more efficient. The introduction of thresholds below which recoupment would not be available and the exclusion of treatment by GPs were among the suggestions made. Some consultees, however, favoured less expensive alternatives, such as increasing insurance premium tax and road tax, or levying taxes on settlements and damages awards.
- 3.31 Consultees were also concerned by the question of who would stand to benefit from the sums recouped. In the Consultation Paper we assumed that the sums recouped would not be earmarked for the NHS. Consultees agreed that this might well be the case. However, the Road Traffic (NHS Charges) Act 1999 suggests that this assumption is no longer appropriate, since the Act specifically provides for the sums recouped to be returned to the hospital(s) where treatment was provided.³¹ As a result, NHS hospitals directly benefit from the recoupment scheme. A number of consultees viewed increased funding for the NHS as an argument in favour of recoupment. Some consultees pointed out, however, that even if sums recouped were used for the benefit of the NHS, there was no guarantee that the Treasury would not cut funding so that there would be no overall gain for the NHS.
- 3.32 A further difficulty connected to the costs of recoupment relates to the issue of placing a monetary value on treatment provided by the NHS. In the Consultation Paper, we distinguished social security recoupment where this particular problem does not arise because the benefits received are already in monetary form. The NHS internal market, the value placed on private care and a tariff system for costs were suggested by consultees as means of resolving this problem. As already outlined,³² the Road Traffic (NHS Charges) Act 1999 addresses this problem by creating a tariff system. It therefore demonstrates the feasibility of using a tariff system to overcome the problem of determining costs. Many consultees felt that the further problem of future care costs was insurmountable and therefore should be excluded. Others proposed specified maximum periods within which costs of care could be recouped. In addition, consultees identified an issue in the problem

³¹ Section 13 of the Road Traffic (NHS Charges) Act 1999.

³² See para 2.10 above.

of differentiating treatment necessitated by the tort from treatment that the victim would have required in any event.

(3) The form of a recoupment claim

- 3.33 Proceeding on the assumption that a recoupment scheme would be introduced, we asked consultees what form the NHS' claim should take. In our Consultation Paper we explained that one could not simply apply the scheme for social security recoupment. Under the Social Security (Recovery of Benefits) Act 1997, recoupable benefits are set off against some of the damages received by a tort victim.³³ However, it would be inappropriate to deduct the costs of NHS care, since a claimant has no claim for damages to cover these costs.
- 3.34 We explored various alternative forms of claim and reached the provisional view that the NHS should have a direct claim against the tortfeasor, parasitic on the victim recovering damages. This mechanism would avoid many of the problems encountered by the other forms of a claim (for example, the unacceptability of requiring the NHS to charge the victim for treatment provided, the duplication of litigation and the uncertain effects that an NHS claim would have on the victims' claim). We also envisaged that any finding of, or bona fide agreement on, contributory negligence would likewise be applied to determine the percentage liability of the tortfeasor to the NHS.³⁴ A clear majority of consultees supported our provisional view. In some instances consultees were prepared to support our provisional view despite having objected to recoupment generally.
- 3.35 Some concerns were raised by consultees as to certain adverse effects on the claimant's claim which could result from an NHS claim being parasitic on the claimant recovering damages. Amongst these concerns were possible delays in reaching a settlement, the re-litigation of issues and the exertion of pressure by the NHS on claimants to make claims against tortfeasors. The Institute of Medicine, Law and Bioethics emphasised that "forcing patients to sue is unacceptable" while the Association of Personal Injury Lawyers stressed that under the recoupment scheme "there should be no obligation on the victim to bring a claim he or she would not otherwise have brought, simply for the benefit of NHS recovery". The situation where a settlement was reached without an admission of liability was viewed as an additional problem for any NHS claim. Several consultees queried what the position would be. Others reasoned that recoupment should be limited to instances where liability was either admitted or determined. Otherwise tortfeasors might be more easily persuaded not to settle. They also seemed to indicate that recoupment by the NHS would only be justified where liability was certain.
- 3.36 In relation to contributory negligence, there was no general consensus among consultees. Not all consultees agreed with our proposal. For those in favour of no reduction, liability in full for the costs of NHS treatment was regarded as a fair result which achieved 'rough justice'. Any disadvantage to the defendant was seen

³³ See paras 2.11 and 2.14 above.

³⁴ The requirement that an agreement on contributory negligence must be bona fide is necessary in order to prevent abuse by the parties. See further Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.40 and n 70.

to be balanced out by the advantages gained from the incidence of claims that were never pursued. However, several consultees expressed dissatisfaction with the DSS recoupment scheme which does not make any provision for contributory negligence. It was considered unjust if a tortfeasor, being liable to the victim only in part, could still be held fully liable for the cost of treating the victim's injuries.

- 3.37 Some consultees suggested alternative methods for a recoupment claim, the most common approach being a form of subrogation.³⁵ Brooke LJ voiced doubt as to whether a satisfactory solution could be found if a claim based on a form of subrogation was not available. He was concerned that "the possibility of a subrogation route is too rapidly discarded". A few consultees drew on the analogy with the position of private medical insurers to support the NHS being given subrogation rights rather than a claim in the form suggested by us.³⁶

(4) Administrative arrangements

- 3.38 Finally, we inquired about the administrative system which would need to operate in order to proceed with a recoupment scheme. In our Consultation Paper, we formed the provisional view that extending the existing regime for the recoupment of social security benefits would be the most sensible approach. We envisaged the administration of recoupment claims being undertaken by a distinct recovery unit, on the model of the Compensation Recovery Unit. Seventy-six per cent of consultees addressing the issue agreed with our provisional view. Many of these supported the approach presented in the Consultation Paper and suggested similar schemes. The need to minimise costs, to avoid the claimant's involvement in the procedure and to avoid burdening care units were highlighted by consultees. As we have seen,³⁷ since our Consultation Paper the role of the Compensation Recovery Unit has been extended by the Road Traffic (NHS Charges) Act 1999 to NHS recoupment following motor vehicle accidents. This development is directly in line with our provisional view.
- 3.39 Particular concerns raised by consultees related to perceived differences between existing social security recoupment and a possible NHS recoupment scheme. These differences called for modification of the DSS scheme before it could be applied to the NHS. Some of the difficulties outlined by consultees included the fact that complexity would arise in trying to devise a centralised recoupment system to act for all the separate NHS Trusts. The Association of British Insurers referred to the "fragmented nature of service provision in the NHS" and considered that applying a centralised recoupment unit would prove to be more difficult. In addition, several consultees stressed the importance of an appeals procedure.³⁸ Since the costs to be recouped by the NHS are not precisely defined

³⁵ In the Consultation Paper, we did not cite subrogation as one of the possible options, as a claim in subrogation would depend on the tort victim having a claim to recover NHS costs from the tortfeasor which the NHS could take over. However, under the present law the tort victim does not have such a claim.

³⁶ See para 3.23 above.

³⁷ See paras 2.8-2.14 above.

³⁸ It should be noted that the appeals procedure for DSS recoupment has been amended by the Social Security (Recovery of Benefits) Act 1997 and more recently the Social Security

as compared to those clearly-defined benefits recouped by the DSS, an appropriate appeals procedure would be required to deal with disputes as to costs as well as liability. The Association of British Insurers felt that “in a significant proportion of cases compensators may choose to challenge the charges raised by the NHS”. A “streamlined mechanism for appeals” was suggested as a means to tackle the problem. These concerns raised by consultees can now be viewed in the light of the Road Traffic (NHS Charges) Act 1999 which provides a working example, including an appeals procedure, upon which to base a wider NHS recoupment right.

- 3.40 A popular argument amongst those who disagreed with our provisional view was that the sums recouped should be returned to the individual hospital that administered the treatment.³⁹ It was felt that the use of a distinct recovery unit to recover the costs from the tortfeasor would see the money recouped returning to a national fund instead of being used to benefit the individual NHS hospital which provided the care. Desmond Flanagan of Headway stressed the importance of returning recouped sums to the individual hospital which treated the victim and was against any system like “the Social Security scheme where the recouped money goes back into the *national pot*.” As mentioned above, section 13 of the Road Traffic (NHS Charges) Act 1999 ensures that the hospitals continue to benefit from the sums recouped, even though a distinct recovery unit administers the scheme. Consultees’ concerns must therefore be considered in the light of this development.

(5) Concluding remarks on NHS recoupment

- 3.41 As we said in the Consultation Paper, the recoupment of costs by the NHS can fairly be said to touch on questions of a party political nature which are outside the remit of the Law Commission. And certainly we do not think that it would now be appropriate for us to draw up detailed recommendations, with proposed draft legislation, for a wide-ranging NHS recoupment scheme. Such details depend on a cost-benefit analysis and on policy choices that are beyond our remit.
- 3.42 Nevertheless, we believe that our decision to examine this issue from a legal perspective has been fully vindicated, not only by the huge interest shown by the media in our Consultation Paper, but also by the fact that we have been able to assist Government (in particular the Department of Health) by summarising for them, at an early stage and at their request, the views we received in response to our Consultation Paper. We understand that this has already been of assistance to the Government in formulating the details of the Road Traffic (NHS Charges) Act 1999 and is also helping them on the question of whether to go further and to legislate for more wide-ranging recoupment by the NHS.⁴⁰

Act 1998. The appeals procedure has been extended to the recoupment of NHS charges under the Road Traffic (NHS Charges) Act 1999. See further para 2.12 above.

³⁹ See para 3.31 above.

⁴⁰ During the debates on the Road Traffic (NHS Charges) Bill 1998, the Government confirmed that it was considering the issue of wider recoupment arising from our consultation paper. See *Hansard* (HL) 18 February 1999, vol 597 col 762.

3.43 **Although it would not be appropriate for us to make detailed recommendations for legislation, we have the following observations to make to those in Government charged with deciding how to proceed on this issue:**

- (1) subject to a cost-benefit analysis pointing to a contrary conclusion, it is our view, from a legal perspective, that the NHS should have the right to recover from tortfeasors (or other legal wrongdoers) the cost of NHS care resulting from a tort (or other legal wrong).**
- (2) we see no compelling reason why the scope of that recoupment should be confined to where the wrongdoer is compulsorily insured (that is, we see no compelling reason why the scheme should be limited to road traffic or employers' liability).**
- (3) the scheme implemented in the Road Traffic (NHS Charges) Act 1999 (including collection by the Compensation Recovery Unit, a tariff of medical expenses and an appeals procedure) is one that could relatively easily be extended to recoupment by the NHS in areas beyond road traffic accidents.**
- (4) contrary to the 1999 Act, we think that any finding of, or bona fide agreement on, contributory negligence should govern the percentage liability of the wrongdoer to the NHS just as it does to the immediate tort victim.⁴¹**

3. CARE PROVIDED FREE OF CHARGE BY RELATIVES OR OTHER PRIVATE PARTIES

(1) The general position

3.44 As we have seen,⁴² awards of damages in respect of care provided gratuitously by relatives or friends of the claimant have been made by courts for some considerable time. But they have justified this recovery in a variety of ways. In early cases⁴³ the courts looked for some obligation by the claimant to pay the carer before damages would be awarded. In *Donnelly v Joyce*⁴⁴ the Court of Appeal dispensed with the need to show any legal or moral obligation to the carer on the claimant's behalf, and regarded the claimant as having suffered a loss consisting in his or her need for services. But the approach followed by the House of Lords in *Hunt v Severs*,⁴⁵ overruling *Donnelly v Joyce*, is to treat the loss as a loss to the carer and, while still awarding damages to the claimant, to impose a trust to ensure that this loss is properly compensated. The law in Scotland takes a similar approach,

⁴¹ See paras 3.34 and 3.36 above.

⁴² See paras 2.16-2.25 above.

⁴³ See para 2.17 above.

⁴⁴ [1974] QB 454; para 2.18 above.

⁴⁵ [1994] 2 AC 350; para 2.19 above.

placing the pursuer under a personal obligation to the carer to account for the damages awarded for past gratuitous care.⁴⁶

- 3.45 In our Consultation Paper⁴⁷ we provisionally rejected the approach which requires, as a condition for the recovery of damages for gratuitous care, the finding of some obligation on the part of the claimant to pay the carer. To require the existence of a contractual obligation is objectionable because it encourages the making of ‘sham’ contracts between claimants and their carers;⁴⁸ reliance on a merely moral obligation is too vague to constitute a clear and certain test. And if the moral obligation was to be regarded as conditional on the claimant’s receipt of damages, it would be unacceptably circular reasoning to found the award of damages on the existence of that obligation.⁴⁹
- 3.46 We were also unable to accept the approach taken in *Donnelly v Joyce*, which regards the loss as that of the claimant. We said that the proper rationale for the award of damages for gratuitous care was the remuneration of the carer, the loss properly being seen as a loss to the carer and not to the claimant.
- 3.47 A few of our consultees argued for a return to the reasoning in *Donnelly v Joyce*. Peter Andrews QC, among others, expressed the opinion that “the correct approach is based on the need of the plaintiff... Compensation for care simply reflects the need which has been created by his disability.” Nonetheless, we remain of the opinion that, where care has been or will be provided free of charge to the claimant, it is unrealistic to argue that he or she suffers any real loss. We accept that an injured claimant has a need for care, but where that need is met by gratuitous provision, the claimant does not incur any pecuniary loss to justify the award of damages under this head. The real loss is suffered by the carer, whether in terms of earnings actually lost or time sacrificed.
- 3.48 Moreover we have no doubt that this loss should be compensated, even though this requires a derogation from the principle that damages should not be awarded to compensate a third party’s loss. In common with our consultees, we believe that an exception to this rule is amply justified by a number of important policy considerations. Primary among these is that damages to enable gratuitous carers to be remunerated facilitate the adoption of the most appropriate care regime for a person who has been wrongfully injured. This is because such an award equips the injured person to make appropriate arrangements to recompense his or her carers, whatever the formal legal arrangements under which the care is provided. Accordingly, damages for gratuitous care are a vital component of a just award to a person who has been wrongfully injured.

⁴⁶ Administration of Justice Act 1982, s 8; para 2.20 above.

⁴⁷ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.44.

⁴⁸ See e.g. *Cunningham v Harrison* [1973] QB 942, 951-952, per Lord Denning MR; *Donnelly v Joyce* [1974] QB 454, 463-4, per Megaw LJ; *Hunt v Severs* [1993] QB 815, 831, per Sir Thomas Bingham MR (CA).

⁴⁹ See *Donnelly v Joyce* [1974] QB 454, 463, per Megaw LJ.

- 3.49 There are also other influential policy considerations. First, the availability of tort damages to compensate gratuitous carers is beneficial in acknowledging the vital role played by voluntary carers in our society and, more specifically, in not discouraging those who wish to provide such care. This factor was recognised by Colman J in *Hardwick v Hudson*, when he justified the award by reference to “the consideration that personal physical care can often be most effectively and economically provided by a family member or close friend”.⁵⁰ Secondly, and paradoxically, the availability of damages for gratuitous care reduces the costs of the tort system. This is because denying damages for gratuitous care encourages injured people to engage commercial care, for the cost of which damages are available and generally at a higher rate than would be awarded for gratuitous care. Thirdly, even if an injured person did not engage commercial care, denying recovery for the “cost” of gratuitous care would have a further undesirable effect in encouraging injured people and their carers to enter into ‘sham’ contracts in an attempt to secure an award.
- 3.50 We are encouraged in these conclusions by the notably similar views expressed by those of our consultees with particular practical experience of situations involving gratuitous care. In their response, Headway, the National Head Injuries Association, said “we are anxious to find a solution to this problem without abandoning the principle that the loss is the carer’s not the plaintiff’s.” Robert Francis QC added that “the devoted care given by so many... never ceases to be a cause of wonder and gratitude. I have no doubt that such carers must continue to be recognised in a very significant way in the assessment of damages.” However, there remain a number of questions regarding quite what form an award of damages for gratuitous care should take, which we shall now consider.

(a) A direct right for carers?

- 3.51 If it is the carer and not the claimant who suffers the loss, it might be argued that the most appropriate method of ensuring proper compensation for the carer would be to confer on him or her a right to recover, direct from the tortfeasor, the ‘cost’ of providing the care. This radical solution was one which we considered in our Consultation Paper.⁵¹ It eliminates the need to use the injured claimant as a conduit for the damages, whether by use of a trust or a personal obligation. And some of our consultees recognised that it was the logical solution: Dyson J, for example, described it as ‘conceptually cleaner’, while the Association of District Judges said that “nothing short of requiring the carer to take his/her own proceedings would be a true recognition of the position”.
- 3.52 But even though most of them agreed with us that the loss was properly seen as that of the carer, over 90 per cent of our consultees opposed the introduction of such a right. Most objected on practical grounds: it would mean the involvement

⁵⁰ [1999] 3 All ER 426, 435-436: see para 2.25 above.

⁵¹ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.56-3.57. In para 3.58 we specifically asked consultees whether they would support the introduction of a direct right for carers in addition to, or as a replacement for, the claim of the injured victim.

of another party in the litigation,⁵² which, in the words of Brooke LJ, ought “to be avoided like the plague.” Apart from the complication and expense the additional claim might entail, consultees were concerned about the adverse effect it might have on the injured claimant’s claim. Some were sceptical that carers would want to exercise such a right, and therefore thought creation of it unnecessary if carers could be adequately compensated through the victim’s claim. And it was thought particularly unacceptable to make awards directly to carers for future care without any reliable guarantee that the care would in fact be provided. We are persuaded that a direct right for carers would be inappropriate, particularly given the possibility of conflict between the claimant and the carer’s interests.

- 3.53 **We therefore recommend that giving private providers of gratuitous care a direct claim against the tortfeasor or other legal wrongdoer would not be an appropriate way of reforming the law.**

(b) Compensating the carer through the claimant’s claim

- 3.54 If carers are not to have a direct claim against the tortfeasor, the question is how else to provide for an award to compensate them. The House of Lords, in *Hunt v Severs*,⁵³ adopted an approach whereby the injured claimant would recover damages for care but hold them on trust for the carer.⁵⁴ In Scotland the pursuer is placed under a personal obligation to account to his or her carer for the damages awarded. Both of these approaches are capable of ensuring that the carer is remunerated.
- 3.55 In our Consultation Paper, we considered some of the arguments for and against favouring a trust or a personal obligation as the means of giving the carer a legal entitlement to the damages.⁵⁵ The prevailing view amongst consultees was that any solution which is based on the imposition of a trust faces several difficult problems, and that the suggestion of a personal obligation is a better one. While the issue becomes less clear-cut if one confines the trust to damages for past care (rather than past and future care), we agree that a personal obligation to account is preferable to imposing a trust. Indeed, the English courts seem to have simply assumed that the only method of giving the carer a legal entitlement to the damages is through a trust and the personal obligation to account has not been discussed in this context. In particular:

⁵² It appears that in practice care is frequently provided by a number of different carers, both before and after the trial. Introducing direct rights for carers would, in such situations, mean the addition of *several* new parties.

⁵³ [1994] 2 AC 350.

⁵⁴ Adrian Hamilton QC, in his response, gave the example of bailment as another area of the law in which a claimant could recover compensation to which another party was beneficially entitled. See *A Tomlinson (Hauliers) v Hepburn* [1966] AC 451, 467-8, *per* Lord Reid: “I need not consider whether this is a trust in the strict sense or precisely on what ground the owner can sue the bailee for the money he has recovered...”. Another example in the context of breach of contract is *The Albazero* [1977] AC 774, which has recently been developed in cases such as *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68 and *Alfred McAlpine Construction Ltd v Panatom Ltd* [1998] CLC 636; see Privity of Contract: Contracts for the Benefit of Third Parties (1996) Law Com No. 242, paras 2.37-2.46.

⁵⁵ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.47-3.54.

- (1) Consultees suggested that the use of a trust would be particularly inconvenient for claimants. If some part of his or her damages are subject to a trust, the claimant is not free to use that money as he or she wishes: they are specifically for the benefit of the beneficiaries under the trust.⁵⁶ But if the claimant is merely made subject to a personal obligation, no part of his or her damages are unavailable in this way. The onus is on the carer to claim the appropriate sum from the claimant. Moreover, it is unclear what duties the claimant would be under as trustee of the money: as Mark Lunney asked in his response, “should the plaintiff have a duty to invest? What of the possibility of a conflict of duty and interest?” Others thought a trust too formal. David Kemp QC said it would “involve unnecessary expense and in many cases would be impracticable”.⁵⁷
- (2) If, having recovered damages, the claimant dies before the damages awarded for care are exhausted, the result if a trust is used is either that they should be returned to the tortfeasor, or that they should be given to the carer as the beneficiary of the trust. Neither solution is ideal.⁵⁸ Returning the money to the tortfeasor contravenes the general principle of finality in litigation: it would mean that the tortfeasor benefits if the claimant dies earlier than anticipated, while the claimant cannot seek further damages if he lives longer than was expected. Giving it to the intended carer seems undesirable when he or she has not provided the care. We think it should remain in the claimant’s estate, along with other unused damages: there is no reason to single out this particular head of damage for special treatment. These problems do not arise if a personal obligation to account for the damages is imposed. But it should be noted that these problems would also be avoided if a trust were imposed merely in respect of damages for past care rather than past and future care.
- (3) If the claimant becomes insolvent, the trust approach would give the carer priority over the claimant’s other creditors, whereas the personal obligation route would leave the carer no better off than anyone else. Solicitors Davies Arnold Cooper, in their response, supported the use of a trust precisely because it would give this advantage to carers. But, even in respect of damages already awarded for past care, it is not obvious why the provision of gratuitous care should entitle the carer to priority over others who may have a legitimate claim against the claimant. We also note the responses of several insurers, who thought it ‘inappropriate’ that the trust approach would theoretically enable the carer to trace the trust money into substitute assets.

⁵⁶ This might be particularly inconvenient for claimants if the carer did not wish to claim the money but rather wished the claimant to have the benefit of it.

⁵⁷ In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 1 AC 669, the House of Lords favoured the use of personal rather than proprietary remedies in the context of recovery of money paid under void contracts. The decision indicates that the law should in general be circumspect about imposing a trust, and its attendant consequences, without good reason.

⁵⁸ See further P Matthews & M Lunney, “A tortfeasor’s lot is not a happy one?” (1995) 58 MLR 395, 403.

- 3.56 Many of our consultees thought (and we agree) that neither a personal obligation nor a trust could deal appropriately with the question of payment for the claimant's *future* care. In English law, the issue has never received full consideration: in *Cunningham v Harrison*,⁵⁹ where the idea of a trust was first raised, the issue of future gratuitous care did not arise because the claimant's wife, who had been caring for him, had died before the trial. In *Hunt v Severs*, the House of Lords did not consider the question of future care because the award of damages under this head was disallowed.⁶⁰ In Scotland, although a pursuer may recover damages for both past and future care, the legal obligation to account to his or her carer arises only in respect of damages for past care.⁶¹
- 3.57 We said in the Consultation Paper that it was important that whichever approach was adopted dealt satisfactorily with the remuneration of the carer in the future.⁶² In their responses, however, our consultees stressed that with regard to future care, the interests of the claimant are equally, if not more, important. Piers Ashworth QC said "the future is uncertain and it may become necessary to employ outside help." A carer who at the trial intends and is expected to provide gratuitous care may, for one reason or another, become unwilling or unable to do so: but this does not affect the claimant's requirement for care, and he or she may have to meet the commercial cost. While the courts should take account of such possibilities in calculating damages for future care, they obviously cannot be certain that the basis on which their assessment is made - for example, the balance between future gratuitous care and future commercial care - will turn out to be accurate. The imposition of a legal obligation to remunerate the carer therefore runs the risk of compensating the carer but under-compensating the claimant.
- 3.58 As we recognised in the Consultation Paper,⁶³ one of the particular weaknesses of a trust approach is that it is difficult to see how it can cope with the uncertainties of the future. Consultees agreed: as far as future care was concerned, the trust solution was described as 'unsatisfactory', 'unworkable', 'impracticable' and 'wholly inappropriate'. But although the personal obligation approach was seen as preferable, many too recognised the problems for it caused by the uncertainties of the future. John Munkman said it was 'quite impossible' to deal with future care using a personal obligation. Others expressed concern that it would be difficult to know what the extent of a claimant's liability to a carer was, or how that liability could be enforced, especially after a change in carers or a deterioration in the claimant's condition. And although it would clearly be unacceptable to give all the money for future care to a particular carer immediately after the trial, it might be difficult to prescribe at trial arrangements for periodic payment. A legal obligation to account, once the gratuitous services have been rendered, does not remove the

⁵⁹ [1973] QB 942. See para 2.19 above.

⁶⁰ The award was disallowed because the care was provided by the tortfeasor: see paras 2.28-2.29 above. The award which was disallowed, however, had included an amount for future care. The point received no direct discussion.

⁶¹ Administration of Justice Act 1982, s 8; see para 2.20 above.

⁶² Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.47.

⁶³ *Ibid*, at para 3.50.

problem of the damages conceivably being insufficient to compensate both the carer and the claimant where the claimant is forced to incur unexpected care expenses.

- 3.59 In view of the responses we have received on this issue and the problems outlined above, we now believe that although some legal obligation is desirable in respect of *past* care to ensure proper remuneration of the carer (and, as we have said, we consider that a personal liability to account is preferable to a trust), the claimant should not be under any *legal* duty to a gratuitous carer in respect of damages awarded for *future* care. In many cases it will be evident that a claimant's care will very probably be provided for free by a relative or friend. And in many of those cases injured claimants will use their damages to reimburse their carers. But to insist on the claimant having a legal duty to the carer for future care runs the unacceptable risk of compensating the carer at the expense of undercompensating the claimant where circumstances turn out differently than envisaged at trial. Moreover, after the award of damages, care would usually be provided on the basis and in the knowledge that part of those damages had been awarded for it: it is arguable that even friends or relatives could reasonably be expected to sort out appropriate remuneration by making with the victim, prior to rendering the care, some arrangement (however informal) as to payment.
- 3.60 The approach of imposing a legal obligation for past care but not for the future is not inconsistent with *Hunt v Severs* - where the point did not arise because all care costs were denied - and is the approach laid down in legislation in Scotland. The legislation in Scotland, also imposes a personal obligation to account. We do not think, however, that the class of carers for whose care the claimant can claim ought to be limited to 'relatives', as it is in Scotland.⁶⁴ Even if 'relative' were to be broadly defined, such a limitation would exclude deserving persons, such as close friends, from being able to recover the cost of providing care.⁶⁵ We are, however, of the opinion that organs of the State should be excluded from the class of carers. We view the provision of care and services by the State as part of our discussion on NHS recoupment.⁶⁶ Our draft Bill also defines gratuitous services as excluding those performed in the course of a business, profession or vocation (and hence excludes services of, for example, a charity worker).⁶⁷

⁶⁴ Administration of Justice Act 1982, ss 8, 13(1).

⁶⁵ The Scottish Law Commission considered that the need for recovery only existed within the family group and recommended a broad definition of relatives which included cohabitants. This restriction on the class of carers was imposed in part because occasions where care was provided outside the family were considered to be less frequent and less foreseeable. In addition, it was thought that allowing such claims would complicate litigation and increase the risk of spurious claims when such parties could contract for the services: see *Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions* (1978) Scot Law Com No 51, paras 20-23, 29-31. With respect, we are not convinced by these arguments. We see no reason why carers who deserve remuneration for their services, but who are outside the family group, should not receive such remuneration.

⁶⁶ See paras 3.19-3.43 above.

⁶⁷ We would emphasise that nothing in our draft Bill is intended to preclude the courts awarding, or requires them to award, damages in respect of services provided by, for example, a charity worker.

3.61 We would also make the perhaps obvious point that the legal obligation to account to the carer for damages for past care should refer to the damages awarded and recovered by the claimant after taking into account any reduction for contributory negligence. That is, if damages before a reduction for contributory negligence, would have been £100,000 of which £40,000 would have been for past gratuitous care, and there is then a reduction of 50 per cent for contributory negligence so that damages of £50,000 are awarded, the obligation to account is in respect of damages of £20,000.

3.62 **We therefore recommend that:-**

- (i) as has long been the case in English law, damages should continue to be awarded in respect of care reasonably provided, or to be provided, gratuitously to the claimant by relatives and friends;**
- (ii) the claimant should be under a personal legal obligation to account for damages for *past* care to a relative or friend who has provided that gratuitous care;**
- (iii) there should be no legal duty on the claimant to pay over the damages recovered in respect of *future* gratuitous care.**

3.63 To what extent, if at all, should this recommendation be implemented by legislation? There are two arguments against legislation, as follows:

- (1) Our recommendation supports the general approach adopted in *Hunt v Severs*. In particular, the English common law, (in contrast, for example, to the position in Scotland prior to the Administration of Justice Act 1982) has generally developed satisfactorily in deciding that damages can be awarded and in deciding when they should be awarded, for gratuitous services performed by relatives and friends. In the light of our minimalist approach to legislation in this area to avoid undermining the flexibility of the common law,⁶⁸ it may be thought better to leave further development to the judges.
- (2) Even if our recommendations were enshrined in legislation, there would be nothing to prevent the claimant and defendant “contracting around” a gratuitous carer’s entitlements. In other words, the claimant and defendant would be perfectly entitled to settle out-of-court on the basis that no sum should be paid for past gratuitous care, perhaps as a “trade-off” for the claimant recovering higher sums than they would otherwise in respect of his or her pecuniary and non-pecuniary loss. Indeed, unless the claimant is concerned about the carer’s position, there would be little incentive for him or her to seek a sum compensating for the carer’s past gratuitous care. Moreover, only a small percentage of all personal injury cases are heard in the courts. In an even smaller percentage of cases will a carer seek to enforce his or her legal entitlement against the claimant.

⁶⁸ See General Introduction above.

3.64 On the other hand, there are two arguments supporting legislation to implement our recommendations, as follows:

- (1) Our recommendation at paragraph 3.62 clarifies and amends the existing law in two respects. First, *Hunt v Severs* did not itself draw the distinction which we think important, between damages for past and future care. Lord Bridge relied on the position in Scotland, where such a distinction is made, but the point did not directly arise because no damages for care were being awarded. Secondly, Lord Bridge spoke solely in terms of the carer's legal entitlement being imposed through a trust. As we have said in paragraph 3.55 above, we agree with the prevailing view of our consultees that a personal liability to account would be a preferable method of giving the carer a legal entitlement than the trust.
- (2) The only way that the actual decision in *Hunt v Severs* denying damages for gratuitous care can be reversed is through legislation. It is strongly arguable that if legislation is needed anyway to achieve this, it should also effect the change required to implement our recommendation at paragraph 3.62 (ii).

3.65 In light of the above factors, we have decided that the best approach is to enshrine in legislation the central part of the recommendation in paragraph 3.62 (i.e. part (ii)) while otherwise leaving the common law free to develop.⁶⁹ This means, for example, that the legislation will not prescribe when damages for gratuitous care by relative and friends will be awarded to the claimant. But if they are awarded, the claimant should be under a personal legal obligation to account for damages for past care to the relative or friend who has provided that gratuitous care.

3.66 It is therefore our view that the recommendation in paragraph 3.62 (ii) should be implemented by legislation but that otherwise the recommendation in paragraph 3.62 does not require or merit legislation. (Draft Bill, clauses 2, 3(2)(a) and 3(3))

(2) Care provided by the defendant

3.67 In *Hunt v Severs*,⁷⁰ the claimant received care free of charge from the defendant. The House of Lords concluded that in such a situation the claimant should not be able to recover damages in respect of that care because, using a trust approach, such damages would be recovered from and then held in trust for the same person.⁷¹ We have recommended that the claimant should not have any legal duty to pay over the damages for future gratuitous care to his or her carer.⁷² If that

⁶⁹ It should be noted that our draft Bill does not go so far as to preclude courts in all circumstances from imposing a legal obligation in respect of damages for future services. We can, for example, imagine situations where there will be no realistic prospect of the claimant being left under-compensated if some damages for future care were subject to a legal obligation to account to the carer, so that the fears expressed in para 3.59 above would be unfounded. But because it deals solely with damages for past care, the implication of the Bill is that the courts would need to think very carefully indeed before imposing a legal obligation as regards damages for future care.

⁷⁰ [1994] 2 AC 350.

⁷¹ See paras 2.28-2.29 above.

⁷² See para 3.59 above.

recommendation is accepted, the logical result is that even where the claimant's future care will be provided by the defendant, the claimant would still be able to recover damages for that care because he or she will not then have to pay them back to the defendant. In respect of future care, therefore, - and assuming the courts follow our recommendation in paragraph 3.62 - *Hunt v Severs* is, logically, not a problem.⁷³

3.68 In respect of past care, however, the decision in *Hunt v Severs* is a problem. The result in *Hunt* has been criticised on a variety of grounds,⁷⁴ which we considered in our Consultation Paper.⁷⁵ Our provisional view was that the decision should be reversed by legislation, so that claimants would not be prevented from claiming the cost of care provided gratuitously by the defendant.

3.69 The overwhelming majority of our consultees agreed with this provisional view. Although the logic underlying the decision in *Hunt v Severs* was recognised by many, consultees clearly thought that there were compelling reasons of policy justifying a change in the law. Staughton LJ, for example was 'delighted' that we had proposed such a change. Lord Bingham of Cornhill 'welcomed' our proposal to reverse *Hunt v Severs* by legislation and found it 'difficult to see any contrary arguments'.

3.70 The primary motivation behind consultees' support for the reversal of *Hunt v Severs* was a recognition that the law as it stood led to undesirable consequences for both claimants and defendants (or their insurers). As we had recognised,⁷⁶ the decision encourages claimants and their carers to enter into contracts for the provision of care: provided that the court does not think such an agreement is a sham, recovery of the sums payable would then be possible. Such a result has been widely criticised,⁷⁷ and we do not think it desirable to encourage either this kind of contract, or such disputes as might arise about whether or not it was a sham.

3.71 Alternatively, the decision might encourage claimants to refuse gratuitous care from the tortfeasor in favour of care provided by other friends, relatives or

⁷³ The reasons which led us to reject a legal obligation on the claimant in respect of damages for future care apply equally where the defendant is the carer. It may appear at the trial that the defendant will provide the claimant with care in the future. But if the claimant is denied any damages for future care on this basis, he or she has no flexibility whatsoever to cope with future contingencies such as the unwillingness or unavailability of the defendant to provide that care. As one of our consultees said, "the claimant should always be in a position to fund his care from somewhere else should the defendant simply become unavailable to provide it for whatever reason."

⁷⁴ See e.g. D Kemp, "Voluntary services provided by the tortfeasor to his victim" (1994) 110 LQR 524; L C H Hoyano, "The dutiful tortfeasor in the House of Lords" [1995] Tort L Rev 63, 69; A Reed, "A commentary on *Hunt v Severs*" (1995) 15 OJLS 133, 137-8; P Matthews & M Lunney, "A tortfeasor's lot is not a happy one?" (1995) 58 MLR 395, 399.

⁷⁵ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.59-3.68.

⁷⁶ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.60-3.63.

⁷⁷ See e.g. *Donnelly v Joyce* [1974] QB 454, 463-4 *per* Megaw LJ; R Doggett, "*Hunt v Severs* - a pyrrhic victory for insurers?" *Quantum*, 3/1994; A Reed, "A commentary on *Hunt v Severs*" (1995) 15 OJLS 133, 137-8.

professionals, even though the tortfeasor might be best placed and best able to provide the necessary care.⁷⁸ This would not only be undesirable from the claimant's point of view: as Lord Bingham of Cornhill put it in his response, there would be "an overwhelming incentive to employ outsiders at commercial rates, with inevitable disadvantage to the plaintiff and a greatly increased bill for the insurer". According to others claimants are in practice being advised to make such decisions.

3.72 The decision in *Hunt v Severs* has also been criticised for its effect on a carer who is only partially liable for the claimant's injuries.⁷⁹ If defendant D1, who is only ten per cent to blame and is entitled to recover a contribution of ninety per cent from defendant D2, provides the claimant with gratuitous care, can D1 recover a contribution to the cost of that care from D2? The answer would appear to be no, because D1 is not liable to the claimant for the cost of that care. Despite a relatively small share in the blame for the damage, therefore, D1 bears the entire cost of providing that care.⁸⁰ Had the claimant been cared for by a professional carer, on the other hand, D1 *would* have been able to recover ninety per cent of the cost of that care from D2. Nigel Cooksley, a barrister, reported that he had experience of a similar situation in practice.

3.73 In our Consultation Paper we also considered the argument that it ought to be a relevant consideration in determining the defendant's liability that he or she was insured in respect of the claimant's claim.⁸¹ The House of Lords had strongly rejected this argument in *Hunt v Severs*,⁸² and several of our consultees agreed that to allow the existence or otherwise of insurance to affect the determination of the defendant's liability was 'a dangerous approach'. But not all consultees were convinced. Professor Jolowicz said that it was "ridiculous to pretend that insurance is irrelevant", while Professor Michael Jones argued that the widespread dissatisfaction with the decision in *Hunt v Severs* must stem from a view that the insurance moneys ought to have been brought into account.

3.74 In our view, however, the defendant's insurance position ought not to affect the determination of his or her liability. The danger otherwise is that decisions as to where liabilities should be imposed will be made on the basis of who happens to

⁷⁸ Mark Lunney, in his response to our Consultation Paper, expressed particular concern that claimants who took this course of action might face a reduction of damages on the ground that the duty to mitigate required the acceptance of free services on offer from the defendant.

⁷⁹ See e.g. D Kemp, "Voluntary services provided by the tortfeasor to his victim" (1994) 110 LQR 524, 526.

⁸⁰ Some consultees suggested that a similar problem arose in cases of contributory negligence. But if a defendant who provided gratuitous care was to be liable for the costs of that care, a finding of contributory negligence would simply reduce his or her liability to the claimant and accordingly the amount of damages for care available. There is no question of recovering the balance from the claimant, as there might be if another party was jointly liable for the injury.

⁸¹ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.65.

⁸² [1994] 2 AC 350, 363 *per* Lord Bridge. In Australia, however, this argument has been better received: see *Kars v Kars* (1996) 141 ALR 37, 56. See further para 2.30 above.

be insured. Although the litigation in *Hunt v Severs* would not have made sense had the defendant not been insured, the question of the defendant's liability must necessarily and logically be prior to that of his or her insurer's liability.

3.75 Nonetheless, we remain convinced that there are persuasive reasons for reversing by legislation the result in *Hunt v Severs*. Whilst, as a matter of principled logic, it may seem problematic to make the defendant liable for a sum which the claimant will then have to pay back, we think, as we said in our Consultation Paper, that the solution "lies in the obvious but crucial point that legislation can override the logic of the common law."⁸³ We cannot agree with the small minority of our consultees who described it as 'grotesque', 'inequitable', and 'inappropriate' that a tortfeasor should be able to 'benefit' from a tort by receiving payment for care provided. As Professor Jolowicz said in his response, it is, for example, "ridiculous to pretend that every driver who is found to have been negligent is an undeserving wrongdoer." Above all, as we have discussed above, denying recovery in these circumstances leads to undesirable consequences in practice for all concerned.

3.76 **In accordance with our provisional recommendation and supported by the vast majority of our consultees, we therefore recommend that there should be legislation reversing the decision in *Hunt v Severs* and laying down that the defendant's liability to pay damages to the claimant for nursing or other care should be unaffected by any liability of the claimant, on receipt of those damages, to pay them or a proportion of them back to the defendant as the person who has gratuitously provided (or will provide)⁸⁴ such care. (Draft Bill, clauses 1, 3(2)(a) and 3(3))**

(3) The quantum of damages

3.77 Having recommended that damages should continue to be available for care provided gratuitously we must now consider how those damages should be assessed. One aspect of this decision is whether the damages should aim to compensate in full, or whether some limits should be applied. In Australia, for example, although the cost of gratuitous care is a well-established head of damages,⁸⁵ a perceived need to limit the liability of defendants and their insurers has led to statutory restrictions on the amounts recoverable in respect of certain types of accident.⁸⁶

⁸³ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.68.

⁸⁴ The words in brackets are designed to cover the possibility - contrary to our recommendation at para 3.62 - that the courts could develop the law by giving the carer a legal entitlement to the damages as regards future care.

⁸⁵ Albeit based on the view that the loss is that of the injured victim and not the carer. See *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 141 ALR 37.

⁸⁶ The limitations usually take the form of ceilings or thresholds for recovery, but in some jurisdictions they have been abolished, either entirely or in relation to certain kinds of accident. Limits are also commonly imposed on other heads of damage, such as damages for pain, suffering and loss of amenity. As Professor Harold Luntz of the University of Melbourne pointed out to us, however, several Australian jurisdictions operate no-fault accident compensation schemes as a replacement for these damages.

- 3.78 In our Consultation Paper we expressed the provisional view that such limitations were unsupported by principle and should not be introduced in this country. All of our consultees who responded on this issue agreed with this view. They generally placed great emphasis on the importance of full compensation for gratuitous carers, and regarded the requirement of reasonableness as a sufficient limit on the damages recoverable. Arbitrary limits were described variously as ‘unfair’, ‘artificial’, ‘wrong’, ‘inappropriate’ and ‘wholly unfair to claimants’.
- 3.79 **In accordance with our provisional recommendation and the views of all our consultees who responded on this issue, we therefore recommend that no limits, either in the form of ceilings or thresholds, should be introduced on damages awarded for gratuitous care.**
- 3.80 As we have seen,⁸⁷ however, the assessment of damages for gratuitous care on the basis of ‘reasonableness’ has raised some difficult questions. In our Consultation Paper⁸⁸ we described this test as ‘inescapably imprecise’. Nonetheless, our provisional view was that no statutory reform of the law relating to the quantum of damages for gratuitous care should be attempted.⁸⁹ We thought that “it should continue to be left to the courts to decide how to assess damages in respect of care gratuitously provided by another.” Very few of our consultees disagreed with this conclusion, but there was clearly some confusion about, and dissatisfaction with, the present law.
- 3.81 As we have seen, prior to *Hunt v Severs*, when the courts were ostensibly trying to compensate the loss of the claimant rather than the carer, they tried to find an acceptable compromise between two ‘extreme solutions’.⁹⁰ These were, first, awarding the full commercial cost of the care, and second, awarding nothing because the claimant had received the care for free and therefore incurred no loss. In practice awards tended to be made on the basis of a discount of between a third and a quarter from the commercial rate,⁹¹ and the commercial rate itself was regarded as a ceiling in all but the most exceptional cases.
- 3.82 But, after *Hunt v Severs*,⁹² the loss is acknowledged to be that of the carer rather than the claimant. Surely, therefore, any earnings reasonably lost by the carer should be taken into account in the assessment of damages for the care provided. As the Pearson Commission said, basing the award for care purely on the market value of the services rendered is harsh on those who give up a highly paid job to

⁸⁷ See paras 2.31-2.33 above.

⁸⁸ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.72.

⁸⁹ The Pearson Commission also made no recommendation for statutory reform: see the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054, paras 343-351. When we last examined the issue we likewise recommended no legislative intervention: see Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56.

⁹⁰ *Housecroft v Burnett* [1986] 1 All ER 332, 342, per O’Connor LJ. See para 2.31 above.

⁹¹ See e.g. *Maylen v Morris* (unreported, 21 June 1988); *Nash v Southmead HA* [1993] PIQR Q156; para 2.32 above.

⁹² [1994] 2 AC 350.

nurse an injured relative.⁹³ The responses we received to our Consultation Paper, however, indicate that in practice the decision in *Hunt v Severs* has not, or at least, not yet, had any great impact on the way in which these damages are calculated. Several consultees argued that more account should be taken of lost earnings, particularly where the medical evidence suggested that the presence of a near relative was invaluable to the claimant's recovery.

3.83 Some consultees also expressed dissatisfaction with the discounts from the commercial rate which appear to have become standard practice. Robin Stewart QC, for example, said:

...the rationale for justifying any reduction from commercial care rates... is that the commercial expenses of tax and National Insurance are not incurred. The old custom was to deduct one third, later on in some cases one quarter. In my experience, many lawyers, and indeed judges, have failed to move with the times, and still look to one third, instead of reducing the percentage reduction to reflect the far lower actual sums that the commercial recipient would have had to pay in recent years.

3.84 It was also argued that while gratuitous carers were spared the expenses of tax and National Insurance, they did not have the benefits of paid employment such as paid holiday or state pension contributions. The Trades Union Congress claimed that these discounts amounted, essentially, to the 'exploitation' of gratuitous carers. Colin McEachran QC expressed a feeling that gratuitous care is "grossly undervalued by the courts", and many others spoke of the 'devotion' of gratuitous carers and the high quality of the care they provided. But Jean Ritchie QC had "never heard any complaint from a carer that he/she was being undervalued because he/she is being paid less than a commercial carer", while one insurer argued that "realistically the amount paid to voluntary carers should be no more than 50 per cent of commercial rates".

3.85 In our opinion the commercial rate provides a good starting point for the assessment of damages for gratuitous care only where the carer was not earning wages. But we think that a discount of a third from that rate to account for tax and other commercial expenses is too high in current economic conditions. Given our recommendation that damages for gratuitous care should continue to be seen as compensation for the loss suffered by the carer,⁹⁴ we also think that, if it was reasonable in the circumstances for the carer to give up paid employment, the starting point should be the carer's lost earnings, and the full commercial rate should not be seen as an effective ceiling to the award. In assessing the reasonableness of a claim in such circumstances, however, the courts should particularly consider whether care by that particular person is of special comfort and help to the claimant. If not, it may be thought inconsistent with the claimant's duty to mitigate to award a sum in excess of the commercial rate. With respect to future care, the award of damages should take account of the chance that the gratuitous care will cease so that the claimant will be required to pay the full

⁹³ Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054, para 350.

⁹⁴ See para 3.47 above.

commercial rate for care.⁹⁵ As Brooke LJ commented, however, “situations are likely to be infinitely varied”, and we agree that “it is much better to leave this to the judges to work out”. While a statutory provision might provide greater certainty, we feel it would be insufficiently flexible to deal with the variety of different situations which may arise in practice.

- 3.86 **In accordance with our provisional recommendation and the views of the great majority of our consultees, we therefore recommend that the law in relation to the quantum of damages for gratuitous care should not be reformed by statute. We nevertheless recommend that the courts should be more willing to award damages to compensate carers for their loss of earnings even though these exceed the commercial cost of care.**

4. LOSS OF THE CLAIMANT’S ABILITY TO DO WORK IN THE HOME

- 3.87 As we have described,⁹⁶ damages may be recovered for the claimant’s loss of the ability to do work in his or her home.⁹⁷ According to the decision of the Court of Appeal in *Daly v General Steam Navigation Co Ltd*,⁹⁸ such damages are recoverable as a past pecuniary loss where the claimant has in fact engaged paid help or has received unpaid help from someone who has had to forgo paid employment to provide it. If the claimant has continued to attempt the work despite the injury, the loss can be reflected in his or her damages for pain, suffering and loss of amenity. As regards the future, however, it seems damages are recoverable as a pecuniary loss regardless of whether the claimant will pay someone else to do the work, or do the work as best he or she can in the circumstances.
- 3.88 In our Consultation Paper we criticised the decision in *Daly* for this inconsistency between past and future loss. Although the decision recognises that it was artificial to assume that past loss was always pecuniary in nature, it applies that very artificiality to the assessment of future loss. We provisionally recommended that past and future loss should be treated consistently. That is, it should be compensated as a pecuniary loss to the claimant where he or she has paid or will pay for the work to be done, as a loss to the third party where that third party has carried out, and will carry out the work for free, and as an element of non-pecuniary loss where the claimant has struggled on with the work regardless and will continue to do so.
- 3.89 Our consultees welcomed the suggestion that the law should be consistent as between past and future loss, and there was widespread agreement with the statement of the law we had proposed.⁹⁹ The greatest concern arose with respect to the idea of awarding damages for non-pecuniary loss where the work has been

⁹⁵ See paras 3.57-3.60 above.

⁹⁶ See para 2.34 above.

⁹⁷ Throughout this section we refer to ‘work in the home’, but this would obviously include, for example, work in the garden and other ‘odd jobs’.

⁹⁸ [1981] 1 WLR 120. See also *Hoffman v Sofaer* [1982] 1 WLR 1350, 1355-1356 (recovery in respect of ‘do-it-yourself’ work around the home).

⁹⁹ See Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.78.

done and will be done by the claimant. Peter Andrews QC, for example, thought it “naive to suppose that the courts will make an appropriate award of damages for non-pecuniary loss where the plaintiff has struggled on.” But the Council of Circuit Judges strongly supported this suggestion, particularly on practical grounds, in preference to “having to make a series of small awards, which it may not be easy to assess individually.” We remain of the opinion that loss of the ability to do work around the home is better, and more realistically, seen as a non-pecuniary loss where the claimant continues to do the work.

3.90 Where the work is done by a third party, such as a friend or a member of the claimant’s family, consultees were unanimous in accepting that damages should be recovered. Consistently with our recommendations on gratuitously provided care,¹⁰⁰ we think that where such damages are awarded in respect of past work the claimant should be under a personal obligation to account to the person who did that work. But once again we think that no legal obligation should be imposed on the claimant to pay third parties for the work they may do in the future.¹⁰¹ If a claimant shows that he or she will either pay for the work to be done or will arrange for it to be done for free by a third party, damages for the work should be recoverable, and the claimant should be free to do with them as he or she wishes.

3.91 **In accordance with our provisional recommendation and supported by the views of almost all of our consultees who responded on this issue, we therefore recommend that, where the claimant has suffered a loss of or reduction in his or her ability to do work in the home:**

- (1) **this should be compensated as a past pecuniary loss where the claimant has reasonably paid someone to do the work, and as a future pecuniary loss where the claimant establishes that he or she will reasonably pay someone to do it.**
- (2) **consistently with our recommendations on gratuitously rendered nursing services, the claimant should also be able to recover damages for the cost of the work where the work has been or will reasonably be done gratuitously by a relative or friend (including the tortfeasor) and should be under a personal liability to account for the damages awarded in respect of *past* work, to the person (including the tortfeasor) who performed the work; but no legal obligation should be imposed in respect of damages awarded for work to be done in the *future*.**
- (3) **where, despite the impairment of his or her ability to do so, the claimant has carried out work in the home and/or will do so, damages for non-pecuniary loss (pain, suffering and loss of amenity) should include a sum in respect of past and/or future reduced ability to do work in the home.**

¹⁰⁰ See para 3.62 above.

¹⁰¹ See our arguments at paras 3.57-3.60 above.

We would also emphasise that (1), (2) and (3) are not intended to be mutually exclusive: that is where the claimant pays someone to do part of the work and/or receives gratuitous services for part of the work and/or carries out part of the work him/herself, damages under (1), (2) and (3) can be combined.

3.92 Should the recommendation in paragraph 3.91 be implemented by legislation? It appears from the responses we have received that litigation on these issues is rare, and that in practice the decision in *Daly* is often distinguished so that past and future loss can be treated consistently. Moreover, the impact of the House of Lords' approach in *Hunt v Severs* on this area has not yet come before the courts. We therefore think it unlikely that the courts would consider themselves bound by the approach in *Daly*. In general, it follows that we consider that the common law can be expected to reach the position set out in paragraph 3.91; and that legislation is, by and large, unnecessary. On the other hand, we think that legislation is necessary, first, to reverse *Hunt v Severs* in so far as the decision in that case means that no damages can be recovered where the person who has gratuitously carried out domestic work is the tortfeasor; and secondly, to build on and clarify (and slightly to depart from) the application of the general reasoning in *Hunt v Severs* to gratuitously provided domestic assistance.

3.93 **We therefore consider that the recommendation in paragraph 3.91 should be implemented by legislation only to the extent that we have recommended analogous legislation in relation to gratuitous nursing care (in paragraphs 3.66 and 3.76 above). (Draft Bill clauses 1, 2, 3(2)(c), and 3(3))**

5. HOSPITAL VISITS

(1) Generally

3.94 Under the present law, a claimant is entitled to recover the reasonable costs incurred by third parties in visiting him or her in hospital¹⁰² and, following *Hunt v Severs*,¹⁰³ damages awarded for these costs are to be held on trust for the person who incurred them.¹⁰⁴ Our provisional recommendation, having considered this issue in our Consultation Paper, was that such damages should continue to be available. We thought this an extension of the basis on which damages are recovered for gratuitous care. There was no real disagreement with our provisional view among consultees.

3.95 Two issues arose in particular. First, should there be a limit on the class of people whose visiting costs are recoverable by the claimant? Several consultees suggested limiting entitlement to the claimant's immediate family, or dependants. Secondly, what costs should be recoverable? George Pulman QC said that although damages for such visits are regularly claimed and paid in practice, "the argument is usually

¹⁰² In principle, there seems no reason why loss of earnings should not be recoverable, but such damages were reluctantly denied as being too remote by Comyn J in *Walker v Mullen*, *The Times* 19 January 1984; cf *Kirkham v Boughey* [1958] 2 QB 338.

¹⁰³ [1994] 2 AC 350.

¹⁰⁴ See para 2.36 above.

on the rate of expense.” As an example, “judges are reluctant to award more than the extra petrol cost for a vehicle, rather than the AA running costs of a car.” Daniel Brennan QC said that awards were rarely made for the care element of visits to a claimant in hospital, even though, as one claims assessor put it, “in practice relatives often provide valuable backup and support services to over-pressed nursing staff.”

- 3.96 In our view, these concerns are adequately dealt with by the standard requirement that the claim be reasonable, and for a reasonable amount. Our draft Bill is also confined to “gratuitous” services, which are defined to mean those provided without a contractual right of repayment and which are not performed in the course of a business, profession or vocation (thereby excluding, for example visits by a vicar or charity worker). As regards the amount of the damages, we see no reason to prescribe by statute what should or should not be included. In particular, we do not think any specific provision is necessary to allow recovery of lost earnings.
- 3.97 A majority of consultees again favoured placing the claimant under a personal obligation to account for damages awarded under this head, in preference to the trust approach adopted in *Hunt v Severs*. We have already considered the respective merits of these devices in the context of gratuitously-rendered nursing care,¹⁰⁵ and many of the same arguments apply in this context. Even more clearly in this case, the loss is suffered by the visitor and not by the claimant, and claimants awarded damages for past losses of this kind should have to pay them over to their visitors. It must be rare for a court to award damages in respect of continuing future hospital visits, but if and when such an award is made, we are once again of the opinion that claimants should not be under any *legal* duty to pay the money over.
- 3.98 **In accordance with our provisional recommendation and the views of almost all our consultees who responded on this issue, and consistently with our recommendation on gratuitous care, we recommend that where someone reasonably and gratuitously has visited or will visit an injured claimant in hospital, the claimant should be able to recover damages for the cost of the visits; further that the claimant should be under a personal obligation to account for the damages awarded in respect of past visits to the visitor. But there should be no legal duty on the claimant to pay over to anyone the damages awarded for future hospital visits. Again, we think that legislation to implement this recommendation is required only to the extent that we have recommended analogous legislation in relation to gratuitous nursing care (in paragraph 3.66 above). (Draft Bill, clauses 2, 3(2)(b), and 3(3))**

(2) Visits by the defendant

- 3.99 We also expressed the view in our Consultation Paper¹⁰⁶ that a claimant ought to be able to recover damages in respect of hospital visits by the defendant, just as

¹⁰⁵ See para 3.55 above.

¹⁰⁶ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.80.

damages should be available for gratuitous care provided by the defendant.¹⁰⁷ Once again, almost all of our consultees supported this suggestion, and we see no reason why visits made by the defendant should be excluded from the general rule we have outlined.¹⁰⁸ Of course, as Piers Ashworth QC said, “tortfeasors (even if unrelated) not infrequently visit their victims, and care must be taken to ensure that legislation does not inadvertently confer upon tortfeasors a right to recompense for saying sorry to their victims.” But even if claimants were for some reason motivated to claim for the expenses of unrelated tortfeasors, we think that the requirement of reasonableness would be adequate to enable a court to deny recovery of such expenses where necessary. That is, just as damages would be unlikely to be recoverable in respect of a non-tortfeasor whose visits were of no real help to the victim, but were motivated by a desire to express sympathy, the same would apply to such visits by the tortfeasor.

3.100 In accordance with our provisional recommendation and the views of the vast majority of our consultees, we therefore recommend that, as in relation to gratuitous care, and by the same sort of legislative provision as recommended in paragraph 3.76 above, *Hunt v Severs* should be legislatively reversed in respect of its denial of a claim on behalf of the defendant for the costs of hospital visits. (Draft Bill, clauses 1, 3(2)(b), and 3(3))

¹⁰⁷ See the discussion at paras 3.67-3.76 above.

¹⁰⁸ See para 3.98 above.

PART IV

REFORM II: ACCOMMODATION EXPENSES

1. INTRODUCTION

- 4.1 As we have seen,¹ the courts have tended to regard a claimant's need for accommodation not as a one-off capital loss but rather as a continuing annual loss. In our Consultation Paper² we asked whether this approach was satisfactory, and raised the possibility of an alternative method of calculation (the 'discounted cashflow' method) which recognised the loss as an immediate capital loss to the claimant, but required credit to be given for the eventual capital 'windfall' to the claimant's estate.

2. PURCHASING ACCOMMODATION

(1) The general approach

- 4.2 *Roberts v Johnstone*³ lays down the method for assessing damages where a claimant needs to purchase accommodation that he or she would not have purchased but for his or her injuries. Rather than awarding the capital cost of the purchase (and deducting an amount that would have been spent irrespective of the injury), this method seeks to compensate the claimant for the loss of use of the capital he or she invests in the property by reference to the rate of return on a risk-free investment. The assumption, therefore, is that if the claimant had not spent his or her money on accommodation, it would have been invested risk-free.⁴ The reasoning behind *Roberts v Johnstone* is that the courts should avoid awarding the "(extra) capital cost of the purchase"⁵ because the claimant retains that capital in the form of the house.
- 4.3 In our Consultation Paper, we considered arguments that the two per cent rate used by the court in *Roberts v Johnstone* in this calculation was too low.⁶ Over two-

¹ See paras 2.38-2.44 above.

² Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, 3.81-3.89.

³ [1989] QB 878.

⁴ This method also makes the implicit assumption, recognised by Lord Lloyd in *Thomas v Brighton Health Authority* [1999] 1 AC 345, 380, that property prices will increase in line with inflation.

⁵ We use the phrase "(extra) capital cost of the purchase" to indicate that principle dictates that there should be deductions from the capital cost for any amount that the claimant would have spent on accommodation irrespective of the injury (see *George v Pinnock* [1973] 1 WLR 118, 125).

⁶ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.85-3.89. We specifically asked, at para 3.89, whether they thought the rate should continue to be two per cent, and if not, what rate, or what method of fixing the rate, they would prefer. In particular, we asked if they would favour the rate being set by reference to the return on index-linked government securities.

thirds of our consultees were in favour of an increase in the rate, describing two per cent as ‘measly and unreasonable’, ‘wholly inadequate’, and ‘out of date’. There was widespread support for the view that, as we had suggested, the rate of return on index-linked government securities was a better indicator of the return from a risk-free investment, and would therefore provide a fairer alternative. Consultees also called for an explicit link between the rate to be used in the calculation of awards for accommodation and the discount rate used to set multipliers. This connection seems particularly important if, as for example solicitors Anthony Gold Lerman & Muirhead explained, “inevitably, plaintiffs have to finance the purchase of accommodation by using damages awarded under other heads.”

- 4.4 We therefore welcomed the decision of the House of Lords in *Thomas v Brighton Health Authority*,⁷ that a three per cent rate should be used in the *Roberts* calculation⁸ because it represented the current rate of return on index-linked government securities (ILGS), and that changes from time to time in the multiplier discount rate should be reflected in corresponding changes to the rate used in the *Roberts v Johnstone* calculation. In fact, ironically, the ILGS rate has fallen since the House of Lords’ decision, so that applying present ILGS rates would in fact bring one back to the former 2 per cent rate.
- 4.5 We are concerned, however, and this was a view shared by several of our consultees, that even using the current rate of return in ILGS (whether 3 per cent or 2 per cent) claimants will not receive enough capital to make the purchase outright. And if the claimant has borrowed money to make the purchase, the ILGS rate is plainly significantly lower than the relevant mortgage interest rate.⁹ This may not be a problem where claimants have sufficient capital of their own to make the purchase. But in most cases this will not be so and the *Roberts v Johnstone* approach, based as it is on the loss of use of capital is inappropriate. The responses of consultees have led us to believe that in practice, the shortfall is usually made up by ‘borrowing’ from damages awarded under other heads of claim. We are concerned that this will lead to undercompensation in those other areas. Even if claimants are compensated for the lost income which would have been earned by those damages, this does not address the fact that capital which was ultimately supposed to be expended has instead been tied up in property.¹⁰
- 4.6 These fears were expressly articulated by some of our consultees. Robert Francis QC, for example, who appeared for the defendants in *Roberts v Johnstone*, did not consider it just that “the plaintiff is obliged to use damages for pain and suffering

⁷ Reported with *Wells v Wells* [1999] 1 AC 345. See para 2.43 above.

⁸ Both sides accepted that the approach in *Roberts v Johnstone* should be adopted. No mention was made of earlier cases which had used the mortgage interest rate, such as *Chapman v Lidstone*, (unreported, 3 December 1982).

⁹ This is well illustrated by *Thomas v Brighton Health Authority* [1996] PIQR Q44. Indeed, the very point of annualising the cost was to find an alternative to awarding the full amount of capital required. When the amount awarded began to approach the full capital cost (cf *Chapman v Lidstone*), the courts’ reaction was to reduce the rate used in the calculation. If the mortgage rate were to be used, this problem would recur.

¹⁰ Borrowing against the house in later years may prove difficult and will in any case produce more expense.

for [the purchase of accommodation], rather than to form a fund to give the claimant some enjoyment in life". The Association of Personal Injury Lawyers expressed concern that claimants might have insufficient funds for their future care needs and would need to borrow in order to pay for care. Concern was also expressed that consultees whose overall award was relatively low, perhaps because of a diminished life expectancy, would simply not have the capital to complete the purchase and would not get the accommodation they needed. The current Master of the Court of Protection, indicating that this problem was not infrequent in his experience, said that he thought the result 'perverse and insensitive'.

- 4.7 In view of all of these concerns, we have spent a good deal of time considering alternatives to the *Roberts v Johnstone* approach. In the Consultation Paper, we set out one such alternative. Under the 'discounted cashflow' method of calculation, the claimant would be awarded the capital cost of the purchase, but would be required to give credit for the present value of the future 'windfall' to his or her estate from the sale of the property on the claimant's death.¹¹ We recognised, however, that this method required predictions to be made about the sale value of the property at some point, perhaps a long time, in the future; and that it also depended on an accurate rate for discounting that value. Indeed on one view, it produces exactly the same award of damages as does the *Roberts v Johnstone* approach.¹²
- 4.8 Given these problems, we felt that this method was not preferable to the conventional approach, and consultees agreed. Only a very few supported the discounted cashflow calculation, the remainder thinking it 'unacceptable' or 'highly artificial'. Brooke LJ commented that he had "no idea what the housing market will be up to in 10, 20 or 30 years' time, and I do not suppose anybody else has either." We are also aware that the discounted cashflow method, in the same way as the conventional approach, fails to give the claimant sufficient money to finance the purchase, so leading to the same concerns about undercompensation in other areas.¹³
- 4.9 But despite their opposition to the alternative we had considered, many consultees were dissatisfied with the current position. A quarter of them regarded both the current approach and the discounted cashflow approach as equally unacceptable. The Master of the Court of Protection said that the conventional approach "bears little relation to reality, either in terms of the cost of accommodation or the plaintiff's actual needs", and added that "it is difficult for the families of personal injury victims to understand, and it places the Court of Protection in an invidious

¹¹ See *Damages for Personal Injury: Medical, Nursing and Other Expenses* (1996) Consultation Paper No 144, para 3.83; C Cooper and C Illidge, "Is *Roberts v Johnstone* still fair to plaintiffs and defendants?" (1993) 137 SJ 767.

¹² For example, suppose that the extra capital required to purchase accommodation is £100,000, the claimant's life expectancy is 30 years and 3% per cent is used as the rate of return. Using the Professional Negligence Bar Association's *Facts and Figures 1998*, under the *Roberts v Johnstone* method, the calculation would be £100,000 x 3% x 19.60(multiplier) arriving at a total figure of £58,800. At least on one view, the calculation under the discounted cashflow method would be as follows: £100,000 - (£100,000 x 0.412) = £58,800.

¹³ See paras 4.5-4.6 above.

position.” Others agreed that it is difficult to explain to claimants why they do not appear to be fully compensated for their losses. There was also criticism of the mechanics of both methods. In their response, the Institute and Faculty of Actuaries, while noting that the discounted cashflow method required difficult predictions to be made about future house price growth, pointed out that the traditional method simply assumed that property prices would increase in line with inflation.¹⁴

- 4.10 In our view, the central problem arises as a result of the way the loss is treated. What is in fact a capital expense is regarded as an annual loss, and so insufficient funds are available at the outset to finance the purchase. It was a view expressed by some consultees that the best solution would simply be to award the claimant the extra capital cost of the purchase, and to ignore the windfall to his or her estate, which was seen as ‘irrelevant’, ‘inappropriate’ and ‘incidental’ to the assessment of the claimant’s compensation.
- 4.11 An argument could be made for recovery of the extra capital cost by the claimant, on the grounds that he or she will not benefit personally from the windfall.¹⁵ But we think such a change would be unduly harsh on defendants, especially since it would potentially mean that there would be a significant increase in their overall liability. A better solution would be to return the windfall benefit to the defendant when it occurred, while still giving the claimant sufficient money to fund the initial purchase. Recognising this aim, several of our consultees suggested methods by which it might be achieved, ranging from giving the defendant some equitable interest in the property, to requiring the defendant to buy the house outright and to give the claimant a life interest.
- 4.12 Nevertheless, we have some concerns about the precise mechanisms suggested. As Daniel Brennan QC stressed to us in his response, claimants would not want to feel that they were living in the defendant’s house for the remainder of their lives. We therefore reject any solution whereby the defendant would own the claimant’s house. The claimant must also be free to move house when necessary or desirable, and to improve or alter the accommodation as he or she wishes. Any interest the defendant is given must therefore be capable of being moved from one property to another, and must not allow the defendant unwarranted rights in relation to the claimant’s accommodation during the claimant’s lifetime. A trust of land could get around the undesirability of the defendant owning the claimant’s house, by vesting the property in trustees who would hold it on trust for the claimant with a remainder to the defendant. The defendant would then be regarded as merely a

¹⁴ This assumption was explicitly recognised in *Thomas v Brighton Health Authority* [1999] 1 AC 345, 380, *per* Lord Lloyd: “...it is further to be assumed that the capital input will be risk-free over the period of the award, and protected against inflation, by a corresponding increase in the value of the house.” Whether this assumption is sustainable is a matter of debate.

¹⁵ A clear analogy can be drawn with those cases which reject defendants’ arguments of ‘betterment’: see *The Gazelle* (1844) 2W Rob 279; *Harbutt’s Plasticine v Wayne Tank and Pump Co* [1970] 1 QB 447; *Bacon v Cooper Metals* [1982] 1 All ER 397. Any enhancement in the value of the house will only benefit the claimant (as opposed to his estate) if the house is sold before his or her death, and then only if the money is not used to buy a similar house. In most cases this must be unlikely.

beneficiary under the trust. However, difficulties would arise in relation to ensuring that the claimant be free to move house, as the trustees could not be compelled by the beneficiary to sell the property unless the trustees' powers of sale had been delegated.¹⁶ For this reason, the trust of land must also be rejected as an unviable mechanism for reform.

4.13 We thought that the best option for reform was the suggestion¹⁷ that the defendant pay the extra capital cost of the property at the time of trial. In return, the defendant should receive a charge over the claimant's property for the amount paid.¹⁸ In effect, damages would be awarded to the claimant in the form of an interest-free loan to be used to purchase accommodation (or to pay off a mortgage taken out to pay for the property), such loan being secured by a charge over the property, and repayable on the claimant's death (or when his or her own accommodation is otherwise not needed by the claimant).¹⁹

4.14 Putting flesh on the bare bones of this suggestion, it seemed to us that the scheme would have the following main points of detail:-

- (i) where a claimant reasonably either had purchased, or could establish on the balance of probabilities that he or she would purchase, accommodation as a result of his or her injuries, the claimant should be entitled to damages for the extra capital cost of that accommodation. In return, the defendant should be given a charge over the property purchased by the claimant for the amount of those damages, to be repaid on the claimant's death (or when the accommodation was otherwise not needed by the claimant).
- (ii) where the accommodation had not been purchased prior to the award, the damages should be held by a solicitor, agreed to by the parties or appointed by the court, acting as a stakeholder, the claimant being the recipient of the stake when property was purchased within a one-year period. The solicitor would be liable for interest accruing on the damages in accordance with current practice and the defendant would be liable for any fees charged by the solicitor. If property was not purchased within one year, the solicitor should pay the equivalent of *Roberts v Johnstone* damages to the claimant and the remaining balance to the defendant. If property were purchased within one year, but was less expensive than anticipated, the solicitor should pay the amount actually required to the claimant and the remaining balance to the defendant.
- (iii) where the claimant, as a result of the injury, had reasonably purchased property pre-trial with a mortgage, the claimant would be bound to pay off that mortgage when these damages were awarded, if this would be

¹⁶ See Trusts of Land and Appointment of Trustees Act 1996, s 9.

¹⁷ John Holt, a barrister, suggested such a scheme in his response to the Consultation Paper.

¹⁸ This approach also removes the need to make any assumptions about the future increase of property values.

¹⁹ For example, where the claimant moves into rented accommodation or a nursing home.

necessary to ensure that the defendant had adequate security for the 'loan' of the damages.

- (iv) the amount to be repaid by the claimant to the defendant should reflect changes in the market value of the property that were not consequent upon improvements, or deteriorations, of the property. It should therefore be varied by reference to local property prices on the rebuttable presumption that the local prices accurately reflect changes in the market value of the property apart from improvements or deteriorations. The best evidence of local property prices should be deemed to be found in the Land Registry's quarterly reports on Residential Property Prices (where available).
- (v) the defendant's charge should be capable of being transferred between properties and the claimant or the claimant's estate should be able to redeem it at any time by payment of the outstanding amount. The defendant should have the power to force the sale of the property on the claimant's death or when the claimant's need for such accommodation ceased, but where any members of the claimant's family were resident in the house at the time of the claimant's death, they should have a power to delay the sale for up to one year thereafter. In addition to the one year period, the court should have an unfettered discretion to delay further the defendant's power of sale.

4.15 It was in considering the details of this scheme that it became apparent to us how complex it would be. Indeed we reached the view that the complexity renders it virtually unworkable in practice. Furthermore it seems to us that it would be most unlikely that claimants would choose damages that are subject to such complex machinery and it would be wrong to insist on damages being awarded under this scheme or not at all. Ultimately, therefore, we have come to the conclusion that the alternative scheme for assessing and awarding damages for the purchase of accommodation is not an improvement on the (admittedly imperfect) *Roberts v Johnstone* approach and we do not recommend legislation to implement it.

4.16 Nor do we think that any of the other alternatives we have considered would be acceptable. In particular, simply to award claimants the extra capital cost of accommodation would seem unduly harsh on defendants, as we have explained in paragraph 4.11 above. To depart from *Roberts v Johnstone* therefore risks substituting potential under-compensation for over-compensation and we think it preferable to leave the common law on this issue as it is.

4.17 **We therefore recommend that damages for the costs of purchasing accommodation should continue to be assessed using the *Roberts v Johnstone* method (with the ILGS rate being the appropriate annual rate of return).**

(2) Where the property has been paid for by a third party

4.18 In some cases the money required to finance the pre-trial purchase of property will have been provided gratuitously before the trial by a third party or parties, often the claimant's parents if he or she is a minor. Awarding the claimant damages for accommodation (which would be assessed using the *Roberts v Johnstone* method)

would therefore appear to be meeting a loss to the provider of such finance and not to the claimant.²⁰ In the Consultation Paper we saw this situation as analogous to the provision of gratuitous care and services. It is therefore arguable that the claimant should hold these damages on trust or be under a personal legal obligation to account to the providers of the gratuitous finance for the damages awarded in respect of gratuitous finance. However, practitioners among our consultees advised us that it is an uncommon problem in practice and we are certainly not persuaded that a legislative provision is here necessary. There is also the difficult question of whether a more convincing analogy is to charitable payments (which are presently ignored in assessing damages and do not give the provider a legal right of recovery) than to gratuitous services.²¹

4.19 We therefore recommend that no legislative provision is required in respect of damages for the purchase of accommodation paid for gratuitously by a third party.

4.20 In the Consultation Paper,²² we raised the issue of whether there is a need to empower courts, at the time of awarding damages, to decide on the parties' respective interests in property. Where the claimant is under an obligation to account for the damages to the third party, there is no real difficulty because the property belongs entirely to the claimant. But the position is more difficult where the purchase or any necessary alterations, are to be funded partly by the third party (for example, the parents of the claimant) and partly from the damages. Fifty-five per cent of consultees responding to this issue were against empowering the courts to decide the beneficial interests in property at the time of trial when damages are awarded. Not only might this complicate trials but the majority of consultees reported having had no problems in practice, indicating that usually the claimant's lawyers or the Court of Protection would ensure that the beneficial interests of the claimant and the other parties were sorted out. Further arguments against empowering the courts included the added time and cost, the inappropriateness of determining beneficial interests in property at the same time as assessing damages in personal injury litigation, and the lack of interest on the part of the defendant in this issue. It is also presumably the case that the claimant (or any third party) could, in a separate action, seek a declaration by the courts of the respective interests in the property.

4.21 We therefore recommend that the law should not be changed in order to provide the courts with a power to determine the beneficial interests in property at the time of trial when damages are awarded.

²⁰ At first instance in *Thomas v Brighton Health Authority* [1996] PIQR Q44, Q55, Collins J rejected the argument that, because the property had been purchased by the claimant's parents and not by the claimant, there was no loss to be compensated.

²¹ See paras 10.10-10.14 below for a description of the present law on the deductibility or not of charity in the assessment of damages, and paras 10.58-10.78 below regarding the law on recovery by third parties of collateral benefits.

²² Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.91.

(3) Miscellaneous associated costs

- 4.22 We indicated in the Consultation Paper²³ that the incidental costs associated with moving house already appear to be recoverable. Two consultees suggested that the current position was unclear as to the recovery of these costs. We disagree and, having made further inquiries with practitioners, we believe that the law at present sufficiently clearly provides for the recovery in damages of the incidental costs of moving.
- 4.23 **We therefore recommend that no change is necessary in respect of damages awarded for the incidental costs associated with moving.**

3. ALTERATIONS TO PROPERTY

- 4.24 Whether or not the claimant needs to move to new accommodation, it may well be necessary to perform some alterations to adapt the claimant's house to his or her needs. A distinction can be drawn between those alterations which, incidentally, increase the market value of the property, and those which do not.

(1) Alterations increasing value

- 4.25 As we have seen,²⁴ in *Roberts v Johnstone* the claimant recovered the cost of performing the necessary alterations, but had to give credit for the increase in the value of the property which resulted. A different approach was taken in *Willett v North Bedfordshire Health Authority*,²⁵ where the cost of alterations was used in the *Roberts* calculation. In our Consultation Paper, we suggested that the approach in *Willett* should be preferred, and that the increase in value of the property or the total cost of the alterations, whichever was smaller, should be included in the annualisation; and, in addition, any 'wasted costs' (i.e. any balance of the cost of the alterations minus the increase in value) should be recoverable.²⁶ A clear majority of our consultees agreed with the approach we set out in the Consultation Paper which we now confirm as a final recommendation. However, we agree with Hobhouse J in *Willett* that, given the fact that the treatment of the expenditure on alterations was not argued in *Roberts v Johnstone*, the courts are free to apply the approach in *Willett* and our preferred approach rather than that in *Roberts v Johnstone*: legislation on this is therefore unnecessary.
- 4.26 An example may help to understand our preference for *Willett* and our preferred approach. Suppose, for example, a claimant remains in his or her existing house, but adapts it at a total cost of £15,000. The value of the house before the alterations is £80,000; the value after the alterations is £90,000, an increase of £10,000. So, of the cost of the alterations, £10,000 has produced an increase in value and the other £5,000 can be treated as "wasted". We would propose that the

²³ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 2.47. See further Kemp & Kemp *The Quantum of Damages*, vol 1 para 5-049.

²⁴ See para 2.45 above.

²⁵ [1993] PIQR Q166.

²⁶ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.96.

£10,000 be treated in the same way as an acquisition cost would be. Assuming a rate of two per cent per annum, the claimant will receive a sum based on £200 per annum which, if the multiplier is, say, 16, will be £3,200. To this figure must be added the “wasted” costs of £5,000, making a total of £8,200.

4.27 **We therefore recommend that (although no legislation on this is needed) the approach in *Willett v North Bedfordshire HA* to the assessment of damages for alterations increasing the value of property should be preferred to that in *Roberts v Johnstone*. Damages should therefore be assessed by applying the appropriate annual rate of return to the increase in value of the property or (if smaller) the total cost of the alterations and then applying a multiplier to this sum; any ‘wasted costs’ (i.e. any balance of the cost of alterations minus the increase in value) should then be added.**

4.28 Concern was again expressed, however, that if the claimant had to give credit for any increase in value, he or she would be left with insufficient funds to perform the required alterations. Just as with the ‘windfall’ value of the property itself, it was pointed out that any increase in value as a result of the alterations could not be realised by the claimant without the sale of the house. Consultees also stressed the importance of consistency in approach between purchase and alteration of the claimant’s home.

4.29 We have therefore considered again the radical alternative which is concerned to ensure that the claimant recovers the cost of the alterations²⁷ in return for the defendant having a charge over the property. That is, we have considered a suggested approach analogous to that for acquisition costs, under which the defendant would pay the full cost of the alterations, and to ensure that the claimant does not benefit from any ‘betterment’ of the property, the defendant would be given a charge, in this case for the increased market value (assessed as at the date of trial and presumptively index-linked to local property prices thereafter). This would ensure that the claimant has sufficient money to pay for the alterations, and that he or she need not give credit for the increase in value until the benefit of that increase has been received. However, as with acquisition costs, we have ultimately concluded that the complexity of this scheme, when worked through in detail, renders it virtually unworkable in practice. We therefore do not think that it would be an improvement on the common law as applied in the *Willett* case.

(2) Alterations not increasing value

4.30 Where the alterations to the claimant’s property make no difference to its market value, the simple cost of the alterations can be recovered and no question of ‘benefit’ arises. The position is more complicated where the market value of the house is actually lowered as a result of the alterations. Some consultees were doubtful that this situation raised any difficulties in practice, but the Royal Association for Disability and Rehabilitation claimed that it was a frequent problem resulting from the adaptation of accommodation. It may be true, as some

²⁷ Principle dictates that there should be deductions for any costs of alterations that the claimant would have incurred irrespective of the injury.

consultees suggested, that the amount of any reduction will usually be relatively small. Nonetheless we think we should address the issue, not in order to recommend legislation - here there are no decisions which stand in the way of our preferred approach - but in order to help judges to ensure consistency and clarity in the law. Moreover in some instances the reduction may be significant.

- 4.31 Once again, of course, the claimant should receive damages for the full cost of the necessary work. The question is whether to compensate the claimant for the reduction in value of the house. The vast majority of consultees thought that the claimant should receive some compensation for this loss. Some argued, however, that the loss would not in fact be realised until the house was sold, and that this should be reflected in the damages awarded. James Rowley told us that in practice, the claimant gets “the cost of reinstatement of the property back to its original condition, heavily discounted for early recovery.”
- 4.32 We agree with the majority of our consultees, however, that the loss should be compensated by assessment of the decrease in value at the time of trial, and without discounting for accelerated receipt. Just as in cases where personal property is damaged and thereby rendered less valuable, we think the loss resulting from the reduction due to the adaptations can be seen as being felt immediately by the claimant, whose asset has been reduced in value. Although at first sight inconsistent with the approach we have advocated for alterations increasing the value of property (where the increase in value is not regarded as accruing immediately to the claimant’s benefit), we believe that this reflects the standard approach whereby doubts as to losses or gains in property values are resolved in favour of the claimant.²⁸ It also seems impractical to talk of discounting the damages when it cannot be said with any certainty when, or even if, the claimant may choose to sell the house and hence when the loss will be realised in money terms.
- 4.33 **Although we do not think legislation is necessary (and this recommendation, like several others above, is therefore addressed to the judiciary) we consider that where, as a result of his or her injuries, the claimant reasonably pays for alterations (or can establish on the balance of probabilities that he or she will pay for alterations) to his or her accommodation and the alterations result (or will result) in a decrease in the value of property, damages should be awarded for (a) the cost of those alterations and (b) the amount of the decrease in value of the property.**

²⁸ See para 4.11, n 15 above.

PART V

REFORM III: THE MANAGEMENT OF THE CLAIMANT'S AFFAIRS

1. THE COURT OF PROTECTION

(1) Generally

- 5.1 Claimants under the jurisdiction of the Court of Protection can, as a general rule, recover the fees payable as a result.¹ This will include fees payable to the Court of Protection itself, as well as the fees of a receiver and associated solicitors' costs where appropriate.² The fees of the Court of Protection are composed in part of fixed sums, the remainder varying according to the capital to be invested and the income to be produced. Over the lifetime of the claimant after the trial, as the capital sum awarded is expended and the expected income decreases, the variable element of the fees will be reduced.
- 5.2 In our Consultation Paper we expressed the view that any award made in respect of the fees of the Court of Protection should take account of this reduction.³ At first instance in *Roberts v Johnstone*,⁴ Allott J had taken what he called a 'broad-brush' approach to this issue, rather than engaging in detailed calculations. Although we recognised that an argument could be made for a more precise method, we thought such a method would be better developed by the courts, and accordingly made no provisional recommendation for legislative reform.
- 5.3 Nearly all of our consultees agreed with this provisional view. Some support for a more precise approach was evident: Bill Braithwaite QC, for example, told us that he 'fundamentally disagreed' with the 'broad-brush' method, and the Association of Consulting Actuaries argued for 'a scientific approach'. One consultee referred to computer aids which would enable 'exact' figures to be calculated. But the more common view seemed to be that, in view of the difficulty of predicting the future and the relatively small amounts of money involved, precise calculation was unnecessary. **In accordance, therefore, with our provisional view, and reinforced by the opinions of our consultees, we recommend that legislative reform is not here required, and that any more precise method of calculation should be left for the courts to develop as appropriate.**

¹ See para 2.47 above.

² It may also include other expenses such as the cost of preparing a statutory will. See para 2.52 above.

³ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.99.

⁴ Unreported, 25 July 1986; see Kemp & Kemp, *The Quantum of Damages*, vol 1 para 5-055; para 2.48 above.

(2) Contributory negligence

- 5.4 As we have seen,⁵ there appears to be some conflict in the cases (as between Rougier J in *Ellis v Denton*⁶ and the Court of Appeal in *Cassel v Riverside Health Authority*⁷) as to whether damages awarded in respect of the fees of the Court of Protection are susceptible to reduction for the claimant's contributory negligence. In our Consultation Paper⁸ we adopted the provisional view that "where the amount of damages awarded to a plaintiff is reduced through contributory negligence, such reduction should be applied to the award in respect of Court of Protection fees in the same way as it is applied to the other damages". We asked consultees whether they agreed with our provisional view. Fifty-five per cent of consultees who responded to the question on contributory negligence did. Forty-five per cent disagreed.
- 5.5 There was some confusion among consultees about our provisional view in terms of its application to fixed and variable fees and in respect of the exact procedure for making a reduction. Very few consultees specifically addressed the issue of fixed fees but those who did thought that a reduction for contributory negligence should apply. As regards variable fees, consultees identified three methods:
- (1) recovery of the fees payable on the full amount subject to a deduction for contributory negligence;
 - (2) recovery of the full fees payable on the reduced amount;
 - (3) recovery of the fees payable on the reduced amount but subject to a deduction for contributory negligence.
- 5.6 We meant option (3) to be our provisional view (as regards variable fees). We argued in the Consultation Paper that this approach did not amount to double deduction. Several consultees disagreed and insisted that double deduction would result. Among those who disagreed, there was a general preference for option (2) rather than option (1).
- 5.7 The Association of Personal Injury Lawyers maintained that it *would* be an 'unjust' double deduction if the award in respect of the fees were reduced for contributory negligence. Robin Stewart QC said that in his "fairly substantial experience of Court of Protection cases" he had never seen a defendant seek to apply a reduction for contributory negligence to the variable element of the fees of the Court of Protection. The Master of the Court of Protection also thought it arguable that to do so would be to make double deduction. The Council of Circuit Judges argued that making this deduction, as we provisionally recommended, would leave the claimant with less than the full fees payable on the damages received. Because the full amount of those fees would still be incurred, the

⁵ See paras 2.49-2.51 above.

⁶ Unreported, 30 June 1989; noted in Kemp & Kemp, *The Quantum of Damages*, vol 1 C2-002.

⁷ [1992] PIQR Q168.

⁸ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.100.

claimant would appear to be undercompensated in the sense that his expected income, after the deduction for contributory negligence, would be reduced to make up the shortfall.⁹ One can also argue, conceptually, that the fees of the Court of Protection can be distinguished from other heads of damage because, as Robin de Wilde QC and the Association of British Insurers said, they are more akin to costs of the action than losses incurred by the claimant. An award in respect of Court of Protection fees does not directly replace any loss the claimant has suffered. Instead, it goes to ensure that the claimant will be able to receive the appropriate level of replacement income.

- 5.8 On the other hand, and in favour of our provisional view, it can be strongly argued that it is precisely because Court of Protection fees are recoverable as damages, and are not 'costs', that they should be susceptible to the normal rules on contributory negligence. The claimant would not engage the assistance of the Court of Protection if it were not for the tort; but in principle if the tortfeasor is only partially liable for the tort, he or she should be only partially liable for Court of Protection fees. There is also a question of whether one can distinguish Court of Protection fees from, for example, financial advisers' fees (which presumably are subject to a reduction for contributory negligence). It is also difficult to argue that Court of Protection fees should be immune from reduction for contributory negligence because the rate of return used to calculate the main fund of damages assumes investment by the Court of Protection. If that were a valid argument, one might equally well say that, for example, damages for medical expenses should be immune from reduction for contributory negligence because it was assumed that a crucial operation would be carried out privately, which the claimant will not be able to afford if damages are reduced. Yet reductions for contributory negligence have traditionally been applied even though not to award full damages may undermine assumptions made in the initial assessment of damages.
- 5.9 We are therefore inclined to adhere to our provisional view that damages for Court of Protection fees (whether fixed or variable) should be subject to reduction for contributory negligence. We therefore tend to support the Court of Appeal's approach in *Cassel v Riverside Health Authority*. It seems to us, however that, whichever view one takes, legislation on this issue is unnecessary. Even if one thought *Cassel* to be wrong, the approach was agreed by the parties and, in any event, did not directly arise in relation to contributory negligence (rather there was simply an agreed reduction of liability of 10 per cent). An appellate court has therefore not had to consider full argument on this issue and there is room for development should the courts wish to depart from *Cassel*.
- 5.10 **We therefore recommend that, while no legislation on this issue is required, the courts should reduce damages for Court of Protection fees (whether fixed or variable) for contributory negligence.**

⁹ If the award in respect of Court of Protection fees is reduced for contributory negligence, the claimant will not be able to receive the appropriate level of income from investing the rest of the damages and arguably the basis for calculating the rest of the damages should be altered to take account of this fact.

2. FINANCIAL ADVICE

- 5.11 Claimants who recover damages for personal injury will normally invest at least some part of their award, and damages for future pecuniary loss are of course calculated on the basis that they will be invested, and that the investment will produce a particular rate of return. Following the decision of the House of Lords in *Wells v Wells*,¹⁰ that rate of return is now to be taken as three per cent.
- 5.12 In our Consultation Paper, we expressed the view that if it is reasonable for a claimant to obtain professional advice to secure that rate of return, he or she should be able to recover the reasonable cost of that advice.¹¹ Indeed, this is probably already the law.¹² There was considerable agreement among consultees with the position we had advocated, but the central reason cited for this support was the continued application of a discount rate of 4.5 per cent in the calculation of multipliers. We had said in the Consultation Paper that “it would almost certainly be necessary for a plaintiff to obtain professional advice to have the best chance of obtaining this return whilst minimising risk.”¹³
- 5.13 Now that a lower rate of assumed return has been adopted, however, we accept that claimants might be expected to incur less expense in achieving that level of return. We had expressed this view in our Consultation Paper, and our consultees agreed: many thought that no damages at all should be available under this head if a lower rate was used. In *Wells v Wells*, Lord Lloyd said that “investment in ILGS will save up to one per cent per annum by obviating the need for continuing investment advice.”¹⁴ But it can still be argued that some advice is necessary, at least initially, in order to structure the ILGS investments appropriately. Laura Hoyano, a lawyer with considerable experience of the system in Canada where awards for financial advice are made on a regular basis, cautioned us that “many plaintiffs dissipate their awards by improvident investments... they need sound financial advice.”¹⁵
- 5.14 Nonetheless, we think that such limited advice as may be necessary may reasonably be regarded as negligible in cost. And the justification for awarding a

¹⁰ [1999] 1 AC 345.

¹¹ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.101-3.103.

¹² See paras 2.53-2.54 above.

¹³ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.102. This opinion was confirmed by our consultees. Clark Whitehill, a firm of chartered accountants, said that “the average claimant would be unlikely to achieve or beat the market index without the skilled assistance of a stockbroker or fund manager” and confirmed that “without this assistance the plaintiff’s damages are very unlikely to last for his lifetime.” In *Wells v Wells* [1999] 1 AC 345, 387, Lord Steyn referred to the “surprisingly high cost of advice that would be needed by a claimants to invest in a portfolio of equities”.

¹⁴ [1999] 1 AC 345, 374.

¹⁵ Cf Personal Injury Compensation: How Much Is Enough? (1994) Law Com No 225, pp xxi, 162 ff & 258-259: of the claimants interviewed who had recovered in excess of £20,000, about two in every five had invested their money in any form of stocks, securities or trusts; claimants were generally more likely to save their money in banks or building societies than invest in stocks and shares.

small sum of compensation for the cost of financial advice is, arguably, weakened by the fact that the three per cent rate of return is itself a “rounded-off” rather than an absolutely precise figure.¹⁶ Whilst we accept, therefore, that in principle a claimant ought to be entitled to recover the reasonable costs of financial advice necessary to enable him or her to achieve the assumed rate of return,¹⁷ we think that where ILGS rates are used, no specific sum should be recoverable under that principle. Certainly, we are of the view that, at this stage, so soon after *Wells v Wells*, it would be inappropriate to recommend legislation on damages for the cost of financial advice.

- 5.15 **We therefore recommend that, following the House of Lords’ decision in *Wells v Wells*¹⁸ laying down a discount rate governed by the return on ILGS, it would be inappropriate at this stage for there to be a legislative provision in relation to damages for the cost of financial advice.**

¹⁶ Of course, it is impossible accurately to assess a future variable rate of return on any investment. The discount rate adopted will therefore inevitably represent an estimate as to the likely net return on ILGS in the immediate future. On this point, it is interesting to note that although their Lordships in *Wells v Wells* were unanimous that the discount rate should be set for the time being at three per cent, that conclusion was reached on differing grounds. Lords Steyn, Hope, Clyde and Hutton considered that the appropriate discount rate should be set by reference to the average net return on ILGS over the three years preceding the decision: see [1999] 1 AC 345 at 388, 393, 397-398 and 404. Lord Lloyd on the other hand considered that a period of three years was too long to produce a fair assessment. In his view, the rate should be set by reference to the average net return over the previous year: see [1999] AC 1 345, 374-376.

¹⁷ Several consultees expressed concern that it was difficult to distinguish between advice necessary to obtain a three per cent rate of return and advice which might be taken with a view to obtaining a higher return. This would also suggest that a cautious approach to recovery of the costs of financial advice is preferable.

¹⁸ [1999] 1 AC 345.

PART VI

REFORM IV: LOSSES ARISING OUT OF DIVORCE

1. INTRODUCTION

- 6.1 Where a claimant suffers personal injury, a consequence of that injury may be the breakdown of his or her personal relationships, and in some cases divorce. Particularly where the injuries suffered are serious and a change in personality has resulted, divorce may be a likely consequence. As a result of such divorce, the claimant may be seen to suffer 'losses', such as the adjustment of shares in the matrimonial home or an order to make periodic payments to a spouse. In addition to these pecuniary losses, the claimant may have suffered non-pecuniary loss in the distress caused by the dissolution of his or her marriage.
- 6.2 Following *Pritchard v Cobden*,¹ such losses are not recoverable from the defendant in the personal injury action, regardless of how foreseeable the divorce and the consequent loss may have been. There has been considerable criticism of this decision, and we reviewed it in our Consultation Paper where we offered solutions to overcome the arguments relied on by the Court of Appeal.² Without taking a provisional view, we asked consultees whether reform should be undertaken to allow claimants to recover damages for these losses. A majority of consultees were opposed to reform and having further considered what has proved a most difficult issue, we agree that reform in this area would not be appropriate. We have derived particular assistance from the views given to us by Hale J, for which we are most grateful.

2. REDISTRIBUTION OR LOSS?

- 6.3 The first argument relied on by the Court of Appeal was that what occurred on divorce was merely a redistribution of assets and therefore the claimant could not be said to have suffered any loss.³ In our Consultation Paper, we suggested that this is not the case if the situation is considered from the standpoint of the claimant alone: if he or she is left with fewer assets after the making of an ancillary relief order consequent on divorce, it is arguable that some 'loss' is suffered.⁴ Many of our consultees agreed. For example, Swinton Thomas LJ said that the argument "that the parties to a divorce are not financially worse off as a result of it... [is] in the vast majority of cases, I believe... just plain wrong". Several consultees felt that such losses were most clear where the claimant's share in the matrimonial property had been transferred or reduced. Not only would the claimant own less of the

¹ [1988] Fam 22.

² Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.104-3.111.

³ See para 2.60 above.

⁴ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.106.

property than before divorce, but he or she would also have a new requirement for separate accommodation.

6.4 We find compelling the argument that losses may be suffered as a result of divorce and therefore the financial consequences of divorce cannot be properly characterised as merely the redistribution of assets. However, we do recognise that difficulties arise in trying to pin-down any loss suffered by the claimant. The financial arrangements made on divorce can be settled in a number of ways, taking into account the circumstances of any given case. The transfer or reduction of shares in the matrimonial home, periodic payments to a spouse and children or a lump sum maintenance payment, provide examples of the types of orders which can be made in ancillary relief proceedings. In *Jones v Jones*⁵ and at first instance in *Pritchard v Cobden*,⁶ although damages were awarded in respect of housing orders made on divorce, the claims for damages in respect of periodic maintenance payments were rejected.⁷ The reasoning behind this approach is that the claimant's new obligation to make periodic payments is counterbalanced by the loss of his or her previous obligation to share, or to undertake completely, the responsibility of providing for the family. In many cases, it may be hard to establish that it is more expensive for the claimant to maintain his or her family through periodic payments than it was when they were living together.

6.5 Some consultees suggested that similar reasoning could not apply where the claimant was ordered to make a lump sum maintenance payment or where shares in the matrimonial home were transferred. For instance Timothy Scott QC said:

If a man has been supporting his wife during the course of the marriage, an order that he pay periodical payments after the breakdown of the marriage can be regarded as a quantification of a pre-existing but previously unquantified obligation to provide support. By contrast if a man has to pay a substantial lump sum after the breakdown of the marriage, this is an obligation of a wholly different nature from the support which he provided during the marriage. There was no inchoate obligation to part with a large capital sum.

On this view, the transfer of shares in the matrimonial home or lump sum maintenance payments are seen as immediate capital losses to the claimant, dissociated from any obligations arising under the marriage.

6.6 But Hale J indicated that it would be unfair to place the claimant who makes a clean break on divorce using a lump sum maintenance payment in a better position than the claimant who makes periodic payments. On this view a lump sum maintenance payment represents periodic payments for the future, and tends to suggest that the dissociation of lump sum payments from pre-existing obligations is not completely defensible.⁸ A similar argument can be applied to the transfer of shares in the matrimonial home. The courts exercise a degree of

⁵ [1985] QB 704.

⁶ See the decision of the Court of Appeal: [1988] Fam 22, 41-43.

⁷ See further paras 2.58-2.59 above.

⁸ In *Pritchard v Cobden* Sir Roger Ormrod indicated that a lump sum payment could be regarded as a capitalisation of periodic payments, see [1988] Fam 22, 47.

flexibility in the types of housing orders that can be made in ancillary relief proceedings. One such type of housing order entails the outright transfer of the matrimonial home to one spouse in exchange for reduced or extinguished periodic payments.⁹ This also suggests that the adjustment of shares in the matrimonial home cannot be so easily detached from pre-existing obligations. As a consequence, the difficulties referred to in respect of periodic payments could be equally problematic for lump sums and housing orders.

- 6.7 The question of whether or not a loss has been suffered cannot be answered by simply identifying the nature of the loss, whether it be the transfer of property shares, lump sum maintenance, periodic payments or any combination thereof. Rather, in order to establish loss an examination of the particular circumstances must be undertaken. Looking further into the facts would require detailed consideration of the claimant's position before and after the divorce. As part of this investigation, the court would be called upon to inquire into whether the parties would have divorced in any event notwithstanding the accident. This point was raised by several of our consultees, including Christopher Purchas QC who considered such investigations to be contrary to public policy. Similar inquiries into the prospects of remarriage would also be necessary as remarriage by either the claimant or his or her spouse would affect the claimant's financial position after the divorce.
- 6.8 Analogies can be drawn with the impact of the prospects of divorce and remarriage on wrongful death claims. We considered arguments both for and against taking into account such prospects for the purposes of claims under the Fatal Accidents Act 1976 in our Consultation Paper Claims for Wrongful Death.¹⁰ We identified two competing interests in the need to ensure accurate assessment of damages and the need to avoid distressing and distasteful inquiries that would result from a detailed investigation into the personal lives of the married couple. In order to reach a proper balance between these competing interests, and in light of the difficulty in establishing an acceptable method for assessing the prospects of divorce or remarriage, we concluded in our report that such prospects should only be taken into account where there is clear and objective evidence.¹¹
- 6.9 If reform were to be undertaken to allow claimants to recover damages for losses arising out of divorce, the policy adopted in wrongful death claims could be employed in this context and would go some way to resolving the difficulties outlined. To this extent, we would not regard arguments based on the need to take into account the prospects of divorce and remarriage as sufficient in themselves to defeat the case for reform here.

⁹ This type of order may be particularly desirable where a spouse might violate a periodic payments order. See further Cretney & Masson, *Principles of Family Law* (6th ed 1997) p 485.

¹⁰ Claims for Wrongful Death (1997) Consultation Paper No 148, paras 3.56-3.72.

¹¹ Our recommendations indicate that in respect of remarriage, clear and objective evidence consists of an agreement to marry or engagement at the time of trial. For divorce, the fact that the parties have separated and are not living together at the time of death or the fact that one of the parties has petitioned for divorce, judicial separation or nullity at the time of death provides clear and objective evidence. See further Claims for Wrongful Death (1999) Law Com No 263, paras 4.27-4.71.

6.10 The case law to date has only considered the situation where it is the breadwinning spouse who has suffered the injury. This may not always be the case and it is just as feasible that a dependent spouse may suffer a loss from a divorce consequent on personal injury. The question then arises as to how one could quantify the loss suffered by a dependent spouse. As there has never been a case on point and considering that a breadwinning uninjured spouse would probably maintain many of the obligations to the injured spouse under a divorce settlement, we would presume that any losses might amount to a reduction in the standard of living expected under the marriage or increased financial hardship. It might be that the dependent spouse is forced to leave the matrimonial home. Although, it seems obvious that a dependent spouse could suffer losses as a result of divorce, the same difficulties would apply. Any loss would be just as difficult to pin down and the concerns about investigations into the injured spouse's position before and after the divorce would be equally relevant.

3. INFINITE REGRESS

6.11 The second point made by the Court of Appeal in *Pritchard v Cobden* was the problem of 'infinite regress'. If personal injury damages reflect the outcome of a divorce, but that outcome depends on the amount of damages awarded, some circularity is possible.¹² In our Consultation Paper, we proposed a solution which would exclude damages recovered under this head from determination in the ancillary relief claim.¹³ Several consultees supported this solution. Florence Baron QC said that it "could be achieved simply and would meet the theoretical difficulty".

6.12 A number of consultees saw this as one aspect of a wider issue, namely the question whether personal injury damages should be excluded completely from consideration in the divorce hearing. At present there is no 'ring-fencing' of damages which would achieve such exclusion and they may be taken into account as appropriate. It was evident that many among our consultees felt that personal injury damages, with the possible exception of those for lost earnings, should be excluded in this way. For instance, the Council of Circuit Judges stated that "the proper course... is to give the Judge dealing with the financial consequences of the divorce a wider discretion to exclude some or all of the damages". Although we can see the force of this argument in principle, we consider this to be essentially a matter of family law, and as such outside our remit. It seems from the responses we received that most family lawyers would regard such exclusion as unacceptable.¹⁴

¹² See further para 2.61 above.

¹³ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.105.

¹⁴ The Law Society's Family Law Committee, for example, indicated in their response that they felt absolute, rather than discretionary, exclusion would be unacceptable because "when hearing an application for ancillary relief the court must have regard primarily to the needs of the children... it would be inappropriate to fetter the court's discretion by ring-fencing damages from an accident as solely for the benefit of the accident victim."

4. PROCEDURAL ISSUES

- 6.13 The third key argument put by the Court of Appeal in *Pritchard* concerned the procedural difficulties arising from the need to know the outcome of divorce proceedings at the time the personal injury claim is heard.¹⁵ In *Pritchard v Cobden*, both sets of proceedings were heard together to avoid this problem. We noted this solution to the procedural difficulties in our Consultation Paper and asked consultees whether changes in listing should be made in order to facilitate the recovery of damages under this head.¹⁶ Swinton Thomas LJ, who had been the judge at first instance in *Pritchard*, said that this arrangement had only been reached with great difficulty, and that the trial was considerably longer than might have been expected from the combination of two comparatively straightforward cases. He thought that making such arrangements on a regular basis would be impractical and that judges with experience in handling both personal injury and divorce cases would be rare. Other consultees questioned the feasibility of having the same judge hear both proceedings and referred to increased specialism in both these fields.
- 6.14 Provision for joint listing assumes that the divorce proceedings and the personal injury claim can be heard together. But this will not always be possible.¹⁷

5. CAUSATION AND REMOTENESS

- 6.15 Causation was not at issue in *Jones v Jones* and in *Pritchard v Cobden* because it was conceded by the defendant in both cases that the claimant's injuries caused or contributed to the divorce.¹⁸ But the Court of Appeal in *Pritchard v Cobden* held that in addition to the three arguments outlined above, recovery in damages for losses arising out of divorce should be denied because the loss was too remote, or because the loss constituted indirect economic loss or as a matter of public policy.
- 6.16 We recognised in the Consultation Paper that in order to recover damages for divorce-related losses, the claimant would have to show that his or her injuries did in fact cause the divorce.¹⁹ Many consultees agreed that this could create difficulties. Ian McClaren QC regarded it as an "almost impossible task" to establish causation, while Dyson J thought there would be "serious evidential difficulties involved in establishing causation". Hale J considered that the move in family law away from determining the reasons for divorce was motivated in part by

¹⁵ See para 2.61 above.

¹⁶ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.107.

¹⁷ If the divorce proceedings take place first, any order for periodical payments can be varied in the light of a subsequent personal injury award: the judicial power to vary an order for maintenance in the form of periodic payments is contained in s 31 of the Matrimonial Causes Act 1971. See further Cretney & Masson, *Principles of Family Law* (6th ed 1997) pp 473-475. If the personal injury claim is concluded first, the award of damages cannot be altered in the light of the divorce settlement.

¹⁸ See paras 2.57-2.59 above.

¹⁹ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.109.

the very difficult task the court faces in determining causation. We therefore find the argument about causation a persuasive one.²⁰

6. FAMILY LAW ACT 1996

- 6.17 In our Consultation Paper²¹ we noted the argument that an inquiry into the circumstances surrounding a divorce, such as might be necessary where a claimant tries to establish that his or her injuries caused the divorce, might be thought to conflict with the policy underlying the Family Law Act 1996.²² Before the 1996 Act, it was the duty of the court hearing the divorce application to make this kind of inquiry.²³ But under the 1996 Act, while conduct is relevant in sorting out the consequences of a divorce, it is irrelevant in deciding whether a divorce order can be made: a divorce order is to be granted on the basis that the marriage has irretrievably broken down without further explanation or investigation of the circumstances of that breakdown. The breakdown of marriage is taken to be established if a statement to that effect, fulfilling certain conditions, is made by one or both spouses.²⁴ After a mandatory period of reflection and consideration,²⁵ a divorce order may be granted on a declaration by the applicant that he or she believes the marriage cannot be saved.²⁶ The Act has not yet been brought into force.²⁷
- 6.18 We asked consultees to consider the argument that the underlying policy of the Family Law Act 1996, in moving away from investigating the causes of divorce, might be frustrated if personal injury claims were to provide a new forum for such investigation.
- 6.19 Many consultees explicitly supported the argument and considered reform to be in direct conflict with the 1996 Act. The Association of District Judges felt that the “philosophy underlying the Family Law Act 1996 would be destroyed” if claims were permitted.

²⁰ But see paras 6.7-6.10 above for our view that there would be solutions to the analogous difficulties inherent in determining the amount of the award, should damages for loss resulting from a divorce be recoverable.

²¹ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, para 3.110.

²² The Act implemented, with some amendments, the reforms recommended in our Reports, Family Law - The Ground for Divorce (1990) Law Com No 192 and Family Law - Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

²³ Matrimonial Causes Act 1973, s 1(3) (repealed by the Family Law Act 1996, s 66(3) and Schedule 10). It would appear that in practice, an inquiry was not usually made. See Family Law - The Ground for Divorce (1990) Law Com No 192, para 2.2 and Appendix C, para 44.

²⁴ See s 5(1)(a) and (b) and s 6 of the Family Law Act 1996.

²⁵ See s 5(1)(c) and s 7.

²⁶ See s 5(1)(d).

²⁷ The Government had intended to bring into force Part II of the Family Law Act 1996 in 2000 but recently announced that implementation will be further delayed. See Written Answer, *Hansard* (HL) 17 June 1999, vol 602 WA 39 and Lord Chancellor's Department *Press Notice* 17 June 1999.

6.20 On the other hand, Timothy Scott QC argued that the 1996 Act does not expressly exclude judicial inquiries into the reasons for marital breakdown, but simply removes the previous judicial duty to make such inquiries. For one thing, the right of either party to raise the conduct of the other in ancillary relief proceedings has been maintained. In determining financial orders for ancillary relief applications, the court must take into account the conduct of the parties where it would be inequitable to disregard such conduct.²⁸ And under the 1996 Act itself, a spouse may seek to prevent the divorce on grounds of hardship, but the court can only prevent a divorce if satisfied that it would be wrong for the marriage to be dissolved, having considered all the circumstances, including the conduct of the parties.²⁹

6.21 A further argument, put forward by Hale J, was that our reference to there being a conflict with the policy of the Family Law Act 1996 is misconceived because the causal-inquiries involved under the 1996 Act are very different from those involved in a personal injury claim for losses arising from a divorce. She wrote to us as follows:

Conduct may of course be relevant to the future care of the children, especially if there is a risk of harm to the children. It may also be relevant to the financial settlement, especially if there has been financial misconduct, or if one person's behaviour is so much worse than the behaviour of the other as to indicate a decreased entitlement to financial provision. These are both quite different inquiries from the one which the tort case would require, which is a factual causation inquiry rather than any sort of moral judgment.

6.22 Particularly in the light of Hale J's views, we consider that there is a minimal risk, at most, of a personal injury claim for divorce losses conflicting with the policy underlying the Family Law Act 1996. We therefore regard the argument against reform based on the Family Law Act as essentially irrelevant in deciding whether or not there should be reform.

7. OTHER RELATIONSHIPS

6.23 It is possible that losses may also result from the breakdown of relationships other than that of husband and wife. Breakdown between cohabitants, parent and child or in any other relationship involving financial dependency or the pooling together of resources could just as easily cause loss to the claimant. Under the present law, by analogy with *Pritchard v Cobden*, it can be assumed that losses flowing from the breakdown of *any* relationship would not be recoverable in damages.

6.24 In principle it would seem that the case for reform should encompass all relationships and not just that of marriage. It is just as feasible that injustice and hardship could be suffered by claimants who were in relationships other than marriage that broke down as a result of personal injury. This argument would also support a claim by spouses who have separated but not yet divorced. Once it has

²⁸ Section 25(2)(g) of the Matrimonial Causes Act 1973 as inserted by s 3 of the Matrimonial and Family Proceedings Act 1984.

²⁹ See Family Law Act 1996, s 10.

been accepted that loss can be suffered from the breakdown of many relationships, a question arises as to whether all personal relationships should qualify for these damages. One view may be that these damages should only apply to relationships which possess certain qualities. However, it is not clear what, if any, criteria should be imposed in order to restrict entitlement.

- 6.25 If other relationships were to be recognised for this head of damages, difficulties would emerge in determining when a breakdown has occurred. With marriage, divorce provides a specific instance where the relationship can be deemed to have broken down despite the fact that the parties may have a continuing relationship, especially where children are involved. With other relationships, there is no similar benchmark and some sort of test would have to be devised to discern when a breakdown has occurred. This may be where the parties have stopped living together or where communication has significantly deteriorated. In any event, it seems likely that any determination that a relationship has broken down will depend on the nature of the relationship in question and the particular circumstances surrounding its breakdown.

8. LOSS CONSEQUENT ON A FUTURE DIVORCE

- 6.26 We have already identified the problems for procedure where the personal injury claim and divorce proceedings do not occur at the same time and particularly where the divorce takes place several years after the personal injury claim has been resolved.³⁰ As we pointed out in the Consultation Paper, prediction of future events is an inevitable part of any award of damages for serious personal injury. However, to award damages for the loss that might be suffered as a result of a divorce which might occur in the future would engage the courts in the prediction of too many imponderables. The court would not only have to speculate as to whether and when a divorce may occur but also as to the loss that could be suffered on such a future divorce. From our discussion, it is apparent that identifying loss when all the facts are available is difficult enough. This would be compounded by the fact that the courts exercise considerable discretion in determining the outcome of divorce proceedings. For these reasons, we would reject any claims for losses consequent on a divorce in the future because it would be too difficult to predict the outcome of that divorce with any confidence.

9. LOSS SUFFERED BY THE UNINJURED SPOUSE

- 6.27 When a marriage ends in divorce, it is more than likely that both parties will suffer financial loss. This results from the mere fact that living as a family in the matrimonial home will be cheaper than maintaining two different households. However, only the injured spouse has a possible claim against the tortfeasor. In some cases though, it may be the uninjured spouse who bears the financial burden of divorce. This would arise particularly where it was the dependent spouse who suffers the personal injury. This contrasts with the factual situations presented by the case law where the injured party has been the breadwinning spouse.
- 6.28 A few consultees addressed the issue of loss suffered by the uninjured spouse where personal injury suffered by their partner causes divorce. George Gadney

³⁰ See paras 6.13-6.14 above.

recognised that the injured spouse may do better after a divorce where orders are made to his or her advantage. To compensate for “damage done to the marriage” he suggested that a statutory sum (akin to bereavement damages) be paid to *both* spouses in equal shares. Hale J referred to the unfairness which would result if the injured spouse could recoup his or her losses in the divorce from the tortfeasor and thereby would not be in a worse position as a result of the tort. The uninjured spouse on the other hand would not be able to recoup any such losses and would be left in a worse position. Hale J thought that family judges in determining divorce settlements would find it hard to accept such unfairness.

- 6.29 There are several objections from principle which defeat the argument that uninjured spouses should be able to recover from the tortfeasor damages under this head. The tortfeasor does not owe a duty of care to the claimant’s spouse. To allow a claim in tort would offend the general rule against recovery of pure economic loss. Further, recovery in damages by the uninjured spouse could be regarded as a resurrection of the claim for loss of consortium which was abolished by section 2 of the Administration of Justice Act 1982.³¹

10. NON-PECUNIARY LOSS

- 6.30 At first instance in *Jones v Jones*, part of the award for non-pecuniary loss included an element reflecting emotional pain resulting from the divorce. The award for non-pecuniary loss was never challenged on appeal and it is not clear whether the award for non-pecuniary loss in *Pritchard v Cobden* contained a similar component.³²
- 6.31 A number of consultees suggested that losses arising out of a divorce should be compensated as a non-pecuniary loss only. Rougier J suggested that the courts should assume “that a spouse constitutes an amenity” and should therefore treat the loss as “an item of general damages”. Several consultees drew analogies with bereavement damages in fatal accident cases, preferring either a tariff scheme of general damages or a fixed statutory sum. The Association of Personal Injury Lawyers thought a possible solution would be “an award of general damages for divorce, to reflect the financial consequences and distress, through a statutory figure, in a similar manner to bereavement payments in fatal cases.”
- 6.32 Some of the arguments against the recovery of pecuniary loss arising from a divorce do not hold the same force when considering an award for non-pecuniary loss. If losses arising out of a divorce were treated as a non-pecuniary loss, the evidential difficulties which apply to quantifying pecuniary losses could be avoided. Moreover, as the outcome of ancillary relief proceedings would not need to be known to assess non-pecuniary loss, the problems of infinite regress and procedure

³¹ Previously, a claim for loss of consortium entitled a spouse to damages from the tortfeasor for loss of their partner’s consortium where the partner had been injured as a result of a tort. Loss of consortium could be claimed where the spouse had a cause of action against the wrongdoer in tort or contract but also independently of any such action, for example in the case of an uninjured spouse. It appears that the claim for consortium could include pecuniary and non-pecuniary losses, for example, the loss of comfort and society of a spouse. For further details of the claim for loss of consortium, see P M Bromley & NV Lowe, *Bromley’s Family Law* (8th ed 1992) pp 107-127.

³² See para 2.57, n 115 and para 2.59, n 121 above.

would not be pertinent. Although these particular arguments against recovery would be weakened, many of the other arguments would equally apply to recovery of divorce losses as a non-pecuniary loss. It would still have to be proved that the tort caused the divorce. In addition, awarding damages for the non-pecuniary loss consequent on a divorce would not resolve the issues which arise in relation to losses consequent on a divorce in the future, losses suffered by the uninjured spouse and the breakdown of relationships other than marriage.

- 6.33 It would be arbitrary for the law to compensate non-pecuniary losses but not pecuniary losses when as a result of a tort both losses may have been suffered. We think this would mark an unjustified preference for non-pecuniary loss. Further, a fixed sum of general damages to reflect financial and non-financial consequences is unprecedented and would cut across the principled distinction between awards for pecuniary and non-pecuniary loss. For these reasons and because many of the arguments against the pecuniary claim would still apply, claims for non-pecuniary loss under this head should not be permitted.³³

11. CONCLUSION

- 6.34 **For the above reasons we recommend that the law should not be reformed to allow claimants to recover damages for losses, whether pecuniary or non-pecuniary, arising out of a divorce foreseeably consequent on an actionable personal injury.**

³³ We should clarify that we are not intending to cast doubt on the availability of damages for non-pecuniary loss to compensate for, eg, the inability to marry or to have sexual relations or to have a loving relationship. Rather we are focusing on the specific non-pecuniary loss of the suffering and distress consequent on the divorce.

PART VII

REFORM V: INTEREST ON DAMAGES FOR PECUNIARY LOSS

1. GENERALLY

- 7.1 In the Consultation Paper we argued that the basic principle underlying the award of interest on damages for past loss was plainly sound. Claimants should be compensated for the delay between the time when the loss is incurred and the time when damages for that loss are awarded. We provisionally recommended that, as damages for past pecuniary loss are awarded according to the value of money at the time when the loss was incurred, the rate of interest on those damages should not be reduced to try to exclude the effects of inflation on interest rates. Consultees agreed unanimously.
- 7.2 We also recommended, provisionally, that the rate used should continue to be the rate on the special account. Almost all consultees supported this recommendation. There was some concern, however, that the rate on the special account, which is currently 8 per cent, was rather high and was reviewed somewhat infrequently. George Gadney, a barrister, cautioned us to take care “to avoid making litigation a good investment vehicle”, and St Paul International Insurance were likewise keen to ensure that claimants “are not encouraged to delay advancement of their claims by making the interest regime too beneficial.”
- 7.3 We agree that the special account rate of 8 per cent, which is effectively net of tax, as damages are not subject to taxation, does seem somewhat high. Nonetheless, we continue to support its use in the calculation of interest on damages for past pecuniary loss. We note the suggestion of Robert Francis QC that a link to the London Inter-Bank Offer Rate (LIBOR) might provide greater accuracy, but we are concerned that excessive fluctuation in the rate used would make the process of awarding interest unduly complex and uncertain. The special account rate has the advantage of being established and certain, and there is no clear evidence that it encourages claimants to delay. Provided that it continues to be subject to review, we think the rate on the special account should continue to be a satisfactory measure for the assessment of interest.
- 7.4 **In accordance with our provisional recommendation and the views of consultees, we therefore consider that, although no legislative provision on this is necessary, the rate used to calculate interest on damages for pecuniary loss should not be reduced to try to exclude the effects of inflation on interest rates, and that the rate on the special account is a satisfactory basis for that rate.**

2. HALF-RATE INTEREST

- 7.5 We have seen¹ how in *Jefford v Gee*² Lord Denning MR suggested that interest on special damages be awarded at half the appropriate rate, to reflect the fact that

¹ See para 2.64 above.

losses may have accrued throughout the period between injury and trial. Although this has developed into a general rule, subsequent decisions³ have differed as to the extent to which exceptions to that rule should apply. In the Consultation Paper we stated our provisional preference for a wide range of exceptions to this 'half-rate' approach.⁴ We argued that the use of a half-rate calculation is only an approximation, and is accurate only if the loss has accrued at a constant rate between the injury and the trial. Where losses have occurred over a period which has ended before trial, or are discrete items of expenditure, the half-rate approach becomes inaccurate, and this inaccuracy is exacerbated where the loss occurs either very shortly after the injury, or not long before the trial. In most claims for personal injury, the former scenario is more likely.

- 7.6 All but a very few consultees who responded on this issue agreed that a wide range of exceptions should be recognised to the half-rate approach, which was variously described as 'unjust', 'unfair', 'wholly wrong', and 'without regard to the realities'. Indeed, the responses we have received suggest to us that the half-rate 'rule' is already fairly narrowly confined in practice. Nonetheless, we feel that the confusion which may arise from the conflicting decisions on the matter is such that the issue is still one we should consider.
- 7.7 In his judgment in *Jefford v Gee*, Lord Denning MR recognised that in principle interest on discrete items of loss ought to be calculated separately. He thought, however, that such items were "not usually so large as to warrant separate calculation",⁵ and so suggested a half-rate approach as a 'broad-brush' measure to be disapplied only in exceptional cases. In the light of this comment we think it significant, however, that the discrete items of loss in *Jefford v Gee* amounted to less than £120 in a total award of over £2,000. The remainder of the loss involved was a loss of earnings which had been continuous from injury to trial and for which the half-rate approach was therefore appropriate. Had the discrete items accounted for a higher proportion of the loss suffered, the decision might have laid down clearer guidelines about the exceptions to the half-rate rule.
- 7.8 Moreover, as several consultees stressed to us in their responses to the Consultation Paper, the calculation of interest on individual items of loss is an easier task today than it was in 1970. Bill Braithwaite QC said that computerised assistance had made accurate interest calculations 'astoundingly easy', and both the Association of Consulting Actuaries and the Institute and Faculty of Actuaries described such calculations as 'straightforward'. We are not convinced that it can still be argued, as it was in *Jefford v Gee*, that the accurate calculation of interest is unnecessarily time-consuming or complex in all but the most exceptional circumstances. Although we have taken careful account of the views of Dyson J, in his response to our Consultation Paper, that it was not "necessary or desirable to

² [1970] 2 QB 130.

³ See *Prokop v DHSS* [1985] CLY 1037; *Dexter v Courtaulds Ltd* [1984] 1 WLR 372; *Hobin v Douglas* (unreported, 19 October 1998), noted in *The Independent* 26 October 1998: see paras 2.66-2.69 above.

⁴ Damages for Personal Injury: Medical, Nursing and Other Expenses (1996) Consultation Paper No 144, paras 3.113-3.117.

⁵ [1970] 2 QB 130, 146.

require elaborate and precise calculations, especially since the sums involved are rarely great”, we agree with consultees that a ‘broad-brush’ approach will generally work to the disadvantage of claimants, and that proper calculation can and should be used where appropriate.

- 7.9 Two changes in practice since *Jefford v Gee* are also significant. At the time of that decision, a claim for interest did not have to be specifically pleaded by a claimant, because it was not regarded as a cause of action in itself.⁶ It followed from this that a defendant did not have to include any amount in respect of interest in a payment into court of a sum in satisfaction of the claimant’s claim. But the position is different today on both counts. Firstly, interest must now be specifically claimed. The statement of case should state, (where possible), the date from which and the rate at which interest is claimed.⁷ Secondly, a cause of action in respect of a debt or damages is now to be construed, for the purposes of payments into court, as a cause of action also in respect of interest on the money claimed.⁸ Any payment into court should therefore include a sum in respect of interest.
- 7.10 These changes mean that a claimant now has a duty to set out the details of his or her claim for interest, for the benefit of both the court and the defendant. Several consultees, notably including the Association of Personal Injury Lawyers and David Kemp QC, while supporting our recommendation of a wide range of exceptions to the half-rate approach, emphasised that claimants should always plead the circumstances which they claim entitle them to rely on such an exception. But we do not think those circumstances need necessarily be unusual. In our view, discrete individual losses occurring on a specific and identified date should as a general rule attract interest at the full average rate from that date.
- 7.11 It was argued by a few consultees that claimants ought to seek interim payments to finance any particular discrete expenditure required before the trial, and that if such awards were not sought it would be unfair on the defendant to be held liable to pay the full average rate of interest from the date the loss was incurred. We cannot accept this argument. Interim payments are not available in all cases,⁹ and we do not think it right that claimants should be obliged to seek them or risk losing their entitlement to interest. Provided that the circumstances of the loss have been clearly identified, the proper and correct rate of interest should be claimable.
- 7.12 We accept, however, that for periodic or continuing losses, precise calculation may be unnecessary. Where, as in *Jefford v Gee*, the claimant suffers a constant and continuing loss throughout the period from injury to trial, the half-rate approach provides a good approximation; likewise, where a continuing loss has started after the date of the accident and/or ended before the date of trial, awarding interest at the full average rate from the midpoint of the period of the loss provides an

⁶ See *Jefford v Gee* [1970] 2 QB 130, 149, *per* Lord Denning MR: “It is no part of the debt or damages claimed... It is more like the award of costs than anything else.”

⁷ Rule 16.4(1)(b) and (2) of the Civil Procedure Rules.

⁸ Rule 36.22 of the Civil Procedure Rules.

⁹ See rule 25.7 of the Civil Procedure Rules.

acceptable result.¹⁰ It could also be argued that individual calculation for some smaller losses is unnecessary. If a period within which a number of such smaller losses have occurred can be identified, an award of full interest on them from the midpoint of that period seems appropriate.¹¹

- 7.13 We regard the general principles set out in paragraph 7.12 above as the default position. In this respect, we envisage that where either the claimant or the defendant is able to establish that an alternative method of calculating interest is more appropriate, this method should be applied.
- 7.14 We note the concerns of our consultees that judges should retain an ultimate discretion with respect to the award of interest. In some circumstances, such as those cases where there has been an unacceptable delay by either party for which the judge wishes to impose a penalty, then the method of calculating interest that would otherwise apply should not necessarily be applied.¹²
- 7.15 In the Consultation Paper, we asked consultees whether legislation, a practice direction or leaving the matter to the courts provided the best means of achieving reform. Several consultees advocated reform by way of a practice direction. However, as our recommendations seek to alter the substantive law, a practice direction would be inappropriate. Practice directions are issued by the courts in order to “regulate the mode and manner of procedure”¹³ and should not therefore be viewed as vehicles by which to implement substantive changes to the law. We have reached the conclusion that reform in this area is best achieved by (and is within the interpretative reach of) the courts, and that legislation is unnecessary. That is, the present law on interest is fairly fluid and in our view - and this is supported by a case such as *Hobin v Douglas*¹⁴ - there is scope for the Court of Appeal to treat *Jefford v Gee* as permitting wide-ranging exceptions.
- 7.16 **We therefore recommend that, while legislation is unnecessary, the following principles should be applied by the courts:**

- (1) interest on damages for pre-trial pecuniary loss should continue to be awarded only if claimed.**

¹⁰ As Lord Denning MR recognised in *Jefford v Gee* [1970] 2 QB 130, 146, awarding interest at half the rate for the whole period is the same as awarding interest at the full rate from the midpoint of the period. However, this “interchange” only works where the relevant period is that from date of injury to date of trial.

¹¹ As an example, an injured claimant might have had to use public transport on a number of occasions in the three months after the injury. Rather than calculate the interest on each individual item of expenditure, the losses could be treated together and an award of interest made at the full rate from the midpoint of those three months.

¹² Of course, if it is the parties’ legal advisers who are responsible for the delay, the appropriate penalty would be in costs rather than in the award of interest.

¹³ See *Halsbury’s Laws* (4th ed 1982) Volume 37, para 12, pp 21-22.

¹⁴ Unreported, 19 October 1998: noted in *The Independent* 26 October 1998. See paras 2.68-2.69 above.

- (2) interest on damages for a non-recurring pre-trial pecuniary loss should be awarded at the full average rate from the date of the loss to the date of trial.**
- (3) interest on damages for a recurring pre-trial pecuniary loss should be awarded at the full average rate from the midpoint of the specific period during which the recurring loss was suffered to the date of trial.**
- (4) either of the parties may establish (provided the details have been specifically pleaded) that a different method of calculating interest is more appropriate in the circumstances than recommendations 2 or 3.**
- (5) notwithstanding recommendations 2-4, the court should have a discretion to refuse interest or to award interest on a different basis than that applicable under recommendations 2-4.**

PART VIII

SUMMARY OF RECOMMENDATIONS ON MEDICAL, NURSING AND OTHER EXPENSES

1. MEDICAL AND NURSING EXPENSES

(1) Section 2(4) of the Law Reform (Personal Injuries) Act 1948

- 8.1 We recommend that section 2(4) of the Law Reform (Personal Injuries) Act 1948 should not be repealed or reformed. (Paragraph 3.18)

(2) Recoupment of costs by the NHS

- 8.2 Although it would not be appropriate for us to be make detailed recommendations for legislation, we have the following observations to make to those in Government charged with deciding how to proceed with the issue of a recoupment right for the NHS:

- (1) subject to a cost-benefit analysis pointing to a contrary conclusion, it is our view, from a legal perspective, that the NHS should have the right to recover from tortfeasors (or other legal wrongdoers) the cost of NHS care resulting from a tort (or other legal wrong).
- (2) we see no compelling reason why the scope of that recoupment should be confined to where the wrongdoer is compulsorily insured (that is, we see no compelling reason why the scheme should be limited to road traffic or employers' liability).
- (3) the scheme implemented in the Road Traffic (NHS Charges) Act 1999 (including collection by the Compensation Recovery Unit, a tariff of medical expenses and an appeals procedure) is one that could relatively easily be extended to recoupment by the NHS in areas beyond road traffic accidents.
- (4) contrary to the 1999 Act, we think that any finding of, or bona fide agreement on, contributory negligence should govern the percentage liability of the wrongdoer to the NHS just as it does to the immediate tort victim. (Paragraph 3.43)

(3) Care provided free of charge to the claimant by relations or other private parties

- 8.3 We recommend that giving private providers of gratuitous care a direct claim against the tortfeasor or other legal wrongdoer would not be an appropriate way of reforming the law. (Paragraph 3.53)

- 8.4 We recommend that:-

- (i) as has long been the case in English law, damages should continue to be awarded in respect of care reasonably provided, or to be provided, gratuitously to the claimant by relatives and friends;
 - (ii) the claimant should be under a personal legal obligation to account for damages for *past* care to a relative or friend who has provided that gratuitous care;
 - (iii) there should be no legal duty on the claimant to pay over the damages recovered in respect of *future* gratuitous care. (Paragraph 3.62)
- 8.5 It is our view that the recommendation in part (ii) of the previous paragraph should be implemented by legislation but that otherwise the recommendation in the previous paragraph does not require or merit legislation. (Paragraph 3.66; Draft Bill, clauses 2, 3(2)(a) and 3(3))
- 8.6 We recommend a legislative provision reversing the decision in *Hunt v Severs*¹ and laying down that the defendant's liability to pay damages to the claimant for nursing or other care should be unaffected by any liability of the claimant, on receipt of those damages, to pay them or a proportion of them back to the defendant as the person who has gratuitously provided (or will provide) such care. (Paragraph 3.76; Draft Bill, clauses 1, 3(2)(a) and 3(3))
- 8.7 We recommend that no limits, either in the form of ceilings or thresholds, should be introduced on damages awarded for gratuitous care. (Paragraph 3.79)
- 8.8 We recommend that the law in relation to the quantum of damages for gratuitous care should not be reformed by statute. We nevertheless recommend that the courts should be more willing to award damages to compensate carers for their loss of earnings even though these exceed the commercial cost of care. (Paragraph 3.86)

(4) Loss of the claimant's ability to do work in the home

- 8.9 We recommend that, where the claimant has suffered a loss of or reduction in his or her ability to do work in the home:
- (1) this should be compensated as a past pecuniary loss where the claimant has reasonably paid someone to do the work, and as a future pecuniary loss where the claimant establishes that he or she will reasonably pay someone to do it.
 - (2) consistently with our recommendations on gratuitously rendered nursing services, the claimant should also be able to recover damages for the cost of the work where the work has been or will reasonably be done gratuitously by a relative or friend (including the tortfeasor) and should be under a personal liability to account for the damages awarded in respect of *past* work, to the person (including the tortfeasor) who performed the work; but

¹ [1994] 2 AC 350.

no legal obligation should be imposed in respect of damages awarded for work to be done in the *future*.

- (3) where, despite the impairment of his or her ability to do so, the claimant has carried out work in the home and/or will do so, damages for non-pecuniary loss (pain, suffering and loss of amenity) should include a sum in respect of past and/or future reduced ability to do work in the home.

We would also emphasise that (1), (2) and (3) are not intended to be mutually exclusive: that is where the claimant pays someone to do part of the work and/or receives gratuitous services for part of the work and/or carries out part of the work him/herself, damages under (1), (2) and (3) can be combined. (Paragraph 3.91)

- 8.10 We consider that the recommendation in the previous paragraph should be implemented by legislation only to the extent that we have recommended analogous legislation in relation to gratuitous nursing care (in paragraphs 8.5 and 8.6 above). (Paragraph 3.93; Draft Bill, clauses 1, 2, 3(2)(c), and 3(3))

(5) Hospital visits

- 8.11 Consistently with our recommendation on gratuitous nursing care, we recommend that where someone reasonably and gratuitously has visited or will visit an injured claimant in hospital, the claimant should be able to recover damages for the cost of the visits; further that the claimant should be under a personal obligation to account for the damages awarded in respect of past visits to the visitor. But there should be no legal duty on the claimant to pay over to anyone the damages awarded for future hospital visits. Again, we think that legislation to implement this recommendation is required only to the extent that we have recommended analogous legislation in relation to gratuitous nursing services (in paragraph 8.5 above). (Paragraph 3.98; Draft Bill, clauses 2, 3(2)(b), and 3(3))
- 8.12 As in relation to gratuitous care, and by the same sort of legislative provision as recommended in paragraph 8.6 above, we recommend that *Hunt v Severs* should be legislatively reversed in respect of its denial of a claim on behalf of the defendant for the costs of hospital visits. (Paragraph 3.100; Draft Bill, clauses 1, 3(2)(b), and 3(3))

2. ACCOMMODATION EXPENSES

(1) Purchasing accommodation

- 8.13 We recommend that damages for the costs of purchasing accommodation should continue to be assessed using the *Roberts v Johnstone* method (with the ILGS rate being the appropriate annual rate of return). (Paragraph 4.17)
- 8.14 We recommend that no legislative provision is required in respect of damages for the purchase of accommodation paid for gratuitously by a third party. (Paragraph 4.19)
- 8.15 We recommend that the law should not be changed in order to provide the courts with a power to determine the beneficial interests in property at the time of trial when damages are awarded. (Paragraph 4.21)

- 8.16 We recommend that no change is necessary in respect of damages awarded for the incidental costs associated with moving. (Paragraph 4.23)

(2) Alterations to property

- 8.17 We recommend that (although no legislation on this is needed) the approach in *Willett v North Bedfordshire HA* to the assessment of damages for alterations increasing the value of property should be preferred to that in *Roberts v Johnstone*. Damages should therefore be assessed by applying the appropriate annual rate of return to the increase in value of the property or (if smaller) the total cost of the alterations and then applying a multiplier to this sum; any ‘wasted costs’ (i.e. any balance of the cost of alterations minus the increase in value) should then be added. (Paragraph 4.27)
- 8.18 Although we do not think legislation is necessary (and this recommendation, like several others above, is therefore addressed to the judiciary) we consider that where, as a result of his or her injuries, the claimant reasonably pays for alterations (or can establish on the balance of probabilities that he or she will pay for alterations) to his or her accommodation and the alterations result (or will result) in a decrease in the value of property, damages should be awarded for (a) the cost of those alterations and (b) the amount of the decrease in the value of the property. (Paragraph 4.33)

3. MANAGEMENT OF THE CLAIMANT’S AFFAIRS

(1) The Court of Protection

- 8.19 We recommend that no legislative reform is required to the method by which damages for the fees of the Court of Protection are calculated, and any more precise method of calculation should be left for the courts to develop as appropriate. (Paragraph 5.3)
- 8.20 We recommend that, while no legislation on this is required, the courts should reduce damages for Court of Protection fees (whether fixed or variable) for contributory negligence. (Paragraph 5.10)

(2) Financial advice

- 8.21 We recommend that, following the House of Lords’ decision in *Wells v Wells*² laying down a discount rate governed by the return on ILGS, it would be inappropriate at this stage for there to be a legislative provision in relation to damages for the cost of financial advice. (Paragraph 5.15)

4. LOSSES ARISING OUT OF DIVORCE

- 8.22 We recommend that the law should not be reformed to allow claimants to recover damages for losses, whether pecuniary or non-pecuniary, arising out of a divorce foreseeably consequent on an actionable personal injury. (Paragraph 6.34)

² [1999] 1 AC 345.

5. INTEREST ON PECUNIARY LOSS

- 8.23 We recommend that, although no legislative provision is necessary, the rate used to calculate interest on damages for pecuniary loss should not be reduced to try to exclude the effects of inflation on interest rates and that the rate on the special account is a satisfactory basis for that rate. (Paragraph 7.4)
- 8.24 We recommend that, while legislation is unnecessary, the following principles should be applied by the courts:
- (1) interest on damages for pre-trial pecuniary loss should continue to be awarded only if claimed.
 - (2) interest on damages for a non-recurring pre-trial pecuniary loss should be awarded at the full average rate from the date of the loss to the date of trial.
 - (3) interest on damages for a recurring pre-trial pecuniary loss should be awarded at the full average rate from the midpoint of the specific period during which the recurring loss was suffered to the date of trial.
 - (4) either of the parties may establish (provided the details have been specifically pleaded) that a different method of calculating interest is more appropriate in the circumstances than recommendations 2 or 3.
 - (5) notwithstanding recommendations 2-4, the court should have a discretion to refuse interest or to award interest on a different basis than that applicable under recommendations 2-4. (Paragraph 7.16)

SECTION B

DAMAGES FOR PERSONAL INJURY: COLLATERAL BENEFITS

PART IX

INTRODUCTION TO COLLATERAL BENEFITS

9.1 Under item 1 of the Seventh Programme of Law Reform¹ we were requested to examine:

...the principles governing and the effectiveness of the present remedy 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 (Recovery of Benefits) Act 1997)... .

9.2 In general terms, what (a) required us to look at was the extent to which an injured person may recover compensation from both the tort system and from another source. For example, should an injured person be entitled to recover full damages plus sick pay provided by an employer and/or a voluntary payment made by a trade union and/or the proceeds of a personal accident insurance policy?

9.3 We have referred to this topic as that of “collateral benefits”. 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.² Although the term “collateral benefits” is commonly used by lawyers, it does have 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. Nevertheless, we have found it convenient to use the phrase “collateral benefits” while recognising that it is something of a term of art and that one could alternatively label this topic “deductions and set-offs”.

9.4 In 1997 we published a consultation paper on this topic.³ The central issues considered were: 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 tortfeasor (or from the victim).

¹ (1999) Law Com No 259. See also Sixth Programme of Law Reform (1995) Law Com No 234, item 2; Fifth Programme of Law Reform (1991) Law Com No 200, item 11.

² Although the claim for damages for personal injury will almost invariably be based on a 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 is based on a breach of contract.

³ Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147.

- 9.5 Although our consultation paper focused on payments as collateral benefits, the same law does, and should, apply to benefits in kind. An exception is the provision of “services” to the injured victim (e.g. gratuitous nursing care) which has tended to be treated in English law as raising distinct issues. We have followed this approach - and have therefore treated gratuitous services as a distinct area dealt with in the first section of this report - because it seems wholly artificial (in the context of personal injury) to regard the claimant as suffering an initial pecuniary loss (the need to incur expense) when no expenses are incurred because of the provision of gratuitous services. This is not to deny that the two areas, even if distinguishable, are closely related. We have therefore regarded it as important to ensure that there is consistency between our approach to the provision of services and to the provision of (other) collateral benefits. In particular, our support for the approach (albeit not the actual decision) of the House of Lords in *Hunt v Severs*⁴ should be borne in mind in considering whether the provider of a collateral benefit should have a right to recover the value of the benefit from the victim.⁵ But the policy reasons in play - for example, and most importantly, encouraging care by the most appropriate person - do appear to be specific to the gratuitous provision of services (as opposed to, for example, the payment of money).
- 9.6 In our consultation paper on collateral benefits we put forward six main options for reform in relation to whether collateral benefits should be deducted or not. Options 1 and 2 were the deduction options. Option 5, at the other extreme, favoured ‘no deduction’. Options 3 and 4 were mid-positions. Option 6 favoured no change. We also asked for consultees’ views on whether providers of collateral benefits should have new statutory recoupment rights against tortfeasors or repayment rights against victims.
- 9.7 We received 79 responses from a range of individuals and organisations. A list of those who responded is included in Appendix B. We found the views of consultees of great assistance in the formulation of our final recommendations. We are extremely grateful to them for their time and effort.
- 9.8 It has been of great significance to us that there was no obvious consensus amongst consultees as to the appropriate way forward (although new statutory recoupment or repayment rights were generally not favoured). That is, Options 1, 2, 4, 5 and 6 all gained considerable, albeit minority, support. We should also point out that in working through the detail of Option 4, which at one stage in our thinking appeared to be a sensible ‘compromise’ position, it became apparent that it was unacceptable in requiring one to treat differently pensions (to be deducted) and insurance (to be ignored).
- 9.9 In the circumstances, we have decided that Option 6 (no change) is the most appropriate recommendation for us to make. Put another way, we have concluded that any reform which we would feel able to recommend would not necessarily improve upon the existing position. Nevertheless, we hope that our paper will assist with the continued development of the common law and, in particular, will

⁴ [1994] 2 AC 350. See paras 3.44-3.86 above.

⁵ See Part XII below.

assist the Government if it should wish to give further consideration to legislative reform of the law on collateral benefits in personal injury cases.

- 9.10 We would certainly not wish Government to lose sight of the arguments in favour of the options put forward in the consultation paper which would radically increase the deduction of collateral benefits (i.e. Options 1 and 2).⁶ Not least of these is the contention that such deduction is an acceptable way (which does not unduly prejudice claimants) of cutting the costs of the tort system. Our view is, however, that Options 1 and 2 do not, at present, command sufficiently wide-ranging support for us to recommend their legislative implementation. While they might be taken forward by a Government committed to a policy of cutting (or redistributing) the costs of the tort system, it is not a recommendation that the Law Commission, which works on the basis of there being wide-ranging consensus for its recommendations, can at this stage make. This can be added to the list of reasons identified in Section A of this report⁷ why the Law Commission may consider it preferable not to recommend legislation. Nevertheless, we hope that our work in this area has reinforced the central strategic importance of collateral benefits.⁸ And there are some within the Law Commission who believe that the time will come when Government will have to look carefully at the merits of Options 1 and 2.⁹
- 9.11 The law on collateral benefits in Fatal Accident Act claims has developed differently from that in respect of claims for personal injury. We address the former in our report on Claims for Wrongful Death.¹⁰ It will there be seen that we recommend that a consistent approach should be taken to collateral benefits in the two areas. But because of the statutory basis of the law on collateral benefits in

⁶ Damages For Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 4.4-4.89.

⁷ See para 1.4 above.

⁸ At para 1.2 of the consultation paper, we said the following: "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". It is of interest that the Irish Law Reform Commission have recently published a consultation paper on this topic, in which they consider our work. See Irish Law Reform Commission Consultation Paper 15/99: Section 2 of the Civil Liability (Amendment) Act, 1964: The Deductibility of Collateral Benefits from Awards of Damages. See also R Lewis, "The Overlap Between Damages for Personal Injury and Work Related Benefits" (1998) 27 ILJ 1, 2-3, and particularly Lewis' comment at p 3: "The questions posed by collateral benefits... lie at the heart of any compensation system, and constitute one of the keys to its future direction". Also R Lewis, "Deducting Collateral Benefits from Damages: Principle and Policy" (1998) 18 LS 15, 15-16, and especially at 15: "...it is difficult to over-estimate the importance of co-ordinating the plethora of compensation schemes for those injured".

⁹ Possibly modified to distinguish between benefits that meet non-pecuniary loss (no deduction) and pecuniary loss (deduction): see paras 11.45-11.49 below.

¹⁰ See Claims for Wrongful Death (1999) Law Com No 263, Part V.

Fatal Accidents Act claims, we recommend in that report that there should be legislative reform.

- 9.12 The rest of Section B is structured as follows. Part X sets out the present law on collateral benefits in personal injury cases. Part XI looks at reform in relation to the deduction or non-deduction of collateral benefits. Part XII looks at reform regarding the rights of the provider of the collateral benefits. Part XIII summarises our recommendations (which, as we have explained, are non-legislative).

PART X

THE PRESENT LAW¹ ON COLLATERAL BENEFITS

- 10.1 The present law relating to the treatment of collateral benefits in the assessment of personal injury damages is complex. In particular there is no single set of rules which applies across the range of benefits which a personal injury victim may receive.
- 10.2 In relation to any collateral benefit there are two central questions. The first is whether the benefit is taken into account when assessing the tort victim's damages. In other words, does the receipt of the benefit lead to a reduction in the damages the victim would otherwise have received? The second is whether the provider of the benefit has the right to recover the value of the benefit provided *either* from the tort victim *or* from the tortfeasor. The legal rules relating to the deductibility of benefits and to third party recovery are, however, interrelated. It is only when they are considered together that it becomes clear first, whether the claimant is entitled to cumulate tort damages and the collateral benefit, and secondly, who out of the collateral benefit provider or the tortfeasor is required to bear the cost of the benefit.
- 10.3 In the next section we shall set out the general approach of the courts to the deduction question and the specific rules for the treatment of the main classes of collateral benefits encountered in personal injury cases. We shall then explain the law governing the rights of a third party to recover the value of a collateral benefit, either from the tort victim or from the tortfeasor.

1. THE DEDUCTIBILITY OF COLLATERAL BENEFITS FROM DAMAGES

(1) General themes in the approach of the courts

- 10.4 Before considering the modern case law it is necessary to distinguish an approach which is found in some older cases. These suggest that where a benefit accrues as a result of a tort victim's reasonably foreseeable action following the tort, it should be deducted in the assessment of tort damages.² If the action was not reasonably foreseeable, the benefit should be ignored. The more recent cases, however, reject a causation or remoteness test for determining how benefits should be treated. In our view, at least in personal injury cases, remoteness should exclude gains from consideration only in extreme cases where the causal link between the benefit and the tort is tenuous.³ For example, a claimant's lottery winnings should not be

¹ This is an updated and shorter version of Part II of our Consultation Paper, Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147.

² *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 further *McGregor on Damages* (16th ed 1997) ch 7, but particularly paras 336-356.

³ A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 121.

deducted simply because the ticket was bought in spare time resulting from the injury.

- 10.5 Turning to the more recent cases, the current law has been significantly influenced by the decision in 1970 of the House of Lords in *Parry v Cleaver*,⁴ and particularly by the speech given in that case by Lord Reid. It was decided by a bare majority that disablement pensions, whether contractual or voluntary, should be ignored in the assessment of damages for loss of earnings. In reaching this result Lord Reid made the following influential statement of principle:

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*⁵ 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.⁶

- 10.6 Twenty years later, Lord Bridge's speech in *Hussain v New Taplow Paper Mills Ltd*,⁷ with which the other Law Lords agreed, marked a shift of emphasis. Lord Bridge referred to Lord Reid's two-stage analysis of the assessment of damages cited 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.⁸

⁴ [1970] AC 1.

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

⁶ [1970] AC 1, 13. Of the other two Law Lords in the majority, Lord Pearce took a similar general approach. Lord Wilberforce, on the other hand, did not think much assistance could be drawn from intuitive feelings as to what was just, and disapproved of reasoning from one type of benefit to another. However he agreed that it was impossible to devise a general principle to cover all collateral benefits. Instead he examined carefully the terms on which the payment at issue had been made to decide how it should be treated in the assessment of damages.

⁷ [1988] AC 514.

⁸ *Ibid.*, at 527.

The shift of emphasis lies in Lord Bridge's contention that the starting point is deduction. In contrast, Lord Reid's view - that the common law treats the question whether or not to deduct collateral benefits as depending on "justice, reasonableness and public policy" - was predicated on the absence of any prima facie rule for the treatment of collateral benefits.

10.7 Lord Bridge went on to reconcile his approach with the rules then existing for the treatment of specific benefits, as follows:

But to the prima facie rule there are two well established exceptions. First, where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor... Second, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, the amount received is again to be disregarded... In both these cases there is in one sense double recovery. If the award of damages adequately compensates the plaintiff, as it should, the additional amounts received from the insurer or from third party benevolence may be regarded as a net gain to the plaintiff resulting from his injury. But in both cases the common sense of the exceptions stares one in the face. It may be summed up in the rhetorical question: "Why should the tortfeasor derive any benefit, in the one case, from the premiums which the plaintiff has paid to insure himself against some contingency, however caused, in the other case, from the money provided by the third party with the sole intention of benefiting the injured plaintiff?"

There are, however, a variety of borderline situations where a plaintiff may receive money which, but for the wrong done to him by the defendant, he would not have received and where there may be no obvious answer to the question whether the rule against double recovery or some principle derived by analogy from one of the two classic exceptions to that rule should prevail. Some of these problems have been resolved by legislation, sometimes in the form of a compromise solution providing that a proportion only of certain statutory benefits is to be taken into account when assessing damages. But where there is no statute applicable the common law must solve the problem unaided and the possibility of a compromise solution is not available. Many eminent common law judges, I think it is fair to say, have been baffled by the problem of how to articulate a single guiding rule to distinguish receipts by a plaintiff which are to be taken into account in mitigation of damage from those which are not. Lord Reid aptly summed the matter up in *Parry v Cleaver*⁹ when he said: "The common law has treated this matter as one depending on justice, reasonableness and public policy."¹⁰

10.8 It is in the light of this shift of emphasis that the specific rules for the treatment of the main classes of collateral benefits should be understood. Thus one can readily

⁹ [1970] AC 1, 13.

¹⁰ [1988] AC 514, 527-528.

see the influence of *Hussain*¹¹ in subsequent decisions. Nevertheless, *Parry v Cleaver*¹² remains a crucial case, since it is the cornerstone for rules preventing the deduction of significant classes of collateral benefits.

(2) The specific rules for the treatment of the main classes of collateral benefits encountered in personal injury cases

10.9 The specific rules, each of which we explain in more detail below, may be summarised as follows:

- (1) As we have seen above, charity is 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) We have also seen that 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, although there is some uncertainty about whether this rule applies to voluntary sick pay.
- (4) 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 (including any proportion of a pension lump sum which is attributable to the period after retirement age). The rule is the same whether or not the provider of the pension is the tortfeasor.
- (5) Redundancy payments (where the plaintiff has been made redundant because of the actionable injury) are deducted from damages for loss of earnings.
- (6) Social security benefits outside the recoupment scheme are subject to the common law. The general common law rule (to which state retirement pensions seem to be 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.

(a) Charity

10.10 The rule that charity is ignored in the assessment of damages derives in part from *Redpath v Belfast and County Down Railway*.¹³ In that case Andrews LCJ relied on causation reasoning to justify this result: 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 also employed a second argument as follows:

¹¹ [1988] AC 514.

¹² [1970] AC 1.

¹³ [1947] NI 167.

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?¹⁴

- 10.11 Relying partly on *Redpath*,¹⁵ Lord Reid stated in *Parry v Cleaver*¹⁶ that benevolence should be disregarded in the assessment of damages in personal injury cases. He considered that it was justifiable to ignore benevolence because the wrongdoer should not benefit from the benevolence of others and because deduction would discourage donors. Lord Reid also implicitly relied on the argument that the intention of the benefactor was not to relieve the tortfeasor. This general rule has been approved by the House of Lords on a number of occasions since the decision in *Parry*, including, as we have seen, in *Hussain*.¹⁷ There is also authority for charitable gifts in kind, in the shape of housing, food, clothing, or some other tangible benefit to be ignored.¹⁸
- 10.12 It is worth cross-referring here to the cases discussed in Section A.¹⁹ They demonstrate that gratuitous services are not to be disregarded in the assessment of damages as charitable benefits in kind. Instead, at least in some cases, damages are awarded despite the receipt of the services, but with the purpose of compensating the third party provider. It may be thought difficult to reconcile these cases on services with those cited in paras 10.10-10.11 regarding the rule that charity is ignored in the assessment of damages. But the courts appear²⁰ to have created a distinction between the treatment of gratuitous services on the one hand, and the

¹⁴ [1947] NI 167, 175

¹⁵ *Ibid.*

¹⁶ [1970] AC 1.

¹⁷ [1988] AC 514; Lord Bridge also expressed his support for the non-deductibility of charitable payments in *Hodgson v Trapp* [1989] AC 807, 819-820; and in *Hunt v Severs* [1994] 2 AC 350, 358. See also *Cunningham v Harrison* [1973] QB 942 (CA); and *McCarmley v Cammell Laird Shipbuilders Ltd* [1990] 1 WLR 963.

¹⁸ *Liffen v Watson* [1940] 1 KB 556. Brian Langstaff QC put an interesting example to us. He said: "I have a case, awaiting hearing, in which the Plaintiff was presented with a 'Dog for the Disabled'. It acts as a very useful aid to him - picking things up that have dropped to the floor, catching and ferrying for him, etc. Apparently, such dogs are invaluable to many disabled people who live on their own, but (although they are cheaper to provide than Guide Dogs for the Blind) cost the charity which provides them around £20,000 per dog once the training costs, feeding costs etc. are taken into account." One way in which the courts might deal with this example would be to say that damages should be awarded for the expense of the dog (provided this was reasonably incurred), regardless of this having been paid by someone else, under the charitable rule. It is, however, conceivable that the courts would develop the law to require such an award to be paid by the victim to the provider. See further paras 10.63-10.67, 12.2-12.5 and 12.25-12.27 below.

¹⁹ See paras 2.15-2.35 above.

²⁰ Cf *Davies v Inman* [1999] PIQR Q26 where *Hunt v Severs* [1994] 2 AC 350 was regarded as having implications for voluntary payments.

treatment of charitable payments and benefits in kind (other than services) on the other hand.²¹

- 10.13 Finally, it is also not entirely clear if an ex gratia payment (or other charity) *by the tortfeasor* would be ignored.²² This has been considered where the victim's employer is the defendant. In *Hussain v New Taplow Paper Mill Ltd*²³ 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*²⁴). But there must surely be an exception to that general rule where the ex gratia payment comes from the tortfeasor himself.²⁵

- 10.14 In *McCamley v Cammell Laird Shipbuilders Ltd*²⁶ 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 *McCamley*, it could be inferred that the payment was not intended to be on account of damages. Nevertheless the case is a difficult one to

²¹ As we point out at para 9.5 above, it seems wholly artificial (in the context of personal injury) to regard the claimant as suffering an initial pecuniary loss (the need to incur expense) when no expenses are incurred because of the provision of gratuitous services. A further distinction is that services have a personal element (ie it matters who provides them) that is not present in payments of money or other gifts.

²² Cf *Hunt v Severs* [1994] 2 AC 350 (gratuitous services provided by a tortfeasor).

²³ [1987] 1 All ER 417.

²⁴ [1973] QB 942.

²⁵ [1987] 1 All ER 417, 428. See J Fleming, *The Law of Torts* (8th 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." See similar arguments in J Fleming, "Collateral Benefits" *International Encyclopaedia of Comparative Law* (1970) vol XI, ch 11, p 14.

²⁶ [1990] 1 WLR 963.

interpret on this point and the law in relation to charity by tortfeasors remains unclear.²⁷

(b) Insurance

- 10.15 It has been settled law since *Bradburn v The Great Western Railway Company*²⁸ in 1874 that insurance payments are not taken into account in the assessment of damages. The rule was established because first, the claimant had bought the insurance and secondly, because it was not the accident which led to the insurance pay-out, but the contract of insurance. The decision in *Bradburn* has been approved by the House of Lords in *Parry v Cleaver*,²⁹ *Hussain v New Taplow Paper Mills Ltd*³⁰ and *Hodgson v Trapp*.³¹ However, these cases have not employed a causation or remoteness rationale for the rule: rather, *Parry v Cleaver*³² established that the underlying rationale for ignoring insurance was that the claimant had paid for it.
- 10.16 It is not clear, however, whether insurance payments will *only* be ignored if the claimant him or herself paid for the insurance. In *Parry v Cleaver* Lord Reid stated the proposition formulated in *Bradburn*³³ as a general one, applicable whether or not the insurance premiums had in fact been paid by the claimant. Lord Denning in *Cunningham v Harrison*³⁴ and Lord Templeman in *Smoker v London Fire & Civil Defence Authority*³⁵ stated the position in similarly general terms.³⁶ However, in *Hussain v New Taplow Paper Mills Ltd*³⁷ and *Hodgson v Trapp*³⁸ 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 claimant had actually paid the relevant premiums. *McCamley v Cammell Laird Shipbuilders Ltd*³⁹ and *Page v Sheerness Steel PLC*⁴⁰ applied the rule in this more limited way.⁴¹

²⁷ In Scotland, there is now provision for deduction of some benevolent payments by the defendant. See Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, paras 3.5-3.7.

²⁸ (1874) LR 10 Exch 1.

²⁹ [1970] AC 1.

³⁰ [1988] AC 514, 527.

³¹ [1989] AC 807, 819.

³² [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).

³³ (1874) LR 10 Exch 1.

³⁴ [1973] QB 942, 950.

³⁵ [1991] 2 AC 502, 539.

³⁶ Two non personal injury cases specifically address this issue, and reach opposite conclusions. See *The "Yasin"* [1979] 2 Lloyd's Rep 45, 48-49, and *Bristol & West v May & Merrimans (No 2)* [1997] 3 All ER 206, 226-232.

³⁷ [1988] AC 514, 527.

³⁸ [1989] AC 807, 819.

³⁹ [1990] 1 WLR 963, 970.

⁴⁰ [1996] PIQR Q26 (first instance), [1997] 1 WLR 652 (CA) and [1999] 1 AC 345 (HL). See paras 10.20-10.21 below.

(c) Sick pay

10.17 Sick pay may take many different forms. In particular, it may be contractual or voluntary. Traditional sick pay, in the sense of payments made in the same way as wages but during the employee's incapacity, are the subject of a line of authority which does not make a clear distinction between contractual or voluntary sick pay. In *Parry v Cleaver*⁴² 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.⁴³

10.18 In *Hussain v New Taplow Paper Mills Ltd*⁴⁴ the payments at issue were long-term and provided for under an insurance scheme, taken out and funded by the claimant's employers to insure themselves against contractual liability for sick pay extending beyond thirteen weeks.

10.19 Lord Bridge made the general statement of the law set out above.⁴⁵ He then rejected the submission made by Counsel for the claimant that the payments should be ignored either as insurance or as disablement pension. In Lord Bridge's 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

⁴¹ 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 (4th) 1, 38-39), it is in conflict with the existence of automatic subrogation rights for all indemnity insurers. This is because if indemnity insurance payments are deducted where the premiums were paid by someone other than the claimant, there would be no conceivable justification for the indemnity insurer's subrogation rights.

⁴² [1970] AC 1. See also *Turner v Ministry of Defence* (1969) 113 SJ 585 where Lord Denning MR, relying on Lord Reid's speech in *Parry v Cleaver*, found that the claimant's loss was not of full wages, but of wages less sick pay.

⁴³ [1970] AC 1, 16; P S Atiyah says in "Collateral Benefits Again" (1969) 32 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 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* (6th ed 1999) p 324, n 13 for a similar view.

⁴⁴ [1988] AC 514.

⁴⁵ See paras 10.6-10.7 above.

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 that there was no authority directly in point, and said:

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, his 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.⁴⁶

10.20 In *Page v Sheerness Steel PLC*⁴⁷ the claimant 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*,⁴⁸ 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 claimant 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.⁴⁹

10.21 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. Accordingly the payments should be classified as sick pay and

⁴⁶ [1988] AC 514, 529-532; it was apparently accepted by the claimant 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."

⁴⁷ [1996] PIQR Q26 (first instance), [1997] 1 WLR 652 (CA) and [1999] 1 AC 345 (HL).

⁴⁸ [1988] AC 514.

⁴⁹ [1996] PIQR Q26, Q34.

not insurance. The House of Lords affirmed the decision of the Court of Appeal on this point.

- 10.22 In the consultation paper we concluded that the general rule should be taken to be that sick pay is deducted from damages for loss of earnings. However, we thought that the cases did not necessarily resolve how the courts would treat a contractual or voluntary payment to meet earnings loss during incapacity which is unlike traditional sick pay. We gave the example of a lump sum insurance payment representing a year's salary.⁵⁰
- 10.23 We thought that the cases pointed in different directions, with *Cunningham v Harrison*⁵¹ and *McCamley v Cammell Laird Shipbuilders Ltd*⁵² suggesting that a payment of this type may be ignored (although we noted that *McCamley* arguably supported deduction if the employer was the tortfeasor). On the other hand we considered that ignoring sick pay, whatever form it took, would be hard to reconcile with *Hussain*,⁵³ which would take precedence as a decision of the House of Lords.
- 10.24 We now think that the uncertainty may go further to encompass voluntary sick pay of any kind. This is because the cases discussed only implicitly provide for deduction of voluntary sick pay. It is arguable that this implication is overridden by the well-established rule that charity is to be ignored in the assessment of damages, and specifically by the decision in *Cunningham v Harrison*.⁵⁴ Nevertheless, the more recent decisions suggest that the courts would most probably resolve any uncertainty in favour of deduction.

(d) Disablement and retirement pensions

(i) Damages for loss of earnings

- 10.25 Until 1970 there was inconsistency in the cases on the question whether or not account should be taken of disablement pensions in the assessment of damages.⁵⁵ As we have said,⁵⁶ the House of Lords settled the matter in *Parry v Cleaver*⁵⁷ by finding that disablement pensions, whether voluntary or not,⁵⁸ should be ignored in the assessment of damages for loss of earnings.

⁵⁰ Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, para 2.27.

⁵¹ [1973] QB 942, 950-951.

⁵² [1990] 1 WLR 963, 971.

⁵³ [1988] AC 514.

⁵⁴ [1973] QB 942, 950-951.

⁵⁵ See two decisions of the Court of Appeal: *Payne v Railway Executive* [1952] 1 KB 26 (which held that a disablement pension should be ignored) and *Browning v War Office* [1963] 1 QB 750 (which held that a disablement pension should be deducted).

⁵⁶ See para 10.5 above.

⁵⁷ [1970] AC 1.

⁵⁸ In that case the pension concerned was contractual.

- 10.26 Lord Reid treated the question to be examined as depending on justice, reasonableness and public policy.⁵⁹ 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.
- 10.27 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.
- 10.28 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 claimant's own contribution, past savings.
- 10.29 Lord Morris of Borth-y-Gest, dissenting, cited *British Transport Commission v Gourley*⁶⁰ as authority for a compensatory measure of damages. If what was being ascertained was the monetary loss which the claimant 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.⁶¹
- 10.30 Lord Pearson, also dissenting, cited the conception of compensation set out in *Gourley*.⁶² 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.
- 10.31 In *Smoker v London Fire and Civil Defence Authority*⁶³ 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.⁶⁴ He considered *Parry v*

⁵⁹ See the citation at para 10.5 above.

⁶⁰ [1956] AC 185.

⁶¹ 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.

⁶² [1956] AC 185.

⁶³ [1991] 2 AC 502.

⁶⁴ Lord Lowry added a short speech.

*Cleaver*⁶⁵ 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 claimant's past work. 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 defendants sought to distinguish the decision of this House in *Parry v Cleaver*⁶⁶ on the ground that the defendants 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...⁶⁷

Accordingly the cases establish that disablement pension is ignored in the calculation of damages for loss of earnings, whether it is paid by the tortfeasor or a third party.

- 10.32 Turning to retirement pension, it should be noted that this will only be a collateral benefit where it would not have been received but for the tort; that is where a claimant takes their retirement pension earlier than they had planned. In *Hewson v Downs*⁶⁸ Park J held, in the light of *Parry v Cleaver*,⁶⁹ that where a claimant had intended to continue to work beyond retirement age, the state retirement pension which he received earlier than intended should be left out of account in the assessment of damages for loss of earnings.⁷⁰ In *Hopkins v Norcross plc*⁷¹ the claimant claimed damages for wrongful dismissal.⁷² He had a fixed term contract which

⁶⁵ [1970] AC 1.

⁶⁶ *Ibid.*

⁶⁷ [1991] 2 AC 502, 543. Also Lord Lowry referred at 546 to an unreported judgment on 14 April 1989 in *Guy v Police Authority for Northern Ireland*, in which McDermott LJ reached the same conclusion.

⁶⁸ [1970] 1 QB 73.

⁶⁹ [1970] AC 1.

⁷⁰ Note that the claimant also received two occupational retirement pensions, but the defendants conceded that they should be ignored in the assessment of the claimant's special and general damages. Moreover, the claimant 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, *Auty v National Coal Board* [1985] 1 All ER 930 and *Longden v British Coal Corporation* [1998] AC 653 confirm that this is the correct approach (see paras 10.34-10.37 below). But cf *West v Versil Ltd and Others*, *The Times* 31 August 1996 (see paras 10.38-10.41 below).

⁷¹ [1994] ICR 11.

⁷² 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."

made no provision for termination on notice. Prima facie his entitlement was to damages in the amount he would have earned until retirement age, subject to the duty to mitigate. Mr Hopkins was in receipt of an early retirement pension which equalled the earnings he would have received if he had carried on in the defendants' employment. It was argued that this should be taken into account in the assessment of damages. Staughton LJ, giving judgment for the Court of Appeal, relied on *Parry v Cleaver*⁷³ and *Smoker v LFCDA*⁷⁴ to find that the pension should be ignored because it had been paid for, even if this resulted in double recovery.⁷⁵ It is implicit that Staughton LJ thought the law should treat a retirement pension in the same way as a disablement pension.

(ii) Damages for loss of pension

- 10.33 Recent case law has considered how extra pension payments received as a result of a tort (because pension payments have started earlier than anticipated) should be treated in the calculation of damages for lost retirement pension, or "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,⁷⁶ in others a retirement pension⁷⁷ and in still others an early retirement pension.⁷⁸
- 10.34 The pension at issue in *Parry v Cleaver*⁷⁹ was called an incapacity pension throughout. The majority held that it should be taken into account after normal retirement age in the assessment of damages for lost retirement pension,⁸⁰ while it should be ignored before normal retirement age in the assessment of damages for loss of earnings. The three Law Lords in the majority reached this conclusion on the basis that earnings and incapacity pension are not comparable, while incapacity and retirement pensions are.⁸¹ Having earlier made the general point that the treatment of collateral benefits should depend not on their source but on their intrinsic nature,⁸² 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.

⁷³ [1970] AC 1.

⁷⁴ [1991] 2 AC 502.

⁷⁵ *Hewson v Downs* [1970] 1 QB 73 was seemingly not cited or referred to.

⁷⁶ *Parry v Cleaver* [1970] AC 1; *Longden v British Coal Corporation* [1995] ICR 957 (CA).

⁷⁷ *Hewson v Downs* [1970] 1 QB 73.

⁷⁸ *West v Versil Ltd and Others*, *The Times* 31 August 1996.

⁷⁹ [1970] AC 1.

⁸⁰ *Auty v National Coal Board* [1985] 1 All ER 930 endorsed this approach.

⁸¹ *Parry v Cleaver* [1970] AC 1, 20-21, *per* Lord Reid; 33, *per* Lord Pearce, who said there was no dispute on the point; and 42, *per* Lord Wilberforce.

⁸² [1970] AC 1, 15.

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.⁸³

10.35 In the consultation paper, we noted the decision of the Court of Appeal in *Longden v British Coal Corporation*.⁸⁴ The defendants had argued that, in order to prevent double recovery, an incapacity pension and lump sum paid *before* normal retirement age should be deducted from damages for lost retirement pension, even if not deducted from damages for loss of earnings. The Court of Appeal decided that both the periodic payments and the lump sum should be ignored when assessing damages for loss of pension rights. They gave two reasons for this decision: first, deduction of these sums would lead to a windfall for the tortfeasors, and, secondly, the incapacity pension had been paid for by the claimant. Roch LJ, giving judgment for the court, considered his view to be supported by authority, in particular *Parry v Cleaver*⁸⁵ and *Smoker v London Fire and Civil Defence Authority*.⁸⁶

10.36 Since the publication of the consultation paper, the decision of the Court of Appeal has been overturned in part by the House of Lords.⁸⁷ Lord Hope, giving the sole speech, agreed with the court below that account should not be taken of pension payments before the normal retirement age in the assessment of damages for loss of pension rights after that time. He considered that there was “much force” in the argument that the point was governed by *Parry v Cleaver*.⁸⁸ However, Lord Hope did not consider himself able to assume that the point had been considered and rejected in *Parry*, and therefore dealt with the issue as a matter of principle. He said:

...what the defendants are seeking to do is to bring into account income receipts arising in one period, which cannot as a result of *Parry v Cleaver* be set against the wage loss in that period, in assessing the loss of income in another period. That seems to be in conflict with basic accounting principles. But in the legal context it is also open to objection on the ground that it is unfair... He cannot reasonably be expected to set aside the sums received as incapacity pension during this period in order to make good his loss of pension after his normal retirement age.⁸⁹

⁸³ *Ibid*, at 20-21.

⁸⁴ [1995] ICR 957.

⁸⁵ [1970] AC 1.

⁸⁶ [1991] 2 AC 502.

⁸⁷ [1998] AC 653.

⁸⁸ [1970] AC 1.

⁸⁹ [1998] AC 653, 669.

10.37 It is in respect of the lump sum that the House of Lords differed from the Court of Appeal. The appellant introduced a new argument to say that the lump sum pension payment should be apportioned, with only the portion attributable to the period after normal retirement age being set off against the claim for loss of pension rights. Counsel for the respondent accepted that the relevant calculation could easily be made.⁹⁰ Lord Hope concluded on this point:

Where a lump sum is paid at the commencement of the man's retirement, its effect is to reduce the amount of the annual pension which he will thereafter receive for the whole of the period for which the pension is to be payable. It is a commutation in part of the annual pension to which the contributor is entitled... I think that it is clear that, in order to compare like with like, the plaintiff should be required to set against his claim for the loss of the retirement pension an appropriate portion of the lump sum which he received on his retirement on the ground of incapacity.⁹¹

10.38 The difficult case of *West v Versil Ltd and Others*⁹² should also be borne in mind, particularly since it suggests that in some circumstances a claimant will have no entitlement to damages for lost retirement pension. In that case the claimant had a number of options as to how he took his pension. Owing to illness caused by a tort, he chose to receive a lesser pension at 60 than he would have received at 65, or had he foregone entitlement to a survivor's pension for his wife. 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. 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 been committed.

10.39 The defendant appealed, contending that the damages for pension loss in the lost years should have been extinguished or reduced by the pension Mrs West would receive. In any event this award doubly compensated Mr West, since the damages for lost pension rights during his lifetime also compensated for the cost of providing for his wife.

10.40 Phillips LJ considered whether the defendant had been right to concede that the claimant 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 claimant 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. Therefore, had the concession not been made, and had damages been correctly assessed, the claimant would have received no damages for his pension loss during his lifetime and thus he would

⁹⁰ *Ibid*, at 671.

⁹¹ *Ibid*, at 671-672.

⁹² *The Times* 31 August 1996.

have paid for his wife's pension entitlement. For this reason it would be wrong to deduct it from his lost years claim. Phillips LJ concluded that the claimant 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.

- 10.41 Millett LJ agreed that the claimant 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;⁹³ secondly, so far as it was due to the early drawing of a pension, there was no loss as the claimant 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 claimant'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 claimant. Neill LJ agreed with the judgments of both Phillips LJ and Millett LJ.⁹⁴
- 10.42 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*⁹⁵ and was implied in *Longden v British Coal Corporation*.⁹⁶

(e) Redundancy payments

- 10.43 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.⁹⁷ 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.
- 10.44 The treatment of redundancy payments in the cases is somewhat confusing. In *Wilson v National Coal Board*,⁹⁸ the House of Lords said that redundancy payments

⁹³ But compare *Dews v National Coal Board* [1988] 1 AC 1 generally and in particular for the House of Lords finding that damages for loss of earnings should be awarded net of pension contributions. Even voluntary pensions contributions should be deducted, provided it is established on a balance of probabilities that the claimant would have continued to make them.

⁹⁴ See *Damages for Personal Injury: Collateral Benefits* (1997) Consultation Paper No 147, paras 2.60-2.61 for a more detailed analysis of this case.

⁹⁵ [1994] ICR 11.

⁹⁶ [1998] AC 653

⁹⁷ Employment Rights Act 1996, s 162.

⁹⁸ 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

should only exceptionally be deducted from damages, since they are not compensation for loss of earnings but for loss of a settled job.⁹⁹ However, their Lordships also found that a redundancy payment should be deducted from damages for loss of earnings where the tort caused the redundancy.¹⁰⁰

- 10.45 In *Colledge v Bass Mitchells & Butlers Ltd*¹⁰¹ the Court of Appeal deducted a redundancy payment from damages for loss of earnings, since the claimant would have been unlikely to have been made redundant but for the accident. Giving the judgment of the Court, Sir John Donaldson MR said of the argument that a redundancy payment should not be deducted from tort damages because it represents compensation for loss of a settled job:

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 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*.¹⁰²

530 (QBD) and *Basnett v J & A Jackson Ltd* [1976] ICR 63 (QBD); and in respect of damages for unfair dismissal: *Yorkshire Engineering and Welding Co Ltd v Burnham* [1974] ICR 77 (NIRC). 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.

⁹⁹ 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 and *Mills v Hassalls* [1983] ICR 330, 335-336, *per* Heilbron J.

¹⁰⁰ 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.

¹⁰¹ [1988] 1 All ER 536.

¹⁰² [1998] 1 All ER 536, 540.

10.46 Accordingly there seems to be some disagreement between *Colledge v Bass Mitchells & Butlers Ltd*¹⁰³ and *Wilson v National Coal Board*¹⁰⁴ as to whether redundancy payments can generally be regarded as compensating loss of earnings. Indeed Sir John Donaldson MR 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.¹⁰⁵

We agree with this observation.

10.47 It is implicit in *Wilson v National Coal Board*¹⁰⁶ that redundancy payments will be treated in the same way where the employer is the tortfeasor. This follows from their Lordships' reliance on the policy argument for deduction that otherwise employers might be encouraged to dismiss for incapacity rather than redundancy. This would only be a consideration for employer who anticipated being sued.

(f) Social security benefits outside the statutory recoupment scheme¹⁰⁷

10.48 Almost all social security benefits received by a claimant as a result of a tort are recouped by the State.¹⁰⁸ This recoupment or "claw back" scheme was first introduced in 1989 and is now given effect in the Social Security (Recovery of Benefits) Act 1997.¹⁰⁹

10.49 Under the Social Security (Recovery of Benefits) Act 1997, "recoverable benefits"¹¹⁰ paid out to a claimant are disregarded when assessing damages. A

¹⁰³ *Ibid.*

¹⁰⁴ 1981 SC (HL) 9.

¹⁰⁵ [1988] 1 All ER 536, 540.

¹⁰⁶ 1981 SC (HL) 9.

¹⁰⁷ Social security benefits within the recoupment scheme are outside our terms of reference: see para 9.1 above.

¹⁰⁸ The provisions apply equally to out of court settlements: s 1(3) of the Social Security (Recovery of Benefits) Act 1997. See also para 2.11 above where we mention DSS recoupment when considering NHS recoupment.

¹⁰⁹ This Act updated the scheme provided for in Part IV of the Social Security Administration Act 1992.

¹¹⁰ "Recoverable benefits" are defined in s 1(4)(c) as "any listed benefit which has been or is likely to be paid as mentioned in ss (1)(b)." Section 1(1)(b) describes benefits "paid to or for [the plaintiff] during the relevant period in respect of the accident, injury or disease." Under s 29, "listed benefits" are those listed in column 2 of schedule 2, namely: those from the Social Security Acts which have been prescribed by the Secretary of State. These are: disability working allowance, disablement pension payable under s 103 of the 1992 Act, incapacity benefit, income support, invalidity pension and allowance, jobseeker's allowance, reduced earnings allowance, severe disablement allowance, sickness benefit, statutory sick pay, unemployability supplement, unemployment benefit, attendance allowance, care component of disability living allowance, disablement pension increase payable under s 104

compensator is required to notify the Department of Social Security within 14 days of a claim being made against them. Within 28 days, the Compensation Recovery Unit is to provide the compensator with a certificate of recoverable benefits which specifies the benefits paid to the claimant since the date of the accident, up to a maximum of five years from the accident. Until 1997, the compensator was liable to pay the certified sum to the DSS, but this was deducted in full from the settlement which the claimant received. It was widely perceived as unfair to claimants that benefits were deducted from their total damages, since the benefits did not necessarily meet the same loss as all heads of tort damages. In particular benefits do not meet non-pecuniary loss. Therefore, under the 1997 Act, although the certified sum is still repaid to the DSS in full, benefits are not deducted from damages for pain and suffering and loss of amenity, nor from heads of pecuniary loss to which they do not relate. Instead benefits are set-off only against damages for the particular type of pecuniary loss which the benefit meets.¹¹¹

- 10.50 Prior to the 1997 Act, the “claw back” scheme only applied to claims in excess of £2,500. The new scheme has no such threshold, and benefits paid are recouped from the tortfeasor regardless of the quantum of the claim.¹¹² But the position remains that recoupment is of benefits that have been paid, or are likely to be paid, for a maximum of five years from the accident.¹¹³
- 10.51 The major benefits excluded from the scheme are state retirement pensions (which are dealt with as set out in paragraph 10.32 above) and survivor’s benefits (which are not relevant in personal injury cases).¹¹⁴ In respect of some of the other benefits excluded it is hard to imagine circumstances in which they would be paid as a result of a personal injury.¹¹⁵ However, other excluded benefits include 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,¹¹⁶ and these might be

or 105 of the 1992 Act, mobility allowance, mobility component of disability living allowance.

¹¹¹ Section 8 and schedule 2 of the 1997 Act list the specific benefits which are to be deducted from the individual heads of damages that a claimant may receive. Compensation for loss of earnings, for costs of care and for loss of mobility are listed. Compensation for pain, suffering, however, is not included in the list.

¹¹² Although under Schedule 1, Part II, para 9 of the 1997 Act, a small-payment threshold may be reintroduced by means of a regulation, we are not aware at present of any plans to make such a regulation.

¹¹³ After five years, social security benefits are to be disregarded in assessing damages: see ss 3 and 17 of the 1997 Act.

¹¹⁴ See *Claims for Wrongful Death* (1999) Law Com No 263, paras 5.56-5.69.

¹¹⁵ For example, maternity benefits and child benefits. Although these could be relevant to a claim for wrongful birth which, for the purposes of the Limitation Act 1980, has been regarded as a claim for personal injury: see *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543.

¹¹⁶ 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

encountered in personal injury cases. It is not entirely clear how they would be treated in the assessment of damages.

- 10.52 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*¹¹⁷ 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.
- 10.53 *Hodgson v Trapp*¹¹⁸ pre-dated the recoupment scheme and concerned whether mobility and attendance allowance should be deducted from damages for the cost of caring for the claimant. Mobility and attendance allowance are both now “relevant benefits” and therefore subject to the DSS recoupment scheme. However 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 the issue.
- 10.54 He repeated his view that the basic rule, applying the compensatory principle, is that collateral benefits should be deducted from damages, although this is subject to certain exceptions.¹¹⁹ The question to be resolved was whether social security benefits should be treated as analogous to benevolence and ignored on that ground. Lord Bridge said:

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”.¹²⁰

- 10.55 He referred to *Parsons v BNM Laboratories Ltd*,¹²¹ affirmed by the House of Lords in *Westwood v Secretary of State for Employment*,¹²² in which it was found that unemployment benefit should be taken into account as mitigating loss of earnings

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.

¹¹⁷ [1989] AC 807. See also A S Burrows, “Damages for Personal Injury: Collateral Benefits and Tax” (1989) 105 LQR 366 for commentary.

¹¹⁸ [1989] AC 807.

¹¹⁹ See paras 10.6-10.7 above.

¹²⁰ [1989] AC 807, 822 (Citation of Lord Reid from *Parry v Cleaver* [1970] AC 1, 14).

¹²¹ [1964] 1 QB 95.

¹²² [1985] AC 20.

occasioned by wrongful dismissal. He also discussed *Lincoln v Hayman*,¹²³ where the Court of Appeal followed *Parsons* in holding that supplementary benefit paid to the claimant 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”.¹²⁴

10.56 He concluded:

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.¹²⁵

10.57 Lord Bridge also considered mobility allowance to be available to meet the cost of the claimant’s care. Accordingly both types of benefit should be deducted from damages for the cost of the claimant’s care.

2. THIRD PARTY RIGHTS TO RECOVER COLLATERAL BENEFITS

10.58 We shall now explain the law governing whether the provider of a (private) collateral benefit has an entitlement to recover its value. A provider’s rights may derive from different aspects of the law of obligations, most notably the law of contract or the law of restitution. Working out whether a person has or should have a contractual third party recovery right is reasonably straightforward. It is more difficult to evaluate whether a person has, or should have, a third party recovery right in the law of restitution. The underlying question is whether there has been an unjust enrichment. If so, the claimant is entitled to the remedy of restitution. In the recent House of Lords case of *Banque Financière de la Cité v Parc (Battersea) Ltd*,¹²⁶ Lord Steyn and Lord Hoffmann stated that the following three questions are central to the availability of a restitutionary remedy:¹²⁷ (i) has the defendant

¹²³ [1982] 1 WLR 488.

¹²⁴ [1989] AC 807, 822.

¹²⁵ *Ibid*, at 823.

¹²⁶ [1999] 1 AC 221.

¹²⁷ Lord Steyn explicitly stated that he was concerned solely with the conditions applying to a claim based on “subtractive” unjust enrichment - that is, an unjust enrichment based on a

benefited or been enriched? (ii) was the enrichment at the expense of the claimant? (iii) was the enrichment unjust?¹²⁸

- 10.59 Where the provider of a benefit claims restitution from the tort victim, the answer to the first question is clear: the recipient of the benefit is obviously enriched by it. Where restitution is sought from the tortfeasor, it is less clear that there has been an enrichment. This depends on whether the benefit is deducted in the assessment of damages and whether the resulting reduction in the tortfeasor's liability is regarded as an enrichment. The answer to the second question will follow easily from the first: any enrichment arising from the provision of a collateral benefit will be at the expense of the provider of the benefit. The answer to the third question, whether an enrichment is unjust, will depend on whether one of the "unjust factors" recognised by English law is present.
- 10.60 The main unjust factors which might be present are "failure of consideration", and, in so far as the claim is against the "third party" tortfeasor, "legal compulsion".¹²⁹ Although the terminology of consideration is traditionally associated with the law of contract, the language of "failure of consideration" is wide enough to embrace the failure of a non-contractual condition.¹³⁰ The terminology of legal compulsion is more difficult, and does not encompass every case in which the claimant was under a legal obligation to transfer a benefit (because there is usually no injustice in such an enrichment). Rather, the terminology of legal compulsion is short-hand to describe cases where a benefit is transferred in accordance with valid legal rules or obligations, but where the relevant rule or obligation gives rise to an injustice by imposing a liability on one person when another ought, more appropriately, to bear the loss.¹³¹ For example, in the leading case of *Exall v Partridge*,¹³² the claimant left his goods with the defendant for repair, but his goods were seized by the defendant's landlord as distress for rent. To recover his goods, the claimant had no choice but to pay the defendant's rent. He was able to obtain restitution for that expense from the defendant.
- 10.61 It should also be recalled that non-contractual third party recovery rights are not necessarily restitutionary. For example, legislative recoupment rights which have been created for the DSS might be analysed as restitutionary. However, they might alternatively be seen as third party recovery rights which are tort-based, with their

transfer of value from the claimant to the defendant. He was not concerned with the case where the claimant seeks restitution as a remedy for a civil wrong. See A Burrows, *The Law of Restitution* (1993) pp 16-17.

¹²⁸ Lord Steyn added a fourth question "(iv) Are there any defences?", whilst Lord Hoffmann considered it necessary also to determine "whether there are nevertheless reasons of policy for denying a remedy": [1999] 1 AC 221, 227 and 234 respectively.

¹²⁹ Other possibilities are "necessity" and "free acceptance", but these primarily relate to "services" which we have dealt with in Section A of this paper: see para 9.5 above.

¹³⁰ See, e.g. *Chillingworth v Esche* [1924] 1 Ch 97; *Essery v Cowlard* (1884) 26 Ch D 191; *Re Ames' Settlement* [1946] Ch 217. See P Birks, *An Introduction to the Law of Restitution* (1989) p 223.

¹³¹ *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534.

¹³² (1799) 8 TR 308; 101 ER 1405.

rationale depending on the existence of policy arguments exceptionally justifying the recovery by third parties of tort damages for pure economic loss, rather than on reversing an unjust enrichment.¹³³

10.62 We shall now set out the main legal rules governing the entitlement of third parties to recover the value of a collateral benefit.

(1) The right to recover the value of the benefit from the victim in the event of a successful tort claim

10.63 The current main possibilities for recovery from the victim are where the provider has a contractual right to repayment (for example, where the victim promises to repay the provider of the collateral benefit in the event of recovering damages); 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; and where an indemnity insurer has a right to repayment from the victim of sums received from the tortfeasor, which is an aspect of the indemnity insurer's simple subrogation rights (which we discuss below).¹³⁴ It is also worth mentioning here that in *Hunt v Severs*¹³⁵ damages for gratuitous care were to be held on trust for the carer; and this can be regarded as analogous to a third party repayment right from the victim.¹³⁶

10.64 In general terms, failure of consideration appears to offer the provider of a collateral benefit the best prospect of restitutionary recovery of the value of the benefit from the victim. In other words, failure of consideration aside, there is generally no injustice in the victim's enrichment. The benefit will have been rendered either as a voluntary contribution (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).

10.65 In an action based on failure of consideration, it may not always be easy to determine whether a benefit has been rendered conditionally (for example, on the basis of the victim not succeeding in a tort claim). This has been a matter of dispute among commentators on the law of restitution.¹³⁷ One can safely say that the condition will normally need to be made express. An unarticulated "condition" will generally be insufficient. The danger is that otherwise those who have simply changed their minds about rendering a gift will be permitted to have restitution. However, it may be that in certain contexts it is so obvious, as established by

¹³³ Cf paras 3.22-3.25 above.

¹³⁴ See paras 10.73-10.77 below.

¹³⁵ [1994] 2 AC 350.

¹³⁶ We have discussed this fully in Section A. Services have traditionally been treated differently from (other) collateral benefits: see para 9.5 above. See also *Davies v Inman* [1999] PIQR Q26, where interest on damages for loss of earnings was found to be held on trust for the claimant's employer, who had advanced wages during the claimant's incapacity pursuant to an undertaking that those wages would be returned in the event of a successful tort claim.

¹³⁷ See e.g. P Birks, "In Defence of Free Acceptance" in *Essays on the Law of Restitution* (ed A Burrows 1991) p 115; A Burrows, *The Law of Restitution* (1993) pp 319-321.

custom and practice, that the provider renders the benefit conditionally that it is unnecessary for the condition to be expressed in order to trigger restitution if it fails.

- 10.66 In practice the most common examples of third party repayment rights are employers' contractual rights to repayment of 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.¹³⁸
- 10.67 It is another question how often contractual repayment rights are enforced. For example, it seems that BUPA stipulates that it will not pay for medical expenses which are legally recoverable from a third party. However, Cane suggests that in practice BUPA does not recover sums which it has advanced to members to meet immediate medical expenses.¹³⁹ Nevertheless our informal enquiries prior to the publication of our consultation paper suggested that some private medical insurers are becoming more assiduous in the exercise of their third party recovery rights.

(2) The right to recoupment from the tortfeasor (other than by simple subrogation)

- 10.68 It is inconceivable that a collateral benefit provider would have a contractual claim to recover the value of the benefit from the tortfeasor. It is also most unlikely that tort law will in general develop to provide third parties with direct claims (for pure economic loss) against tortfeasors. However, where the benefit is paid to the victim under a contractual or statutory obligation, and it is deducted from the damages which the defendant must pay, there is a question whether the provider is entitled to restitution because he or she has discharged the tortfeasor's liability under legal compulsion.¹⁴⁰
- 10.69 The decision of the Court of Appeal in *Metropolitan Police District Receiver v Croydon Corp*¹⁴¹ seems to block such a claim. In that case the claimant had made payments of sick pay to the victim pursuant to a statutory obligation. He was denied the right to recoup the payments from the tortfeasor. Reversing the decision of Slade J at first instance, the Court of Appeal reasoned as follows: given that sick pay is deducted in assessing a victim's damages, the defendants had incurred no liability to the extent that the victim had received sick pay. The Court of Appeal therefore held that the payments could not be regarded as discharging any liability of the defendants, and that as a result, the defendants had not been enriched by the payments.

¹³⁸ See R Lewis, "The Overlap Between Damages for Personal Injury and Work Related Benefits" (1998) 27 ILJ 1, 4-5.

¹³⁹ P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999) p 329, n 4.

¹⁴⁰ 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* (5th ed 1998) chs 15 and 17; A Burrows, *The Law of Restitution* (1993) chs 7-8; Peter Birks & Jack Beatson, "Unrequested Payment of Another's Debt" (1976) 92 LQR 188.

¹⁴¹ [1957] 2 QB 154.

10.70 We note, however, the decision of Sachs J in *Land Hessen v Gray & Gerrish*.¹⁴² This case concerned a road traffic accident in which two German teachers were injured, one fatally. Land Hessen, a German state and the employer of the two teachers, was required by German law to make various payments to them, and to the widower and children of the deceased. Land Hessen asserted a restitutionary right to recover the payments from those whose negligence had allegedly caused the accident. It was argued that all that needed to be shown was that the payments were compelled by law, that the claimant did not officiously expose itself to the liability to make the payments, and that they discharged a liability of the defendants. Sachs J accepted that all of these elements were present, and distinguished *Metropolitan Police District Receiver v Croydon Corp*¹⁴³ as follows:

That decision only binds me to the extent of the Plaintiff's claim to emoluments. It does not bind me in relation to the other parts of the Plaintiff's claim not covered by the decision of the Court of Appeal and which the Plaintiff was liable to pay in consequence of this accident.¹⁴⁴

Accordingly he found that the claimant had a restitutionary right to recover some of the payments made, but left the decision about exactly which for a later hearing.

10.71 It is not clear precisely what is meant by the term 'emoluments', and thus the basis on which Sachs J distinguished the facts in *Land Hessen*¹⁴⁵ from those in *Metropolitan Police District Receiver v Croydon Corp*¹⁴⁶ is not apparent. However, the reasoning in *Metropolitan Police District Receiver v Croydon Corp* excludes the recoupment of any benefit which is deductible from tort damages, and thus applies to any benefit which might be regarded as enriching the defendant. It is therefore strongly arguable that the decision in *Land Hessen* is inconsistent with that of the Court of Appeal in *Metropolitan Police District Receiver v Croydon Corp* and tends to support our provisional view, set out in the consultation paper, that Slade J's reasoning at first instance in the *Croydon Corporation*¹⁴⁷ case is to be preferred to that of the Court of Appeal.

10.72 It is also important to note the significance of Sachs J's view that the unjust factor of legal compulsion was made out in this case. It is implicit in this analysis that there is an injustice in allowing the cost of wrongdoing to fall on the providers of collateral benefits. In other words, on this analysis, as between tortfeasors and those who provide collateral benefits under a valid contractual (or perhaps statutory) obligation, the tortfeasor's liability to the tort victim is primary.

¹⁴² Unreported, 31 July 1998.

¹⁴³ [1957] 2 QB 154.

¹⁴⁴ Unreported, 31 July 1998.

¹⁴⁵ *Ibid.*

¹⁴⁶ [1957] 2 QB 154.

¹⁴⁷ [1956] 1 WLR 1113 (QBD).

(3) The right to take over the victim's tort claim by "simple" subrogation.

10.73 Alone amongst the providers of collateral benefits to personal injury victims, an indemnity insurer has the automatic right 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.¹⁴⁸

So, for example, personal accident insurance is non-indemnity insurance, whereas medical expenses and permanent health insurance are indemnity insurance.

10.74 An indemnity insurer's right of subrogation - which Mitchell has usefully labelled "simple subrogation" - 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). In other words, the tortfeasor's liability to the tort victim is not discharged by the insurer's payment to the insured, but the tort victim is unable to recover double compensation.¹⁴⁹

10.75 In the recent case of *Banque Financière de la Cité v Parc (Battersea) Ltd*,¹⁵⁰ the House of Lords classified subrogation rights arising by operation of law (rather than under the terms of a contract) as restitutionary. Having referred to subrogation rights arising under a contract, Lord Hoffmann said:

...the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived... One is part of the law of contract and the other part of the law of restitution.¹⁵¹

10.76 How then are an indemnity insurers' simple subrogation rights to be accommodated within a restitutionary analysis? The enrichment to be prevented must be that which the tort victim stands to recover if he or she recovers tort damages as well as the collateral benefit. The "injustice" in play appears to be that tort victims should not be more than fully indemnified for their losses.¹⁵² However, it should be noted that "simple subrogation" is only effective to avoid double

¹⁴⁸ *The Law of Subrogation* (1994) p 67.

¹⁴⁹ See e.g. *Esso Petroleum Co Ltd v Hall Russell & Co Ltd*, "*The Esso Berincia*" [1989] AC 643 (HL, Sc).

¹⁵⁰ [1999] 1 AC 221.

¹⁵¹ [1999] 1 AC 221, 231-232: Lords Steyn, Griffiths and Clyde agreed with Lord Hoffmann's speech. See also the speech of Lord Steyn at p 228, expressing the same view. This account is in accordance with the view expressed by Charles Mitchell in his book *The Law of Subrogation* (1994) p 9.

¹⁵² See *Castellain v Preston* (1883) 11 QBD 380, 386, per Brett LJ; Charles Mitchell, *The Law of Subrogation* (1994) p 67; A Burrows, *The Law of Restitution* (1993) p 80.

recovery where an indemnity insurer actually exercises its subrogation right.¹⁵³ We also agree with Mitchell that the rights cannot be fully explained without reference to the position of the tortfeasor. This is for the following reason: if the primary aim is to prevent the victim obtaining double recovery, this could be straightforwardly achieved through the deduction of indemnity insurance from tort damages. In fact, the full effect of the doctrine of subrogation in this context is to transfer the cost of the defendant's wrongdoing from the insurer to the tortfeasor. An indemnity insurer's rights are therefore similar in effect to a direct right to recoup benefits from the tortfeasor (as discussed above), and the existence of the rights implicitly treats the tortfeasor as primarily liable for the consequences of wrongdoing.

- 10.77 It should be noted that, even though indemnity insurers have automatic subrogation rights, it is still common for contractual provision to be made for recovery of indemnity insurance payments if the recipient recovers tort damages. Our understanding is, however, that the same is not true for non-indemnity insurance policies. This may be because such contractual provision might be found to be champertous and therefore void.¹⁵⁴

(4) Conclusion on third party rights to recover collateral benefits

- 10.78 It should be reasonably clear in practice whether a third party has a contractual repayment right, or if they are an indemnity insurer with automatic subrogation rights. On the other hand, even if one accepts that the legal basis upon which a third party may assert a restitutionary repayment right is clear (and, in particular, what constitutes the injustice of the enrichment), establishing the claim is unlikely to be straightforward unless the benefit has been provided subject to an *express* condition. Moreover, as regards the assertion of a restitutionary recoupment right there is Court of Appeal authority denying a remedy.¹⁵⁵

¹⁵³ 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* 113 (1994) DLR (4th) 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."

¹⁵⁴ 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 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, 628-630; Eugene G Doherty, "Priority of the Subrogation Interest in the Insured's Personal Injury Recovery" (1992) 80 Illinois Bar Journal 224, 228.

¹⁵⁵ See para 10.69 above.

PART XI

REFORM I: DEDUCTION OR NOT?

1. THE OPTIONS FOR REFORM SET OUT IN THE CONSULTATION PAPER

11.1 Aside from noting the uncertainties in the present law,¹ we suggested in the consultation paper that the present law may be regarded as internally inconsistent in three respects, as follows:

- (1) There is a tension in the collateral benefits cases as to whether the measure of damages to be applied is purely compensatory or has a punitive element.
- (2) Some of the specific collateral benefits rules are inconsistent with one another. We considered the most striking example to be that sick pay is deducted from damages for loss of earnings, whereas disablement pension is ignored.
- (3) It is inconsistent that indemnity insurers have a right of subrogation in respect of the insured's tort claim, whilst non-indemnity insurers do not. One of the reasons for this conclusion is that policies are often categorised as indemnity or not on the basis of tradition. Accordingly, for example, life and personal accident insurance policies are not seen as indemnity insurance and yet they may indemnify the insured for a specific loss.

11.2 We considered that the uncertainties and inconsistencies in the current law suggested that there should be a re-consideration of what the law on collateral benefits ought to be. Detailed argument in the consultation paper led to the following contentions:

- (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.²
- (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

¹ See generally summary at para 10.9 above, and more specifically paras 10.13-10.14, 10.16 and 10.22-10.24 above.

² See in respect of these two arguments the Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death (1987) ch 6, especially at p 187.

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 accepting the following proposition, which we called “the proposition underpinning the deduction options”:

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, received by the victims of personal injury should be deducted from damages which meet the same loss.³

11.3 In order to work out the ramifications of this proposition it is necessary to consider whether collateral benefits meet the same loss as tort damages at all, and, if so, whether they are comparable to tort damages generally or only to damages under a particular head. We undertook this exercise in respect of the main classes of collateral benefits encountered in personal injury cases (other than social security benefits).

11.4 As a result of that enquiry we put forward two options for reform based on the proposition underpinning the deduction options. We suggested four other options for reform should consultees reject that proposition. We shall now set out the six options put to consultees.

(1) Option 1

11.5 The first option for reform was as follows:

(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 payments⁴ 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

³ Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, para 4.51.

⁴ So far as these are collateral benefits. See para 10.32 above.

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.

- 11.6 Under this option for reform we should clarify that, as regards insurance payments, the main change would be that personal accident insurance would be deducted from tort damages. Indemnity insurance would continue to be ignored,⁵ because an 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".⁶ Our view was that, if personal accident insurance payments were to be deducted, they should be deducted in full. However, we asked consultees whether the claimant should be given credit for the insurance premiums for the two years prior to the accident, on a model suggested in work done for the American Law Institute.⁷

(2) Option 2

- 11.7 Option 2 was the same as Option 1, except that charitable payments would continue to be ignored in the assessment of damages. This exception would be best rationalised on the basis that charitable payments generally either do not meet loss at all, or meet non-pecuniary loss, for which there cannot be one correct valuation.⁸ Even though this allows for the possibility that some charitable payments might meet pecuniary loss, it may be preferable to assume that none do in order to avoid investigation into the intentions of individual donors.

(3) Option 3: Deduction of collateral benefits except where the provider intended them to be in addition to tort damages

- 11.8 The effect of adopting this option would be that a court would be required to ignore, for example, a charitable payment, an insurance payment or sick pay, where it was satisfied that the provider intended the payment to be in addition to tort damages.
- 11.9 Apart from the view that respecting a provider's intentions conflicts with arguments of principle and policy for not permitting double recovery,⁹ we noted that a difficulty with this option is that it would create uncertainty. Where a provider's intentions were unexpressed, it would be difficult to determine them. One might consider a search for an unexpressed intention to be an entirely artificial exercise. This potential problem might, however, be remedied by a series of rebuttable presumptions, either that a benefit was, or was not, intended to be in addition to tort damages.

⁵ Unless one were also to reform the law by removing an indemnity insurers' automatic subrogation rights: see paras 12.21-12.22 and 12.33-12.36 below.

⁶ An exception to this would be where a defendant-employer has taken out permanent health insurance for the victim-employee.

⁷ For further details of the study and the model proposed by the American Law Institute see *Damages for Personal Injury: Collateral Benefits* (1997) Consultation Paper No 147, paras 3.63-3.70 and paras 4.45-4.46.

⁸ See the discussion at paras 11.45-11.49 below.

⁹ See para 11.2 above.

11.10 We asked consultees whether they would favour this option according to which Options 1 or 2 above (and we asked consultees to say which they preferred) would be qualified, and a collateral benefit ignored where the provider intended it to be in addition to tort damages. We also invited 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.

(4) Option 4: Reversal of the rule on disablement pensions only

11.11 According to this option the law would remain as it is, except that disablement pensions, 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).¹⁰

11.12 We said that adoption of this option 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.¹¹ It would entail acceptance that although disablement pension has been paid for, it is to meet loss of earnings in the same way as sick pay and should therefore be deducted from damages for loss of earnings.

(5) Option 5: No deduction

11.13 This option was diametrically-opposed to Option 1. According to it all collateral benefits would be ignored. This is the present position for claims under the Fatal Accidents Act 1976.

11.14 A merit of this option would be that it would achieve consistency between collateral benefits and would, arguably, render the law relatively simple and certain. On the other hand, it could be said that ignoring all collateral benefits would take the law in the opposite direction to where it should be going. Our provisional view was that Option 5 should be rejected as contradictory to the justifiable compensatory aim of tort damages.

(6) Option 6: No change

11.15 The consultation paper emphasised how difficult we had found this issue. We therefore recognised that the present approach of the courts - whereby some collateral benefits are deducted and others (particularly, charitable payments and insurance payments) are ignored - might be regarded as a satisfactory solution to an intractable problem. An alternative argument was that, in so far as there are improvements to be made, they are better made through common law developments. In other words it might 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 links would also be preserved with the other common law

¹⁰ These are the provisos (c) and (d) set out in para 11.5 above.

¹¹ See para 11.1 above.

jurisdictions. Finally, we noted that consultees might find convincing the influential arguments of policy put forward by Lord Reid in *Parry v Cleaver*.¹²

- 11.16 On the other hand, we reiterated our view that the present law contains many uncertainties and inconsistencies.¹³ The law is complex and expensive appellate rulings are consistently required. Depending on one's views on the policy arguments involved, one might also regard the present law as being unfair. Indeed the continuing existence of so many uncertainties and inconsistencies in this area of the law might be seen as indicative that the common law is unable to formulate a coherent body of rules to deal with collateral benefits.

2. CONSULTEES' RESPONSES AND OUR RECOMMENDED APPROACH

- 11.17 The responses of consultees confronted us with a paradox. The vast majority advocated reform of one kind or another. Thus 78 per cent of those who chose an option favoured Options 1 to 5 which were those entailing change. There was, however, no consensus about what form the new law should take. Twenty-one per cent supported Option 1; 19 per cent supported Option 2; 3 per cent supported Option 3; 19 per cent supported Option 4 and 16 per cent supported Option 5.
- 11.18 The lack of consensus amongst consultees has been influential in persuading us that we should not recommend reform to the rules on the deductibility of collateral benefits. In particular, the great range of views held makes it extremely difficult to devise a solution to the problems in the existing law which will command widespread approval. The other major consideration in our decision is that the only option for reform for which there seems to be wide-ranging consensus, namely Option 4 (which was implicitly supported by those favouring Options 1-3), appeared on closer examination likely to create as many problems as it would solve. It therefore seems to us that the present law, for all its uncertainties, would not be improved upon by any reform which we would feel able to recommend.¹⁴
- 11.19 This conclusion is reinforced by consideration of views expressed by the 22 per cent of consultees who supported Option 6, which was the "no change" option. First, it was argued that the law does not cause a problem in practice. The Law Society said:

¹² [1970] AC 1.

¹³ See para 11.1, n 1 above.

¹⁴ We should also here mention the views given by consultees in answer to our question (see Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147, para 4.83) whether social security benefits (within the recoupment scheme) to be awarded after 5 years should be deducted from tort damages to meet the same loss. About 60% of consultees who responded to this question favoured deduction, while about 40% opposed it. A number argued against deduction on the basis that it would complicate matters by requiring difficult predictions to be made about the availability and amount of future social security benefits. We agree with the majority of consultees that social security benefits after five years should be deducted but, since we do not recommend reform elsewhere, we do not recommend reform on this issue (which is, in any event, outside our terms of reference). See para 9.1 above, and our report, Claims for Wrongful Death (1999) Law Com No 263, paras 5.56-5.69.

The Commission seems to start from the position that the law in this area is difficult, inconsistent and needs to be reformed. However, although there has been a trickle of cases going to the Court of Appeal, these have mostly been in the one area of collateral benefits provided by employers.

In practice, little difficulty is experienced in applying the present law: practitioners adopt the approach that if the accident victim has paid for, or contributed to, the benefit, it should not be deducted; if it has been provided gratuitously it should be deducted (except for charitable payments).

- 11.20 Secondly, it is notable that this view was linked to a warning that change may simply create new problems. The Institute of Legal Executives said:

In the experience of practitioners studying the paper, there were no identifiable individuals or bodies [who] had problems with or complained about the current system...Collateral benefits is an intractable problem, and a change in the law, rather than clarifying the position, could create further inconsistencies.

- 11.21 Finally, it was contended that there were no costs savings to be made from reforming the law. The Common Law Group at Davies Arnold Cooper said:

...it is our view that no calculable cost saving would be effected by altering the current system.

- 11.22 Nevertheless, despite our conclusion that we should not now recommend reform, we have found consultees' responses instructive in a number of ways. They have led us to reach settled views on a number of issues, which we shall now set out. We hope that what follows will be of assistance in the ongoing development of the common law, and should the Government wish to give further consideration to legislative reform of the law on collateral benefits.

(1) There should be consistency in the law on collateral benefits in personal injury and Fatal Accident Act claims

- 11.23 Ninety-two per cent of consultees agreed with us that there should be consistency between the law on collateral benefits in personal injury and in Fatal Accidents Act claims. Since we do not recommend reform in personal injury cases, this has led us to recommend reform to section 4 of the Fatal Accidents Act 1976 to create consistency with the present law in personal injury cases. Details are set out in our report on Claims for Wrongful Death.¹⁵ Moreover it seems to us crucial that in developing the law the courts should keep in mind the importance of maintaining consistency in the treatment of collateral benefits across the two kinds of cases.

(2) Option 5 should be rejected

- 11.24 We shall start by considering Option 5, since it was at one end of the deduction/non-deduction spectrum, in providing for all collateral benefits to be ignored. As we have said, only 16 per cent of consultees were in favour of Option

¹⁵ See Claims for Wrongful Death (1999) Law Com No 263, paras 5.21-5.46.

5. In addition some of that support was conditional on the creation of statutory repayment rights for providers of collateral benefits, which we reject below.

- 11.25 The vast majority of consultees agreed with our provisional view that Option 5 should be rejected. A large number of consultees objected to a blanket non-deduction rule on the basis that it would be inconsistent with the usual measure of tort damages. The following comment by Bill Braithwaite QC is an example of the sentiments expressed:

I certainly do not agree that we should rectify our poor system of damages by the philosophically unjustifiable means of not deducting collateral benefits.

- 11.26 We remain of the view that Option 5 should be rejected. To ignore all collateral benefits would fly in the face of the cardinal rule that, leaving aside exceptional cases,¹⁶ tort damages are compensatory. In addition, the approach required by tort principle is supported by the argument of policy for deduction mentioned above.¹⁷ We are therefore convinced that, in keeping with the modern case law, *prima facie* collateral benefits which meet the same loss as tort damages should be deducted.

- 11.27 In reaching this conclusion we have carefully considered the arguments made in support of Option 5. A pragmatic argument was forcefully put by Peter Andrews QC. He considered that collateral benefits should be ignored because it is a fiction that tort damages are compensatory:

...in many cases of serious personal injury, the plaintiff does not receive truly compensatory damages. He is not placed in the same position as if uninjured. It then follows that there should be no general principle debarring him from retaining "accident" moneys whatever the source. There will be no double recovery because tort damages are only one of the layers of protection which society should provide to those who are disabled. Different members of society will accumulate different levels of recompense for similar injuries depending on a variety of factors, including but not limited to charity donations, personal insurance, the quality of the employment contract, the competence of the instructed lawyers, the idiosyncrasies of the determining judge, and the chance of whether the accident is susceptible to tortious recovery.

This seems to us to be something of a counsel of despair. Even if it is accepted that it is difficult in practice to apply the compensatory measure of tort damages, we do not accept that it can be an improvement to abandon principle altogether.

- 11.28 Moreover, we are hopeful that our recommendations elsewhere will go some way to ensuring that tort damages better achieve their compensatory aim.¹⁸ We also found it of interest that Mr Andrews later said:

¹⁶ Where, for example punitive or restitutionary damages are available.

¹⁷ See para 11.2 above.

¹⁸ See, for example, *Damages for Personal Injury: Non-Pecuniary Loss* (1999) Law Com No 257, and *Claims for Wrongful Death* (1999) Law Com No 263, published at the same time as this report.

It is a pity that the Commission favours¹⁹ the deduction of collateral benefits in isolation from the other reforms proposed in earlier Reports - most notably No 224 [where it was recommended that ILGS rates be used in the calculation of future pecuniary loss]. The use of ILGS would have been a valuable reform on the road to true compensatory damages. Against such a background, the deduction of collateral benefits could have been justified.

Mr Andrews' final sentence supports our own view that the decision of the House of Lords in *Wells v Wells*²⁰ has already remedied one of the most important causes for the insufficiency of tort damages. It also suggests that some who supported Option 5 may now no longer do so.

- 11.29 The argument was also made that Option 5 would be an improvement because it would make the law simple and certain. For example, the Association of Personal Injury Lawyers said:

...by ignoring all collateral benefits practical clarity is achieved... By achieving full clarity there would be a tremendous saving in legal costs and appeals.

Thompsons said of Option 5:

This approach reduces legal costs, promotes certainty, predictability and simplicity.

- 11.30 We can see that Option 5 is superficially simple and certain, and we noted this feature in the consultation paper. We are, however, no longer wholly convinced that reform on this basis would be straightforward in practice. The same might have been said of section 4 of the Fatal Accidents Act 1976. Yet that provision has led to complexity and confusion in the case law.²¹

(3) Options 1 and 2 should be rejected

- 11.31 We shall now consider the options for reform which provided for increased deduction of collateral benefits, commencing with Options 1 and 2 which went the furthest in this direction.
- 11.32 We have concluded that both of these options should be rejected because of lack of support: only 21 per cent supported Option 1 and 19 per cent supported Option 2.²² Moreover some of this support was conditional on the creation of statutory third party recoupment rights, which we reject below.

¹⁹ We should point out that we did not favour any particular option for reform in the consultation paper.

²⁰ [1999] 1 AC 345.

²¹ See Claims for Wrongful Death (1999) Law Com No 263, paras 2.40-2.51 and 5.28.

²² In respect of our question to consultees whether, if insurance payments were to be deducted, they should be deducted net of insurance premiums for the 2 years prior to the accident, views were evenly balanced.

11.33 Consultees' opposition to the deduction of charity (which was the difference between Options 1 and 2) was particularly clear. Appeal was made to public opinion and to the practice in other jurisdictions. Some consultees also believed that benevolence would be discouraged by deduction of charity from tort damages.

11.34 It is also significant that some of consultees' arguments against Option 1 demonstrate that there may be unforeseen complexities in providing for the deduction of charity. Thus Nigel Cooksley suggested that deduction of donations by close relatives would be anomalous. He said:

...one can imagine the situation of a father or other relative giving money to his injured adult child by way of assistance after an accident... it would seem... absurd that the victim should give credit for such sums.

11.35 Several consultees also raised practical problems to do with the administration of charities. For example, Mark Bennet said:

It would be impossible to set up a charity for the general benefit of tortfeasors or their insurers - the law would not allow it. Achieving the same by stealth is abhorrent... If a school minibus crashes and funds are raised for the benefit of the victims, the defendants pay damages and the victims repay the fund. What is the fund to do with the money? Give it back to the donors? Of course not.

The Association of District Judges raised a similar issue as follows:

It is recognised [that] difficulties would arise in individual "disaster" cases, a fund being created at a time of public emotion to provide for a group of people injured by a particular catastrophe. There is no inevitability [that] those precipitating the setting up of such a fund would realise that the result of raising what may be very substantial sums might reduce the compensation payable by the tortfeasor, not unusually popularly cast in the role of "villain". Such a circumstance might create public dismay, and it would be essential that no fund could be set up or created save with the authority of the Charity Commission.

11.36 These reasons for leaving the charity rule alone might be thought to be reinforced by the views of a number of consultees that charitable payments are rare in practice. The Forum of Insurance Lawyers made this connection when they said:

In practical terms we suspect that charitable payments are more problematic for our purposes than they are significant.²³

²³ Similar sentiment was expressed by JW Davies of Brasenose College, who said: "Perhaps the absence of information about charitable payments to tort victims in Professor Genn's survey indicates that gifts are just not very important in practice." In addition, Professor Richard Lewis said: "...charitable monies are rare for... PI victim[s]."

(4) Option 3 should be rejected

11.37 Option 3 is the next of the deduction options, according to which either Options 1 or 2 would be adopted, but with the additional proviso that a collateral benefit which was intended to be in addition to tort damages should be ignored. There was practically no support for this reform. Only 3 per cent of consultees who chose an option supported reform on this basis.

11.38 Moreover, opposition to Option 3 was expressed in strong terms. It was frequently argued that it would be unworkable to enquire into the intentions of collateral benefit providers. The Association of District Judges called Option 3 “quixotic”. The Personal Injuries Bar Association spoke for many when they said:

We were unanimously of the view that whether Option One [or] Option Two... was to be adopted Option Three should not be implemented... it would not only lead to uncertainty but would also be likely to introduce complexity into litigation whereas the object of the current proposals is to simplify personal injury litigation where possible.

11.39 We accept the clear view given by consultees that Option 3 should be rejected as a basis for reform.

(5) Option 4 should be rejected

11.40 The final deduction option to be considered is Option 4, which was the first choice of 19 per cent of consultees. However, as several consultees pointed out, support for Option 4 was implicit in support for Options 1-3. On one reading of consultees’ responses, therefore, there was 62 per cent support for Option 4.

11.41 We were at first convinced that the law should be reformed in line with Option 4. It seemed to us significant that it had received by far the largest measure of support from consultees (both here and in the context of the Fatal Accidents Act 1976). In addition a number of consultees agreed that the non-deduction of disablement benefit is the most striking inconsistency in the current law. It was also felt that this inconsistency has a significant effect in practice. For example, David I Tomlinson said:

To the writer, who is not a lawyer, it seems absurd that a disability (or ill-health) pension prior to normal retirement date is regarded as any different from contractual sick pay.

11.42 The Personal Injuries Bar Association said:

...the disagreement was confined to deductibility of sick pay, disablement pension payments, retirement pension payments and redundancy payments. Two [of the four] members felt that the present position leads to substantial overcompensation in a large number of cases... .

11.43 George Pulman QC said:

There is an absurdity in the present practice. In the CICB (NB now CICA) the injured policeman or fireman gives credit for the benefits which include the pension which he receives; but at Common Law he

does not. If the injured fireman or policeman can find an insured tortfeasor, he will get vastly more compensation. This often happens in practice.

11.44 Ronald Walker QC said:

Reform of the law relating to the deduction of pensions would, in my opinion, have a considerable impact on the cost of personal injury litigation. Many claims would be considerably reduced, which would I believe make them more readily capable of settlement. Furthermore the not unknown phenomenon of plaintiffs in occupations such as that of fireman or policeman seeking, and obtaining, early retirement on medical grounds following an apparently minor injury (in order to achieve double recovery) would no doubt become much less prevalent.

11.45 We also noted that many consultees supported a particular argument of principle, which implied support for reform at least to the extent of Option 4 (although it might also support a modified version of Options 1 or 2). According to this view a distinction should be made between collateral benefits which meet pecuniary loss and collateral benefits which meet non-pecuniary loss. The point was put in various ways. In relation to charity, Girvan J said:

There is nothing intrinsically correct in one view of damages and there can be differences within different jurisdictions in the one country... Where charitable donors are responding to a given situation and this results in additional monies being available to parties who have suffered physical or emotional loss, it would be unjust to deprive the donee of the benefit of the charitable gift because that then would be determining that the judgment as between the plaintiff and the defendant represents the only possibly just outcome to the situation.

11.46 When considering insurance payments, the Faculty and Institute of Actuaries said:

...it would be desirable to see tortfeasors' payments of damages reduced by insurance benefits which compensate for monetary loss but not for others, which compensate for the unquantifiable, such as pain and suffering... .

Professor W V H Rogers said:

I may find unacceptable the law's arbitrary valuation of my leg or my life and I should be allowed to continue to treat my own provision as an "extra".

Also in the context of insurance, Raymond Walker QC said:

A person should be entitled to take the view that in addition to insuring himself/herself against a situation where an injury is not caused by an identifiable tortfeasor, he/she wishes to top up in the event of the injury being caused by a tortfeasor (i.e. to in effect achieve double recovery) because whilst a sum of money can never really make good a significant permanent pain and/or disability it would help to cushion his/her inner feeling of loss.

- 11.47 As a general proposition, the argument is that because no valuation of non-pecuniary loss is demonstrably correct, the law should not insist that its valuation of this type of loss is right. It also follows that a person can never be overcompensated for such loss. The cumulation of tort damages and collateral benefits which meet non-pecuniary loss therefore does not conflict with the compensatory measure of tort damages.
- 11.48 We adverted to these arguments in the consultation paper.²⁴ We also noted the major counter-arguments. These may be re-stated as follows: first, tort law aims to compensate fully and in so doing values non-pecuniary loss. Internal consistency requires the law to view that valuation as definitive. Secondly, the recommendations made in our report *Damages for Personal Injury: Non-Pecuniary Loss*²⁵ will, if implemented, ensure that awards for non-pecuniary loss are widely regarded as fair. An injured person who received tort damages for non-pecuniary loss on top of other payments to meet the same loss might then be widely regarded as having received “too much” compensation. Thirdly, there is the argument of policy described above²⁶ in favour of the deduction of collateral benefits.
- 11.49 It seems to us that there may be situations in which these three counter-arguments would be persuasive. For example, if it was clear that wide-ranging deduction of collateral benefits was the only way to enable increases in tort damages for personal injury to be made elsewhere, this might be decisive in rejecting the distinction between collateral benefits which meet pecuniary loss (and should be deducted) and those which do not (and should not be deducted). Nevertheless, that many consultees supported this argument of principle could be seen as an additional reason to pursue reform on the basis of Option 4, since, at the least, it suggests that disablement pensions should be deducted from damages for loss of earnings.
- 11.50 Nevertheless, when we came to working out the detail of legislative reform on the basis of Option 4, we ran into significant difficulties. These resulted mainly from the links between pensions and insurance. In particular, a pension may be payable out of a fund which has been wholly or partly invested in contracts in the nature of endowment insurance policies. Moreover a pension may be payable under a straightforward risk insurance contract, i.e. a contract with no investment elements taken out to insure against the financial consequences of a particular event.
- 11.51 This means that it may be difficult in practice to distinguish between some disablement pensions and some insurance. Legislation to implement Option 4 would therefore need to spell out very clearly when a payment was to be regarded as a disablement pension. This would inevitably lead to complexity. It is also quite likely that however carefully the provision was drafted, there would still be uncertainty about how some payments should be categorised. The upshot of our enquiry into the detail of Option 4 was therefore that the present law is a better

²⁴ *Damages for Personal Injury: Collateral Benefits* (1997) Consultation Paper No 147, paras 4.60 and 4.74.

²⁵ (1999) Law Com No 257.

²⁶ See para 11.2 above.

compromise between the differing views regarding the deduction of collateral benefits than any reform which we would feel able to recommend.

11.52 We also think it significant that the practical difficulties we encountered in considering Option 4 highlighted the problems of principle in distinguishing between pensions and insurance in the assessment of damages. The corollary of this is that if it is thought right that there should be increased deduction of collateral benefits, the models for reform which should be entertained are Options 1 and 2 (possibly modified to distinguish between non-pecuniary and pecuniary loss)²⁷ because they do not require one to distinguish between the treatment of pensions and insurance.

11.53 **It follows that we do not ourselves recommend any statutory change to the law on whether collateral benefits should, or should not, be deducted in assessing damages for personal injury (ie we favour Option 6). Nevertheless we hope that our report will assist with the continued development of the common law and, in particular, will assist the Government if it should wish to give further consideration to legislative reform of the law on collateral benefits in personal injury cases.**

²⁷ See the discussion at paras 11.45-11.49 above.

PART XII

REFORM II: THE RIGHTS OF THE PROVIDER OF A COLLATERAL BENEFIT

1. THE QUESTIONS PUT TO CONSULTEES

12.1 In the consultation paper, we looked at several possible reforms to the rights of the providers of collateral benefits. We asked consultees to bear in mind the need for consistency in dealing with the deductibility of collateral benefits and the issues discussed in this section.

(1) Should there be a new statutory right to recover the (non-deductible) payment from the victim in the event of a successful tort claim?

12.2 We have described above the current possibilities for third party recovery from the victim.¹ In the consultation paper we expressed reluctance 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.² Understanding of concepts such as “failure of consideration” in a non-contractual sense is at an early stage. Our view was that the common law of restitution is capable of developing in such a way as to afford justice to the providers of collateral benefits in claims against the victim. In contrast to the recoupment question considered below, there is no appellate decision blocking the way to common law development.

12.3 However, if reform aims to avoid overcompensation and to reimburse the provider, a rule of deduction plus a recoupment right would be preferable, since this would guarantee that the victim was not overcompensated. In contrast, to give the provider a repayment right would only prevent overcompensation if the right were exercised.

12.4 It should also be noted that for a statutory repayment right 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.

12.5 We asked consultees whether they agreed 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. We also invited views on a proposal of the Ontario Law Reform Commission 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

¹ See paras 10.63-10.67 above.

² *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

³ Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death (1987) ch 6, pp 190-194.

(2) Should the provider of a “deductible” collateral benefit have a new statutory right to recoup the benefit from the tortfeasor?

12.6 Where a collateral benefit is deducted in assessing damages, should the provider have a right against the tortfeasor for having “discharged” the tortfeasor’s liability? We considered this question in respect of all the specific benefits we have looked at except for social security benefits, since the DSS recoupment scheme is outside our terms of reference.⁴

(a) The argument of legal principle for a recoupment right

12.7 A right of recoupment would be contrary to the principle that pure economic loss is not compensated in a negligence claim. However, we have seen that the restitutionary principle of unjust enrichment arguably supports creation of a recoupment right where a third party has met a loss for which the tortfeasor would otherwise have been liable, and the third party acted under legal compulsion (or, possibly, necessity).⁵

12.8 In *Metropolitan Police District Receiver v Croydon Corp*⁶ the Court of Appeal denied a restitutionary right to recover from the tortfeasor the value of sick pay which the employer was required by statute to pay, because the payments could not be regarded as discharging any liability of the defendants since they would have been deducted in assessing the victim’s damages. It was contended in the consultation paper that this could be criticised as an over-technical approach. At first instance, Slade J offered an alternative analysis:

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 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.⁷

12.9 In reality, as Slade J recognised, the tortfeasors had been relieved of part of their liability. If a wrongdoer is regarded as primarily liable for the consequences of his or her wrongdoing, a wrongdoer 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 those who make insurance payments or provide pensions to tort victims. As we have seen, this analysis was accepted by Sachs J in *Land Hessen v Gray and*

⁴ See para 9.1 above.

⁵ See paras 10.58-10.62 and 10.68-10.72 above.

⁶ [1957] 2 QB 154. See also para 10.69 above.

⁷ [1956] 1 WLR 1113, 1130-1131.

Gerrish,⁸ despite the Court of Appeal decision in *Metropolitan Police District Receiver v Croydon Corp.*⁹

- 12.10 The argument for giving the provider of a collateral benefit a right to recoup the benefit from the tortfeasor might be seen to be supported by the fact that the DSS has a right to recoup social security benefits paid as a result of a tort from the tortfeasor.¹⁰ Again, this analysis regards a wrongdoer as primarily responsible for the consequences of his or her wrongdoing. Further, an indemnity insurer's subrogation rights may also be regarded as relevant.

(b) The case against an automatic recoupment right

- 12.11 The consultation paper also recognised that there are arguments against giving the provider of a deductible collateral benefit a right to recoup the benefit from the tortfeasor. It may be that the risk of unjust enrichment in the cases discussed above is adequately met by the possibility of an express contractual provision that the collateral benefit should be repaid to the provider in the event of a successful tort claim by the victim (or of making the payment conditional, which, in the event of the condition failing, would trigger a restitutionary right to repayment). 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.
- 12.12 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, insurers and pension providers. The NHS and the DSS do not bargain to undertake risk. Indeed contractual arrangements for repayment would be seen as undesirable and anomalous.
- 12.13 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 had been made under necessity and that that is sufficient in principle to justify recoupment from the tortfeasor.¹¹

(c) Policy issues

- 12.14 We considered that the arguments of principle for and against an automatic recoupment right were finely-balanced. We recognised the force of the "unjust enrichment" argument for overruling *Metropolitan Police District Receiver v Croydon*

⁸ Unreported, 31 July 1998.

⁹ See paras 10.70-10.72 above.

¹⁰ Social Security (Recovery of Benefits) Act 1997; See paras 2.11 and 10.48-10.51 above. A further analogy is with the NHS' right to recoup some of the costs of caring for road accident victims: Road Traffic (NHS Charges) Act 1999. See generally paras 2.8-2.33 and 2.36 above.

¹¹ For necessity as a factor, alongside legal compulsion, grounding restitution where another's liability is discharged, see *Owen v Tate* [1976] QB 402; *The Zuhul K* [1987] 1 Lloyd's Rep 151. See also para 10.60 n 129.

*Corp.*¹² At the same time we acknowledged (with the possible exception of charitable payments) that any “injustice” was weakened by the third party’s opportunity to provide contractually for repayment of the collateral benefit (or to render the benefit conditionally). On that basis, we considered that general policy considerations were crucial in determining whether there should be an automatic recoupment right.

- 12.15 We thought that there was a real question whether there would be any practical point in creating new statutory recoupment rights. We adverted briefly above to the current practices of collateral benefit providers in securing recovery of their outlay.¹³ We found it significant that provision for, and enforcement of, recovery rights is not widespread. This suggests that if the law were changed to provide for third parties to have recoupment rights, there would be probably be little change in practice.
- 12.16 Even if providers of collateral benefits would enforce a new automatic recoupment right, we noted policy arguments against this option for reform.¹⁴ First, the transaction costs of allocating tort liability for personal injury are already very high and are borne by large groups in society. A recoupment right for third party providers of collateral benefits which was enforced¹⁵ would increase costs still further. Bulk recovery agreements of the French and German type, whereby liability insurers agree to pay a percentage of all claims by providers of collateral benefits, might mitigate the cost of extensive subrogation. However, they would by no means extinguish it. The process of reaching such agreements would be complicated and therefore costly. One would be left with a myriad of arrangements between individual employers, first party insurers and pension funds on the one hand and liability insurers on the other hand. There would also be continuing administrative costs.
- 12.17 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. According to these insurers agree to meet property damage claims by their own first party insured to avoid the cost of pursuing subrogated claims.¹⁶ However the scope in the motor claims context for economies of scale is much greater than in respect of arrangements for bulk recovery of non-state collateral benefits.

¹² [1957] 2 QB 154.

¹³ See paras 10.66-10.67 and 10.76-10.77 above.

¹⁴ See Reuben Hasson, “Subrogation in Insurance Law - A Critical Evaluation” (1985) 5 OJLS 416, 425-428.

¹⁵ 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.

¹⁶ 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.

- 12.18 Secondly, a general recoupment right which was enforced would undermine the policy argument for deduction of collateral benefits made earlier. This is because deduction of collateral benefits would no longer potentially release funds in society to enable better provision to be made for the ill and injured. Instead money from those who fund liability insurance would go to the providers of collateral benefits rather than to accident victims.
- 12.19 We asked consultees whether they agreed with our provisional view that the reasoning of Slade J at first instance in *Metropolitan Police District Receiver v Croydon Corp*¹⁷ 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.
- 12.20 If consultees agreed with this view, we asked whether, in the light of the arguments of principle and policy analysed in paragraphs 12.7-12.18 above, they favoured 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).

(3) What should be done about indemnity insurers' subrogation rights?

- 12.21 We discussed above the possible rationales for indemnity insurers' automatic right to take over the victim's claim by "simple" subrogation.¹⁸ In the consultation paper we identified a number of arguments for removing, or, at least not extending, this type of subrogation. First, the distinction drawn between indemnity and non-indemnity insurance (where simple subrogation rights do not exist) is a difficult one.¹⁹ Secondly, indemnity insurers' subrogation rights cause overcompensation where the insurer chooses not to exercise its subrogation right. It is arguable that a rule of deduction allied with a recoupment right is a preferable means of affording third party recovery, since it guarantees that the victim is not overcompensated. 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.
- 12.22 We took the view that, irrespective of whether these arguments are persuasive, 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 most common 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 detailed knowledge of the practice of insurers, as well as careful consideration of the views of a wide range of interests within the insurance community. We asked consultees whether they agreed that we should not recommend abolition of

¹⁷ [1956] 1 WLR 1113 (QBD); [1957] 2 QB 154 (CA).

¹⁸ See paras 10.74-10.76 above.

¹⁹ See para 11.1 above.

automatic subrogation rights for indemnity insurers. We also invited 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.

2. CONSULTEES' RESPONSES AND OUR CONCLUSION THAT THERE SHOULD BE NO STATUTORY CHANGE

- 12.23 Putting contractual recovery rights aside, whether a restitutionary or a tort-based analysis of the third parties' position is employed, the underlying question remains who, as between the provider and the tortfeasor, should ultimately bear the cost of the collateral benefit. If the tortfeasor, there are second-order questions about the form a recovery right should take. The position of the tort victim is, however, always relevant. In particular, if it is thought just for the tort victim to receive tort damages as if the collateral benefit had not been received, the inevitable consequence is that the provider should have no third party recovery right. Moreover if compensation of the tort victim is prioritised, any third party right should be designed so as not to cut across the victim's claim.
- 12.24 Overall, our position in personal injury cases is that the only area in which the best answer to these questions is clear-cut is in relation to the provision of gratuitous services. We have explained our recommendations in that area in detail in Section A. Beyond this, we have expressed some conclusions in Section A regarding NHS recoupment. As to (other) collateral benefits, which we are here concerned with, we consider that whether or not there should be new third party recovery rights, and the form that these should take, is best left to the developing common law of restitution and of tort. In other words we do not think that the case for new third party rights is so clear cut that legislation is justified. At the same time we believe that there is scope for the relevant arguments to be aired and resolved in the course of common law development. We hope that this report will assist in that process. We explain below in further detail how we have reached this view, and in doing so advert to the opinions expressed by consultees.

(1) There should be no new statutory right to recover a (non-deductible) payment from the victim in the event of a successful tort claim

- 12.25 Of those who responded to this question, only 15 per cent supported the creation of statutory third party repayment rights, whilst 74 per cent thought that this should be left to common law development.²⁰ Many consultees were opposed to statutory reform on reasoning which was expressed by Girvan J as follows:

It seems to me that the interests of those providing a collateral benefit can be easily secured by the provider himself making express provision to cover the situation of a recovery by the plaintiff of damages against a defendant.

²⁰ Few consultees considered the Ontario Law Reform Commission's proposal 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). Only a very few actually supported the idea of a trust. See also paras 3.55-3.59 above for a discussion of the trust in relation to gratuitous services.

Other consultees who considered “automatic” recovery rights to be wholly unnecessary included Brooke LJ, Professor Andrew Tettenborn and the Association of Personal Injury Lawyers.

12.26 We agree that the option of “self protection” weakens the case for statutory reform. Moreover, no compelling arguments have emerged for enacting such rights for any particular class of collateral benefit providers. Should such arguments emerge, the common law has demonstrated itself to be perfectly able to develop so as to address them.²¹

12.27 In line with the views of the majority of consultees we therefore recommend that:

There should be no new statutory right to recover a (non-deductible) payment from the victim in the event of a successful tort claim for personal injury.

(2) There should be no new statutory right for the provider of a “deductible” collateral benefit to recoup its value from the tortfeasor

12.28 Of consultees who responded to the question, 88 per cent agreed with our provisional view that the reasoning of Slade J at first instance in *Metropolitan Police District Receiver v Croydon Corp*²² 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 in reality benefit the tortfeasor by discharging his or her liability to the victim. However, only 50 per cent of those who addressed the question favoured the creation of a new statutory right to recoup the value of deductible collateral benefits from the tortfeasor. Moreover, some support for the creation of new rights was contingent on the adoption of Options 1 or 2 regarding deduction or not, both of which we have rejected above.

12.29 We have concluded that we should not recommend a new statutory right for the provider of a deductible collateral benefit to recoup its value from the tortfeasor. We are influenced by the limited support amongst consultees for statutory reform in this area. Again, many consultees considered it sufficient that collateral benefit providers can provide contractually for recoupment.

12.30 Still, it must be recognised that any development of the common law is impeded by the decision in *Metropolitan Police District Receiver v Croydon Corp*²³ (subject to the case of *Land Hessen*²⁴ being regarded as having altered the position). We remain of the view that there is great force in the analysis of Slade J in the *Metropolitan*

²¹ *Davies v Inman* [1999] PIQR Q26 is an interesting case in this regard, since the courts awarded interest on damages for loss of earnings to be held on trust for an employer who had advanced the wages subject to an undertaking by the claimant to repay them from his damages. Roch LJ, who gave the only speech said at Q36: “There is, in my view, a public interest to encourage volunteers. It minimises hardship, especially if the voluntary payments mean that the injured party can maintain, whilst disabled, living expenses such as mortgage payments, rent and housekeeping bills.”

²² [1956] 1 WLR 1113 (QBD); [1957] 2 QB 154 (CA).

²³ [1957] 2 QB 154.

²⁴ Unreported, 31 July 1998.

Police case that *in reality* a tortfeasor benefits from the payment of sick pay to the tort victim (even though the payment does not operate to discharge a crystallised liability, but rather has the effect that the tortfeasor's liability does not ever arise).

- 12.31 Yet even if Slade J's approach to "enrichment" was accepted, there should only be a restitutionary right if the enrichment thereby caused was unjust. We found the following statement by Dr Charles Mitchell of interest in this regard:

It does not seem to me to be in the least obvious that a tortfeasor is necessarily the person who should bear the load of paying a victim when compared with an insurer who has been paid to compensate a victim, a government body which is required by statute to compensate a victim... or a carer who has acted under moral compulsion.

This suggests to us that, even accepting that a tortfeasor may "in reality" be enriched by the provision of a deductible collateral benefit, whether the enrichment is unjust is not invariably straightforward. This conclusion supports the case against legislation and for leaving the existence of a restitutionary claim to common law development.

- 12.32 **We therefore recommend that there should be no new statutory right for the provider of a "deductible" collateral benefit to recoup its value from the tortfeasor.**

(3) There should be no change to the law on indemnity insurers' subrogation rights

- 12.33 Of consultees who considered our questions on this subject, 90 per cent agreed that we should not recommend the abolition of automatic subrogation rights for indemnity insurers. On the other hand, there was very little response to the related questions posed in the consultation paper: that is, as to whether the rights are justified, and whether they should be extended to the providers of other collateral benefits.

- 12.34 In the consultation paper, we noted that insurers' subrogation rights are not confined to the personal injury context, but arise in relation to all forms of indemnity insurance. Many consultees therefore considered that the issue lay outside the scope of our project. For example, Professor J A Jolowicz QC said:

...the question... belongs in a review of the law relating to insurance, not of the law relating to damages for personal injury.

Brooke LJ expressed the same view:

I do not think the present paper is a good vehicle for exploring [these] issues... .

- 12.35 Further, many consultees explicitly agreed with our provisional view that the abolition of subrogation rights would require a detailed study of the implications for the insurance industry. For example, Girvan J said

This is an area which would require very careful investigation and careful consultation with the insurance industry.

Similarly, Horwath Clark Whitehill said:

The effect on the insurance industry should be fully researched before such a decision should be made.

12.36 Consultees have therefore confirmed our provisional view that we should not recommend the abolition of indemnity insurer's subrogation rights in this report. Further, given that very few consultees considered whether subrogation rights should be extended to the providers of other collateral benefits, we do not recommend that subrogation rights should be extended.

12.37 **Accordingly, we recommend that there should be no change to the law relating to indemnity insurers' subrogation rights, and the providers of other collateral benefits should not be given analogous subrogation rights.**

PART XIII

SUMMARY OF RECOMMENDATIONS ON COLLATERAL BENEFITS

1. DEDUCTION OR NOT?

- 13.1 We do not ourselves recommend any statutory change to the law on whether collateral benefits should, or should not, be deducted in assessing damages for personal injury (ie we favour Option 6). Nevertheless we hope that our report will assist with the continued development of the common law and, in particular, will assist the Government if it should wish to give further consideration to legislative reform of the law on collateral benefits in personal injury cases. (Paragraph 11.53)

2. THE RIGHTS OF THE PROVIDER OF A COLLATERAL BENEFIT

- 13.2 We recommend that there should be no new statutory right to recover a (non-deductible) payment from the victim in the event of a successful tort claim for personal injury. (Paragraph 12.27)
- 13.3 We recommend that there should be no new statutory right for the provider of a “deductible” collateral benefit to recoup its value from the tortfeasor. (Paragraph 12.32)
- 13.4 We recommend that there should be no change to the law relating to indemnity insurers’ subrogation rights, and the providers of other collateral benefits should not be given analogous subrogation rights. (Paragraph 12.36)

(Signed) ROBERT CARNWATH, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
8 September 1999

[Pages 150-152 are intentionally blank]

APPENDIX A

Draft Damages for Personal Injury (Gratuitous Services) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Damages for gratuitous provision of services by defendant.
2. Duty to account for damages for past gratuitous services.
3. Interpretation.
4. Commencement and extent.
5. Short title.

[The draft Bill followed by Explanatory Notes can be found on the following pages. Appendix B begins on p 157.]

A

B I L L

TO

Amend the law relating to damages in respect of the gratuitous provision of services in personal injury cases. A.D. 1999.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 **1.** In an action for personal injury, no rule of law is to be treated as preventing damages from being recovered in respect of the gratuitous provision of services for the injured person by an individual merely because he is the defendant. Damages for gratuitous provision of services by defendant.

10 **2.**—(1) This section applies to damages awarded in an action for personal injury which are awarded in respect of services which have been gratuitously provided for the injured person by an individual. Duty to account for damages for past gratuitous services.

(2) If damages to which this section applies are recovered, the person by whom they are recovered shall be under an obligation to account for them to the individual who provided the services.

15 **3.**—(1) In this Act “personal injury” includes any disease and any impairment of a person's physical or mental condition. Interpretation.

(2) References in this Act to the provision of services for an injured person include, in particular—

- 20 (a) providing him with nursing care,
 (b) visiting him in hospital, and
 (c) carrying out any task that he would have carried out as part of running or maintaining the home or supporting his domestic or family life if he had not suffered the injury.

25 (3) For the purposes of this Act, an individual provides services gratuitously if he provides them—

- (a) without having any contractual right to payment in respect of their provision, and

(b) otherwise than in the course of a business, profession or vocation.

Commencement
and extent.

4.—(1) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(2) Nothing in this Act affects a cause of action accruing before the day on which this Act comes into force.

5

(3) This Act extends to England and Wales only.

Short title.

5. This Act may be cited as the Damages for Personal Injury (Gratuitous Services) Act 1999.

EXPLANATORY NOTES

This draft Bill gives effect to our recommendations in respect of the gratuitous provision of services which can be found in paras 3.62, 3.66, 3.76, 3.91, 3.93, 3.98 and 3.100 of this Report.

Clause 1

Clause 1 is directed at, and reverses, the actual decision of the House of Lords in *Hunt v Severs* [1994] 2 AC 350 (according to which there can be no damages for care provided gratuitously by the tortfeasor).

Clause 2

Clause 2 is concerned to build on, clarify and slightly to depart from, the reasoning of the House of Lords in *Hunt v Severs* on the general approach to damages where gratuitous services are provided to an injured person.

It lays down that the person who recovers damages in respect of gratuitous services shall be under a duty to account, for the damages recovered in respect of past services, to the individual who has gratuitously provided those services. While this follows *Hunt v Severs* in imposing a legal duty to pay across the damages, a personal duty is preferred to the imposition of a trust (for the reasons set out in para 3.55 of this Report). The duty to account is imposed only in respect of damages for past, and not future, services (for the reasons set out in para 3.59 of this Report).

It should be noted that clause 2 lays down the position once damages have been awarded and recovered. It does not dictate that damages should be awarded in respect of gratuitously provided services (although we support the approach in *Hunt v Severs* that they should be: see para 3.62 of this Report). Nor does clause 2 prevent the courts imposing a legal duty to the provider of the services in respect of damages for future services (although for the reasons set out in para 3.59 we regard this as almost always undesirable).

Clause 3

Clause 3(1) defines personal injury.

Clauses 3(2) sets out, without providing an exhaustive definition, the main types of services covered by the Bill.

Clause 3(3) lays down the meaning of *gratuitous* services for the purposes of the Bill. The Bill only applies to services provided by an individual. Services provided by organisations or companies (for example, the NHS or local authorities) are therefore excluded. Two conditions must be satisfied for the provision of services to be gratuitous. First, they must be provided otherwise than under a contract, whether with the injured person or someone else (e.g., an employer) which provides payments for those services (subsection (a)). Secondly, they must be provided otherwise than in the course of a business, profession or vocation (subsection (b)). Services provided by, for example, a charity helper or a vicar are not gratuitous services, even though provided without a contractual right to payment, because they are performed in the course of a vocation (see para 3.60 of this Report).

APPENDIX B

LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON CONSULTATION PAPER NO 144

Judiciary

Mr Justice Bell

The Lord Chief Justice, Lord Bingham of Cornhill

Lord Justice Brooke

Lord Justice Buxton

Mr Justice Dyson

Mr Justice Gage

Master Leslie, Master of the Queen's Bench Division

Master Lush, Master of the Court of Protection

Mrs A B Macfarlane, former Master of the Court of Protection

Lord Justice Otton

Lord Phillips of Worth Matravers

Mr Justice Rougier

Sir Christopher Staughton, former Lord Justice of Appeal

Lord Justice Stuart-Smith

Lord Justice Swinton Thomas

Barristers

Peter Andrews QC

Piers Ashworth QC

Florence Baron QC

Bill Braithwaite QC

Daniel Brennan QC

Michael Brent QC

Andrew Buchan

Gary Burrell QC

Nigel Cooksley

Kieran Coonan QC

Conrad Dehn QC

Robin de Wilde QC

Charles Foster

Robert Francis QC

George Gadney
Allan Gore
Adrian Hamilton QC
Philip Havers QC
John Holt
M N Howard QC
David Kemp QC
Brian Langstaff QC
Charles J Lewis
Colin McEachran QC
Harvey McGregor QC
Ian A B McLaren QC
John Munkman
Sir Michael Ogden QC and James Holdsworth
George Pulman QC
Christopher Purchas QC
Andrew Ritchie
Jean H Ritchie QC
J James Rowley
Thomas Saunt
Lionel H Scott
Timothy Scott QC
Robin M Stewart QC
Raymond Walker QC
Peter Weitzman QC
Wyn Williams QC
Henry Witcomb

Solicitors

Anthony Gold Lerman & Muirhead
Davies Arnold Cooper
Irwin Mitchell
C P Mather, Penningtons
Nabarro Nathanson
Pannone & Partners
Jane Simpson, Manches & Co
Thompsons
John Usher, Thompsons
Richard Vallance, Charles Russell

Insurers

AXA Insurance

Lloyd's

St Paul International Insurance

Accountants

Mark Bennet, Leigh, Day & Co.

R D Bolton, Binder Hamlyn

Clark Whitehill

Sara Fowler, Ernst & Young

Rowland Hogg, Rowland Hogg

Medical Practitioners

Professor B A Bell MD FRCS

Dr Simon Fleminger

Dr P J R Shah FRCS

Professor Jonathan P Shepherd

Dr Derick T Wade

Academics

Professor Richard A Buckley

B A Childs

Simone Degeling

Laura C H Hoyano

Professor J A Jolowicz QC

Professor Michael A Jones

Professor Richard Lewis

Mark Lunney

Professor Harold Luntz

Professor David Miers

John Murphy

Dr Werner Pfennigstorf

Alan Reed

Professor W V H Rogers

Professor Keith Stanton

Professor Andrew Tettenborn

Individuals

Graham Box

Desmond Flanagan, Headway National Head Injuries Association

Peter W Guegan

B G Hellyer, International Paraplegic Claims Service
J A Howard
Bryan Long
Anne Luttmann-Johnson
Norman S Marsh
Derek J Peirce
Shilpa Shah
Janet A Stowe, Personal Injury Claims Assessment Service

Government Departments

Department of Health

Organisations

Association of British Insurers
The Association of Consulting Actuaries
Association of District Judges
The Association of Insurance and Risk Managers
Association of Personal Injury Lawyers
The Automobile Association
British Medical Association
Bush & Company
Consumers' Association
Council of Circuit Judges, Civil Sub-Committee
Criminal Injuries Compensation Authority
Faculty and Institute of Actuaries
The Family Law Bar Association
Forum of Insurance Lawyers
Headway National Head Injuries Association
Healthcare Lawyers Association
Institute of Legal Executives
Institute of Medicine, Law and Bioethics
The Law Society, Civil Litigation Committee and Family Law Committee
The Law Society of Northern Ireland
London International Insurance and Reinsurance Market Association
The Medical Defence Union Limited
Medical Protection Society
Motor Insurers' Bureau
The National Road Traffic Accident Claims Centre
Personal Injuries Bar Association, Law Reform Sub-Committee

Police Federation of England and Wales
The Royal Association for Disability & Rehabilitation
Royal College of General Practitioners
Royal College of Nursing
The Society of Public Teachers of Law, Tort Group
Solicitors Family Law Association
Spinal Injuries Association
Trades Union Congress

LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON CONSULTATION PAPER NO 147

Judiciary

Mr Justice Bell
Lord Justice Brooke
Judge Gareth O Edwards QC
Mr Justice Girvan
Judge Simon P Grenfell
Judge Alistair G MacDuff QC
Judge Robert Taylor

Barristers

Peter Andrews QC
Piers Ashworth QC
Bill Braithwaite QC
Michael Brent QC
Andrew Buchan
Nigel Cooksley
Charles Foster
John Hendy QC
David Kemp QC
Charles J Lewis
Harvey McGregor QC
Ian A B McLaren QC
John Munkman
Sir Michael Ogden QC

George Pulman QC
Thomas Saunt
Robin M Stewart QC
Raymond Walker QC
Ronald Walker QC
Wyn Williams QC

Solicitors

Davies Arnold Cooper
Evill and Coleman
John M Galt, T G Baynes
Irwin Mitchell
C P Mather, Penningtons
Pannone & Partners
Thompsons

Accountants

Mark Bennet, Leigh, Day & Co.
Horwath Clark Whitehill

Academics

Professor Richard A Buckley
J W Davies
Professor A M Dugdale
Professor G H L Fridman QC FRCS
Laura C H Hoyano
Professor J A Jolowicz QC
Professor Richard Lewis
Mark Lunney
Professor Harold Luntz
Professor David Miers
Dr Charles Mitchell
Professor Jeffrey O'Connell
Professor Anthony I Ogus
Professor David G Owen
Dr Werner Pfennigstorf
Professor W V H Rogers
Professor Andrew Tettenborn
Prue Vines

Individuals

Janet A Stowe, Personal Injury Claims Assessment Service

David I Tomlinson

Government Departments

Treasury Solicitor's Department

Organisations

Association of British Insurers

The Association of District Judges

Association of Personal Injury Lawyers

British Medical Association

Council of Circuit Judges, Civil Sub-Committee

Criminal Injuries Compensation Appeals Panel

Faculty and Institute of Actuaries

Forum of Insurance Lawyers

Healthcare Lawyers Association

Institute of Legal Executives

The Law Society

The Law Society of Northern Ireland

The Law Society of Scotland, Obligations Committee

London International Insurance and Reinsurance Market Association

The Medical Defence Union Limited

Medical Protection Society

Personal Injuries Bar Association, Law Reform Sub-Committee

Police Federation of England and Wales

Royal College of General Practitioners

Scottish Law Commission

Trades Union Congress