

The Overlap Between Damages For Personal Injury And Work Related Benefits

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This article examines the problem of “collateral benefits” received by an accident victim also seeking damages at common law. It does so in the specific context of the benefits which may be received by a plaintiff as a result of employment. These include, for example, sickness and redundancy payments, and pensions for disablement and early retirement. Should such benefits be taken into account to reduce the damages payable by the tortfeasor? A steady stream of litigation in the last forty years or so has produced a complex set of rules influenced by policies which pull in different directions. The rules expose various tensions in the law of tort. In particular, they reveal the conflict between the aims of compensation and deterrence: the plaintiff is to be compensated only to the full extent of his loss on the one hand, and yet on the other the defendant must pay in full and not receive a subsidy from a third party.¹ The cases also reveal uncertainty about how employment benefits should be viewed: are they to be deducted because they are akin to those publicly provided by the welfare state, or are they to be left out of account, as are monies payable under an insurance policy, because they are truly private rights, independently negotiated and separately paid for? Do the benefits merely duplicate tort by being paid for the same purposes as the damages, or do they offer compensation for some additional losses?

The area has recently been investigated by the Law Commission as part of its programme reviewing the law of damages for personal injury. In September 1997 a Consultation Paper on collateral benefits was issued which canvassed various

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¹ The policy issues in relation to benefits in general are discussed in Lewis, “Deducting Collateral Benefits From Damages: Principle And Policy” (1998) *Legal Studies* (forthcoming).

options for reform.² The subject is therefore topical. It also constitutes a neglected and yet important area of compensation law. Before the Law Commission review comparatively little had been written on the subject in spite of the importance of coordinating the plethora of compensation schemes for those injured.³ Over fifty forms of financial assistance for disablement have been traced.⁴ The series of ad-hoc schemes exposes the lack of any coherent policy towards the treatment of disabled people. Some receive much more help than others even though their needs and injuries are the same. It is not only the particular conditions of entitlement which cause the inequalities of treatment, but also the differing provisions with regard to the receipt of collateral benefits. The fortunate few who are able to obtain compensation from the common law are especially well treated. Because of their collateral benefits some plaintiffs recover far more than their pecuniary loss.⁵ This

² *Damages For Personal Injury: Collateral Benefits* (1997) Consultation Paper No 147. There are two other associated Consultation Papers. First, in the case of Fatal Accidents the assessment of pecuniary loss resulting from death involves examination of collateral benefits and this is considered by the Law Commission in *Claims For Wrongful Death* (1997) Consultation Paper No 148. Secondly, recoupment of NHS costs from tortfeasors is considered in the earlier Law Commission paper *Damages For Personal Injury: Medical Nursing And Other Expenses* (1997) Consultation Paper No 144. Before the consultation process for this Paper had finished, the Government announced in its June 1997 budget that it intended taking measures to promote NHS recoupment and end the subsidy to insurers.

³ Academic writing upon the law of tort is overwhelmingly biased towards the issue of liability as opposed to quantum, an emphasis which does not reflected the importance of assessment of damages to practitioners and litigants. However, the collateral source problem is considered in a handful of U.K. articles, almost all critical of the waste resulting from failures to deduct from damages. See Ganz, "Mitigation Of Damages By Benefits Received" (1962) 25 MLR 559, McGregor, "Compensation Versus Punishment In Damages Awards" (1965) 28 MLR 629, Atiyah, "Collateral Benefits Again" (1969) 32 MLR 397, Casey, "Damages And Social Security Benefits" [1972] Juridical Rev 22, Williams, "State-Financed Benefits In Personal Injury Cases" (1974) 37 MLR 281, Davies, "State Benefits And Accident Compensation" (1982) J Soc Welfare L 152. The most significant contribution is that of J. G. Fleming "The Collateral Source Rule And Loss Allocation In Tort" (1966) 54 Cal L Rev 1478, and "Collateral Benefits" in *International Encyclopedia Of Comparative Law* (Vol. XI) chap 11. Textbook writers devote little attention to the rule. But see A. Ogus, *The Law Of Damages* (1973) p 218 - 230, P. Cane, *Atiyah's Accidents Compensation And The Law* (5th ed 1993) chap 15, and A. Burrows, *Remedies For Torts And Breach Of Contract* (2nd ed 1994) p 121 -135.

⁴ Consumers Association, *Managing At Home - A Which Campaign Report* (1978) and J. Simkins and V. Tickner (eds), *Whose Benefit? An Examination Of The Existing System Of Cash Benefits And Related Provision For Intrinsically Handicapped Adults And Their Families* (1978).

⁵ In the U.S.A. it was found that the average plaintiff injured in a road accident received \$1.40 for each \$1 of pecuniary loss. This was partly because 79% of plaintiffs had at least one collateral source of payment in addition to damages. See the All Industry Research Advisory Committee, *Automobile Injuries And Their Compensation In the United States* (1979). Of those traffic victims in the USA who are successful in tort claims it has been suggested that two thirds of their total recovery comes from sources other than the tortfeasor. See J. O'Connell, *The Injury Industry* (1971) chap 4 p 29. This was confirmed in an empirical study by D.R. Hensler et al, *Compensation For Accidental Injuries In The United States* (1991).

waste involved in paying what may amount to double compensation is a feature of tort law which has been highlighted by Atiyah.⁶ Although his general views on reform of the law are not shared by the present Law Commission, it now recognises

“ ... the force of the contention that the damages burden should be reduced by the amount of the collateral benefits so that money could thereby be released to contributors to liability insurance through lower premiums, which would in turn potentially increase the funds available to achieve better provision for all the ill and injured.”⁷

The questions posed by collateral benefits therefore lie at the heart of any compensation system, and constitute one of the keys to its future direction.

It has been in the context of work related benefits that courtroom struggles over collateral benefits have largely been fought.⁸ Employers today commonly reward their employees with a range of “fringe benefits” in addition to pay. These include various benefits, some insurance based, offering protection against sickness, disablement and early retirement. There are several ways of looking at the continuation of monies from an employer after the employee has stopped work following injury. The strongest arguments for allowing the employee to retain work benefits in addition to the damages awarded are where the payments by the employer are viewed as benevolent gifts, or loans to be repaid later, or as quasi insurance monies paid for by the employee via his labour. By contrast, the benefits are more likely to be deducted if they are seen either as continued wages which, like free medical services, in effect can prevent any loss from arising, or as interim payments from the tortfeasor and intended to reduce the final bill to be paid. The cases reveal judicial uncertainty about which of these perspectives is most appropriate. They are each examined in the organisation of the caselaw which follows.

⁶ P. Cane, *Atiyah's Accidents Compensation And The Law* (5th ed 1993) pp 322 - 330, and P. S. Atiyah, *The Damages Lottery* (1997) chap 8, and “Personal Injuries In The Twenty First Century: Thinking The Unthinkable” in P. Birks (ed) *Wrongs And Remedies In The Twenty First Century* (1996).

⁷ Op cit n 1 para 4.25.

⁸ “It provides a veritable microcosm of all the conflicting views which perplex the whole subject of collateral benefits. Indeed the startling lack of uniformity is noticeable not only on the international plane as between one country and another. Within each national system rival views are frequently locked in contest.” Fleming, “Collateral Benefits” in *International Encyclopedia Of Comparative Law* (Vol. XI) (1986) chap 11-29.

(i) Where There Is A Legal Obligation Or Expectation That The Benefits Would Be Repaid

Monies paid by an employer on condition that they be returned in the event of a damages claim proving successful will not be deducted from the plaintiff's damages. A claim can be made in full because there is no overcompensation; in effect, the plaintiff must repay what amounts to a loan. Thus according to Diplock LJ in *Browning v War Office*⁹

“Cases where the plaintiff has been advanced monies to meet expenses occasioned by the accident by a third party upon his undertaking to repay the sums advanced, either absolutely or conditionally upon his recovering them from the defendant, raise no problem. The loss he sustains remains the same irrespective of whether he has actually paid the expenses from his own pocket or converted them into a liability to a third party.”

The rule has been supported by law reform bodies,¹⁰ and continues to receive the support of the Law Commission. Although the Commission argues that at one extreme all benefits accruing as a result of the accident should be taken into account, it continues to except those “where the provider of the collateral benefit has a right (by contract or operation of law), which it proposes to enforce, to recover the benefit”¹¹ Therefore, provided the employer could show an intention to recoup the money advanced to its employee, the payment would be left out of account even if more comprehensive deduction rules were introduced.

The rule is an important one in practice because it is very common for today's contracts of employment to contain a clause giving the employer the right to recoup sickness payments if the claim for damages proves successful.¹² However, such

⁹ [1963] 1 QB 750 at p 770.

¹⁰ *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054, chaired by Lord Pearson) vol 1 para 504, *Scottish Law Commission Damages For Personal Injuries: Report On (1) Admissibility Of Claims For Services; (2) Admissible Deductions* (1978) Report No 51, para 62.

¹¹ The Law Commission Consultation Paper *Collateral Benefits* (1997) para 4.80.

¹² For example, the British Rail sick pay scheme contained the following clause: “In respect of absence due to an accident or injury occurring either on or off duty, sick pay under these arrangements will be paid as a loan which will be repayable to British Rail in the event of the member of the staff involved in such occurrence recovering damages from a third party or British Rail, or compensation from the Criminal Injuries Compensation board or any other body set up for a similar purpose.”

clauses were much less usual in the past. In 1949 in *Dennis v London Passenger Transport Board*¹³ the employer did not specifically reserve the right to recoup and yet still was said to expect repayment in the event of a successful damages claim. Because the employee was thought to owe a moral duty to make repayment, and was prepared to give an undertaking that he would do so if full damages were awarded, it was held that the monies ought to be included in the damages award. However, the court ensured that there would be no double compensation by also directing the plaintiff to reimburse the bodies which had advanced him the monies.¹⁴ However, in 1973 the Law Commission doubted whether a court had the power to direct that the damages be earmarked in this way.¹⁵

The right to recoup monies in the event of a successful damages claim need not be confined to agreements to continue to pay wages or provide sickness payments in the event of injury. It is open to employers to insert similar provisions in their pension arrangements as well as any permanent health protection they arrange for their employees. Employers have the opportunity to arrange clauses which, in effect, reverse the result of cases we are about to consider: they could make pension and health payments, and even redundancy payments, deductible from the award of damages. However, as yet such clauses are rarely inserted into the relevant agreements. This is because of a failure to plan sufficiently for the possibility of a tort claim, rather than any inherent problem with the concept of inserting such a clause. Much more could be done with the contract of employment in relation to a potential claim for damages than has been done to date.

(ii) Where The Employer Is Also The Defendant

Where an employer is also the defendant, it is more likely that the monies paid to the plaintiff will be considered to be on account of damages, and therefore deductible. There is a good public policy reason for this: judges have recognised that

¹³ [1948] 1 All ER 779. The case was cited in *Doonan v Scottish Motor Traction Co* [1950] SC 136 where it was held proper for a jury to consider the fact that the employer had advanced monies only as a loan.

¹⁴ A similar course was contemplated by Goddard LJ with regard to payment to a hospital in *Allen v Waters* [1935] 1 KB 200 at p 215.

¹⁵ *Report On Personal Injury Litigation - Assessment Of Damages* (1973) Report No 56 para 141.

employers should be encouraged to make immediate payments to reduce the hardship suffered as a result of the loss of earnings following the accident.¹⁶ For this reason the Scottish Law Commission suggested that payments made by tortfeasors directly to their victims should be presumed to be on account of damages.¹⁷ In *McCamley v Cammell Laird Shipbuilders Ltd*¹⁸ it was suggested that even payments characterised as ex gratia should be deducted if they came from a defendant, although no account would be taken of them if it could be inferred that the defendant wanted the plaintiff to receive full damages as well. Such an approach limits the scope of the general rule that benevolent payments are to be disregarded, as discussed under the heading after next. However, on the facts of *McCamley* the judges were able to infer that the ex gratia payment, even though made by the defendant, was intended to be in addition to any damages awarded later so that the plaintiff, in fact, obtained double payment.

However, this tendency to deduct from damages payments made by a defendant cannot be raised to a rule of law. Several recent cases have required employers to pay more money irrespective of the sums already advanced. The intention of the payor is crucial and, as noted under the next heading, it is the nature of the payments that matters more than the source. This was again emphasised in *Smoker v London Fire Authority*¹⁹ which rejected the employer's suggestion that pension monies should be deducted if the defendant was also the employer. *Parry v Cleaver*, the leading case against deduction, was not to be distinguished on that ground. The pension monies and the head of damages being claimed were sufficiently distinct for both to be payable even though both were funded by the employer. Overall, however, there is uncertainty here. The Law Commission conclude that the law in relation to gratuitous payments by tortfeasors is unclear.²⁰ A solution would be to

¹⁶ Lloyd LJ in *Hussain v New Taplow Paper Mills* [1987] 1 All ER 417 at p 428.

¹⁷ Report No 51, op cit n 10, para 61. This position was supported by the Pearson Commission, op cit n 10, para 536. It recommended that payments from a defendant should be taken into account unless they are subject to the rare express provision, rarely made, that they are to be repaid from damages.

¹⁸ [1990] 1 WLR 963.

¹⁹ [1991] 2 AC 502.

²⁰ Consultation Paper *Collateral Benefits* (1997) para 2.14.

adopt the option for reform it puts forward which deducts all such payments unless the employer reserved a right to recoup the money from any later damages award. However, other options being considered by the Commission include, firstly, exempting charitable payments from any wider deduction rule and, secondly, examining the intentions of the provider of the benefit. These options would inevitably continue the uncertainty of what is to happen where benefits are provided by an employer who is also the defendant.

(iii) The Intrinsic Nature Of The Benefits Compared To The Head Of Damages

It is more likely that collateral payments will be taken into account to reduce damages if they are of the same nature as the sums lost because of the accident. As Lord Reid noted in *Parry v Cleaver*.²¹

“Surely the distinction between receipts which must be brought into account and those which must not depend not on their source but on their intrinsic nature.”

Do the employment benefits replace losses specifically taken into account as items under one of the heads of damages? If so, they are likely to be deducted, as where payments covering sick pay and lost wages were deducted from the earnings loss in *Hussain v New Taplow Mills*.²² By contrast there will be no deduction from that head of damage if the additional benefits are paid for loss of a pension, especially if the latter is viewed as containing an element of investment for the future akin to life assurance and thus quite different from compensation for earnings loss. Similarly a pension derived from insurance may be deducted from damages specifically related to the loss of a retirement pension, but not from the damages awarded for the different kind of loss involving earnings interruption. It was for this reason that the pension was payable in addition to damages for lost earnings in *Parry v Cleaver*, a case discussed in detail below. However, it is by no means easy to agree the nature and purpose of certain collateral benefits. Thus, in contrast to *Parry*, the Law Commission take the view that a disablement pension replaces lost earnings, and

²¹ [1970] AC 1 at p 15.

²² [1988]1 AC 514.

because this is the same kind of loss as that met by the damages award, it should be deducted from it.²³

(iv) Ex Gratia Payments From The Employer

Here the dilemma is whether to treat the payment as a continuation of wages or as a gift, the first being deductible, the second not. The present rule is that no account is to be taken of the plaintiff's receipt of charitable or benevolent payments.²⁴ The fact that it is the employer that provides such assistance seems to have made little difference, and in general therefore it is the gift analogy that has prevailed.²⁵ However, there is an exception if the employer is also the defendant. We have seen that there is then a tendency to regard the payment as an advance on damages. The Pearson Commission agreed that ex gratia payments should not be deducted except where the employer is also the defendant.²⁶ It has been with the scope of this exception and with establishing the intent of the employer that recent litigation has been concerned.

A pension in lieu of wages

The payment of a pension was considered to be ex gratia and left out of account in *Cunningham v Harrison*²⁷ In this case the plaintiff was injured in a road accident and left tetraplegic. His employers paid him a full salary for ten months as they were bound to do under his contract of employment. This could be deducted from damages. However, the employers generously continued to make ex gratia payments amounting to half the plaintiff's salary and they intended to continue to do

²³ Consultation Paper *Collateral Benefits* (1997) paras 4.62 - 4.67.

²⁴ *Redpath v Belfast and County Down Railway* [1947] NI 167.

²⁵ This contrasts with the criminal injuries compensation rule which deducts the employer's gratuitous payments from compensation from lost earnings. By para 47 of the Criminal Injuries Compensation Scheme the gratuitous payments are treated in the same way as other payments from employers because a Home Office review thought it impractical to distinguish between them. D. Miers, *State Compensation For Criminal Injuries* (1997) p 239 and for the review, *Criminal Injuries Compensation: A Statutory Scheme* (1986) para 20.3.

²⁶ Op cit n 10, vol 1 para 501.

²⁷ [1973] QB 942.

so for the rest of the plaintiff's life. The Court of Appeal held that these payments were to be left out of account. Lord Denning stated:

“It is an uncovenanted benefit coming to the plaintiff over and above the compensation recoverable at law. In this case he receives from his employers virtually half pay for the rest of his days. No one grudges him this money: but there it is. It is voluntary. He gets it and it is not to be taken into account.”²⁸

Payment on retirement

In *Connolly v Tesco's Stores*²⁹ it was held that a payment made by a brewery to the tenant of a public house was an ex gratia payment which would have been made whenever the tenant retired. It was therefore to be left out of account and not treated as if it were a redundancy payment resulting from the accident when, as discussed below, it would have been deducted.

Insurance payment for disablement

The proceeds of an insurance policy taken out by an employer for employees (who were unaware of its existence and paid nothing towards its cost) was characterised as an act of benevolence from the employer akin to a charitable payment and therefore left out of account in assessing damages in *McCamley v Cammell Laird Shipbuilders Ltd.*³⁰ This was in spite of the fact that, unlike in *Cunningham's* case above, the employer advancing the payments was also the defendant responsible for paying the damages. *McCamley* involved a personal accident policy taken out by British Shipbuilders on behalf of themselves and their subsidiary companies, including the defendant company, and extending the benefits towards all their employees, described as “the insured persons.” The policy provided for a lump sum to be paid in the event of death, loss of limbs, sight, or permanent total disablement from the usual occupation. The lump sum was based on a multiple of the insured's annual wages, but unlike the cases in the next section, it was not paid directly in substitution for wages. Because of the company's admitted

²⁸ At p 951.

²⁹ Unreported, QBD May 2 1989, BPILS vol I para 503.

³⁰ [1990] 1 WLR 963.

negligence in the course of launching an oil rig the plaintiff suffered severe injury, losing part of both an arm and a leg. The insurers paid a sum of £45,000 to the defendant company who, in turn, forwarded it to the plaintiff's solicitors, specifically stating that it was to be credited against the eventual award of damages. The plaintiff contested this set off.

The Court of Appeal held in favour of the plaintiff. Although it refused to accept that the arrangement could fall within the well established insurance exception to the rule that benefits should be deducted,³¹ it held that it came within a second exception concerning money received from an act of benevolence.

“The payment was not an ex gratia act where the accident had already happened, but the whole idea of the policy, covering all the many employees of British Shipbuilders and its subsidiary companies, was clearly to make the benefit payable as an act of benevolence whenever a qualifying injury took place.”

It did not matter that the arrangement was made before the accident took place - it was a contingent act of benevolence. But it was important, firstly, that the insurance proceeds were payable irrespective of whether the accident involved fault or resulted in common law liability and, secondly, that the monies did not duplicate directly any of the heads of the damages claim. This made it easier to justify keeping separate the damages the defendant was required to pay in tort.

Finally, it may be of some importance that the plaintiff had no right to the insurance payments because this made them distinguishable from sickness payments due under contracts of employment in other cases. There was no contractual right to the lump sum for the disablement unlike, for example, in *Hussain's* case discussed in the next section. It was recognised in *Browning v The War Office*³² that it would not be fair to take into account compensation to which the plaintiff had no right “seeing that, as soon as the compensation is awarded by the court, the employer may cut off or cut down the pension.”

In spite of these attempts to confine *McCamley*, the case appears extremely favourable to plaintiffs, and marks the most recent high water mark of the approach

³¹ *Bradburn v Great Western Railway Co* (1874) LR 10 Exch 1.

³² [1963] 1 QB 750 at p 760 per Lord Denning.

favouring the cumulation of benefits. It extends *Cunningham* by applying the ex gratia rule to an employer who is also the defendant, and in spite of the fact that the employer asked for the payment to be credited against any later award of damages.

Insurance payment for death

Although *McCamley* was not cited, the same result was achieved in *Bews v Scottish Hydro-Electric*.³³ The defendant employers were liable for negligently causing the death of one of their employees. They had taken out an insurance policy on the life of their employees, and they alone paid the premiums. However, the £54,000 they received under this policy was forwarded by them to the deceased's estate. Their liability insurers later claimed that this large sum should be set off from the damages that they were required to pay. However, it was held that the sum received by the estate was an ex gratia payment from the employers and was not intended to be on account of damages. The estate thus obtained double compensation, and received the same money as it would have done if the deceased had paid the premiums himself. Although the case purported to follow *Cunningham v Harrison*, it extended it to where the employer is also the defendant.

(v) Continuation Of Wages And Payment Of Sickness Benefits

The Potential Extent Of The Overlap

An employer may continue to pay an employee while he is absent from work following his accident. Almost nine out of ten full-time employees benefit from some kind of occupational sick pay scheme if their earnings are interrupted for a short time as a result of injury or, more commonly, illness.³⁴ However, this figure can be misleading.³⁵ Coverage is partial and excludes the self-employed and part-time workers. The more likely beneficiaries are the better paid and, in particular, those in

³³ [1992] SLT 749.

³⁴ An estimate in the DSS, *Inquiry Into Statutory Sick Pay* (1985). A figure of 80 per cent was given by the DHSS in its *Report On A Survey Of Occupational Sick Pay Schemes* (1977). By contrast Harris et al, *Compensation And Support For Illness And Injury* (1984) p 213 found that in 1976 only 56 per cent of employees reported receiving such payments during their absence from work. The Pearson Commission op cit n 10 para 139, on advice from the DHSS, suggested that after an absence of six months only ten per cent of workers would remain entitled.

³⁵ Lewis, "The Privatisation Of Sickness Benefit" (1982) 11 ILJ 245 at p 249.

white collar jobs in larger organisations. Those least likely to benefit, or to benefit for only a short time, are lower paid manual workers employed by small firms. If an employer operates a scheme, it is likely that up to ten per cent of employees will not qualify for payment from it. This is because they may not have worked long enough or they may have exhausted their entitlement.³⁶

How much money is received by those who are members of such schemes? Although one survey reported that over three quarters of those receiving sick pay had their full pay made up for at least a part of their absence,³⁷ the Law Commission found that of those who returned to their pre-accident job only a third reported received full pay during their absence, and a quarter received no pay at all.³⁸

The Basic Rule

If the employer neither reserves the right nor expects to reclaim the monies advanced, and these monies are not characterised as ex gratia payments intended to be additional to damages, the plaintiff is unable to claim them again from the tortfeasor as damages for lost earnings. This is because

“... the servant has not then suffered any loss of pay, and the wrongdoer cannot be liable for what the servant has not lost.”³⁹

Thus in *Turner v Ministry of Defence*⁴⁰ the plaintiff was required to give credit for the sick pay which he received from his employer. *Parry v Cleaver* suggests that it makes no difference whether the sickness payments are voluntary or contractual as long as they retain the character of being wages.⁴¹ The Pearson Commission confirmed that occupational sick pay should be taken into account unless there is a

³⁶ Harris, op cit p 214.

³⁷ Ibid.

³⁸ Report No 225, *Personal Injury Compensation: How Much Is Enough?* (1994) para 7.3. The position was worse for those who did not return to their pre-accident employment: a half received no sick pay. After six months absence only 12 per cent of employees receive their full basic salary according to M. Howard and P. Thompson, *There May Be Trouble Ahead* (1995) p 9.

³⁹ Morris LJ in *Metropolitan Police District Receiver v Croydon Corporation* [1957] 1 All ER 78 at p 86.

⁴⁰ (1969) 113 Sol J 585.

⁴¹ Atiyah, “Collateral Benefits Again” (1969) 32 MLR 397 at p 401.

requirement either in the contract of service or in an agreement for the loan of the money, that the employer is to be refunded from any damages recovered.⁴²

Wages Or A Benefit Akin To Insurance?

The question which arises here is what constitutes sickness payments which are to be deducted from damages as if they are wages, as opposed to benefits akin to insurance which are not to be deducted because the employee has indirectly paid for them? In *Hussain v New Taplow Paper Mills*⁴³ the plaintiff had lost an arm because of the negligence of his employer. He continued to work for the same firm but in a different job. For the first thirteen weeks after his accident his employer paid his wages in full. It was agreed that this sick pay was deductible from damages. However, under his contract of employment he was then entitled to further payments equal to half his pre-accident earnings. These payments were to continue irrespective of whether he continued to work for the employer. The employer obtained reimbursement of these sums under the provisions of a permanent health insurance policy taken out on all its employees but funded by the employer alone. Were these additional sums also to be treated as if they were sick pay and thus to be deducted from damages?

The House of Lords held that they were to be taken into account because the payments, whether made for long or short term disability, were indistinguishable from the uninsured sick pay forwarded in lieu of wages for the first thirteen weeks. The basic character of these payments was unaffected by the fact that the defendant employer took the precaution of insuring against the possibility of having to make them. The payments remained a partial substitute for earnings and as such were of the same nature as the sums lost. Their Lordships therefore distinguished the case of a pension payable only after employment ceased and which was unrelated to the interruption in earnings as was said to be the case in *Parry v Cleaver*.

⁴² Op cit n 10, at para 505.

⁴³ [1988] 1 AC 514.

The plaintiff had argued that the payments were more in the nature of insurance or pension payments rather than wages, especially as the disability was permanent, and entitlement would continue even if the plaintiff were to change his job or the employer were to go into liquidation. Rejecting this argument Lord Bridge stated:

“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.”⁴⁴

Hussain was followed in *Page v Sheerness Steel*⁴⁵ where it was again emphasised that in order for the employee to obtain the permanent health insurance monies as well as damages he must contribute, either directly or indirectly, to the cost of the insurance.

Further Criticism And Suggested Reform Of The Distinction Between Sick Pay And Disablement Pensions

The result of the above cases is that there is a sharp distinction between sick pay, which is to be deducted, and a disablement pension, which is not. Lord Reid in *Parry* argued that the rationale for the distinction is that sick pay is a reward for contemporaneous work, whereas the pension is payment for past work. The Law Commission is very critical of this view and suggests that the attempt to characterise the payments as different in kind is difficult to sustain.⁴⁶ First, it notes that it is possible to receive sick pay for a very long time - perhaps many months, or even years. An extreme example is *Page v Sheerness Steel* where the payments were to last for life. In such cases it is very hard to see the payments as a reward for contemporary work. Secondly, the Commission argues that both the pension and sick pay are

⁴⁴ Ibid at p 532.

⁴⁵ [1996] PIQR Q 26, affirmed on this point by the Court of Appeal, sub nom *Wells v Wells* [1997] PIQR Q 1

⁴⁶ Consultation Paper *Collateral Benefits* (1997) paras 2.105 - 2.109. Similarly Ogus, *The Law Of Damages* (1973) p 227.

“... remuneration and therefore by definition to replace lost earnings. If Lord Reid accepted that both sums were paid for by the plaintiff, it is hard to see how he could maintain a distinction in the way the two are treated in the calculation of damages. The point is reflected in the view of other judges that a distinction in the treatment of sick pay and disablement pensions cannot rely upon whether they are paid for by the plaintiff or not.”⁴⁷

The Commission suggest that *Hussain* demonstrates the fragility of the distinction: apart from the fact that the long-term sickness benefit was paid prior to termination of employment, it was indistinguishable from a disablement pension. It seems wrong to treat the two collateral benefits differently only because of their different names when, by their nature, they are very similar. The Commission conclude that this is the most striking inconsistency in the present law.⁴⁸ It proposes a number of options for reform, but describes the suggestion that disablement pensions be treated the same as sick pay - both to be deductible - as the most limited of the reforms it puts forward.

Net Or Gross Repayment To Employer?

In *Franklin v British Railways Board*⁴⁹ after suffering an injury for which his employer was responsible the plaintiff was unable to work for a year. During that time he received sick pay under the terms of a contract which required him to repay the employer from any damages he later received. This meant that the sick pay was ignored for the purpose of calculating damages, and from that lump sum the plaintiff then repaid the amount of sick pay he had received. However, his employer then requested that he also reimburse the tax and national insurance contributions which had been paid to the Revenue and the DSS under the PAYE system. In effect this claim for the gross pay not only would have required the plaintiff to repay sums he had not actually received, but it also would have put the onus of obtaining the relevant rebates upon him rather than the employer. The Court of Appeal rejected the argument and held that only the net amount of sick pay had to be repaid. Sir Thomas Bingham commented:

⁴⁷ Ibid para 2.106.

⁴⁸ Ibid para 4.96.

⁴⁹ [1994] PIQR P1.

“... I would find it surprising if the employee were obliged by his conditions of service to ‘repay’ money he had never had. Every consideration of convenience and fairness would indicate the Board and not the employee as the appropriate party to recover sums overpaid to departments of government and as the party who should be out of pocket during any period of delay.”

However, he conceded that it might still be possible to draft a loan clause which required gross repayment.

(vi) Pensions

About four out of five people in full time work are members of either an occupational or personal pension scheme.⁵⁰ Almost all of these schemes provide for payment in the event of forced retirement from work because of illness or injury. It has been in this area of pensions that the trend towards deduction of benefit has been most opposed. Pensions have been seen as different in kind from earnings because, for example, they may be paid irrespective of earnings loss. The policy arguments have treated pensions, unlike sick pay, as a form of insurance for which the employee has paid by his labour. Many pensions in fact are backed by some form of insurance arrangement. However, recent cases have retreated a little from applying this analogy and have deducted long term benefits if they can be seen as a substitution for earnings. In line with this trend we have already noted the Law Commission’s criticism that the distinction between the treatment of sick pay and disablement pensions is the most striking inconsistency in the present law. Its most limited option for reform is that both should be deductible on the basis that both in effect substitute for loss of earnings.⁵¹ It similarly considers that the primary function of a retirement pension is to meet income loss which results from stopping work. Even though there is an element of investment in a retirement pension, the Commission thinks that this is insufficient for it to be seen as savings rather than income replacement, and it therefore suggests that it be deducted.⁵² This proposal

⁵⁰ Office For National Statistics, *Living In Britain: Results From The 1995 General Household Survey* p 122. Rather more men (86%) than women (77%) are members, and there are twice as many in occupational schemes as opposed to personal ones. About a third of women in part time employment have a pension scheme.

⁵¹ Consultation Paper *Collateral Benefits* (1997) para 4.95.

⁵² *Ibid* para 4.72.

for extensive deduction of pensions provided by the employer is in line with what currently happens in relation to criminal injuries compensation.⁵³

However, the present common law is far removed both from the statutory scheme of criminal injuries compensation and from the policy which the Law Commission would like to see in force. The focal point of the law remains the 1969 House of Lords decision of *Parry v Cleaver*.⁵⁴ This major case deals not only with whether pension monies are to be deducted from damages, but also with matters of general principle relevant to other collateral benefits. The facts of the case concerned a police constable who, whilst directing traffic, was so severely injured in a car accident that he had to give up his job. The question arose as to whether the pension to which he was entitled on being discharged from the police force for disablement should be deducted from his damages for lost earnings. By a bare majority, their Lordships overturned the decision of the Court of Appeal⁵⁵ and held that the disability pension was not to be set off from damages for lost earnings. Whereas the minority thought that the pension resembled a form of sick pay, the majority considered it to be more like insurance monies which the policeman had paid for, either directly in the form of contributions, or indirectly in lieu of higher wages.

Assisted especially by Australian authorities,⁵⁶ their Lordships thus resolved some of the uncertainty which had existed following two previous Court of Appeal decisions. In *Payne v Railway Executive*⁵⁷ the court held that a naval pension which the Minister had a discretionary power to withhold or reduce, was not deductible

⁵³ Para 47 of the Criminal Injuries Compensation Scheme deducts from compensation for loss of earnings any pension unless it accrues solely as a result of contributions made by the victim or his dependants. If the pension is to be taxed, only half is to be deducted. A pension is given a wide meaning and includes "any payment payable as a result of the injury or death in pursuance of pension or any other rights connected with the victim's employment, and includes any gratuity of that kind and similar benefits payable under insurance policies paid for by the victim's employers." See *Miers* op cit n 25 p 236.

⁵⁴ [1970] AC 1.

⁵⁵ The lower court decision is criticised by Goodhart in (1967) LQR 492.

⁵⁶ *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569, *Paff v Speed* (1961) 105 CLR 549.

⁵⁷ [1952] 1 KB 26 followed in *Judd v Hammersmith Hospitals* [1960] 1 All ER 607.

from damages, whereas in *Browning v War Office*⁵⁸ the plaintiff was required to give credit for a disability pension that he was receiving from the United States government. In the latter case the court relied upon the House of Lords decision in *British Transport Commission v Gourley*⁵⁹ which emphasised the principle that damages are to be compensatory rather than punitive. However, *Browning* was disapproved in *Parry* and the conflict in approach resolved in favour of the plaintiff. In spite of this, litigation has continued from time to time based on the particular terms of individual pension schemes, and upon how the distinction between pensions and sickness payments is to be applied in practice.⁶⁰

The Insurance Analogy And The Intrinsic Nature Of The Payments

Both Lords Reid and Pearce in *Parry* treated pensions as if they were a form of insurance. They did not think it mattered whether the employee contributes to the pension or not for, in effect, his labour was taken as a sufficient indirect contribution. The Pearson Commission later agreed that both occupational disability and permanent health monies should be left out of account because such long-term cover should be considered part of the employee's remuneration.⁶¹ In emphasising the insurance comparison Lord Reid stated:

“The products of the sums paid into the pension fund are in fact delayed remuneration for ... current work. That is why pensions are regarded as earned income. But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance, what he gets back depends on how things turn out So, if insurance benefits are not deductible ... why should his pension be deductible?”

In his strong criticism of the case Atiyah argues that what employees buy in such cases is the right to cover against *uncompensated* loss of income, and they are not deprived of this right if the pension is deducted from their damages any more than if

⁵⁸ [1963] 1 QB 750.

⁵⁹ [1956] AC 185.

⁶⁰ See, for example, the conflicting unreported cases cited by Auld J at first instance in *Smoker v London Fire Authority* [1991] 2 AC 502 at 519.

⁶¹ Op cit paras 520 and 529. The 1973 Law Commission Report gave similar support. Op cit n 15 para 152.

they go through their working lives uninjured.⁶² The result of the case was that the plaintiff obtained his civilian wages, a police pension, social security benefits and the damages awarded. He was thus much better off than if he had not been injured. Atiyah asks how can this be justified when most accident victims fail to obtain any compensation from tort at all?

Following his insurance analogy Lord Reid in *Parry* continued:

“A pension is intrinsically of a different kind from wages [W]ages are a reward for contemporary work, but ... a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind.”

Because of this difference the majority held that it was wrong to deduct the pension from damages for lost earnings. This was followed in *Smoker v London Fire Authority*⁶³ even though the payments were made directly by an employer rather than derived from an insurance policy. By contrast, in *Hussain* the sick pay substituting for earnings while employment continued was deducted from damages for lost wages. This was because it was of the same nature as the damages, and was said to be very different from a pension payable after employment has ceased, as was the case in *Parry*. However, as we have seen the Law Commission reject this distinction and would deduct pensions as well as sick pay because both substitute for lost income.

Deducting Early Receipt Of A Pension Against Damages For Loss Of Pension

In emphasising the particular purpose of the payments, their Lordships accepted in *Parry* that although the pension could not be deducted against damages for lost earnings, it could be deducted against any claim for the loss of retirement pension from the date the plaintiff was expected to retire.⁶⁴ Lord Reid noted that it would not matter even if the pension at that date was labeled as being for incapacity rather than retirement. The labels were of no consequence if, in effect, *after* the normal retirement date the two pensions were of the same kind. Strictly deduction is not in

⁶² “Collateral Benefits Again” (1969) 32 MLR 397.

⁶³ [1991] 2 AC 502.

⁶⁴ [1970] AC 1, per Lord Reid at p 20, Lord Pearce at p 33, and Lord Wilberforce at p 42. Their views were supported by the Pearson Commission op cit n 10 para 523.

issue, for it is not as if the plaintiff is receiving a new benefit; instead what must be measured is the additional amount of retirement pension that would have been received if the injury had not occurred.

However, litigation has continued since *Parry* in order to determine whether the lesser lump sum pension and periodical payments received early, *before* normal retirement, can be credited against the award of damages for pension loss *after* the normal retirement date. Although the problem was not discussed in *Parry*, the early payments were not credited against pension loss in that case. On the one hand, if the early pension is considered to be the fruit of insurance and is in a separate parcel from the post retirement insurance, it can be argued that the plaintiff has purchased his incapacity pension and the money is not to be set off, even against his claim for loss of retirement pension. On the other hand, it can be argued that credit should be given because at least part of the payments are of the same “intrinsic nature” as the pension loss.

Following *Parry* there were a number of largely unreported decisions adopting differing approaches.⁶⁵ Generally, although no credit was given for the early receipt of the periodic pension,⁶⁶ there was credit for the early lump sum payment. As a result the plaintiff who could afford not to commute his pension into a lump sum was better off than the impecunious plaintiff who had been forced to do so. Appellate guidance finally came in the case of *Longden v British Coal*.⁶⁷ Relying especially upon the insurance justification for the cumulation of benefit, the Court of Appeal found in favour of the plaintiff by refusing to deduct either the pension or the lump

⁶⁵ These are analysed by Rowley, “A Guide To Pension Loss Calculation” [1995] JPIL 107.

⁶⁶ But in *West v Versil Ltd* (1996) The Times 31 August, the Court of Appeal thought that a deduction could be made from the pension loss even during the pre-retirement period. This complex case seems to conflict with *Parry v Cleaver*. The plaintiff had suffered a loss in life expectancy and drew his pension at aged 60 instead of 65. He chose to accept a lower pension so that his wife would continue to receive a pension after his death; he therefore rejected a larger pension which was payable for his lifetime but would not then transfer to his wife. The court was prepared to ignore the pension payable to the wife, but thought that the pension payable during the plaintiff’s lifetime should be brought into account.

⁶⁷ [1995] PIQR Q 48.

sum.⁶⁸ Roch LJ considered that the plaintiff had purchased the incapacity benefit, and therefore, as in *Parry* and *Smoker*, it should not be set off.

Tax And Pensions

In *Cox v Lancashire County Council*⁶⁹ a fireman received a pension on being invalided out of the fire service. He set up his own business as a French polisher. The tax he would have to pay on his income was greater because of the amount he received by way of pension. In calculating his net loss of income the question arose as to whether to deduct the lower amount of tax due upon his business income alone, or whether to include the higher tax which resulted from the addition of his pension. The defendants argued that if the pension was to be deducted from the damages, it must also be disregarded when calculating tax payable on net income loss. However, the judge found in favour of the plaintiff by taking into account the plaintiff's actual tax position and not the notional lower amount of tax he would have had to pay on his business income alone. His net loss of income was therefore greater, and his damages were increased to take account of it.

(vii) Redundancy And Severance Payments

In the Law Commission survey just over half of those injured never returned to the job they were doing before the accident. Some of these people decided to resign or retire, but a quarter of them had been made redundant.⁷⁰ If any redundancy payment is to be deducted from damages the defendant must establish that the plaintiff's injury is the cause in fact of his redundancy. This means that the payment is not to be deducted if the job is lost for reasons other than the injury suffered. Although all depends upon the facts in the particular case, normally redundancy payments are made in relation to a pool of employees and are not related to an individual's injury or incapacity. In such a case causation cannot be established and

⁶⁸ Rowley, "An Updated Guide To Pension Loss Calculation" [1995] JPIL 212, and by the same author, "Calculating Pension Loss Entitlements" unpublished paper given at the Euro Forum conference on Schedules Of Damages In Personal Injury, April 1997.

⁶⁹ Unreported, Lexis transcript QBD 20 Oct 1987, BPILS vol I para 513.

⁷⁰ Report No 225, *Personal Injury Compensation: How Much Is Enough?* (1994) para 5.5.

the redundancy payments must be left out of account as in *Mills v Hassall*.⁷¹ However, this may not lead to an increase in damages: if the plaintiff was going to lose his job in any event his claim for loss of earnings may be reduced.

Failure to establish causation is illustrated by the case of *Connolly v Tesco's Stores*.⁷² A brewery gave the injured plaintiff an ex gratia payment upon his retirement from the tenancy of a public house. It was a payment to the advantage of the brewery because it enabled them to establish a managed as opposed to a tenanted public house. It was found that the payment was made not because of the injury to the plaintiff but would have been made whenever he retired. As a result it was not to be taken into account in the assessment of damages.

There are two cases, *Wilson v National Coal Board*⁷³ and *Colledge v Bass Mitchells & Butler*,⁷⁴ where it was shown that the injury caused the redundancy payment, and it was accepted that an offset from damages should be made. Causation was established in *Wilson* even though a pool of other employees were also made redundant. The plaintiff had been injured in a colliery accident. Although permanently unable to resume work, the plaintiff was retained as an employee until the colliery was closed down a year later and he was then made redundant. Unlike other employees in the pool he was not able to accept the alternative employment on offer at a neighbouring colliery. As a result the House of Lords held that the payment should be deducted from his damages.

However, even if it is clear that the employee is made redundant because of the tortious injury it has been suggested that the character of the redundancy payment may prevent its deduction from any damages for loss of earnings. In *Wilson* several of their Lordships suggested that their decision to deduct was exceptional and based

⁷¹ [1983] ICR 330. Heilbron J suggested that where a pool of workers are made redundant, it is not sufficient to establish causation to show only that the plaintiff put forward his name for redundancy and did so because of his injuries. *Yorkshire Engineering v Burnham* [1974] ICR 77 is an unfair dismissal case in which causation could not be established.

⁷² Unreported, QBD May 2 1989, BPILS vol I para 505.

⁷³ [1981] SLT 67.

⁷⁴ [1988] 1 All ER 536, followed in *Gill v Britvic*, unreported 1989, BPILS vol 1 para 534. See also *Fricke v Benjamin Perry & Sons Ltd* (1973) 16 KIR 356. *Stocks v Magna Merchants Ltd* [1973] ICR 530 is a wrongful dismissal case in which the redundancy payment was deducted.

on its own facts. Lord Scarman contrasted the different nature of redundancy payments with a claim for lost earnings:

“A redundancy payment is compensation for loss of a settled job: *Hindle v Percival Boats Ltd.*⁷⁵ It is not ordinarily a compensation for loss of future earnings: for it is payable even when a man finds another job at the same or higher wage immediately after his dismissal. It provides a fund which is available to help during a period of disturbance and resettlement In many cases, therefore, it would not be reasonable or just to deduct it from damages paid to compensate him for loss of future earnings. But in some cases it will be reasonable to deduct it In such a case as the present, deduction accords with public policy for it will encourage employers to keep on injured employees after their accident instead of dismissing them because of their injuries.”

Despite these reservations about the nature of the payment, the Court of Appeal in *Colledge* again deducted the redundancy monies. Although Sir John Donaldson saw the force of Lord Scarman’s argument, he thought that in order for the plaintiff to succeed he would have to show that he was entitled to a head of damage for loss of a job - for which the redundancy payment is designed. Loss of future earnings could then be treated quite separately. But there was no such head of damage, with the result that the loss had to be included in compensation for future earnings. This then apparently necessitated the deduction of the redundancy payment. Donaldson could envisage no situation in which the payment would not be deducted other than where causation could not be proved. The Law Commission agree with this analysis,⁷⁶ and offer the further justification that, although it might be difficult to pin down precisely for what purpose a redundancy payment is made, it is at least closely analogous to compensation for loss of earnings, and therefore should be deducted from it.⁷⁷

CONCLUSION

This article has explored the rules relating to an area of law which forms one of the important battlegrounds in the future development of compensation for personal

⁷⁵ [1969] 1 WLR 174.

⁷⁶ Consultation Paper *Collateral Benefits* (1997) para 2.68.

injury. The inter-relationship of compensation schemes is crucial in understanding the extent and fairness of the provision made for those incapacitated and disabled in society. However, in spite of its importance and of continued litigation in the area, little attention has been paid to the conflicting policy bases which have given rise to the disputes on collateral benefits. As a result, the ad hoc rules which have developed reflect confusion and uncertainty. There is now some hope that these problems will diminish and that a more coherent set of rules will be developed as a result of the reform process instituted by the Law Commission. This article, by looking only at the benefits related to work, has covered the key area where the major decisions must be made and the policies formulated.

Although the Law Commission Consultation Paper considers a wide range of options for reform, it generally favours increasing the extent that benefits are deducted. Its most comprehensive option is very attractive to those who espouse Atiyah-like concern about the equity and rationality in present compensation arrangements. It is that *all* collateral benefits should be deducted from damages.⁷⁸ The attraction of moving completely away from the nineteenth century policy of allowing plaintiffs to cumulate monies from different sources is that it avoids one of the more wasteful aspects of the present tort system. If the monies saved could then be distributed to a wider group of disabled people suffering the same injuries then the reform would indeed have many supporters. However, achieving such a transfer of resources is easier said than done. This article therefore prompts the following final question: should a welfarist reviewing the tort system support cuts in damages now in the hope of the more equitable reallocation of these resources at some later date, or should a defence be mounted of the existing relatively high level of support given to the fortunate few who succeed in their common law claim? The dilemma, frequently encountered when piecemeal reforms of our welfare system are considered, is an acute one.

⁷⁷ Ibid para 4.73. Contrast the view of the Scottish Law Commission in Report No 51, op cit n 10, para 86, that loss of wages was irrelevant to the assessment of the redundancy payment and it was designed to compensate for the disruption involved in the change of employment.

⁷⁸ Consultation Paper *Collateral Benefits* (1997) para 4.80. This is subject to two provisos: if a benefit is paid for a particular loss it should be deducted only from the corresponding part of the damages award; and there should be no deduction if the provider of the benefit has a right which it will exercise to recover the value of the benefit from the plaintiff.

Words (excluding footnotes): 7,700