was an aberrant confidant. The circumstances of a case, thus, may raise a presumption that the third party has obtained confidential information through a breach and, unless he can displace this presumption by indicating a public source, the third party will be affixed with an obligation of confidence once he is given notice of the confidential status of the information.

A final point of interest in *G. v. Day* concerns the role of detriment in the action for breach of confidence. Detriment to the plaintiff is often cited as an element which must be shown to exist in order to establish a cause of action for breach of confidence.[14] Except in the special class of cases in which the government is seeking to restrain the disclosure of a public secret,[15] this view must be a misconception. An enforceable confidence does not depend for its existence on establishing that detriment has or will ensue to the plaintiff as a result of a breach of the confidence. Especially in the case of confidences formed by the communication of personal, as opposed to commercial, information, a breach of confidence may show the plaintiff in an advantageous rather than discreditable light. This much is apparent from the early case of *Prince Albert v. Strange*[16] in which the plaintiff was successful in restraining the disclosure of certain etchings which he and Queen Victoria had made. In the course of his judgment in the case Knight Bruce V.-C. commented:

> Everyone . . . has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances.[17]

The correct view is that detriment is not an element which must be established to make out a cause of action, but a factor relevant to the determination of the appropriate remedy once the cause of action has been established. The injunction, like all equitable remedies, is discretionary and one of the grounds on which it *might* be refused is the absence of detriment to the plaintiff as a result of the breach of confidence. But, even granting this role to detriment, the courts will not lightly exercise their discretion against the award of an injunction. The cases support the statement of Mason J. in *Commonwealth of Australia v. John Fairfax & Sons Ltd*[18] that it 'may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism'.[19] In a similar vein, Yeldham J. in *G. v. Day* held that 'no discretionary grounds'[20] existed for declining to grant an injunction to the plaintiff. The unauthorized disclosure of the plaintiff's name as the person who had made the mistaken sighting would work 'to his detriment in a not insubstantial way'[21] both because of the fear which he entertained for his safety and because of ridicule by those whose standards of conduct were different from his own.

FRANCIS GURRY*

REDDING v. LEE[1]

Assessment of damages for Personal Injury — Collateral Benefits — Social Security Benefits — Invalid Pension — Unemployment Benefits — Deductibility.

It frequently happens that a person who is injured becomes entitled to benefits from any of a number of sources, as well as having a claim for damages. Such sources would include an employer, who may

[14] See *Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41, 48 *per* Megarry J.; *Dunford & Elliott Ltd v. Johnson & Firth Brown Ltd* [1977] 1 Ll. L. Rep. 505, 509 *per* Lord Denning M.R.; *Castrol Australia Pty Ltd v. EmTech Associates Pty Ltd* (1981) 33 A.L.R. 31, 48 *per* Rath J.

[15] For an explanation of why this class of cases is treated differently, see *Commonwealth of Australia v. John Fairfax & Sons Ltd* (1981) 55 A.L.J.R. 45, 49 *per* Mason J.

[16] (1849) 2 De Gex & Sm . 652; 64 E.R. 293; (on appeal) (1849) 1 Mac. & G. 25; 41 E.R. 1171.

[17] (1849) 2 De Gex & Sm. 652, 697; 64 E.R. 293, 312.

[18] (1981) 55 A.L.J.R. 45.

[19] *Ibid.* 49.

[20] [1982] 1 N.S.W.L.R. 24, 37.

[21] *Ibid.* 36.

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[1] (1983) 57 A.L.J.R. 393; 47 A.L.R. 241.

be obliged to grant the injured person sick leave for a period and continue to pay him his wages notwithstanding his inability to work, or who may have set up a superannuation fund, the benefits of which are payable on early retirement due to incapacity. Another such source might be a private insurance arrangement that the injured person has entered into. Occasionally, the injured person receives benefits without any legal entitlement; for instance, his employer may continue his wages *ex gratia* or he may receive assistance from a charitable organization or individual. In the modern welfare state injured persons are entitled along with others to share in the benefits the community makes available. In the context of two appeals concerned with different benefits received under the Social Security Act 1947 (Cth) the Full High Court has reviewed the law relating to the effect of the receipt of benefits from a collateral source on the assessment of the damages payable for the personal injury sustained: *Redding v. Lee*.[2]

Essentially there are three ways that the legal system as a whole can deal with the question:

(1) it can allow the plaintiff to accumulate the benefits and damages;

(2) it can reduce the damages payable by the defendant by the amount of the benefits received by the plaintiff;

or

(3) it can adopt a mechanism to ensure that the collateral source is reimbursed at the expense of the defendant.

As we shall see, each of these solutions is adopted in the Social Security Act 1947 (Cth) in respect of one type of benefit at least.

Of course, other solutions are also possible. In the United Kingdom, for instance, the Law Reform (Personal Injuries) Act 1948, after vigorous debate on the matter, adopted a compromise between (1) and (2), permitting the plaintiff to retain half of certain social welfare benefits and giving the defendant credit for the other half. At one time, under the workers' compensation legislation, an injured employee was barred altogether from seeking damages if he recovered workers' compensation. Nowadays, he may claim both, at least initially, though the legislation then adopts the third of the above solutions.[3] Even today, an entitlement to a benefit which would otherwise arise may be prevented from arising by a right to claim damages. Thus under the legislation in force in mid-1983 and the current rules adopted by the registered health insurance funds, no medical, hospital or nursing home benefits may be payable where a member is entitled to recover damages.[4]

If the legal system does adopt the third method mentioned above of dealing with the question, there are two alternative ways that could be employed. One is to require the plaintiff in the damages action to reimburse the collateral source; another is to give the collateral source a direct action against the defendant. Each of these could be reinforced in various ways, for example by giving the collateral source a charge over the damages paid. If a direct action is given against the defendant and the defendant pays the collateral source before he has paid the plaintiff, the payment must obviously be credited to the defendant in the plaintiff's action. If, however, payment is made to the plaintiff first, the risk of non-recovery from the plaintiff must be placed either on the collateral source or on the defendant.[5]

It is sometimes assumed — as it is in the judgments in *Redding v. Lee*[6] — that the 'correct' solution to the problem is the third and that the only real question is how this is best achieved. I hope to show that

[2] *Ibid.*

[3] See, *e.g.*, Workers Compensation Act 1958 (Vic.), s. 66.

[4] Health Insurance Act 1973 (Cth), ss 18 and 35A; National Health Act 1953 (Cth), s. 59; *Handley v. Datson* [1980] V.R. 66 (F.C.). According to recent newspaper reports, the health insurance funds are unable to ascertain whether claimants from them have claims for damages or compensation, so that it is suspected that much 'double dipping' occurs. At the time of writing it had not been announced whether the new Medicare scheme would accept primary responsibility for hospital and medical expenses incurred in circumstances where damages are payable, as Medibank had done.

[5] The Workers Compensation Act 1958 (Vic.), s. 66, places it on the defendant, who is obliged to indemnify the employer and then seek to recover the payment from the plaintiff.

[6] (1983) 57 A.L.J.R. 393.

that is not necessarily so.[7] Shifting a loss from a collateral source to the defendant inevitably involves some costs. Justification for incurring such costs could be found if it were shown that increasing the amount payable by the defendant would reduce the number of accidents and so reduce the overall cost to the community. However, in these days when damages are seldom paid by the actual 'tortfeasors' and when insurance premiums are both insensitive to the cost of particular accidents and often have little effect on the level of hazardous activities (as in the case of motor vehicle insurance), it is seldom that such a case can be made out. In any event, so far as the courts are concerned the choice is generally only between solutions (1) and (2), since the legislature alone can impose solution (3), except in rare cases such as under the *actio per quod servitium amisit*.

In *Redding v. Lee* it was mostly thought that issues of public policy were exclusively for the legislature and that the Court should decide on principle alone. The principles to be applied were accepted as those to be found in *National Insurance Co. of New Zealand Ltd v. Espagne*.[8] Although in that case Dixon C.J. warned that '[i]t is hardly possible to work out any principle which would apply to every case',[9] and Windeyer J. said that 'it is not . . . possible to enunciate an exhaustive rule for all parts of this vexed topic',[10] each made some attempt at generalization. Fullagar J. agreed with both judgments. Dixon C.J. said:

> There are certain special services, aids, benefits, subventions and the like which in most communities are available to injured people. Simple examples are hospital and pharmaceutical benefits which lighten the monetary burden of illness. If the injured plaintiff has availed himself of these, he cannot establish or calculate his damages on the footing that he did not do so. On the other hand there may be advantages which accrue to the injured plaintiff, whether as a result of legislation or of contract or of benevolence, which have an additional characteristic. It may be true that they are conferred because he is intended to enjoy them in the events which have happened. Yet they have this distinguishing characteristic, namely they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him. This is readily seen in the case of benevolence. If a fund is raised by subscription for the benefit of a badly injured neighbour obviously this cannot operate in relief of the liability of a man who negligently caused the injury. So in a contract of accident insurance; where in the absence of special stipulation the insurer will not succeed by subrogation or otherwise to the insured's right of recourse against others in the case of injury by their negligence. But for the reason given it does not follow that the negligent parties can treat the insurance as operating in relief of their liability. It was effected by the money of the plaintiff for his own benefit in the event of an accident, a benefit both independent of and cumulative upon whatever right of redress against others might arise out of the circumstances of the accident.[11]

Windeyer J. said:

> So far as any rules can be extracted, I think they may be stated, generally speaking, as follows: In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages. The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of

[7] See also Fleming J. G., 'The Collateral Source Rule and Loss Allocation in Tort Law' (1966) 54 *California Law Review* 1478; James F. Jr., 'Social Insurance and Tort Liability: The Problem of Alternative Remedies' (1952) 27 *New York University Law Review* 537.

[8] (1961) 105 C.L.R. 569.

[9] *Ibid.* 573.

[10] *Ibid.* 600. See also *Batchelor v. Burke* (1981) 35 A.L.R. 15, 17-8 *per* Gibbs C.J.

[11] (1961) 105 C.L.R. 569, 573.

> the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause.[12]

These statements of principle have proved elusive of application, as illustrated by the three to two division of opinion in *Parry v. Cleaver*.[13] In *Tuncel v. Renown Plate Co. Pty Ltd*[14] the Court described as 'subtle' the distinction drawn by Dixon C.J. between benefits such as the subsidy of pharmaceutical expenses and those benefits which have the 'distinguishing characteristic' which makes them appropriate to be left out of account in the assessment of damages. The Court continued:

> In our opinion, the distinction that was drawn by that distinguished judge rather lies in the nature of the benefit and purpose of its payment. The payment of pharmaceutical benefit would be a payment in the very area of loss which a victim would be claiming against the person causing him injury, viz the loss caused by the cost of his medication.

Support for this view was found in the judgment of Menzies J. in *Espagne's* case,[15] who observed that the pension in that case would have been paid to the plaintiff on account of his blindness, whether or not he was still able to earn wages. In such a case a benefit should be deducted only if it was intended as a substitute for the earnings of which the plaintiff had been deprived by the injury for which the defendant is responsible.[16] This is consistent with the result in *Parry v. Cleaver*.[17] In that case it was agreed that sick pay was to be deducted in the assessment of damages for loss of earnings, but it was held that a pension was not deductible. The distinction is that sick pay would not have been paid to the plaintiff if he had been able to obtain other work and so earn during the relevant period, but the pension was payable to him notwithstanding his ability to earn money elsewhere. Thus it is necessary to characterize the purpose of the payment of the benefit to see whether it is intended to meet the very loss for which damages are claimed; if it is, then it will be deductible, otherwise it will not be.[18]

The elusiveness of the principles was further demonstrated by the actual decisions in *Redding v. Lee*,[19] where it was held, by a majority of six to one, that an invalid pension paid under the Social Security Act 1947 (Cth), Part III, Division 3, to a person who was 85 per cent incapacitated for work was not deductible; whereas unemployment benefits paid under section 107 of the Act were held, by a majority of only four to three, to be deductible. As we have seen, in *Espagne's* case[20] an invalid pension paid to a blind person had been held not deductible and the actual decision to that effect was not challenged in *Redding v. Lee*. Instead an attempt was made to show that subsequent amendments to the Social Security Act should lead to a different conclusion now being reached, at least in the case of an invalid pension based on 85 per cent incapacity. Only Wilson J. accepted this argument. The majority held that no relevant distinction could be drawn.

The joint judgment of Mason and Dawson JJ.[21] found that the intention to confer a benefit in addition to the plaintiff's right to damages was deduced in *Espagne* from the discretion vested in the Director-General of Social Security. Although subsequent amendments to the Act limited that discretion so that an invalid pension may now be payable as of right, their Honours held that there is still some discretion

[12] *Ibid.* 599-600.
[13] [1970] A.C. 1 (H.L.).
[14] [1976] V.R. 501 (F.C.)., 508.
[15] (1961) 105 C.L.R. 569, 579.
[16] *Cf. Browning v. War Office* [1963] 1 Q.B. 750 (C.A.), 769 *per* Diplock L.J.
[17] [1970] A.C. 1 (H.L.).
[18] See also *Wollington v. S.E.C. of Victoria* [1979] V.R. 115, 123-4; and on appeal [1980] V.R. 91 (F.C.), 101-2 *per* Jenkinson J. The joint judgment of Young C.J. and Menhennitt J. in this case (at 98) held that 'the proper characterization of the payments in a case like the present does not depend upon the intention or motive of any individual' and went on to consider (at 99-100) how that intention is to be ascertained in the absence of a statute whose terms enable the necessary characterization to be made. For a characterization of the various social security benefits available in the United Kingdom, see *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Pearson Report) (1978) Cmnd. 7054, i, para. 490.
[19] (1983) 57 A.L.J.R. 393.
[20] (1961) 105 C.L.R. 569.
[21] (1983) 57 A.L.J.R. 393, 402-3.

left to the Director-General in determining the rate of pension. For this purpose, he must have regard to all the circumstances of the case, which would include the plaintiff's damages claim. If he nevertheless determines to pay at the full rate, presumably the intention can be inferred that the plaintiff is to enjoy the pension notwithstanding his damages claim. The pension therefore possesses the requisite 'additional characteristic'.

Gibbs C.J., having also said[22] that the test of *Espagne's* case requires the court to consider the nature of the benefit and to inquire whether the person or body supplying it intended the plaintiff to enjoy it in addition to any damages he might recover, appreciated that no direct assistance might be forthcoming from the statute under which it was paid as to the intention with which it was paid. In that case, his Honour said,[23] the nature of the benefit will need to be closely considered. Since pensions generally had been held not deductible, his Honour thought that the same should apply to the one at issue here.

Brennan J. agreed[24] that nothing significant had changed since *Espagne*. Wilson J., however, dissented, believing that the amendments to the Social Security Act since that case freed the Court of the obligation to follow it. Construing the Act as it now stands, his Honour concluded that the payments already made were not intended as an act of bounty.[25] He was of the opinion that the grant of an invalid pension is virtually a matter of right and is not affected by the discretion as to the rate, which has to be exercised years before the outcome of the trial is known. This must be right and would almost certainly have been agreed to by Deane J., who agreed with the majority only because *Espagne's* case had stood for more than 21 years without challenge, during which time the Social Security Act had been amended more than 40 times without making it clear that such a pension is to be taken into account or providing for its recoupment.[26] His Honour recognized that ultimately the burden of both damages and social security is borne by the community. He thought it unlikely in such circumstances that there should be a legislative intention that a person who has actually received payments of an invalid pension before trial should receive compensation for loss of earnings on the same basis as if the pension had not been received. Yet that is what *Espagne* held. Murphy J. seems to have been of a similar opinion, but was prepared to countenance accumulation of benefits by the plaintiff because in practice damages awards do not fully compensate.[27]

Wilson J. conceded that any future pension payments should not be taken into account, since such payments would be made with full knowledge of the plaintiff's recovery of damages and so could more readily be taken to be intended to be enjoyed in addition to the damages.[28]

On unemployment benefits Mason and Dawson JJ., with whose judgment in this respect both Wilson and Deane JJ. agreed,[29] held that such benefits do bear the character of a partial substitute for wages, though they do not bear a relationship to the wages which could have been earned.[30] They are not, in their Honours' opinion, provided merely in relief of impecuniosity. Nor are they dependent on the exercise of 'any large area of discretion', since an applicant who satisfies the criteria laid down in the Act is entitled to payment.[31]

Gibbs C.J. and Brennan J. dissented because they found it impossible to distinguish unemployment benefits from invalid pensions. Gibbs C.J. held that such benefits are not dependent on lost earning capacity or wages, but are intended to provide relief against destitution for needy persons.[32] Brennan J. thought[33] it unlikely that Parliament intended that statutory subventions — of which he pointed out there are many in the Social Security Act — should reduce the measure of a 'wrongdoer's' liability and correspondingly increase the plaintiff's dependence on public funds. His Honour detected another

[22] *Ibid.* 395.
[23] *Ibid.*
[24] *Ibid.* 410.
[25] *Ibid.* 409.
[26] *Ibid.* 413.
[27] *Ibid.* 406.
[28] *Ibid.* 409.
[29] *Ibid.* 409 and 413 respectively.
[30] *Ibid.* 403.
[31] *Ibid.* 404.
[32] *Ibid.* 398.
[33] *Ibid.* 412.

indication of the legislature's intention in the flexibility of the benefits; that is, a person may shift from sickness benefits to unemployment benefits or an invalid pension and back again. It was unlikely that Parliament intended such a shift to affect the 'wrongdoer'.

Murphy J. also saw no distinction between an invalid pension and unemployment benefits.[34] Since of the majority, Wilson J. certainly took the same view and Deane J. would have, but for the actual decision in *Espagne*, we have the strange result that only two of the seven members of the Court were able to distinguish between the two types of benefit, yet their view prevailed and we are left with the result that invalid pensions are not deductible, whereas unemployment benefits are.

In *Tuncel v. Renown Plate Co. Pty Ltd*,[35] in a part of the judgment which was not reported, it was held that the court should make allowance for the possibility of receipt of unemployment benefits in the future. Nothing was said on this point in the judgment of Mason and Dawson JJ. in *Redding v. Lee*.[36] Presumably, if there is no discretion to pay the benefits in the future once the statutory criteria are satisfied, then such allowance must be made. This would depend on the plaintiff laying out his damages award in such a way as not to fail the income test for payment of unemployment benefits.

Gibbs J. referred to the fact that logically, if unemployment benefits are to be taken into account, a failure to apply for such benefits when eligible would amount to a failure to mitigate damages.[37] *Vassilef v. B.G.C. Marine Services (N.S.W.) Pty Ltd*,[38] however, had held that no deduction should be made in such circumstances. This reinforced the Chief Justice's opinion that unemployment benefits actually received should not be deducted. On the reasoning of the majority, *Vassilef's* case must now be regarded as doubtful, though it is still possible to hold that it is not unreasonable for a plaintiff to fail to apply for unemployment benefits for which he is eligible.

The Social Security Act has long provided for repayment to the Commonwealth of sickness benefits paid where the recipient recovers compensation, including damages. The relevant provisions are now to be found in Part VII, Division 3A of the Act, which came into operation on 1 August 1982. In *Redding v. Lee*[39] Gibbs C.J. regarded it as clear that where a statute provides for repayment, a benefit must be disregarded in the assessment of damages. On this there was no difference of opinion. In relation to other types of benefits, his Honour referred to broader issues of public policy, but since any enquiry as to what might best suit the public interest was unlikely to lead to any definite conclusion, he thought it better to maintain consistency of principle.[40] Both Murphy J. and Deane J. were of the opinion that it would be desirable for the legislature to provide for the recoupment to the Commonwealth of the types of benefit which were at issue in the case.[41]

Although it is correct that if the statute provides for recoupment, benefits must be disregarded in the assessment of the damages, this is not necessarily the desirable solution. It would be best if invalid pensions and sickness benefits were treated in the same way as unemployment benefits are now to be treated as a result of the decision of the majority.[42] In order to enforce the provisions of Part VII, Division 3A of the Social Security Act relating to repayment of sickness benefits, the Commonwealth employs numerous clerks whose function it is to keep in touch with solicitors and insurance companies to ascertain whether damages actions have yet come to trial or been settled. Then they have to determine what proportion of a judgment or settlement should be repaid and they have to collect it. All this costs money and no benefit is discernible from it. It also causes hardship to plaintiffs to have to repay benefits years after they have been received. There is no evidence to support Murphy J.'s view that placing the

[34] *Ibid.* 406.
[35] [1976] V.R. 501 (F.C.).
[36] (1983) 57 A.L.J.R. 393.
[37] *Ibid.* 398.
[38] [1980] Qd. R. 21.
[39] (1983) 57 A.L.J.R. 393, 395.
[40] *Ibid.* 397-8.
[41] *Ibid.* 406 and 413 respectively.
[42] *Cf.* the Pearson Report's Summary of Conclusions, i, 367: 'Social security should be recognized as the principal means of compensation. Double compensation should be avoided by offsetting social security benefits in the assessment of tort damages.' More expressively, it is said (at 364) that if the Commission's recommendations were adopted, 'tort will become the junior partner' of the social security system.

full cost of losses on the insurers of defendants will reduce the level of accidents. If it were true, the burden could be placed on defendants through bulk transfers by means of taxation, rather than through individual transfers assessed by an army of Commonwealth clerks. The consequence of the decision in *Redding v. Lee* on unemployment benefits in theory means that insurance premiums will be slightly lower than they otherwise would have been, whereas taxes will be slightly higher. Since taxes are supposedly progressive, whereas insurance premiums are definitely regressive (particularly so in the case of compulsory third party motor vehicle insurance), it is better that taxes should rise and premiums fall than vice versa.

Economic logic of this sort is not likely to prevail, since taxes for welfare purposes are a Commonwealth responsibility, whereas insurance premiums are raised by the States. The Commonwealth will no doubt thus seek to recoup itself for all these benefits, even though overall it will cost the community more and the costs will be regressively distributed. We can but await the legislation.

Finally, whatever the outcome in relation to social security, *dicta* in *Redding v. Lee* confirm the pre-existing law that no deduction is to be made for benefits received under an insurance policy the plaintiff has taken out or by way of charitable gift.[43] Similarly, payments received under an employment-related pension or superannuation scheme are not to be deducted and it is irrelevant in this case whether the scheme is designated contributory or non-contributory.[44] On the other hand, sick pay provided by the employer pursuant to the terms and conditions of the employment is not to be deducted, on the basis of the view that this negates the relevant loss; that is, the loss of earning capacity is not productive of financial loss and thus does not qualify for compensation.[45] Mason and Dawson JJ. contemplate the possibility of other benefits, though not strictly provided on the terms and conditions of the plaintiff's employment, as being 'of such a nature that they should be placed in the same category'.[46]

Mason and Dawson JJ. explain the non-deductibility of insurance payments on the grounds that it would be unjust and unreasonable to reduce the damages of a prudent plaintiff who insures himself against accident by allowing the premiums he paid and the proceeds to enure for the benefit of the 'tortfeasor'.[47] Their Honours regard employment-related pensions and superannuation in the same light. Although they correctly recognize that no relevant distinction is to be made between contributory and non-contributory schemes, they believe there is stronger reason for refusing to reduce the damages when the plaintiff has made the payments himself, thereby diminishing his assets. But in truth, where the employer alone contributes, the plaintiff may have received lower wages, thereby diminishing his assets in that way, so there is really no distinction and no 'stonger' reason in one case than the other. Yet equally the plaintiff may have accepted lower wages in return for generous sick leave conditions and the distinction based on the alleged negation of the loss looks thin indeed.[48] From the practitioner's viewpoint, however, this criticism is academic: the law on these points now looks reasonably well, if illogically, settled.

HAROLD LUNTZ*

[43] (1983) 57 A.L.J.R. 393, 394 *per* Gibbs C.J.; 399-400 *per* Mason and Dawson JJ.

[44] *Ibid.* 395 *per* Gibbs C.J., 400 *per* Mason and Dawson JJ.

[45] *Ibid.* 401 *per* Mason and Dawson JJ.

[46] *Ibid. Cf.* Luntz H., *Assessment of Damages for Personal Injury and Death* (2nd ed. 1983) paras. [8.3.06-21].

[47] (1983) 57 A.L.J.R. 393, 400. The consequence, of course, in the case of non-indemnity insurance, which does not carry a right of subrogation, is that the plaintiff recovers more than his loss. In the case of insurance against property damage this is avoided by the doctrine of subrogation, which means that the premiums enure for the benefit of the insurance company where damages are recovered from a tort-feasor. *Cf.* Cooper-Stephenson K. D. and Saunders I. B., *Personal Injury Damages in Canada* (1981) 472: 'Contrast two plaintiffs visiting a cavern or mine, one of whom spends $50 on a protective helmet and the other the same sum on accident insurance. Negligence causes a rock fall so that both are struck. The first plaintiff suffers only minor injury, having been saved by his helmet; the second suffers serious injury but has $500,000 insurance coverage. The first plaintiff's foresight and expenditure will enure for the benefit of the tort defendant. Why not the second?' *Cf.* also *Hackett v. Motor Accidents Board* [1983] V.R. 673.

[48] *Cf. Mandas v. Thomschke* (1983) 145 D.L.R. (3d) 530.

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