MITIGATION OF DAMAGES IN PERSONAL INJURY ACTIONS

> "It would be a simple approach to say that upon an injury happening, a plaintiff cannot have both what he has lost and what he has received but would not have received if there had not been an injury. It seems clear however that this is not the principle of law."[1]

1. *The Problem*[2]

Although the same basic problem arises in both personal injury claims and actions under Lord Campbell's Act, the courts have not found the solution in the same considerations in each case. When dealing with actions under Lord Campbell's Act the courts have been content, in general, to carry out the legislative intention of compensating the dependants for the pecuniary loss which they have suffered. Any desires, whether consciously recognised or not, of punishing the wrongdoer have usually been outweighed by the clear legislative direction of compensation only, though there have been departures from this rule. Whether or not the courts should have taken the same line of approach in personal injury claims, it is clear that they have not and for this reason little reference will be made to the Lord Campbell's Act cases except where it is clear that some principle of general application is involved.

In defining the problem, that in asking to what extent such collateral benefits as payments under accident insurance policies, sick leave payments, social service payments, gifts by third persons etc., should be taken into account when assessing damages, we may begin with the general proposition that an award of damages is meant to provide monetary compensation for the damage which the plaintiff has sustained. That this is the fundamental principle has recently been emphasised by the Court of Appeal.[3] The difficulties arise when it is sought to combine this rule with the idea that a wrongdoer should not be permitted to appropriate to himself the benefits, accruing to the plaintiff as a result of the injury, for which either he, *i.e.* the plaintiff, or some third person has paid. It can hardly be doubted, it is submitted, that there does exist this

1. See per Jacobs A.J., *Cook v. Marshall Sawmilling Co. Pty. Ltd.* (1960) 77 W.N. (N.S.W.) 40 at 41.
2. Considerable attention has been paid to this problem in recent years. See *e.g.* Parsons, *Mitigation of Tort Damages for Loss of Wages*, 28 A.L.J. 563; *Damages in Actions for Personal Injuries*, 30 A.L.J. 618; Ganz, *Mitigation of Damages by Benefits Received*, 25 M.L.R. 559; Fleming James Jr., *Social Insurance and Tort Liability: the Problem of Alternative Remedies*, 27 N.Y.U.L. Rev. 537; See also 63 Harv. L.R. 330; 68 Harv. L.R. 366.
3. *Browning v. War Office and Anr.*, [1962] 3 All E.R. 1089.

clash of principles and the object of this article is to examine the ways in which the courts have managed to reconcile these conflicting views and to attempt to extract some rules for guidance in the future.

This problem in various guises has recently come before the High Court of Australia.[4] In *National Insurance Co. of N.Z. v. Espagne* Windeyer J. put the question in these terms—

> "The decision in *Bradburn v. The Great Western Railway Co.*[5] has stood too long and on too firm a foundation of policy and justice to be unsettled by demands for logical consistency . . . How far then is the decision in Bradburn's case to be extended and what general principle is to be extracted from it? That is the question as I see it."[6]

What might be described as a liberal approach was taken by Dixon C.J. in *Espagne's Case*. He begins with the proposition that the object of the award of damages is to compensate the plaintiff for the bodily or other "physical" injury he has received.

> "What we are concerned in is the consequences to him. The consequences must be traced out and so far as they lie in the future they must be pre-estimated and the result assessed together with the consequences which have already accrued and translated into money. I am disposed to adopt the view that damages are for bodily and physical injuries and the incapacities and deterioration involved in them, using the word 'physical' of course in a sense wide enough to include all mental and nervous conditions. There are many consequential heads of damage to which it is customary to direct evidence and which are submitted to a distinct or separate consideration. But in theory as I see it these are really evidentiary even if the evidence is often conclusive to show that they or some notional element based directly upon them must go into the assessment."[7]

On one view than, it may be argued that where a plaintiff has been so injured as to materially affect his earning capacity no account should be taken of any collateral benefits, for whatever else he may receive he will not ever be able to earn a living and it is for this aspect of his loss that he is being compensated. His Honour does concede however that although monetary considerations are purely evidentiary, the evidence of financial gain may be so strong as to require a less theoretical approach. For commonsense dictates that, since we have made money the means whereby loss is compensated, if the plaintiff has suffered no financial loss as a result of his

4. *National Insurance Co. of New Zealand Ltd. v. Espagne*, 35 A.L.J.R. 4; *Paff v. Speed*, 35 A.L.J.R. 17; *Graham v. Baker*, 35 A.L.J.R. 174.
5. (1874) L.R. 10 Ex. 1.
6. 35 A.L.J.R. at 12.
7. 35 A.L.J.R. at 5.

lost earning capacity no account can be taken of that lost capacity. It will be shown later, it is hoped, that the learned Chief Justice's approach is not without important consequences.

The usual way in which an award of damages will be made in a case where permanent physical injury has been sustained may be seen in the assessment made by the trial judge (Stanley J.) in *Espagne's Case.*

Loss of Earning Capacity	£10,000
Pain and suffering, ill health, the impairment of his senses and loss of the capacity to do anything but exist	£13,000
Special damages.	£ 2,120

Whether one describes the first head of damages above as loss of earning capacity or loss of wages it can only have meaning if it is measured in terms of, and compensated by, a sum of money. Although it is somewhat lengthy, it is convenient here to set out a passage from the joint judgment of Dixon C.J., Kitto and Taylor J.J. in *Graham v. Baker.*[8]

> "So far the matter has been discussed as if the right of a plaintiff whose earning capacity has been diminished by the defendant's negligence is concerned with two separate matters, *i.e.* loss of wages up to the time of the trial and an estimated future loss because of his diminished earning capacity. It is, we think, necessary to point out that this is not so. A plaintiff's right of action is complete at the time when his injuries are sustained and if it were possible in the ordinary course of things to obtain an assessment of his damages immediately, it would be necessary to make an assessment of the probable economic loss which would result from his injuries."[9]

The judgment goes on to say that for obvious reasons the loss which can be accurately quantified up to the date of the trial (including wages actually lost) is separately assessed as special damage.

> "We mention this matter because it has been suggested that since an injured plaintiff is entitled to recover damages for the impairment of his earning capacity, the fact that a totally incapacitated plaintiff has, during the period of his incapacity, received his ordinary wages is not a matter to be taken into consideration. To be more precise, however, an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution in his earning capacity is or may be productive of financial loss. And if, notwithstanding such impairment, both his contract of employment and his

8. 35 A.L.J.R. 174. 9. 35 A.L.J.R. at 176.

> right to ordinary wages continue, how can it be said that his impairment has resulted in any loss so far as his earning capacity is concerned ?"[10]

This view which closely follows the view propounded by Dixon C.J. in *Espagne's* Case does not, it seems, accord with that taken by Diplock L.J. in *Browning v. War Office*.[11] Diplock L.J. deprecates the use of the term loss of earning capacity and is of the opinion that compensation is being made for pecuniary loss, pure and simple.[12] The difference between the two approaches is that Diplock L.J. is concerned with what actual pecuniary loss the plaintiff will suffer whilst the High Court inquiry is how to measure the loss which flows from the destruction of earning capacity. How the damages are described, *i.e.* as general or special is for our present purposes, immaterial.

The plaintiff in *Graham v. Baker*[13] was compulsorily retired from his employment by reason of his incapacity which was caused by the defendant's negligence. Before his retirement the plaintiff had received a certain number of days "sick pay" and upon retirement received payments under a contributory superannuation scheme. The High Court held that whilst the pension payments

10. 35 A.L.J.R. at 177.
11. [1962] 3 All E.R. 1089.
12. And this is so whether the damages under consideration are "general" or "special". The distinction between general and special damages is a source of great confusion when loss of wages or loss of earning capacity is under consideration. See Jolowicz, *The Changing Use of "Special Damage" and its Effect on the Law*, 1960. Camb. L.J. 214. The learned author says that the term "special damage" has acquired two different meanings: (a) damage which is not presumed by the law to follow from the wrongful act but which must be specially pleaded and proved and (b) damage which is capable of exact calculation. He takes the view that "pecuniary loss" should be regarded as special damage since "it cannot, strictly speaking, be presumed to follow from the mere fact of injury", whereas loss of earning capacity can be presumed to flow from personal injury and should therefore be classified as general damage. It is thought that the distinction is well made by Windeyer J. in *Paff v. Speed* (35 A.L.J.R. 17, 24): "It is, I think, important to distinguish between claims based on a termination of employment with a particular employer and, on the other hand, on the destruction of a man's capacity to do work of a particular kind. In the first case the loss is of wages that might have been earned and of other emoluments and advantages, including opportunities of advancement and promotion in that service. In the second case the loss if of earning capacity and the only relevance of wages that were earned and of the conditions of employment before the accident, is as an aid in assessing damages for that loss". It is suggested that the wages lost up to the date of the trial could be included in the claim for general damages. This amount together with the amount to be assessed as prospective loss is the money equivalent of the total loss of earning capacity which results from the injury. The evidence of wages which would have been paid up to the trial is used to assess the damage suffered in respect of this period. The amount awarded is not of course necessarily the same as the amount claimed, for as with prospective loss, it may be scaled down (or even up) to account for possible unemployment, likely reduction or increase in wages.
13. 35 A.L.J.R. 174.

which had been made up to the date of the trial should not be taken into account when assessing damages, the sick pay benefits which were regarded by the court simply as wages were to be taken into account.

Apart from the question of whether superannuation payments should generally be debited against the plaintiff's prima facie loss, *Paff v. Speed*[14] is an interesting case from the point of view of the pleadings. The plaintiff, who until his compulsory retirement consequent on his injury, was a member of the police force claimed as part of his general damages, the loss of pension benefits and other emoluments which would have accrued to him had he remained in the police force. At the trial, evidence was admitted by the trial judge of the pension of approximately £780 per annum which had been granted to the plaintiff. This was clearly correct for as Fullagar J. said:

> "Here the plaintiff was claiming, although as general and not special damages,[15] for the value of a totality of specific benefits which he said he had lost. In such a case it must be open to the defendant—just as it would be in relation to any item of special damages—to prove that the plaintiff has not lost that totality but something less. He is not saying that the plaintiff must set off a collateral gain against a loss. He is merely accepting a special basis on which the plaintiff makes his claim, and saying that on that basis the plaintiff has not lost as much as he says he has lost."[16]

The situation was not greatly different from that in *Graham v. Baker*.[17] In each case the plaintiff had pleaded a loss *i.e.* wages or pension rights, and it was proper for the defendant to show that in each case no such loss had been sustained.

But Windeyer J. in *Paff v. Speed* and the Court in *Graham v. Baker* both qualified the view taken to this extent. In the former case His Honour said:

> "But a claim that because of physical injuries the plaintiff's capacity to earn money has been destroyed is not met simply by showing that he has received money or other assistance from a charity, a former employer, a friend or the State."[18]

and in the latter the Court was of the opinion that

> "such payments (*i.e.* sick leave payments) are quite different in character from *ex gratia* payments made or advanced either unconditionally or conditionally on repayment at some future

14. 35 A.L.J.R. 17.
15. The loss of pension rights arising from a particular employment should be pleaded with particularity. It is clearly special damage. Cf. note 12.
16. *Paff v. Speed*. 35 A.L.J.R. at 22.
17. *Supra*.
18. 35 A.L.J.R. at 24.

date or so that they will be repayable on a contingency. Nor do they share the same character as payments made to an employee pursuant to some provident or welfare scheme."[19]

What then are the distinguishing characteristics of the various collateral benefits which cause them to be exluded from the assessment of damages ?

Insofar as damages are to compensate for the economic loss consequent on the injury, they will depend mainly on the concept of loss of earning capacity. There may of course be other heads of purely economic loss *e.g.* the alleged loss of pension rights in *Paff v. Speed.* We have seen (*Graham v. Baker*) that sick pay, characterized as wages (at least up to the date of the trial) is to be credited to the defendant for such payments are directly related to earning capacity *i.e.* are made to the employee in consequence of his contract of employment. Provided these payments continue to be made, or more strictly, for as long as the plaintiff has a legal right to receive them, his earning capacity remains unimpaired. But as we shall see not all collateral benefits, whether received as of right or *ex gratia*, are to be set off against the plaintiff's claim.

It may be that the answer depends in part upon the form or character of the benefits granted. If the defendant can show that the benefit received is of the same nature (*e.g.* wages, or pension payments) as the loss which he has sustained (*e.g.* loss of earning capacity or present pension payments) then the plaintiff will be required to give credit for them. But when the benefits appear under another guise, and since they do in fact mitigate the plaintiff's pecuniary loss it must be decided if these benefits should not be taken into the reckoning.

In *Espagne's* Case [20] the collateral benefit under consideration was a Commonwealth Social Services pension paid to a person permanently blind. All members of the Court were agreed that the pension should not reduce the plaintiff's damages but there was not complete agreement on the reasons for this. Dixon C.J. expressed the view that certain benefits are conferred, either by legislation or contract, which have the distinguishing characteristic of being conferred on an injured person "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."[21]

If, for the monent, we restrict our attention to social service benefits such as were under consideration in *Espagne's* Case we are

19. 35 A.L.J.R. 178.
20. 35 A.L.J.R. 4.
21. 35 A.L.J.R. at 5.

entitled to assume that it is the intention of the legislature that the injured person is to enjoy, at least, the amount of the benefit. But it is a further step to say that the plaintiff is to have the benefit in addition to the full measure of damages to which he would undoubtedly have been entitled had no benefit been paid. In any particular case it will be a question whether the benefit is such that the plaintiff is entitled to have his full damages as well. This is the "additional characteristic". To say that a benefit has this additional characteristic is to merely state the final solution. Whether it has or not must, it is respectfully submitted, be found in other considerations. The reason may be simply the intuitive feeling of the Court or it may be for other reasons which are discussed below, but the reasons for saying that the benefit has this characteristic will not be discovered merely by saying that it has.

Perhaps another approach will make the point clear. In many, but by no means all cases, the injured person will receive a benefit from some source other than the defendant. It may be reduced, increased or discontinued and the contingency upon which this variation or suspension depends may be an award of common law damages, but in any case the decision to continue or otherwise deal with the benefit will be made by some person or authority other than the court. So far as the court is concerned the only variable is damages award, and it is by varying this according to the collateral benefit received that the compensation only principle is, in some measure, achieved.

What then does the court look for in determining whether or not the benefit has this additional characteristic ? Even if the decision to include or exclude it is intuitive, it is thought that there must be something in the nature of the benefit under consideration which inclines the court to the view that the benefit is intended to be, or should be regarded as being "additional".

2. *The Classical Theory*

So far, little or nothing has been said of the classical tests for determining whether the collateral benefit should be taken into account. The courts, being guided by notions of what seems to them as fair and reasonable have sought to avoid what was thought to be the result of a strict application of the compensation only rule by using various devices. "Matters completely collateral and merely *res inter alios acta* cannot be used in mitigation of damages".[22] This sentence expresses a conclusion but does not seek to justify it. Neither does an investigation of the intricacies of the theories of causation solve the problem for if one thing is clear in this somewhat confused area of the law, it is that the happening of an injury

22. *Mayne on Damages.* 11th ed. (1946) 151.

is a condition precedent to either damages or collateral benefit. The author respectfully agrees with the view taken by Dixon C.J.

> "To say that the injury is only a *causa sine qua non* while the precedent or additional conditions whence the advantage arises form a *causa causans*, seems to me simply to be the expression of a voluntary preference for one of two essential factors which must combine in producing the result and to bring it forward at the expense of the other which is correspondingly pushed back".[23]

Matters collateral, problems of causation and remoteness were exhaustively examined by Windeyer J. in *Espagne's* Case and it is not intended here to cover the same ground. Although such tests find strong support in authority it is hoped that they have been finally laid to rest for they obscure rather than illuminate the real judicial process.

3. *Social Service Benefits*

It will be convenient to deal now with Social Service Benefits (*i.e.* some benefit provided by a governmental authority which is financed from general revenue) for it was with a pension granted under the Commonwealth Social Services Act 1947-1959 that *Espagne's* Case was concerned. The case dealt with a plaintiff who had been rendered totally blind as a result of the defendant's negligence, though the Court considered the nature of invalid pensions in general as well as dealing with pensions in respect of blindness to which special provisions of the Act are applicable. The High Court, particularly Dixon C.J. and Windeyer J., sought to find in the provisions of the Act an indication that the pension payments were to be in addition to any award of damages. But unless the court can derive assistance from some characterization test such as has been suggested, it must, it is thought, make an empirical value judgment. Although it may be possible to discover an intention in the donor of the benefit that it should be in addition to damages there seems to be no *a priori* reason why the intention of the donor should be the governing consideration. The court may give effect to this intention but is not bound to do so. To argue that the intention of the donor is not to relieve the wrongdoer of his liability but to provide a windfall for the plaintiff is, however, to support the only realistic alternative of two possible views, for it is almost inconceivable that the intention of the donor, if he had one at all, would be to assist the wrongdoer.

The close examination made by the Court of the various sections of the Social Services Act, indicates that the Court was looking for another ground on which to base its conclusion. The investigation

23. 35 A.L.J.R. at 5.

involved a consideration of the pension which the plaintiff had received up to the date of the trial and the payments he might expect in the future. Windeyer J. pointed out that the Social Services Act regulated the grant of a pension but did not create a legally enforceable right to it. Generally the grant of a pension is the result of an administrative discretion exercised in favour of the applicant. The discretion is not at large but section 25 provides for seven cases in which the pension is not to be granted. Sub-section 25(f) provides for a means test to be applied before a pension is granted and sec. 46 provides for the cancellation or reduction of a pension (other than a blind pension) if having regard to income or value of property or "for any other reason" the Director-General considers the pension should be reduced or cancelled. Sub-section 25(a) provides that a pension is not to be granted to a person who is not deserving of a pension. Dixon C.J. was of the opinion that even though special provisions were applicable to a blind pension (which is not to be reduced except in the case of insanity or the imprisonment of the applicant or "for any other reason") the pension was granted after a consideration of the position or situation in which the applicant stood "and not in relief of any person antecedently liable to him to compensate him in any way for his loss of vision".[24] It is respectfully doubted for the reason advanced above that this latter ground is of any assistance. It does seem likely, however, that the possibility of the pension being reduced did influence His Honour.

With respect to pension payments which might be made after the trial Windeyer J. took the view that as any award of damages which might be made would under the means test section of the Act, affect the plaintiff's continued eligibility for a pension. In the case of pension payments which had been made up to the date of the trial (of which no uncertainty could exist) His Honour found it necessary to derive support from the terms of the Act itself.

> "At this point it is only necessary to say that the Commonwealth disburses its bounty according to the statute; and it may override the Common Law".

So far the statement is unexceptionable, but it continues:

> "To read the Act as meaning that the grant of a pension diminishes a pensioner's claim against a wrongdoer would be to the advantage of the wrongdoer and his insurer: but it would be or might be to the disadvantage of the Commonwealth and of the pensioner. This is not, in my view, the result that the statute on its true construction produces."[25]

To begin with, if His Honour means the intention of the Commonwealth in the same sense as one might look at the intention of

24. 35 A.L.J.R. at 6. 25. 35 A.L.J.R. at 11.

the donor of a gift, it has been said above that this *in itself* is not sufficient reason to cut across the compensation only rule. The court must decide that it is proper that the intention should be put into effect. If, as seems likely from the use of the word "construction" in the above extract, His Honour meant to convey that as a matter of law the Commonwealth Parliament had provided that such Social Service benefits were not to be taken into account in computing damages, this would raise questions as to the constitutional validity of such an enactment. Has the Commonwealth power to affect the law relating to the proper measure of tort damages between two parties neither of whom is the Commonwealth? It is submitted that it has not. Without elaborating further, for such a discussion is outside the scope of this article, the author is somewhat hesitantly of the opinion that such a law could not be characterized as a law with respect to any of the matters in placita xxiii or xxiiiA of sec. 51 of The Constitution.

In dealing with pensions awarded for permanent blindness, Windeyer J. recognised that the same degree of uncertainty of future payments as was present with a normal invalid pension did not here exist. He was content to exclude blind pensions because it was "the manifest policy of the Act" that the blind pensioner was to have his pension in addition to whatever rights of action or proprietary rights he might have. But with respect, is not the question "What *are* the rights of action or proprietary rights?"

The approach taken by Menzies J. while similar in outline emphasised the nature of the aspect of the injury for which damages were payable. Dealing with the question whether the pension payments received up to the date of the trial should be deducted from the damages which were prima facie recoverable His Honour said, "I think this question should be answered in the negative for the simple reason that, although it is as compensation that damages are awarded, in the aspect under consideration it is as compensation for lost wages, and the fact that the Commonwealth has seen fit to make to a person seeking such damages does not affect the amount of wages that he has lost".[26] *A fortiori* then, in the case of general damages for loss of earning capacity.[27] Fullagar J. agreed with the Chief Justice and Menzies J. McTiernan J. relied on the argument that the injury was not the *causa causans* of the receipt of the pension. Wanstall J. in *Zielke v. Voak*[28] held that an increase in pension benefits paid to the plaintiff under the Repatriation Act 1920-1959 (C'wth) as a result of the injury suffered due to the defendant's negligence should be ignored in assessing damages. Counsel for the defendant sought to distinguish *Fraser v. Maxwell*[29]

26. 35 A.L.J.R. at 8.
27. See note 12 *supra*.
28. 3 F.L.R. 1.
29. (1959) Qd. R. 322.

(which His Honour followed) on the ground that "the right to this pension is not defeasible as long as the plaintiff does not earn more than a negligible percentage of a living wage". Wanstall J. preferred the view that the increase in pension resulted from the determination of the tribunal that the plaintiff's present incapacity resulted from an occurrence that happened during his war service, though it was obvious that the recent injury had aggravated the condition. In any event it is felt that a repatriation pension is the type of benefit to which the reasoning in *Espagne's* case should apply. The opposite conclusion was reached by Jackson S.P.J. in *Samios v. Repatriation Commission*[30] where His Honour took the point, distinguishing *Payne's* Case,[31] that the pension would continue irrespective of any damages. The second reason for finding against the plaintiff was that since the Commonwealth through the Repatriation Commission was one of the defendants as well as the donor of the pension it would be "highly illogical" not to take the pension into account. Here of course any argument based on the maxim *res inter alios acta* must break down and if justification for double recovery is to be found elsewhere it may be found in the fact that the Commonwealth assumes many guises. Its character as a defendant in a tort action is quite different from its character as a dispenser of social service benefits. The view taken by the learned judge, if carried to its logical conclusion, would mean that any social service benefit paid by the Commonwealth would be set off against the plaintiff's prima facie loss merely because the Commonwealth was found liable as a defendant. There is more justification for this result in the case where the employer has provided some benefit and is also being sued by the employee. The plaintiff's claim was also reduced by an amount equal to the sum he had obtained as Commonwealth unemployment benefit. No exception can be taken to this part of the decision for on either the characterization test or the test propounded in *Espagne's* Case it would seem to be a benefit for which credit should be given.[32]

4. *Insurance*

There seems to be no doubt that the payments made to the plaintiff under a policy of accident insurance are not to be taken into account.[33] As Diplock L.J. points out in *Browning's* Case,[34] when the matter first came up it might have been decided either way for in the final analysis questions of remoteness are empirically

30. [1960] W.A.R. 219.
31. *Payne v. Railway Executive* [1952] 1 K.B. 26.
32. See also *Lindstedt v. Winiborne Steamship Co. Ltd. and Anr.* 83 Ll.L.R. 19. The case is criticised in Kemp and Kemp, *The Quantum of Damages* (1954) 42.
33. *Bradburn v. Great Western Railway Co.*, (1874) L.R. 10 Ex. 1.
34. [1962] 3 All. E.R. 1089.

decided, but it is interesting to note that he attempted to find a theoretical basis for the decision. "The policy moneys, unlike the pension in the present case, are not payable in respect of the assured's inability to follow a gainful occupation which he would have followed but for his injuries."[35] This approaches closely the characterization test mentioned above and what was said by Menzies J. in *Espagne's* Case.[36]

5. *Sick Pay, Wages, Pensions (other than Social Services Benefits) and Superannuation Payments*

One aspect of *Paff v. Speed*[37] has been considered above. There was, however, the more general question of whether, having ascertained the plaintiff's prima facie loss, any regard should be had to his pension. Dovey J. had, as we have seen, correctly allowed the defendant to lead evidence of what pension the plaintiff would actually receive in order to rebut the plaintiff's claim that as a result of the injury he would lose pension rights to which he otherwise would have been entitled. The jury returned a general verdict for £17,500. The Full Court of New South Wales on appeal took the view that the jury must have come to the conslusion that the plaintiff's damages amounted to approximately £30,000 from which they subtracted the capitalized value of the pension (assuming the plaintiff to reach 70 years of age and a 5% investment rate) of £13,300. Such a figure *i.e.* £30,000 was clearly excessive and the court ordered a new trial. In the High Court, Menzies J. agreed that if the jury's verdict amounted to an award of £30,000 discounted by the present value of the pension, they had clearly reached the figure of £30,000 on the wrong principles, but he did not think that such a conclusion was warranted. Although the evidence of the pension was correctly admitted, it was not to be used "to mitigate the damages payable by that other on account of the injuries caused."[38] His Honour referred to his discussion of the problem of damages and pensions in *Espagne's* Case, but added that the reasons for permitting double recovery were to be found in an examination of the relevant superannuation act.[39]

The position is well explained by McTiernan J.:

"Whether the sum of £30,000 is a reasonable amount or not at which to assess the total damages claimed in the declaration depends upon how much of it could be attributed to loss of

35. [1962] 3 All. E.R. at 1097.
36. The cases permitting double recovery are usualy said to be based on policy considerations *i.e.* the policy of not permitting the wrongdoer to reap the benefit of the plaintiff's insurance premiums and his thrift and foresight in providing himself with accident insurance. See 27 N.Y.U.L. Rev. at 552 *et seq.*
37. *Supra.*
38. 35 A.L.J.R. 23.
39. Police Regulation (Superannuation) Act 1906, (N.S.W.).

benefits by way of pension and superannuation resulting from the plaintiff's early retirement from the Police Force. It must be remembered that the capitalized value of the pension which he received has been regarded as a set-off *only*[40] against the estimated amount of such loss".[41]

Taking the view that police pensions are collateral benefits of a non-deductible nature[42] His Honour quite consistently points out[43] that if the word "benefits" in the plaintiff's declaration did not extend to pension or superannuation benefits, then the evidence of the pension should not have been admitted at all. Windeyer J. said that even though the jury were aware of the pension an award of £17,500 was reasonable in the circumstances. Fullagar J. dissented from the view that the damages were not excessive, but having in mind his opinion in *Espagne's* Case it is not easy to see on what ground. His Honour was clearly impressed by the fact that the plaintiff would, should he live to 70 years of age, receive the equivalent of a present amount of £30,000. But if pension benefits are not to be taken into account then such cases must occur. He said that *Payne v. Railway Executive*[44] was not in point, and indeed on the question which really occupied the attention of the Court this is true, but it was relevant to the claim for loss of earning capacity. It may be as suggested in a recent note [45] that Fullagar J. characterized the pension as a partial monetary equivalent of the plaintiff's lost earning capacity and therefore on the test suggested is to be taken into account. *Graham v. Baker*[46] has been sufficiently covered above.

Until the decision in *Browning v. War Office*[47] the authoritative English case dealing with pensions paid by employers was *Payne v. Railway Executive*[48] in which Cohen and Singleton L.JJ. each gave reasons for the decision not to reduce the damages payable as a result of a pension paid to the plaintiff. Birkett L.J. agreed with the reasons in both judgments. Singleton L.J. thought

40. Author's italics.
41. 35 A.L.J.R. 20.
42. McTiernan J. takes the orthodox view that such a pension is a *res inter alios acta*, though he does observe that the Governor-in-Council may refuse to grant a pension or may vary or rescind a pension once granted.
43. 35 A.L.J.R. 20.
44. [1952] 1 K.B. 26.
45. Merkel, 3 M.U.L.R. 529.
46. *Supra.*
47. *Supra.*
48. [1952] 1 K.B. at 27. The plaintiff here received an allowance for his wife and child but this Singleton L.J. held to be irrelevant. If, since *British Transport Commission v. Gourley*. ([1956] A.C. 185), the way in which a plaintiff may be relieved of his income is a proper matter for investigation by the Courts logically the amount which the plaintiff may have to spend in supporting his family should also be looked at, and a deduction made for the allowance granted for support of the family. The Courts will probably take the view that this is too remote.

that one reason for declining to take account of the pension was that the plaintiff had in fact paid for his pension (in the same way as he might pay the premiums on an accident insurance policy) by accepting a lesser salary than that which would have been payable if no pension rights were attached to the position. He did, nevertheless, regard the possibility or probability of the pension being reduced if damages were awarded as the main ground for his decision.

The Court of Appeal in *Browning's* Case has thrown doubt on *Payne's* Case particularly the *ratio* of Cohen L.J. and Sellars J. The facts in *Browning's* Case are simple. The plaintiff Browning while serving as a sergeant in the United States Air force in England was severely injured in a motor vehicle accident caused by the negligence of one Rance and a British soldier. As a result of his injuries he was discharged from the United States Air Force. Between the date of his injury and the date of discharge he received his full pay of $415 per month and upon his discharge was paid by the United States Government a veteran's benefit of $217 per month. He was entitled by law to this benefit having suffered a disability resulting from personal injury suffered in the line of duty. The United States Government was bound to pay this amount and it could not be suspended nor reduced below $198 per month under any circumstances. The Court of Appeal (Donovan L.J. dissenting) reversing the judgment of Sellars J. held that the plaintiff was required to give credit to the defendant for the amount of the benefit. The majority held that they were bound by the decision in *British Transport Commission v. Gourley.*[49] The reasons for the decision are summed up in a passage of the judgment of Lord Denning M.R.

> "The general principle undoubtedly is that the plaintiff should be compensated, so far as money can do it, for the pecuniary loss or loss of earnings (or of earning capacity, I care not how it is put), which he has suffered or will suffer by reason of the injury. He should recover for his loss, but for no more than his loss. If he can earn money elsewhere, he should do so. The award of damages is made to compensate him, not to punish the wrongdoer. That is now settled by *British Transport Commission v. Gourley.*[50] He should, therefore, give credit for all sums which he receives in diminution of his loss, save in so far as it would not be fair or just to require him to do. The difficulty is to say when it is or is not fair and just to take the receipts into account. The cases give some guidance on the point. It would obviously not be fair to reduce his damages by reason of charitable gifts made to him (*Redpath v. Belfast & County Down Ry.*,[51] approved by this court in *Peacock v.*

49. [1956] A.C. 185.
50. [1956] A.C. 185.
51. [1947] N.I. 167.

Amusement Equipment Co., Ltd.[52]); or by reason of insurance benefits which he has bought with his own money (see *Bradburn v. Great Western Ry. Co.*[53]); or by reason of sums advanced to him which he is under an obligation to repay (*Inland Revenue Comrs. v. Hambrook*[54]); or by reason of sums, provided by third persons to help him, which he has undertaken to repay (see *Dennis v. London Passenger Transport Board*,[55] *Schneider v. Eisovitch*.[56]

Apart from such exceptional cases, however, the injured person must, I think, give credit for any sums which he receives as of right in consequence of his injury".[56a]

Diplock L.J. regarded the *ratio* of Cohen L.J. in *Payne's* Case to be "fairly and squarely" on the principle that damages for negligence were punitive and this, he said, was directly opposed to what had been decided in *Gourley's* Case. With respect, this does less than justice to Cohen L.J. It is true that he adopted the words of Sellars J.,[57] but nevertheless he took the view that the injury was not the *causa causans* of the pension. He was assisted to this conclusion by the thought that to decide otherwise would put the burden of supporting the injured plaintiff on the taxpayer instead of the wrongdoer. It is conceded that this part of his opinion is possibly open to the construction put on it by the Master of the Rolls. The most obvious objection which could be taken to the majority opinion in *Browning's* Case was taken by Donovan L.J. He, as others before him have done, pointed out that *Payne's* Case found no mention in *Gourley's* Case and no question arose in the latter case of bringing in "some receipt accruing to the plaintiff in consequence of the accident". To the argument that the two cases were basically the same and that logic demanded that the answer be the same, His Lordship replied that in this field logic was conspicuous by its absence.[58] The second point which might be made arises from the judgment of Lord Denning M.R. where he says that the plaintiff must give credit for all sums which he has received in diminution of his loss "save in so far as it would not be fair or just to require him to do so." One will search in vain the majority judgment in *Gourley's* Case for any reference to what is fair and just

52. [1954] 2 Q.B. 347.
53. (1874) L.R. 10 Ex. 1.
54. [1956] 2 Q.B. 641 at 656, 657.
55. [1948] 1 All. E.R. 779.
56. [1960] 2 Q.B. 430.
56a. [1962] 3 All. E.R. at 1091.
57. "Just as the wrongdoer cannot appropriate to himself the benefit of the premiums paid by the injured party to cover accident risks, so he cannot, I think, appropriate the benefits accruing from the injured party's service which similarly entitles him to those benefits". [1951] 1 All. E.R. at 1036.
58. Cf. the family allowance in *Payne's* case.

in such circumstances.[59] On the particular facts of *Gourley's* Case three principles stand out above all others. 1. Tort damages are to provide compensation only. 2. The test of whether such items as tax liability are to be taken into account is whether they are sufficiently proximate, or, to use the expression of the House of Lords, whether they are not too remote; the phrase "*res inter alios acta*" in this context is discouraged.[60] 3. The obligation to pay income tax is "almost universal in its application"[61] and is not "something purely personal to the plaintiff."[62]

It is not intended here to canvass the merits of *Gourley's* Case nor to discuss its application with respect to taxation in the Australian scene where the matter is complicated by the Commonwealth income tax legislation, but it seems desirable to illustrate its possible application to *Browning's* Case and cases of a similar nature. Where pensions and superannuation payments which arise *ex contractu* or out of the employment are concerned, doubtless the remoteness question will be solved in terms already familiar.

What of the universal application test? Lord Reid said that the liability to pay income tax was not personal to the plaintiff, but when does a benefit pass from this class into the universal class. Accident insurance is an example of something purely personal, and so perhaps are pension schemes which are closely associated with the plaintiff's employment, be they contributory or non-contributory. Social services such as invalid pensions are available to the population at large though they are personal to the extent that eligibility for receipt of such benefits will depend on the particular incapacity suffered and possibly the financial situation of the plaintiff. There is some difficulty in characterizing the benefit in *Browning's* Case. A condition precedent to its grant was that the recipient be a serviceman injured "in the line of duty". Is it to be regarded as in the nature of a superannuation payment which, it seems to be admitted is not of the same nature as wages,[63] or social service

59. The House of Lords did of course recognise that there were exceptions to the compensation only rule. See *e.g.* per Earl Jowitt [1956] A.C. at 198. "There are, no doubt, instances to be found in the books of exceptional cases in which the dominant rule does not apply, as, for instance, in cases of insurance, or cases calling for exemplary or punitive damages or in certain cases dealing with the loss of use of a chattel". (It is not clear why loss of use of a chattel should be regarded as an exceptional case. Even if no "special damage" is suffered, general damages will be recoverable. See *e.g. The Hebridian Coast*, [1961] A.C. 545).
60. See per Earl Jowitt at 203, Lord Goddard at 207, Lord Reid at 212. Lord Tucker did not use the word "remoteness" but his language suggests that this was the concept he had in mind. Lord Radcliffe agreed with Lord Goddard.
61. Per Earl Jowitt at 203.
62. Per Lord Reid at 214.
63. But see per Lord Denning M.R. in *Browning v. War Office* [1962] 3 All E.R. at 1092.

benefit of universal application, or a social service benefit which exhibits the additional characteristic referred to by Dixon C.J. in *Espagne's* Case ? The approach taken by the High Court may well depend on this point. The Court of Appeal, however, being thoroughly committed to the compensation only rule, found it sufficient to hold that the collateral benefits received were such that it would not be unfair for the plaintiff to bring them into account. One consideration which weighed heavily with the Court of Appeal was the completely non-discretionary nature of the pension. This, it will be recalled, was of some importance in *Espagne's* Case.

Having looked at the major cases on this aspect a brief resumé of other relevant decisions may not be out of place.

In *McInnes v. Crowe*[64] the plaintiff had received the full amount of sick leave with pay to which she was entitled under the regulations governing her employment. The Full Court held that as she had been paid during her period of incapacity she had suffered no loss of wages but awarded her damages to compensate her for the exhaustion of her sick leave rights upon which she otherwise might have relied in case of illness. The decision is quite in accord with the view now taken by the High Court. In *Francis v. Blackstone*[65] the plaintiff received payment from the employer which included certain sums payable under the contract of service but mainly consisting of gratuitous payments. Ross J. declined to take either amount into account relying partly on the decision of Wolff J. in *Guthrie v. Baker*[66] in relation to that part of the payment which the employer was obliged to pay. At least on this point both cases must now be taken to be overruled by the High Court as must probably the decision of Mansfield S.P.J. (as he then was) in *Grant v. Carrick*[67] insofar as it rests on the same ground. Here the plaintiff received forty-nine weeks sick pay but the report gives no indication of the amount which the employer was obliged to pay. It would seem difficult to argue that where the contract of employment provides for a specified number of weeks sick leave on full pay any payments of salary in excess of this amount are other than gratuitous.[68] Dealing with the voluntary payments in *Francis v. Blackstone,*[69] Ross J. said that he could see no difference between those made by an employer and those made by some third person. It was then but a short step to hold that those payments were not to be taken into account. The answer should depend, he thought on the reason for payment and not the method. In other words, the payments were characterized as a gift, not as wages.

64. [1925] 27 W.A.L.R. 102.
65. [1955] S.A.S.R. 270.
66. [1953] 55 W.A.L.R. 67.
67. [1956] Q.W.N. 16.
68. See *Graham v. Baker* 35 A.L.J.R. at 177.
69. *Supra.*

The last case to be mentioned to deal directly with the point is *Teuber v. Humble.*[70] Once again the employer continued to pay the plaintiff his full wage (including increases under the relevant awards) and in turn collected from the insurer and retained the money to which the plaintiff would have been entitled as workers' compensation. Chamberlain J. rejected the argument that the payments were voluntary holding that the plaintiff had received them as of legal right. He agreed that the employer could, as a matter of law, have terminated the contract of employment but had not done so and had, apart from keeping the plaintiff on the payroll, retained the workers' compensation payments. His Honour further said that as the plaintiff's employment was governed by an industrial award,[71] the contract of employment could only be terminated by either party on the proper notice therein prescribed.[72] But with the greatest respect, it does not seem possible that the matter can rest there for Clause 35(a)[73] provides for "incapacity pay" to be made to employees absent through illness or incapacity, while Clause 35(f) provides that "an employer shall not be obliged to make a payment to a member in any twelve months of his employment dating from the date of his original engagement in respect of a period longer than that specified in sub-clause (c)[74] hereof whether the member is absent on one or more occasions." It is thus possible (and likely) that the employer will not desire to terminate the contract of employment yet be under no legal obligation to pay sick pay. Any contributions by the employer over and above the award amount will be gratuitous and therefore should not be taken into account. This conclusion is, of course, independent of the problems which may arise if the employee is under a legal (or moral) duty to re-imburse his employer.

Moving on to pensions which arise out of the employment it is thought that *Graham v. Baker* and *Paff v. Speed* conclude the matter unless *Browning v. War Office* induces the High Court to reconsider the question. Although in both the Australian cases above mentioned, the High Court was content to rely on *Espagne's* Case, it will be remembered that the uncertainty of future pension payments influenced the Court's decision in that case. It is at least likely that *Browning's* Case will not extend to those situations where either the grant of the pension is discretionary or the plaintiff himself has

70. [1962] S.A.S.R. 117.

71. See Commonwealth Arbitration Reports Vol. 90 Pt. 1, 919.

72. *Ibid.*, 928 clause 10. Cf. *Graham v. Baker* at 176.

73. *Ibid.*, 943.

74. Sub-clause (c) prescribes the rate of and period for payment of incapacity benefits.

made a cash contribution to the pension fund.[75] This latter point can, it is submitted, be supported by *Bradburn's* Case.[76]

6. *Agreements to Repay the Benefit*

If the plaintiff is under a legal obligation to repay the benefit to the donor, the amount so repayable should not be taken into account.[77] There do exist certain complications and it is interesting to compare the reasoning in *Treloar v. Wickham*[78] with that in *Blundell v. Musgrave*.[79] In the latter case the High Court divided four two on the question of whether Musgrave, a member of the permanent naval forces should recover as special damages the sum of nearly £600 for medical and hospital treatment provided by the Navy, which under the Naval Financial Regulations he was, at the time of the trial, liable to pay to the Naval Board although it was possible and likely that he would be forgiven the charge if he did not succeed in his action. The majority view was that "if the Naval Board had authority to make the charge and took the appropriate steps to impose a liability to pay the amount in question upon the respondent, it is of no consequence that at some later stage they may forgive the whole or some part of the charge."[80] Dixon C.J. and Fullagar J. dissented. The Chief Justice held the view that before a plaintiff could recover in an action for personal injuries expenses which he had not yet paid, he must show at the trial that it is an expenditure which he must meet—that though he has not paid he is in fact worse off by that amount. "It cannot be enough to entitle a plaintiff to recover from a defendant in respect of money still to be paid that the plaintiff is liable to pay it if and only if he recovers a corresponding amount from the defendant."[81] It was not perhaps necessary, in His Honour's opinion, for the plaintiff to be under a legal liability for the amount; a "moral and social obligation" "which he could only escape at the cost of his reputation for

75. See also *Keating v. Cochrane* ((1960) 77 W.N. (N.S.W.) 35) where Else-Mitchell J. held that a pension granted under the Superannuation Act 1916-1957 (N.S.W.) should be taken into account. He distinguished *Bradburn's* case on three grounds: (a) The contributions made by the employee were compulsory; (b) The employer had also made contributions to the pension fund; (c) Except in two cases the pension was received as of right. Cf. *Watson v. Ramsay* ((1961) 78 W.N. (N.S.W.) 64) where Brereton J. disagreed with points (a) and (b). The argument in the judgment that if the plaintiff had received damages and then had to sue for his pension, the defendant employer could not set up in defence the damages award is attractive but irrelevant.

76. See also *Judd v. Board of Governors of the Hammersmith etc. Hospitals*, ([1960] 1 All E.R. 607) where Finnemore J. found the reason for not taking into account a pension to which the employer made contribution in the surmise that the wages payable would otherwise have been greater. This may be reasonably covered by the principle in Bradburn's case.

77. *Treloar v. Wickham* 34 A.L.J.R. 511, 105 C.L.R. 102. *Blundell v. Musgrave*, 96 C.L.R. 73.

78. *Supra*.

79. *Supra*.

80. 96 C.L.R. at 86.

81. *Ibid*. at 79.

honest dealing" might be sufficient. But whatever the liability required was, the plaintiff had not discharged the burden of showing that it was more likely than not that he would have to re-imburse the Board. Fullagar J. probably went even further than did Dixon C.J. and required a legal liability plus a subjective intention on the part of the person to whom the liability was owed to enforce payment.[82]

All members of the Court did agree that regulation 150A,[83] even if constitutionally valid, was irrelevant as liability under it could not arise until after damages had been recovered. Similar considerations were involved in *Treloar v. Wickham*[84] but owing to the way in which the appeal was argued the general question of collateral benefits did not receive the main attention of the court, though the matter was mentioned by the way. The plaintiff who suffered injury as a result of the negligence of a fellow employee sued his employer and the jury returned a general verdict of £15,000. The plaintiff's claim included an amount of £2,105 in respect of wages or salary lost by him between the date of the accident and the date of the trial. The employer had made weekly payments over the same period to the plaintiff equal to the amount of wages which the plaintiff would otherwise have earned. By the time the case reached the High Court the question was whether the jury would have understood from the trial judge's direction that whether or not the £2105 was to be taken into account depended upon the jury's acceptance or rejection of the view that it was repayable out of the verdict. The plaintiff had called evidence that he had undertaken to repay the amount, presumably if, and only if, he recovered damages. Fullagar J. thought that though the Court had differed as to the result in *Blundell v. Musgrave* there had been general agreement on the law to be applied. His Honour drew a distinction between "on the one hand a promise to pay or repay out of damages if damages are recovered but not otherwise, and, on the other hand, a promise to repay out of damages if damages are recovered but to repay in any event."[85] But as His Honour observed the point was not raised from beginning to end of the case. It is a fair inference from the mere statement of the alternatives and having in mind Fullagar J.'s decision in *Blundell v. Musgrave* that if the former alternative were the correct conclusion to be drawn from the evidence, and if the £2105 were characterized as wages, no

82. See Parsons, *Damages in Actions for Personal Injuries*. 30 A.L.J. 618
83. "Notwithstanding anything contained herein where a member who has been granted medical attendance under these regulations recovers or receives damages from a third party the Naval Board may require the member to pay . . . the whole or any portion of the cost . . . and thereupon the amount . . . shall be a debt due to the Commonwealth."
84. 34 A.L.J.R. 511; 105 C.L.R. 102.
85. 34 A.L.J.R. at 515; 105 C.L.R. at 114.

recovery of this amount would have been possible. This is in line with the view taken of the effect of regulation 150A in *Blundell v. Musgrave*. It is true that the regulation merely gave the Board power to make the charge, a power which may not have been exercised and to this extent the situation is different from that where there has been an undertaking to repay conditional only on the recovery of damages.[86] However the mainspring of the argument seems to be the fact that liability could only arise after and by reason of the award of damages.

These two cases have been discussed as if the same considerations were equally applicable to both of them. To the mind of Dixon C.J. there was a fundamental difference. "We are not here," said His Honour, "dealing with the recovery by a plaintiff as part of his damages of some expenses contingently payable by him cf. *Blundell v. Musgrave*. The case is one where his prima facie loss is treated as standing unreduced by a payment contingently received."[87] From the last few sentences of His Honour's judgment it appears that he was of the opinion that had the jury been asked precisely whether the £2105 was repayable by the plaintiff no objection could have been taken. Menzies J. took the same view as did Fullagar J. but thought that there was one further possibility *i.e.* "if the employer had not paid the plaintiff his wages for the period in question but had merely advanced or lent him a sum the equivalent of his wages, then the plaintiff's lost wages were recoverable and the advance or loan should be entirely disregarded."[88] . . . "I have not been able to find any authority upon the question of how the respective rights and obligations of the employee, employer and third party are affected by payment of wages coupled with a binding unconditional promise to repay them, but I am disposed to think the result of such an arrangement is in substance that wages have been advanced rather than paid".[89]

It is suggested that the *Treloar v. Wickham* and *Blundell v. Musgrave* situations are in principle the same.

If there is an unconditional liability on the plaintiff to pay an amount (either the cost of medical treatment or a sum of money advanced as wages) to the donor (the Naval Board or employer) of the benefit (medical treatment or wages) then the amount of such

86. One difficulty is the meaning to be given to the word damages in such agreements. Does it mean any award of damages or must the plaintiff recover damages for the particular loss under consideration *e.g.* medical expenses or loss of wages. The same difficulty arose in *Blundell v. Musgrave* in relation to reg. 150A. Dixon C.J. was inclined to restrict the meaning to the particular type of damage in respect of which the benefits had been granted, *contra* Fullagar J.
87. 34 A.L.J.R. at 514; 105 C.L.R. at 111.
88. 34 A.L.J.R. at 518; 105 C.L.R. at 121.
89. 34 A.L.J.R. at 519; 105 C.L.R. at 122.

liability is a proper claim for damages. If there is a liability (imposed either by contract or by law) on the plaintiff employee to pay or repay the amount contingent on the recovery of damages then such an amount is not the subject of a proper claim for damages.

The result is that on the authority of *Blundell v. Musgrave* and taking account of the dicta in *Treloar v. Wickham* (unless one accepts the distinction made by Dixon C.J.) a liability imposed contingent on the recovery of damages should be disregarded because the plaintiff can show no loss either because he will not (unless he recovers) be required to bear the expense of the benefit provided or because he has in fact been paid his wages and is under no unconditional liability to repay them. The fact situation in the recent New Zealand case of *Wolland v. Majorhazi*[90] is similar to that it *Treloar v. Wickham.* Here the employer paid wages during the period of incapacity and the plaintiff signed an undertaking in the following terms: "Subject to adjustment and refund by me upon my obtaining compensation from the person responsible for my injuries". Halsam J. in holding that the plaintiff was entitled to recover the amount claimed as loss of wages said that the claim for loss of wages was in reality a measure of an equivalent obligation to the employer. If, as is suggested, the case on this approach is in conflict with the principles applied in the High Court, it may be possible to uphold it on an argument which appears at page 435 of the report.

> "In my view, the plaintiff by his conduct in accepting the payment on such terms, promised to repay the wages so advanced to him, in the event of his recovering that amount from the third party. As a corollary, he was under an obligation to collect that sum. Failure on his part to do so would have left him liable, at the suit of his employer to an action for a sum equal to the total amount of his advance."

The difficulty remains that although he might be under an inchoate liability until he brings his action, this will be discharged whether he wins or loses.[91]

7. *Workers' Compensation*

It is not intended to investigate all the possible problems which might arise when workers' compensation enters the picture but two recent Queensland cases have involved a consideration of the effect of the Queensland Workers' Compensation legislation on a damages award. The plaintiff in *Lamb v. Winston and Anor.* (No. 2)[92]

90. [1959] N.Z.L.R. 433.
91. *Blundell v. Musgrave* was followed in *Beckman v. Haddy* ([1959] S.A.S.R. 11) and *Treloar v. Wickham* applied in *Perkins v. Abel and Moore Road Machinery (W.A.) Pty. Ltd.* ([1962] W.A.R. 80). See also *Francombe v. Holloway* ([1957] V.R. 139).
92. (1962) Q.W.N. 20.

in an action for damages for negligence claimed, *inter alia*, special damages for medical expenses which had been paid not by the plaintiff but by the Insurance Commissioner under Section 14D of The Workers' Compensation Act 1916-1961. These expenses therefore did not represent a loss which the plaintiff had sustained. The plaintiff had in fact received from the Insurance Commissioner sums amounting to nearly £3,300 including £1,646 by way of weekly payments. Although the plaintiff had received compensation, he was entitled to bring a common law action.[93] Gibbs J. held that the medical expenses were recoverable by the plaintiff but it is not easy to agree with His Honour's reasons. Cl. 24A(2) of the Schedule to the Act makes any compensation paid under the Act a first charge on damages recovered for any injury in respect of which compensation has been paid.[94] He referred to *Blundell v. Musgrave* and said that the fact that the plaintiff would be liable if he recovered damages to reimburse the Commissioner was irrelevant but found for the plaintiff on the basis that a payment under Sec. 14D was "not of the kind that is to be taken into account in mitigation of damages" citing *Espagne's* Case. If *Espagne's* Case turned on the assumption that certain benefits are intended to be enjoyed in addition to any award of damages, then notwithstanding that the benefits under Sec. 14D are conferred "independently" of any right of redress against any other person, the principle of that case does not apply here, for it is clear from the terms of the Workers' Compensation Act that the benefits under the Act are *not* intended to be enjoyed in addition to damages. This is expressly provided in Cl. 24(i) of the Schedule, and is a necessary inference from Cl. 24A(2).

In *Lane v. Borthwick*[95] Stanley J. faced the same problem. The difficulties arose in this way. Cl. 24A(i) of the Schedule provides that if a worker sustains an injury which creates both a claim for compensation and a legal liability independently of the Act in some other person to pay damages in respect of that injury, the worker may both take proceedings to recover the damages and apply for compensation. Sub-section (2) makes "any amount of compensation" paid a first charge on the damages and provides that the person liable shall pay the sum so charged to the Commissioner. There is no specific provision in the Queensland Act which deals with the inclusion or exclusion of compensation payments made in

93. Workers' Compensation Act 1916 to 1962 (Q.), Schedule, Cl. 24(i).
94. Cl. 24A(5) provides, "All payments made by the Insurance Commissioner (now Insurance Office) under or pursuant to this Act in respect of an injury to a worker shall be deemed to be compensation under this Act for the purposes of section sixteen hereof, clause twenty-four of the Schedule hereto and this clause."
95. *Lane v. Thomas Borthwick & Sons (Australasia) Limited and Mercantile and Stevedoring Co. Pty. Ltd.* [1959] Qd.R. 151.

or from damages awarded against a person (other than the employer) in respect of the injury for which compensation has been paid.[96] If compensation under Sec. 14D has been paid, unless this amount is included in the damages award, the employee may well find his damages saddled with the charge. On general principles the employee should not be able to claim medical expenses which he has not incurred and which have been paid for by the Insurance Office under Sec. 14D. Neither can the fact that his damages will be charged with this amount assist him for the rule in *Blundell v. Musgrave* will prevent the inclusion of the amount of compensation in the damages award. This reasoning leads to the conclusion that the employee having recovered some damages from the negligent third party may be liable to reimburse the Insurance Office for the payments made on his behalf under Sec. 14D. What the Act has given with one hand it takes away with the other. As Stanley J. in *Lane's* Case pointed out this is an absurd result and quite contrary to the policy of the Workers' Compensation Acts.

Cl. 24A(2) might be thought to provide an escape from this dilemma. The second paragraph of that sub-clause provides:

> The employer or other person from whom those damages are recoverable shall pay to the Insurance Office any sum charged thereon by virtue of this sub-clause or, if those damages are insufficient to meet that charge, the whole of those damages, and that payment shall, to the extent thereof, satisfy the liability of that employer or other person for payment of those damages.

This is mainly a machinery section enabling the person liable to pay the damages to pay the compensation charged thereon directly to the Insurance Office. Even regarded as imposing a liability on that person which could be enforced by the Insurance Office against him, the amount is, it seems, charged on and against the damages so that the actual amount paid over to the plaintiff employee will be reduced *pro tanto*.

There are two possible means of escape. The Act gives the injured employee the right to accept compensation and to claim damages. Clause 24A(i) provides:

> Subject to this clause, in respect of an injury received under circumstances creating both—
>
> (a) Independently of this Act, a legal liability in some person, whether the employer or a person other than the employer, to pay damages in respect of that injury; and

96. Where the employer is the defendant in the action the matter is governed in Queensland by Sec. 9A of the Act. This provides that the damages which an employer is legally liable to pay shall be reduced by the total amount of compensation paid. Provision is also made for compulsory insurance with the Insurance Office in respect of employers' common law liability to their employees.

(b) A claim for compensation under this Act,

a worker may both take proceedings to recover those damages and apply for compensation under this Act according to his entitlement thereto . . ."

Paragraph (a) refers to a legal liability in some person to pay damages independently of the Act and (b) refers to "those damages". It is arguable that the inference from this sub-clause is that the damages are to be computed without regard to any compensation payments and the remainder of Clause 24A prevents double recovery in accordance with general principle and the intention of the legislature. The other possibility would be to interpret the word damages where it occurs in Clause 24A(2) as including only those heads of damage in respect of which the plaintiff has actually recovered.[97] In other words, if the plaintiff's medical expenses have been paid by the Insurance Office under Section 14D and this amount is held not recoverable as damages, such amount is not charged upon "those damages" as *those* damages have not, in fact, been recovered. It necessarily follows that the Insurance Office will have no right of indemnity against the defendant since the defendant is not liable in law for "those damages". Once again, this explanation does not appear to be in accordance with the policy of the Act.[98]

Weekly payments and lump sum payments raise further difficulties. If, as has been suggested above, one can find in the Act an indication that any sums granted by way of compensation are not to operate to reduce the damages for which the defendant is liable then of course there is no difficulty, but if this is not so, problems of characterization arise. In a recent New Zealand case[99] the question arose whether the deduction from damages of compensation payments required by the New Zeland Act should be made before or after the reduction made in accordance with the Contributory Negligence Act.[100] The answer given turned in part on the characterization of the weekly payments. Were they to be regarded as mitigating the plaintiff's loss of wages or were they to be regarded as something quite different? Henry J., dissenting, thought that compensation payments (*i.e.* weekly payments or lump sums) should not be equated with "loss of wages"; the majority were of the

97. But see *C. & A. Odlin Ltd. v. Gray* [1961] N.Z.L.R. at 429 per Henry J.
98. Sec. 3(2A) of the Motor Vehicles Insurance Act 1936 to 1962 (Q.) does not affect the situation. Its effect is to make any sum which has been paid as workers' compensation in respect of an injury caused by a motor vehicle and in respect of which the Insurance Office is entitled to be indemnified by the wrongdoer, damages within the meaning of the Act. It gives statutory force to what was decided by Ostler J. in *John Cobbe & Co. Ltd. v. Viles* [1939] N.Z.L.R. 411.
99. *Gray v. C. & A. Odlin Co. Ltd.* [1960] N.Z.L.R. 710: affirmed [1961] N.Z.L.R. 411.
100. It will be realised that this question may arise when any collateral benefit is to be taken into account.

contrary opinion.[101] Any further investigation of the subject of Workers' Compensation is beyond the scope of this paper.

8. *Charitable Assistance and Miscellaneous Cases*

Gifts, be they by an employer or other person, are not to be taken into account.[102] *Liffen v. Watson*[103] where the plaintiff successfully claimed an amount for board and lodging which would have been provided by her employer had she not lost her job as a result of her injury, but which was now provided by her father, could be explained on the same basis.

Shearman v. Folland,[104] *Francis v. Blackstone*[105] and *Johns v. Prunell*[106] deal with living expenses. In the first case the defendant sought to offset against the plaintiff's expenses incurred at a nursing home where she recuperated from her injuries, an amount which she would otherwise have spent on accommodation at the hotels at which she was accustomed to live. Asquith L.J. delivering the judgment of the Court of Appeal ordered that the plaintiff should give credit to the extent of £1 per week for the time spent in the nursing home, this amount being the estimated cost of food at the home for one week. This result was achieved by considering the fees charged by the nursing home to have a composite nature *i.e.* board and nursing, and declining to take into account the "nursing" part of the fee since this was not in "pari materia" with the hotel charges. A characterization test has thus been employed since the Court apparently felt that it was not right for the wrongdoer to be able to claim credit for the full amount of hotel expenses. Yet having decided that some account should be taken of the plaintiff's "saved" living expenses why should not the total amount be included, even if, to give the example taken by the Court a millionaire accustomed to reside at most expensive resorts has in fact been saved money by his sojourn in a hospital. The "damage" which he might suffer by an enforced change in his style of living can and should be adequately catered for in his general damages. The headnote in *Johns v. Prunell*[107] sufficiently sets out the facts. "The plaintiff was injured by the negligence of the defendant whilst in the employ of his father, with whom he had an agreement that he would work for £10 per week and his keep. During the period of incapacity due to his injury the plaintiff continued to live with his

101. See also *Unsworth v. Elder Dempster Lines Ltd.* [1940] 1 K.B. 658 at 670 and 674; *Farmer & Co. Ltd. v. Griffiths* 63 C.L.R. 603 at 613, 614 per Evatt J.
102. *Peacock v. Amusement Equipment Ltd.* [1954] 2 Q.B. 347; *Redpath v. Belfast and County Down Ry.* [194] N.I. 167; *Browning v. War Office* [1962] 3 All E.R. 1089; *A.G. for N.S.W. v. Perpetual (Trustee) Co.* 85 C.L.R. 237 per Fullagar J.
103. [1940] 1 K.B. 556.
104. [1950] 2 K.B. 43.
105. [1955] S.A.S.R. 270.
106. [1960] V.R. 208.
107. *Ibid.*

father who continued to provide him with his keep." Sholl J. refused to give damages for what the plaintiff claimed was lost keep, for the plaintiff had in fact lost no keep. He was kept by his father before the incapacity as well as during it. Counsel for the plaintiff relied heavily upon *Liffen v. Watson*[108] where the plaintiff having lost her keep from one source, obtained it from another. Sholl J. however distinguished this case. "There were", he said referring to Fullagar J.'s judgment in *Blundell v. Musgrave*, "two distinct lines of authority: those on the one hand which dealt with the question, with what items the plaintiff was entitled to be credited in taking account of his out-of-pocket loss, and on the other hand those which related to the question, with what items the plaintiff was to be debited for the purpose of such a calculation."[109]

In *Liffen v. Watson* it was the second question which was in issue, since there was no doubt that she had lost something. Was she bound to debit her prima facie loss with the value of the keep provided by her father? The answer was that she was not so required. His Honour continued: "The law, however, while it has thus imposed in the taking of such account of loss quite strict limits upon a plaintiff's right to credits, has been more lenient (and a good deal less precise) in deciding with what items he is to be debited. It has declined to mitigate the burden on the wrongdoer by crediting him, and debiting the plaintiff with 'matter completely collateral, and merely *res inter alios acta*.' "[110] It is because the law takes this less precise view of what is to be debited against the plaintiff, that the plaintiff in *Liffen v. Watson* was not required to bring into account any of her keep provided by her father and the plaintiff in *Shearman v. Folland* was required to account for only a portion of the saved living expenses. But the plaintiff in *Johns v. Prunell* did not, in His Honour's view, even get to first base, because far from being able to argue that he should not bring his keep into account, he could not even show that he had lost it. This is true if the plaintiff pleads that he has lost his keep but what he originally pleaded was loss of wages estimated at £4 per week which he would have received, not in cash, but in kind. Counsel agreed however that the jury should assess the damages to be awarded for loss of keep and having done so the learned judge ruled that the sum was irrecoverable. Counsel may have been wiser to stick to his guns and claim the amount as loss of wages (which it is submitted it was) and then argue on basis of *Liffen v. Watson* that the keep he had received was either not in pari materia (the characterization test) or was merely the result of charity. The fact that the same person provided the keep both before and after the injury seems to be

108. *Supra.*
109. 1960 V.R. at 210.
110. *Ibid.*

immaterial. If the employer in *Liffen v. Watson* had discharged the servant but paid her an amount equal to the value of her keep purely as an act of grace, it can hardly be thought that the result would have been any different.

9. *Conclusion*

As Fullagar J. and Sholl J. have pointed out, the question of what damages the plaintiff should finally receive, consists of two parts. Firstly, has the plaintiff sustained any loss for which he should be credited ? Secondly, is there any collateral benefit which he should bring into account ? The Courts, it is said, have been less strict with the plaintiff in answering the second question than they have been in answering the first. But they have not always been consistent in deciding whether the plaintiff has suffered no prima facie loss or whether he has suffered such a loss but has been compensated by the receipt of some collateral benefit. If the approach of Diplock L.J. in *Browning's* Case is adopted and the Court merely seeks to compensate the plaintiff for his net pecuniary loss, the the distinction does not seem to matter, though this means that the only guide for determining whether a benefit should be brought into account, is whether it is fair or just to require the plaintiff to do so. But if it be required of the plaintiff that he must first show a prima facie loss before any question of including or excluding a benefit can arise, it is important that both the loss and the benefit be properly characterized. Failure to do this, it is respectfully submitted, led Sholl J. into error in *Johns v. Prunell.*

Until the High Court again have the opportunity of considering this whole question in the light of *Browning's* Case it is difficult to forecast the likely trend of authority. It seems at least likely that *Browning's* Case will be restricted to those cases where the benefit is of a non-contributory nature and does not depend for its grant or continuance on any administrative discretion.

P. J. HOCKER*

*LL.B. (Q'ld), Barrister-at-Law, Lecturer in Law in the University of Queensland.