SCOTTISH LAW COMMISSION

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DAMAGES FOR PERSONAL INJURIES: DEDUCTIONS AND HEADS OF CLAIM

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The Commission would be grateful if comments were submitted by 31 March 1976. All correspondence should be addressed to:

Mr. H.R.M. Macdonald
Scottish Law Commission
Old College
South Bridge
EDINBURGH
EH8 9BD

(Telephone: 031-667 3437)

DAMAGES FOR PERSONAL INJURIES: DEDUCTIONS AND HEADS OF CLAIM

PART I INTRODUCTION

1. Our Second Programme of Law Reform envisages in Item 10 the consideration of "Damages arising from Personal Injuries and Death". In accordance with this Programme Item and in response to specific questions referred to us under s.3(1)(e) of the Law Commissions Act 1965, we prepared and submitted to the then Lord Advocate a Report on the Law Relating to Damages for Injuries Causing Death.[1] The purpose of the present Memorandum, prepared in terms of the same Programme Item, is to consider the desirability of extending to claims by injured persons who have survived their injuries, certain recommendations which we have already made in the context of injuries causing death. But the Memorandum is prompted also by the need to consider the relevance to Scots law and Scottish practice of certain recommendations made by the Law Commission in their Report on Personal Injury Litigation - Assessment of Damages[2] - and also of certain recent English decisions relating to the admissibility of heads of claim and appropriate deductions in actions of damages.

2. In our Report,[3] in the context of claims for damages for injuries causing death, we made a number of recommendations designed to clarify the law relating to deductions which, the defender may argue, should be made from damages because the dependants benefit from inheritance, the receipt of charitable donations, the proceeds of insurance policies, or other

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[1] Scot. Law Com. No.31 (1973), H.C. 393; referred to in this Memorandum as "our Report".

[2] Law Com. No.56 (1973), H.C. 373; referred to in this Memorandum as "the Law Commission Report".

[3] Paras. 93-101; Recommendation No.24.

pecuniary benefits. It seems appropriate to consider whether, against the background of our recommendations relating to deductions in fatal accident cases, similar principles should be applied in actions at the instance of the injured party himself. Further questions, however, arise in consequence of certain recommendations made by the Law Commission Report which, if extended to Scotland, would make significant inroads upon principles traditional in our law of reparation. These questions are whether the injured person should himself be able to recover damages for the cost of necessary services rendered by others to him, or whether those persons should themselves be able to recover in respect of such cost; and whether the injured person should be entitled to recover the value of services which, but for the accident, he would have gratuitously rendered to other persons, or whether those other persons should be entitled to recover damages directly from the wrongdoer for the provision of such gratuitous services. A further reason for discussing these questions is that claims, of the first two classes at least, have already been presented to the Scottish courts, and it is evident from the decided cases that the law on the topic is at present unclear.

3. We well appreciate that some of the questions raised may be thought to put in issue basic principles of the law of reparation, a matter being considered by the Royal Commission on civil liability under the chairmanship of Lord Pearson. It is certainly true that different answers to them might be appropriate if a different approach to compensation for personal injuries were adopted. If, for example, in all or some areas the common law system were supplanted by a state system of compensation, questions of overlapping benefits would not arise or would arise in a different form. In particular, it might be appropriate also to have regard to benefits in kind, such as the home help service provided by local authorities. Equally, if the common law system of

damages were retained and third parties were conceded rights to damages for economic loss, different solutions to these questions might well be appropriate. Having regard, however, to the Royal Commission's terms of reference, our concern is to consider what anomalies or uncertainties exist within the existing framework of the law, and we seek to avoid trespassing on matters within the province of the Royal Commission.

4. In considering what benefits received by an injured person should be taken into account in assessing his claim for damages, we have endeavoured to take into account the existing general principles of Scots law relating to the assessment of damages. The basic principle is that damages are not intended to be penal but to be compensatory, in the sense of making good to the pursuer the present and future loss he has sustained in consequence of his injuries. The fact that taking into account a benefit received by the pursuer may reduce the liability of a "wrongdoer" is not by itself a good reason for ignoring the benefit. So stated, this principle appears to be a simple one, but this appearance is deceptive. The fundamental difficulty is whether the extraneous mitigation of losses which the injured person would otherwise sustain can be regarded as reducing the amount of these losses for the purpose of calculating the defender's liability. This is not, as it may at first seem to be, so much a question of logic as of social and legal policy, and it is not clear that exactly the same principles apply to such diverse benefits as gifts, insurance policies, pension rights, and such state benefits as retirement benefits, industrial injury benefits and supplementary benefits.[4] In coming, therefore, to our own tentative conclusions, we have endeavoured to have regard to the specific nature of each benefit. At the same time, the range of possible benefits to be taken into account is extremely wide and, where the benefits are state or local authority benefits, has varied from time to time and is likely to be the

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[4] See Parry v. Cleaver [1970] A.C. 1 per Lord Wilberforce at p.42.

subject of further changes. We have, therefore, endeavoured to look for common factors in the nature of the benefits and to find principles which might be applied not only to existing benefits of that class but to other benefits similar in kind which may be available in the future and be the subject of debate in future cases.

5. To simplify the presentation of this Memorandum, it may be convenient to make, in the first instance, a distinction between benefits derived from the state or local authorities and all other kinds of benefit. It is not clear that similar principles apply to the two categories. We consider, first, the category of "private" benefits where the issues are possibly less complex.

PART II BENEFITS OTHER THAN THOSE DERIVED FROM THE STATE OR LOCAL AUTHORITIES

(1) Private means

6. In claims by the relatives of a deceased injured person for loss of support, it was formerly held that the relatives' private means might be taken into account in calculating the amount of damages.[1] The matter was reviewed by the House of Lords in Cruikshank v. Shiels,[2] where the defender and appellant is reported to have argued that

> "the true foundation of the claim for damages for loss of support being partly the existence during life, as between claimant and deceased, of a mutual obligation of support in case of necessity, the award must be conditioned by the same considerations as would affect the right to aliment and the amount of aliment awarded in an action where such a claim for support was attempted to be enforced. In an action for aliment by a wife against a husband the private means of the wife are always a relevant consideration. The reason is obvious. Aliment is only awarded ex necessitate. To the extent to which the wife has private means she cannot prove her necessity".[3]

This argument was rejected both by the Second Division (Lord Mackay dissenting) and by the House of Lords on the view that in a claim by a widow for reparation what is relevant is not the aliment she reasonably requires by virtue of her husband's particular position, but the loss of support she has actually sustained by virtue of her husband's death; and that to take into account a wife's own income would be to limit her right to dispose of her own estate as she pleased, a right which was unlimited before the wrongful act. It seems clear that, in claims for damages for loss of earnings at the instance of the

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1 Smith v. Comrie's Executrix 1944 S.C. 499.

2 1953 S.C. (H.L.) 1.

3 The argument of the defender and appellant as set out in the Second Division by Lord Patrick (1951 S.C. 741 at p.746.)

injured person himself, there would be no basis for a claim analogous to that of the defender in Cruikshank v. Shiels. A living pursuer whose injuries deprive him of earnings and of earning capacity suffers losses irrespective of his own private fortune. In this context, what is to be compensated is what is lost and the existence of private means neither increases nor decreases the loss. The law on this point is both well settled and, in our view, satisfactory. We consider, therefore, that the first principle in this domain is that in computing an injured person's damages no account should be taken of his possession of private means. The views of readers would be appreciated.

(2) Benefits from private benevolence

7. The question has occasionally arisen whether an injured person must deduct from the damages which he claims the value of benefits coming to him in consequence of private benevolence. These benefits may be of various kinds, philanthropic donations by outside persons, whether in cash or in kind, extra-contractual payments including provisions made by an employer, or benefits in cash or in kind received from relatives such as board and lodging.

8. There is clear English authority for the view that private benevolence of this kind should be disregarded in the computation of damages. Although in Lory v. Great Western Railway Co[4] Asquith J. made a deduction from a widow's claim of a gratuitous payment of £160 which she had received from a Police Charitable Fund, the general view in England is that such payments do not fall to be deducted. Thus in Liffen v. Watson[5] the Court of Appeal, in a case where the plaintiff's loss included board and lodging from her employer as well as a weekly wage, the Court

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4 [1942] 1 All E.R. 230.

5 [1940] 1 K.B. 556; cf. Moore v. Babcock & Wilcox Ltd [1966] 3 All E.R. 882, at p.887.

of Appeal held that the plaintiff was entitled to recover damages in respect of the loss of board and lodging, despite the fact that after the accident she had been lodged gratuitously by her father. The same result was reached in Peacock v. Amusement Equipment Co Ltd,[6] a fatal accident case where the step-children of the plaintiff had made a voluntary payment following the accident. There are also numerous dicta of persuasive authority on this subject including dicta of the House of Lords in Parry v. Cleaver.[7]

9. Apart from English authority, it has been held in Northern Ireland in Redpath v. Belfast and County Down Railway Co[8] that monies received from a relief fund subscribed to by the public after an accident should not be taken into account in calculating the damages of the victims.

10. In Scotland, the only authority relating to relief funds subscribed by the public is the decision of Sheriff Irvine Smith in Dougan v. Rangers Football Club Ltd,[9] in which both the facts of the case and the judgment are instructive. The action was one for damages and solatium brought by the children of a person killed in the course of an accident at a football ground. It was held that the payments received by the children from a disaster fund set up after the accident should not be taken into account, even though the defenders had themselves contributed to the fund. The Sheriff examined the various justifications for this result canvassed in the English cases, including causation, intention, equity and public policy, but he placed most stress upon the last two grounds.

11. Though the Commission has noted that in Browning v. The War Office,[10] Diplock L.J. emphasised the importance of

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[6] [1954] 2 All E.R. 689.

[7] supra; See also Browning v. The War Office [1963] 1 Q.B. 750.

[8] [1947] N.I. 167.

[9] 1974 S.L.T. (Sh.Ct.) 34.

[10] [1963] 1 Q.B. 750 at p.770.

remoteness, the tenor of the leading opinions in Parry v. Cleaver,[11] with which we respectfully agree, is to reject the relevance of the classic concept of remoteness in the present context. It does not seem relevant to make the quantum of a defender's liability depend upon whether or not he could reasonably have foreseen that the injured person would have gained benefit from the benevolence of others.[12] In The National Insurance Company of New Zealand v. Espagne[13] stress was laid on the question whether the benevolent dispositions to an injured person were clearly intended for his benefit rather than for the relief of others from their liability to him.[14] In the end, however, like the learned Sheriff, we attach most weight to the simple equities of the situation. In the words of Lord Reid in Parry v. Cleaver[15]:

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer."

Moreover, to deduct charitable payments in computing damages might discourage such philanthropy and, in effect, divert benevolent payments from their intended object.

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11 supra.

12 ib., per Lord Reid at p.15, and Lord Pearson at p.34.

13 [1961] 105 C.L.R. 569.

14 ib., at p.600, (cited by Sheriff Irvine Smith in Dougan, supra, at p.37) when Windeyer J. remarked: "The decisive consideration is not whether the benefit was received in consequence of or as a result of the injury but what was its character: and that is determined, in the one case by what, under his contract [e.g., insurance] 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 ... each must depend on the terms of the particular contract, pension scheme, charitable benefaction or statute governing the benefit conferred."

15 supra, at p.14.

12. There is arguably an important distinction between most instances of private benevolence and the case where the defender himself makes the payments. This was the situation in Dougan and, where it arises, we are conscious that some of the arguments referred to in the previous paragraphs may be thought to have less force. Our provisional view, however, is that, unless a strong case can be established, no exception should be made to the general rule. It is always open to a defender in these circumstances to make a benevolent payment on the express understanding that it is to be regarded, in the event of a claim succeeding, as an interim payment of damages, in the same way as it is open to an employer to continue to pay wages on the footing that they fall to be repaid by an employee if an action of damages is successful. If payments are made to injured persons or their dependants without such a proviso, or are paid directly into a benevolent fund, they should, in our view, be regarded as purely charitable. We would welcome views on this provisional conclusion.

13. Our general view is that the principle should apply whatever the precise form of the benevolence, whether a donation in kind as in Liffen v. Watson,[16] a donation in the form of an ex gratia pension, or a donation in the form of "wages" paid by an employer in the absence of any contractual obligation on his part to do so. Lest, however, there should be any doubt in this matter we propose, in conformity with the recommendation which we have already made in the context of claims arising out of injuries causing death, that it should be clarified by legislation that, in actions of damages for personal injuries, no account should be taken of the value of benefits secured by the pursuer in consequence of private benevolence. We would, however, appreciate comments upon this proposal.

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[16] [1940] 1 K.B. 556.

(3) Insurance policies, friendly society benefits, pensions arising from employment etc.

14. We propose to deal together with benefits arising from private insurance policies, friendly society schemes, and pensions arising out of employment, because we consider that, on analysis, similar principles are applicable to all benefits privately contracted for and not arising out of state schemes for social security.

15. In relation to insurance policies there is no direct authority whether, in actions for damages at the instance of injured persons, benefits received under accident insurance policies should be deducted. In relation to claims by the relatives of a deceased person for loss of support,[17] and claims for damage to property,[18] it is clear that such benefits are not to be deducted. In an old case,[19] moreover, referred to by Lord Reid in Parry v. Cleaver[20] the pursuer had been assaulted by the defender and claimed damages for his injuries. During a part of his illness he had received an allowance from a friendly society and, in charging the jury, Lord Chief Commissioner Adam said:

> "I do not think you can deduct the allowance from the society, as that is of the nature of an insurance, and is a return for money paid."[21]

The Lord Chief Commissioner clearly assumed that neither insurance benefits nor friendly society benefits fell to be deducted. It has certainly not been the practice of the Scottish courts to deduct accident insurance benefits in assessing claims for damages.[22]

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17 Smith v. Comrie's Executrix 1944 S.C. 499 per Lord Mackintosh at p.501; Adams v. James Spencer & Co 1951 S.C. 175.

18 The Port-Glasgow and Newark Sailcloth Co v. The Caledonian Railway Co (1892) 19 R. 608.

19 Forgie v. Henderson (1818) 1 Murray 410.

20 [1970] A.C. 1 at p.14.

21 At p.418.

22 Adams v. James Spencer & Co 1951 S.C. 175 per Lord Jamieson at p.188.

16. We consider this practice to be sound. Reasons which might justify its adoption are discussed in various English cases, which clothe the practice with the clear stamp of judicial approval. The leading case is Bradburn v. The Great Western Railway Co[23] where Pigott, B. remarked:

> "I think that the plaintiff is entitled to recover from the railway company the full ammount of the damage which they have caused him to suffer by their negligence; and I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, 'laying by for a rainy day'. He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them. It is true that there must be the element of accident in order to entitle him to the money; but it is under and by reason of his contract with the insurance company, that he gets the amount; and I think that it ought not, upon any principle of justice, to be deducted from the amount of the damages proved to have been sustained by him through the negligence of the defendants."[24]

This principle has been approved in many subsequent decisions, including that of the House of Lords in Parry v. Cleaver.[25]

17. Parry v. Cleaver was concerned with the deductibility of a pension. A police constable had been injured by the negligent

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23 All E.R. Rep. 1874-1880 195; (1874) L.R. 10 Ex. 1; (1874) 44 L.J. Ex. 9; 31 L.T. 464; 23 W.R. 468.

24 These words are taken from the Law Times Reports at p.465, where they are attributed to Cleasby, B. They also appear in the All England Reports Reprint at p.197, where they are attributed to Pigott, B. Elsewhere this passage is not reported in these words, but the other reports are unanimous in indicating that Pigott, B. was sitting.

25 supra.

driving of the defendant, whom he sued for damages. He had been discharged from the police service as a result of his injuries, and in consequence was in receipt of a disability pension. The defendant claimed that the damages fell to be reduced by the notional value of this pension. The majority of the House rejected this contention, and the views of Lord Pearce may be taken as representative of their reasoning:

> "If one starts on the basis that Bradburn's case (1874) L.R. 10 Ex. 1, decided on fairness and justice and public policy, is correct in principle, one must see whether there is some reason to except from it pensions which are derived from a man's contract with his employer. These, whether contributory or non-contributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums.
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> "Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their 'character' is the same, that is to say, they are intended by payer and payee to benefit the workman and not to be a subvention for wrongdoers who will cause him damage."[26]

Lord Pearce saw some confirmation of this view in the fact that Parliament had directed, in the Fatal Accidents Act 1959 (which does not apply to Scotland), that in fatal accident cases pensions were not to be taken into account.

18. The Law Commission Report expressed agreement with the reasoning in Parry v. Cleaver[27] and suggested, in effect, that it should be given legislative authority.[28] Before

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26 At p.37.

27 Para.152.

28 See clause 1 of the draft Bill annexed to the Law Commission Report, p.96.

concluding that the same approach should be adopted in Scotland we think it right to consider a matter which the Law Commission Report did not discuss, namely whether the same approach should be adopted even where the disability pension is payable by an employer who is also the defender, since it is arguable that this would be imposing a double burden upon him.

19. The question arose in an English fatal accident case, Smith v. British European Airways Corporation.[29] The plaintiff's husband, a flight steward employed by BEA, was killed as a result of an accident arising out of the negligence inter alios of the pilot of the plane. In terms of the flight steward's employment with BEA, pension benefits accrued on his death to his estate, in consideration for which the deceased had agreed on behalf of himself and his successors to waive any claims for negligence on the part of the company or its servants, whether at common law or under the Fatal Accidents Acts. The plaintiff, however, argued that this agreement had been rendered void by s.1(3) of the Law Reform (Personal Injuries) Act 1948 which invalidated clauses excluding the employer's liability to the employee in respect of the negligent acts of his fellow-employees. This argument was accepted, but the court held that the sum received by the plaintiff under the pension scheme, not being a contract of insurance within the meaning of the Fatal Accidents Act 1908, must be taken into account in reduction of the amount of damages which the plaintiff was entitled to recover.

20. The result in Smith v. British European Airways Corporation could no longer be reached in England because s.2(1) of the Fatal Accidents Act 1959 provides that no deduction from damages is to be made in respect of a pension in a fatal

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[29] [1951] 2 All E.R. 737.

accident claim. Nor, if the Bill annexed to our Report is enacted, could the result in Smith be reached in a Scottish action for damages arising out of a fatal accident.[30] No case, to our knowledge, has yet been reported in either jurisdiction where, in answer to a claim made by a person for injuries occasioned to him by the negligence of a fellow-employee, an employer has argued that the amount of the damages should be reduced to take account of sums paid by the employer to the employee under a disability pension scheme. We concede that to fail to take account of such benefits would be to introduce an element of duplication of damages if the purpose of the disability pension scheme is to compensate the employee for the inevitable risks associated with certain types of employment. We consider, nevertheless, that no account should be taken of such benefits. We do so partly to achieve consistency with the position in fatal accident cases and partly because it may be a matter of chance whether an employee's injury benefits arise under a company pension scheme or under private insurance schemes, and because consistency with our recommendations relating to insurance benefits is desirable. In either case the ultimate basis for the benefit is the work done by the employee.

21. The conclusions which we have reached may be generalised as follows. The various benefits from insurance policies, from friendly societies and similar organisations, and from pensions, flow from the underlying contract rather than the accident, which is merely the contingent event on which they are payable. The pursuer will usually have assumed onerous obligations in the contract and it would be unfair to deprive him of their counterpart. In the usual case, the contract is res inter alios acta in relation to the defender in an accident case. Where it is not, and the benefit is in fact provided by the defender,

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[30] See clause 1(5).

it would make for consistency and clarity in the law if the same principle were applied. We conclude, therefore, that in actions of damages for personal injuries, no deduction should be made from the damages awarded in respect of benefits which the pursuer has received or may receive by reason of the existence of a contract or by membership of an association which entitles him to benefits in the event of an accident or events which supervene by reason of an accident, notably money paid under insurance policies, payments by a friendly society or trade union, and pensions arising from employment. We would welcome comments on this general proposition.

PART III BENEFITS DERIVED FROM THE STATE OR LOCAL AUTHORITIES

(1) State retirement pensions

22. The first category of benefits which we propose to discuss is state retirement pensions. It has been decided in England, following the reasoning of Lords Reid and Pearce in Parry v. Cleaver,[1] that retirement pensions paid by the state are not to be taken into account.[2] In terms of s.2(1) of the Fatal Accidents Act 1959, neither state retirement pensions nor pensions derived from private sources fall to be deducted in fatal accident cases in England. In Scotland, it was held in Adams v. James Spencer & Co[3] that a widow's pension under the National Insurance (Industrial Injuries) Act 1946 should be deducted in computing her claim for patrimonial loss. The law was subsequently altered by s.1 of the Law Reform (Personal Injuries) (Amendment) Act 1953, which declares:

> "In an action for damages in Scotland in respect of a person's death there shall not in assessing those damages be taken into account any right to benefit resulting from that person's death."[4]

23. We have recommended in our Report that no account should be taken of what the dependants receive, in consequence of the death, by way of succession or settlement, whether or not from the injured person's own estate, or in respect of any insurance money, pension, gratuity, benefit under the National Insurance Acts, or payments from a friendly society or trade union.[5] We see no reason why the same principle should not apply to a claim by an injured person. The analogy with private pensions is close and, even if the injured person did not obtain the

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1 [1970] A.C. 1.

2 Hewson v. Downs [1970] 1 Q.B. 73.

3 1951 S.C. 175.

4 See our Report, paras. 94-95.

5 ib., para. 101.

benefit by virtue of a contract in which he himself assumed obligations, his entitlement to the pension depends on his participation in the pension scheme. We propose, therefore, that there should be an express statutory provision to the effect that state retirement pensions, including foreign state retirement pensions, are not to be taken into account in considering the amount of damages in a claim by an injured person. We would appreciate comments on this proposal.

(2) State or local authority benefits which do not depend on the payment of contributions

(a) Supplementary benefit, family income supplement, etc.

24. The second category of benefits is that of benefits which do not depend on the payment of contributions by the beneficiary. The category includes supplementary benefit and family income supplement. In two English cases, Eldridge v. Videtta[6] and Foxley v. Olton[7] it was decided that supplementary allowances should not be taken into account because of their discretionary character. We understand, however, that supplementary benefits are payable as of right although the nature of the scheme requires the conferment of a residual discretion in marginal cases.[8] There is no clear Scottish authority as to whether or not supplementary benefits should be taken into account.

25. The Law Commission Report did not deal with supplementary benefits specifically, but concluded that, in the absence of specific legislation, all social security benefits should be ignored.[9] Our own conclusion is that supplementary benefits should not be taken into account in the assessment of damages for personal injuries. This conclusion is not based on the

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6 (1964) 108 S.J. 137.

7 [1965] 2 Q.B. 306.

8 Ministry of Social Security Act 1966, s.4; Gallagher v. Imperial Chemical Industries Ltd 1970 S.L.T. (Notes) 41, per Lord Kissen; Duffy v. Sportsworks Ltd 1971 S.L.T. (Notes) 19 per Lord Thomson at p.20.

9 Para. 137.

view that they are of a discretionary character,[10] but rather upon a consideration of the purpose of supplementary benefits. This is to provide subsistence for persons who are not in full-time employment and whose income from all sources, including other social security benefits, is insufficient to meet their needs. The benefits are paid from the general fund of taxation, and are not related to the prior payment of contributions. Since they are calculated on the basis of the claimant's needs from time to time, it would seem to follow that, while the claimant's receipt of damages for personal injuries may be relevant to the assessment of supplementary benefits (since savings and other capital above a fixed amount are taken into account), the claimant's potential right to supplementary benefits should be irrelevant to the assessment of damages for personal injuries. We note that the Committee on Alternative Remedies reached the same conclusion in relation to national assistance.[11] We also consider that the same principle should be applied in relation to other social security benefits whose object is to ensure that when account is taken of other income, the person concerned is provided with the basic necessities of life. While this reasoning would not exclude the taking into account of supplementary benefits actually received, we think that such benefits should be ignored on the view that there would otherwise be an incentive to delay the settlement of claims.

26. We suggest, therefore, that it should be clarified by statute that, in assessing damages for personal injuries, no account shall be taken of supplementary benefits under the Social Security Acts and other pecuniary benefits which do not depend

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[10] This was the basis of the decisions in Eldridge v. Videtta, Foxley v. Olton and McCarrol v. McCarrol 1966 S.L.T. (Sh. Ct.) 45.

[11] Final Report of the Departmental Committee on Alternative Remedies, Cmd. 6860 (1946), para. 49.

on the payment of contributions. We envisage that, if the proposed tax credit scheme is introduced, the same principle should apply to "negative income tax", the function of which is to secure, after all other sources of income have been taken into account, a minimum subsistence level. We would welcome comments on these proposals.

(b) Health service facilities

27. It is provided in s.2(4) of the Law Reform (Personal Injuries) Act 1948 that

> "In an action for damages for personal injuries ... there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the ... National Health Service (Scotland) Act 1947."

This provision, which precludes the possible defence that the services were unnecessary or the expense unreasonable, was not that recommended by the majority of the Monckton Committee.[12] That Committee considered, but rejected, an argument presented in the Beveridge Report that

> "... if comprehensive medical treatment is available for every citizen without charge quite irrespective of the cause of his requiring it, he ought not to be allowed, if he incurs special expenses for medical treatment beyond the treatment generally available, to recover such expenses in the action for damages."[13]

The Committee thought that the Beveridge proposal was inconsistent with the liberty of the individual, and themselves recommended that, while the reasonable cost of medical and allied services, including nursing, should be recoverable as damages, notwithstanding that similar services might have been obtained through the state, it should be open to the

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[12] Final Report of the Departmental Committee on Alternative Remedies, Cmd. 6860 (1946), paras. 51-56.

[13] Cmd. 6404 (1942), para. 262.

defender to contend that the services were not necessary or that the expense was unreasonable.[14]

28. S.2(4) of the 1948 Act may lead to over-compensation in cases where it is patent that, sooner or later, the injured person will utilise National Health Service facilities, and it is clearly for consideration whether a mandatory requirement to ignore the possibility is just to defenders. The application of the ordinary test of reasonableness, arguably, would lead to more satisfactory results. We concede, however, that this point raises a basic issue of legislative policy and assume that the matter will be considered by the Royal Commission on civil liability.

(3) State benefits payable in the event of injury, sickness at work or unemployment

29. The third category of benefits includes those designed to compensate a person in the event of injury, sickness at work or unemployment. We propose to discuss United Kingdom and other benefits separately because they have hitherto been treated in different ways by statute.

(a) United Kingdom benefits

30. S.2(1) of the Law Reform (Personal Injuries) Act 1948 regulates the effect of some of these benefits upon the assessment of damages for personal injuries. It provides that:

> "there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness or invalidity benefit[15] for the five years beginning with the time when the cause of action accrued."

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[14] Para. 56.

[15] Added by the National Insurance Act 1971, s.14 and sch.5, para. 1.

This provision differed from the recommendations of the Monckton Committee.[16] The terms of reference of this Committee were to consider, having regard to the observations on alternative remedies contained in the Beveridge Report, how far the statutory schemes of social insurance and financial assistance to persons incapacitated by injury or sickness should affect common law proceedings for damages for personal injury. The majority of the Committee recommended inter alia that the common law right of action should be retained, but that the injured person or his dependants should not be entitled to recover from both sources of compensation more than the maximum which he would be entitled to under either, and that in assessing damages the court should take into account in diminution of damages the value of certain benefits already paid in respect of the injury and the estimated value of the future benefits. The benefits to be taken into account did not include national assistance or unemployment benefit. These recommendations were the object of a dissent by the trade union members, in whose view no regard should be had to the amount of benefits which the injured person may have received or be entitled to receive.[17] S.2 of the 1948 Act embodies a compromise, which was extended to invalidity benefit by the National Insurance Act 1971.

31. The section, as amended, does not apply to unemployment benefit. There are occasions when, after a period of incapacity during which he has received industrial disablement benefits, an injured person is unable to find employment and receives unemployment benefit. In the English case of Parsons v. B.N.M. Laboratories Ltd,[18] an action against an employer for wrongful dismissal, the Court of Appeal held that unemployment benefit received by the employee after his dismissal had to be

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16 Cmd. 6860 (1946), paras. 38, 48 and 92.

17 Annex A, p.56.

18 [1964] 1 Q.B. 95.

deducted in full, but some stress was laid on the fact that the benefit was paid out of a fund to which the employer himself had contributed. In the later case of Foxley v. Olton,[19] an action for damages for personal injuries sustained in a road accident, John Stephenson J. must be taken to have considered that the source of the benefit was immaterial:

> "In each case the plaintiff must mitigate his damage and gain from a statutory benefit no fortuitous windfall in addition to his proper compensation from the defendant. I must, therefore, deduct the unemployment benefit received by the plaintiff."[20]

The Law Commission Report in effect recommends that this rule should be reversed in personal injuries cases. In proposing that no account should be taken of social security benefits other than those specified in s.2(1) of the 1948 Act, it stressed that any other course would be out of line with legislative policy in claims under s.2 of the Fatal Accidents Act 1959, where social security payments are not taken into account, and with the approach to pensions taken by the House of Lords in Parry v. Cleaver.[21]

32. In Scotland the question whether a deduction should be made for unemployment benefit was not the subject of reported decision until 1967 when, in McPherson v. Kelsey Roofing Industries Ltd,[22] Lord Kissen held that the benefit should be deducted. He referred with approval to the remarks of Lord Patrick in Adams v. James Spencer & Co[23] and paraphrased them as follows:

> "It seems to me to be unreasonable that the pursuer should receive full compensation from the wrongdoer for loss of earnings and at the same time receive some additional compensation for that loss from a fund built up by the compulsory contributions of employers, employees and taxpayers generally."[24]

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19 [1965] 2 Q.B. 306.

20 At p.311.

21 [1970] A.C. 1.

22 1967 S.L.T. (Notes) 93.

23 1951 S.C. 175 at p.189.

24 At p.94.

Lord Kissen reached the same conclusion subsequently in Gallagher v. Imperial Chemical Industries Ltd,[25] and did so although he was aware of the views of the House of Lords in Parry v. Cleaver.

33. We think it right that an injured person should take all reasonable steps open to him to mitigate his loss, but we also recognise that there is an element of personal insurance in unemployment benefits, as in industrial injury benefit, industrial disablement benefit and sickness or invalidity benefits. We consider, therefore, in conformity with the legislative policy set out in s.2(1) of the 1948 Act, which is clearly in the nature of a compromise in a situation where any rule is bound to be partly arbitrary, that in assessing damages for personal injuries the court should take into account one-half of the value of any rights which have accrued or may accrue to the injured person from the injuries over a period of five years in respect of unemployment benefits. The same principle should be applied to all future benefits, other than pensions, which are partly financed by the state, but where there is a partial element of personal insurance. We would appreciate comments on these proposals.

(b) Foreign state benefits

34. S.2(1) of the 1948 Act applies only to United Kingdom benefits. In McGinty v. John Howard & Co Ltd[26] Lord Robertson had to consider whether, in assessing damages for personal injuries, he was bound to take account of a disability benefit received by the pursuer from the Irish Ministry of Social Welfare. He held that, since it was not a benefit expressly envisaged by s.2(1) of the 1948 Act, "the whole of it should be taken into account in assessing damages". This decision has

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[25] 1970 S.L.T. (Notes) 41.

[26] 1969 S.L.T. (Notes) 83.

been criticised[27] on the ground that the Irish Social Welfare Act of 1952[28] declares:

> "In assessing damages in any action at common law in respect of injury or disease ... there shall not be taken into account any benefit",

and on the separate ground that the pursuer's payments into the fund were of a voluntary character, equivalent to payments under ordinary insurance contracts, benefits under which are not taken into account. The approach of Irish law to deductions in common law actions of damages is not directly relevant to the question whether or not Irish social security benefits are to be deducted in assessing damages in a United Kingdom court, though the argument that the payments were of a voluntary character is of some force. Arguably, however, it is anomalous if different rules are applied respectively to United Kingdom state benefits and to foreign state benefits. We invite views, therefore, as to whether s.2(1) of the 1948 Act should be extended to cover foreign benefits analogous to those specified in that section.

(4) Redundancy payments

35. The English courts have recently had occasion to consider whether redundancy payments should be deducted from an award of damages for personal injuries. In Cheeseman v. Bowaters United Kingdom Paper Mills Ltd[29] it was agreed by counsel for both parties that account must be taken of redundancy payments. In Stocks v. Magna Merchants Ltd,[30] (a wrongful dismissal case), Arnold J. concluded that

> "there is a closer analogy, as regards remoteness or proximity to the dismissal of the plaintiff, between the payment of unemployment benefit and the payment

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27 1970 S.L.T. (News) 53.

28 No.11 of 1952.

29 [1971] 1 W.L.R. 1773.

30 [1973] 2 All E.R. 329.

> of a sum for redundancy under the 1965 Act than there is between the payment of a retirement pension and a redundancy payment",[31]

and accordingly held that a deduction should be made.

36. Our preliminary view is that a different conclusion would be appropriate in an action for personal injuries. It is possibly arguable that redundancy payments should be regarded simply as payments in lieu of wages which the employer is under a legal obligation to make and as such should be deducted. The analogy with unemployment benefit seems less strong in personal injuries cases, however, because the legal obligation to make redundancy payments arises in circumstances which have nothing to do with personal injuries sustained by the employee either in the course of his work or through any other cause. The Redundancy Payments Act 1965 prescribes the circumstances in which an employer has to make these payments to his employees. These are where the employer ceases to carry on the business for which the employee was employed (or at the place where he was employed)[32]; and where the requirements of the business cease or diminish.[33] The amount of the payment depends on the length of service and on the age of the employee. The same argument applies in this context as in the case of private means, namely that what is to be compensated is what is lost as a result of the accident, and the fact of redundancy for a different reason neither increases nor decreases that loss. We therefore consider that no deduction should be made from an award of damages for personal injuries in respect of redundancy payments, but we invite views on our provisional conclusion.

(5) Other benefits

37. We do not consider that it would be feasible to list exhaustively or examine in detail all the other benefits which

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[31] At p.333.
[32] s.1(2)(a).
[33] s.1(2)(b).

may require to be taken into account by the courts in assessing damages. Difficult questions may arise in other cases which we have not considered, for example, unfair dismissal claims,[34] but we have confined our discussion to claims for personal injuries. In our view, however, the ordinary principles of the law, including the principle of causal remoteness, and the principles described in the preceding paragraphs, will assist the courts in determining how such benefits should be treated.

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[34] e.g. Parsons v. B.N.M. Laboratories Ltd [1964] 1 Q.B. 95, referred to in para. 31 supra; Stocks v. Magna Merchants Ltd [1973] 2 All E.R. 329, referred to in para. 35 supra.

PART IV ADMISSIBLE HEADS OF CLAIM

38. As we mentioned in the introduction, in a number of recent cases in Scotland novel claims have been presented, which seek to extend the classes of loss for which an injured person may claim damages or which seek to extend the right to claim damages to persons other than the injured person.

(1) The injured person's claim for loss and expenses sustained by others on his behalf

39. A number of recent cases in Scotland and in England have raised the question whether an injured person may include in his own claim for damages an item in respect of the losses and expenses sustained by others in rendering him necessary services. The classic circumstance is where a husband is injured in a traffic accident and, instead of employing a professional nurse to look after him in his home, his wife renders him nursing services, sometimes leaving her employment to enable her to do so. Is the husband to be permitted to include in his claim for damages an item in respect of the value of his wife's services both when she has and when she has not sustained pecuniary loss in rendering these services?

40. The matter was considered by the Law Commission Report, its conclusions being summarised in a recommendation that

> "Where others have incurred expense or suffered pecuniary loss on behalf of the victim such expenses, so long as they are reasonable, should be recoverable by the plaintiff from the tort-feasor."[1]

The question has also been considered by the Court of Appeal in England in two decisions reported after the publication of the Law Commission Report, Cunningham v. Harrison[2] and Donnelly v. Joyce.[3] The latter case established that, under

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[1] Recommendation 12(a), p.90.

[2] [1973] Q.B. 942.

[3] [1973] 3 W.L.R. 514.

English law, in an action for damages for personal injuries, a plaintiff is entitled to claim damages in respect of the provision by a third party of services rendered necessary by reason of the plaintiff's injuries and that whether or not the plaintiff was under a legal obligation to reimburse the provider of the services. Megaw L.J., reading the judgment of the court, remarked:

> "Mr Hamilton's first proposition is that a plaintiff cannot succeed in a claim in relation to someone else's loss unless the plaintiff is under a legal liability to reimburse that other person. The plaintiff, he says, was not under a legal liability to reimburse his mother. A moral obligation is not enough. Mr Hamilton's second proposition is that if, contrary to his submission, the existence of a moral, as distinct from a legal, obligation to reimburse the benefactor is sufficient, nevertheless there is no moral obligation on the part of a child of six years of age to repay its parents for money spent by them, as in this case.
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> "We do not agree with the proposition, inherent in Mr Hamilton's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff - the injured person - the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages - for the purpose of the ascertainment of the amount of his loss - is the proper and reasonable cost of suppling those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.
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> "Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the 'provider';

> it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received, because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do. The question of legal liability to reimburse the provider may be very relevant to the question of the legal right of the provider to recover from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer.
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> "The corollary of this proposition is that, unless at any rate some very special circumstances exist,... the provider has no direct cause of action against the wrongdoer."[4]

41. In Scotland, until recently at least, the opinion prevailed that such a claim would be inadmissible unless the injured person by antecedent contract had agreed to repay the expense or loss incurred or that repayment had actually been made. Nevertheless, it is thought that there has always been a persuasive case for the view that an injured person may come under a legal obligation to reimburse expenditure on services reasonably incurred by another on his behalf when, by reason of his injuries or otherwise, he is incapable himself of entering into a contract to obtain those services. The person to whom the services were rendered may be liable on the principle of negotiorum gestio, i.e. the unauthorised administration of another's affairs in a situation - usually of emergency - where his authorisation could be assumed were he in a position to consent. Though we know of no Scottish case where the doctrine has been extended beyond the management of property or business affairs, there would seem to be no reason in principle why the doctrine should not apply when services of a personal kind are rendered. It may be, too, that in cases where the injured person is not incapable of

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[4] pp. 519-520.

contracting himself a claim based on the doctrine of recompense would be admitted. While the scope of this doctrine in Scots law is not altogether clear, it has not, so far as we are aware, been invoked in this precise context.[5] The absence or dearth of authority for the application of the principles of negotiorum gestio and recompense, and the difficulty in such cases of meeting the defence that the services were intentionally rendered gratuitously, tend to the conclusion that a legislative solution to these problems would not be inappropriate. Such a solution would be without prejudice to claims at common law against an injured person by one who has rendered personal services.

42. Since 1958, moreover, pursuers have argued, on different principles, that even in the absence of an antecedent contract between them and the injured person, they should recover damages for loss or expense sustained by others on their behalf. In Thomson v. Angus County Council[6] a married woman, who averred that she had suffered personal injuries for which the defenders were responsible, included in her claim for damages an item for the wages her husband had lost by leaving his employment to look after her. Lord Guthrie remarked:

> "In my opinion, it is relevant for the pursuer to aver that, in consequence of her incapacity, domestic assistance was necessary, and to claim against the defenders the reasonable cost of such assistance. The basis of her claim is not, however, her husband's loss of wages, since the question is not what her husband lost, but what the pursuer would have required to pay for domestic assistance."[7]

This decision was followed by Lord Sorn in Murphy v. Baxter's Bus Services Ltd[8] in which the circumstances were similar.

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5 The application of the doctrine in relation to personal services was recognised in a dissenting judgment by L.J-C. Alness in Gray v. Johnston 1928 S.C. 659.

6 18th March, 1958, unreported, but excerpted in Murphy v. Baxter's Bus Services Ltd 1961 S.L.T. 435.

7 See 1961 S.L.T. 435 at p.436.

8 1961 S.L.T. 435.

These decisions were disapproved by the First Division in Edgar v. Lord Advocate.[9] A wife had given up her full-time employment to look after her husband after he was injured in a road accident, and in his own action of damages he included an item corresponding to the wife's loss of wages. This claim was not admitted because (1) the loss was the wife's and not the husband's and (2) there was no agreement by the husband to pay his wife for her services. This decision might at first sight appear to be conclusive of the state of the current law, but Lord Carmont remarked:

> "It is not proper to figure any situation other than that tabled by the pursuer, as, for instance, a household in the running of which, owing to its scale, both spouses had to contribute by their respective earnings, and which was disrupted by the husband being incapacitated by injury, so that the cesser of the wife's contribution by having to stay at home to nurse her husband upset the financial stability of the house."[10]

This remark was founded upon in Jacks v. Alexander Macdougall & Co (Engineers) Ltd,[11] an action at the instance both of a husband and a wife, in which the husband, in his claim, averred that he and his wife used their earnings jointly to defray household expenses and maintain their standard of living, and that he lost the benefit of his wife's earnings during the period of his incapacity. Lord Keith admitted this averment to probation, but the case is understood to have been settled. It is not clear whether or not this decision would have been approved on review by a higher court.

43. Even the approval of Jacks v. Alexander Macdougall & Co (Engineers) Ltd would not solve all the questions in this field. If the ratio applies only to spouses who pool their earnings or even only to spouses, the rule would be a narrow one and, while catering for an important class of cases, would not deal with the hardship which arises when, for example, an unmarried

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[9] 1965 S.C. 67.

[10] At pp.72-73.

[11] 1972 S.L.T. (Notes) 81 and 1973 S.L.T. 88.

daughter leaves her employment to return to an injured father's home to look after him. We question, in fact, whether the existence of a marital or even a family relationship between the person directly injured and the person who renders assistance is really material. It is, arguably, relevant to a claim presented directly by the person rendering assistance, the basis of the claim being that he or she falls within the class of persons who, by reason of their close relationship to the person directly injured, should have been within the range of the defender's foresight. But it is hardly relevant to a claim by the injured person, whose loss is of the same nature whoever renders the necessary services.

44. What is clear in this difficult area is that if, in the circumstances of those cases, it would have been reasonable for the injured person to employ another person to look after him, and if he had contracted with another person, whether or not a relative, that he or she should receive remuneration for rendering necessary services, the injured person would have been entitled to include the cost in his claim for damages.[12] The Law Commission Report reached the conclusion embodied in the recommendation cited above[13] partly because they thought it artificial that

> "the payment of compensation should depend on whether a largely fictitious contractual relationship has been engineered by the victim's legal advisers."[14]

We are disposed to agree, not least because such services are usually rendered by persons within the injured person's family, or at least by persons closely related to him. Our view in this matter is reinforced by the need to discourage a multiplicity of claims arising out of the same accident, and by the consideration that claims of this nature will normally be small both in amount and in relation to the sum total of the injured person's claim. We also consider, like the Law

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12 Edgar v. Lord Advocate 1965 S.C. 67, per Lord President Clyde at p.71.

13 See para. 40, supra.

14 Para. 112.

Commission, that it should be immaterial whether the provider of services actually suffered personal loss in consequence of rendering the services.

45. However, we find it difficult to accept the view of the Law Commission that, if the injured person is to recover damages in respect of expense incurred or pecuniary loss suffered by others in assisting him, he should not be placed under a duty to account for the damages recovered to the person who actually suffered the loss. The rule proposed by the Law Commission not only conflicts with the principle of the law of reparation that only losses directly sustained are recoverable, but with considerations of fairness to the person who actually suffered the loss. The Law Commission did not think that the person who rendered the services should have a right of statutory recovery and remarked:

> "this solution may occasionally raise difficulties in cases which are settled, but in the great majority of cases the plaintiff will be receiving compensation for loss sustained by those near and dear to him and we think it would be altogether too cynical to suggest that this is likely to be a real problem."[15]

We agree that in most cases the problem would not be a real one but it would be serious in the smaller number of cases in which the injured person ignored his moral responsibilities.

46. Since the approach which we propose is inconsistent with that adopted by the majority of the Inner House in Edgar v. Lord Advocate,[16] we consider that legislation is required. Hesitating as we do to adopt the view of the Law Commission that the injured person should be under no legal duty to account to those who, perhaps at considerable personal sacrifice, have rendered necessary services to him, we have

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[15] Published Working Paper No. 41, para. 207, referred to in the Law Commission Report, para. 155.

[16] 1965 S.C. 67.

considered alternative approaches to the problem. Our provisional view is that the two problems of the extent of the liability of the wrongdoer and the duty of the injured person to account could be met simultaneously by enacting that for the purposes of determining damages for personal injuries and of determining the injured person's duty to account to others for necessary services which they have rendered or caused to be rendered to him in consequence of the injuries, it should be presumed that a person who renders or causes to be rendered such services has not done so gratuitously but on such terms as to repayment or remuneration as may seem reasonable to the court in the circumstances of the case. This approach would have the effect of enabling the injured person to include in his own claim for damages an item in respect of those services, but it would also place upon the injured person a statutory liability, quite apart from any other legal or moral duty, to repay the sum he recovers in respect of those services to the person who rendered them or caused them to be rendered. We are conscious that this proposal presents problems in cases where, for example, by reason of contributory negligence on his part, the injured person recovers only a proportion of the total damage he has sustained. To place upon him a duty to repay the cost of the necessary services might seriously diminish his net available damages. A problem of the same nature, however, arises where the injured person has paid or will require to pay for the necessary services by express contract and it is thought that the two situations should attract the same results in law. It will be for the injured person to come to an appropriate arrangement with his benefactor, and the latter will not necessarily insist upon his legal rights. We do think, however, that the option to decline to receive payment should be with the benefactor rather than the option to refuse to make payment with the injured person.

47. We should appreciate comments upon this provisional proposal. If it is found acceptable we would appreciate

advice as to whether the term "necessary services" should be defined and if so how. In any event the term should include such nursing services to and attendance upon the injured person, and such supply to him of medical and surgical requisites, apparel and household goods as may seem to the court to be reasonably necessary.[17]

(2) The claim of others for losses and expenses sustained by them on behalf of the injured person

48. As we have just seen, the general tendency of the Scottish courts has been to reject claims by the injured person for losses and expenses sustained by others in rendering assistance to him on the ground that he, the injured person, has suffered no loss. In consequence, the courts have been faced with claims by the person who rendered assistance to the injured person to recover their losses and expenses, on the ground that the defender owed a duty to the person who rendered assistance (usually the wife or a near relative of the injured person) not to cause loss by injuring the close relative. The cases include Soutar v. Mulhern[18] where the tenant of a house sued his landlord to recover sums he had expended in obtaining medical attention for his daughter who, he claimed, had contracted diphtheria because of the insanitary conditions of the house, and in visiting her in hospital. While the Second Division remitted the facts to proof before answer, the case must be regarded as special since the landlord clearly owed a duty to his tenant to keep the house in a sanitary condition. In M'Bay v. Hamlett,[19] where a husband and wife had been injured in a car accident through the admitted fault of the defender, Lord Cameron held that the husband was entitled to claim, as items in the total damages, his expenditure in visiting his wife in hospital and in

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17 cf. the definitions of "services" and "necessary services" in the Law Commission Report (clause 4(2), p.104).

18 1907 S.C. 723.

19 1963 S.C. 282.

employing a housekeeper during the period of his wife's disability. If this decision is correct, it would seem immaterial whether the defender owed a direct duty of care to the pursuer.

> "The wrongdoer now must be properly held to have in contemplation the injurious consequences which his wrongful act towards a married person will or may reasonably have on the other spouse. This is well settled in the case of fatal accidents."[20]

In subsequent cases, however, M'Bay has been distinguished, followed with reluctance, or simply not followed.

49. In Robertson v. Glasgow Corporation[21] the daughter of a woman who had died as a result of injuries sustained in a road accident claimed damages from the defenders inter alia in respect of the expenses she had incurred in maintaining her mother from the date of the accident until the latter's death. Lord Johnston rejected this claim inter alia on the ground

> "that the relationship between a married daughter and a mother, who has remarried and whose husband is still alive, is [not] so close that a delinquent may reasonably be expected to have in view that an injury to the mother may result in the married daughter having to incur expenses in maintaining her."[22]

In Higgins v. Burton[23] a father claimed reimbursement of outlays incurred in visiting his children in hospital after they had been injured in an accident. Lord Avonside remitted the case to proof before answer but made it clear that, but for Soutar v. Mulhern and the persuasive effect of Lord Cameron's judgment in M'Bay v. Hamlett, he would have held that the defender owed no duty to the father. Jacks v. Alexander

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20 At p.287.

21 1965 S.L.T. 143.

22 At p.144.

23 1967 S.L.T. (Notes) 61.

Macdougall & Co (Engineers) Ltd[24] is also relevant in this context. A husband had suffered serious burning injuries while at work and, apart from his own claim to which reference has been made above, his wife claimed in her own right for the loss she had sustained in giving up work to look after him and for the travelling expenses she had incurred in visiting him in hospital. Counsel for the wife argued that the defenders owed a duty to the wife to take reasonable care not to cause her loss by injuring her husband, founding particularly on the right of a near relative to claim damages and solatium in fatal accident claims. Lord Keith rejected the wife's claim on the view that, although in fatal accident cases derivative claims are recognised by law, they

> "are not based upon any duty owed by the defender to the pursuer at the time when the injuries which caused the death were inflicted. It is no doubt true to say that a reasonable man might well anticipate injurious consequences to a wide range of persons holding various relationships with an individual directly affected by his acts or omissions. But the law has consistently refused, subject to the limited exceptions already mentioned, to accept that any such persons have any right of action. It has been denied to collaterals in respect of the death of their relative (Greenhorn v. Addie;[25] Eisten v. North British Railway Co);[26] to masters in respect of the death of or injury to their servant (Allan v. Barclay;[27] Reavis v. Clan Line Steamers);[28] and to an illegitimate child in respect of the death of its mother (Clarke v. Carfin Coal Co).[29] It is to be observed that if the principle contended for were once admitted the door would be open to an infinite range of indirect claims."[30]

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24 1973 S.L.T. 88.

25 (1855) 17 D. 860.

26 (1870) 8 M. 980.

27 (1864) 2 M. 873.

28 1925 S.C. 725.

29 (1891) 18 R. (H.L.) 63.

30 1973 S.L.T. 88 at pp.90-91.

50. In considering what legislative response is appropriate to this problem we note, though we do not stress, the undesirability of encouraging the public to place a monetary value upon services which ordinarily are rendered freely, and from feelings of charity, to the injured person. We concede, however, that there are hard cases where it would be inequitable that the loss should be borne, or borne entirely, by the person who rendered the services. There ought to be provision for repairing that loss, and the question is rather one of the form which that provision should take. We note, too, though again we do not stress, that to allow a direct action by the person who rendered the services - except in certain cases where a person rendering the services had a duty to support the injured person - would be to allow a right of action by a person for damages for an alleged wrong which he suffered only as a consequence of his own free choice to intervene.

51. We note, also, and on this occasion stress, that it is important - quite independently of the rule that all actions arising from the same injuries should be litigated in the same action[31] - not to allow a multiplicity of rights of action to arise. The case for channelling all claims through the injured person is a strong one, not only because this would tend to reduce inconvenience to all parties and cost to the defender, but because it will tend to facilitate the settlement of claims. Here we are in entire agreement with the Law Commission. If, however, the law were to establish a presumption that such services are not rendered gratuitously, it would be open to the injured person to include in his action a claim for the loss which he himself will sustain by reimbursing the person or persons who rendered him services.

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[31] See Cole-Hamilton v. Boyd 1963 S.C. (H.L.) 1, per Lord Reid at p.12, and McCallum v. Paterson 1968 S.L.T. (Notes) 98.

52. We do not, however, exclude the possibility that in some cases a person who rendered services to an injured person or sacrificed property in an emergency might directly sue the person at fault for damages. Such a claim might be based on a logical extrapolation of the principles recognised in the "rescue cases". The pursuer in such cases founds upon a duty owed to himself, and his conduct is not regarded as novus actus interveniens.[32] If a person in an emergency rendered services to the victims of a vehicle accident until they could be transported to hospital, it might well be argued that he should have a claim against the person whose fault caused the accident, both in respect of services rendered and of damage to his own property, e.g. bedding and other linen spoiled by bloodstains. As Lord Justice-Clerk Cooper observed in Steel:

> "The fact that the pursuer's claim is novel does not necessarily mean that it is unfounded in law."[33]

If our approach, however, were given statutory effect, it would be necessary to ensure that a defender who paid damages to the injured person in respect of services covered by the statutory presumption was not liable to pay damages again directly to the person who rendered those services. We would welcome comments on this provisional proposal.

(3) The claim by the injured person in respect of personal services that he can no longer render to dependants

53. The Law Commission Report proposes that, where the injured person

> "gratuitously rendered personal services to anyone within the Fatal Accidents Acts class of dependants prior to his injury, he should be able to recover their reasonable past and future value from the tortfeasor."[34]

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32 Steel v. Glasgow Iron and Steel Co 1944 S.C. 237; Wilkinson v. Kinneil Cannel and Coking Coal Co Ltd (1897) 24 R. 1001.

33 At p.246.

34 Para. 159(b).

It gives as the most obvious example where a housewife is injured and her family is thus deprived of her services.

54. This is a proposal which, in the light of the existing principles of the law of reparation in Scotland, as indeed of the law of torts in England, at first sight seems startling. The "victim" has himself suffered no loss, and it is a basic principle of Scots law that "damages necessarily involve a loss, either actual or prospective".[35] The Law Commission Report bases its recommendation on the view that, in actions for damages following the death of an injured person, where the person killed is one who rendered gratuitous services to dependent relatives, the courts in England put a value on those services and award damages based on that value. It points out, however, that where the injured person survives, no value is put on those gratuitous services, except in the special case, admitted in English law but not in Scots law, where a husband was deprived of his wife's services or a father of his daughter's. This claim for damages for loss of services is not a reciprocal one and, while a husband or father may exercise it, it extends to no other dependant. The Law Commission Report considers that this species of compensation should not be limited to such a narrowly circumscribed class and so, in effect, recommends its extension to the class of those who would be entitled to claim under the Fatal Accidents Acts. They consider, however, that the right of recovery should belong only to the victim himself:

> "We think that where, within the family group, gratuitous services were, prior to his injury, rendered by a tort victim, he should be paid such compensation as will enable him to replace those services which he is no longer able to give."[36]

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35 Edgar v. Lord Advocate 1965 S.C. 67 per Lord President Clyde at p.71.

36 Para. 157.

55. The introduction of such a rule would clearly be a greater departure from existing principles of Scots law than it would be from those of English law. Scots law has no analogue to actions for loss of services[37] and, even in actions by a husband for damages following the death of his wife, the court does not put a value on the gratuitous services rendered by the wife. The case, therefore, for requiring the person who has caused the injuries to pay the reasonable value of the gratuitous services which others have lost on account of the accident must be shown to be a strong one, if a change in the law is to be justified.

56. We concede that the absence of such a rule may cause anxiety to the injured person and hardship to the person whom the injured person looked after. The hardship is particularly acute when, by reason of injuries to his wife, a husband loses the services of a wife who before the accident had no paid employment but remained at home, looking after her husband and their children. Because of his wife's injuries, the husband may have to employ a housekeeper and may be directly out of pocket as a result of the accident. Hardship may also be suffered by parents who, because of injuries received by their daughter, lose the benefit of her services. We hesitate, however, to accept the recommendation of the Law Commission because it departs from the basic principle of the Scots law of reparation that damages may be claimed only by the person who actually suffered the loss. Our hesitation with regard to the English proposal in its present terms is reinforced by the absence of any requirement that the injured person should account to the person who actually sustained the loss. Equally, we hesitate to advocate conferring a right of recovery upon the person who suffered loss as a result of the withdrawal of services previously rendered on a gratuitous basis. It would be tantamount to introducing a right to damages for incidental

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37 Allan v. Barclay (1864) 2 M. 873; Reavis v. Clan Line Steamers 1925 S.C. 725; Quin v. Greenock and Port-Glasgow Tramways Co. 1926 S.C. 544; Gibson v. Glasgow Corporation 1963 S.L.T. (Notes) 16.

economic loss. Such loss, however, may be suffered by a wider range of persons than those envisaged in the Law Commission Report, and the issue is one which, once again, affects the basic principles of the law of reparation. We conclude, therefore, with regard to the claims both of the injured person who has rendered gratuitous services and of the recipients of those services, that these matters are properly the concern of the Royal Commission on civil liability, and should not be the subject of legislation before consideration by that body.

PART V SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENTS ARE INVITED

1. In assessing damages for personal injuries no account should be taken of -

(a) the private means of the injured person (paragraph 6);

(b) benefits secured in consequence of private benevolence (paragraphs 7-13), including payments made by a person liable to make reparation, unless the payment has been made specifically to account of damages (paragraph 12);

(c) benefits arising from a contract or membership of an association, notably money paid under insurance policies, payments by a friendly society or trade union, and pensions arising from employment (paragraphs 14-21);

(d) state retirement pensions (paragraphs 22-23);

(e) supplementary benefits, family income supplement and other pecuniary benefits provided by the state or local authorities which do not depend on the payment of contributions (paragraphs 24-26);

(f) any redundancy payment paid to the injured person under the Redundancy Payments Act 1965 (paragraphs 35-36).

2. S.2(1) of the Law Reform (Personal Injuries) Act 1948 should be amended to include unemployment benefit (paragraphs 30-33). Views are invited whether it should be extended to include analogous foreign benefits (paragraph 34).

3. In determining damages for personal injuries and the injured person's duty to account to others for necessary

services which they have rendered or caused to be rendered to him in consequence of the injuries, it should be presumed that a person who renders or causes to be rendered necessary services to an injured person has not done so gratuitously but on such terms as to repayment or remuneration as may seem reasonable to the court in the circumstances of the case. For this purpose necessary services includes such nursing services to and attendance upon the injured person, and such supply to him of medical and surgical requisites, apparel and household goods as may seem to the court to be reasonably necessary (paragraphs 39-47).

4. In determining damages for personal injuries, no direct right to recover damages from the wrongdoer should be conceded to any person who renders or causes to be rendered necessary services to an injured person in circumstances where the injured person himself recovers damages from the wrongdoer (paragraphs 48-52).