Scottish Law Commission

(SCOT. LAW COM. No. 51)

DAMAGES FOR PERSONAL INJURIES

REPORT ON

(1) ADMISSIBILITY OF CLAIMS FOR SERVICES

(2) ADMISSIBLE DEDUCTIONS

Laid before Parliament
by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
18*th July,* 1978

SCOTTISH LAW COMMISSION
11 MAY 2007

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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ISBN 0 10 255778 0

SCOTTISH LAW COMMISSION

To The Right Honourable Ronald King Murray, Q.C., M.P.,
Her Majesty's Advocate.

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, we submitted on 14th May 1968 our Second Programme for the examination of several branches of the law of Scotland with a view to reform. Item No. 10 of that Programme, which was published on 19th July 1968, requires us to proceed with an examination of the law relating to Damages arising from Personal Injuries and Death.

In pursuance of Item No. 10 we have examined the law relating to the admissibility of claims for services and of certain deductions in actions at the instance of injured persons. We have the honour to submit our proposals for the reform of this branch of the law.

J. O. M. HUNTER
Chairman of the Scottish Law Commission

20 April 1978

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DAMAGES FOR PERSONAL INJURIES: REPORT ON (1) ADMISSIBILITY OF CLAIMS FOR SERVICES; (2) ADMISSIBLE DEDUCTIONS

PART I INTRODUCTION

1. Our Second Programme of Law Reform envisages in Item No. 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 section 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 present report, prepared in terms of the same Programme Item, considers the admissibility of certain claims for services and of certain deductions in actions of damages raised by accident victims who have survived their injuries.

2. A practical problem which has much exercised us is that presented where a wife leaves her employment to provide nursing assistance and domestic help to an injured husband. Should the person responsible in damages to the husband also be liable to recompense, directly or indirectly, the wife? The Law Society of Scotland, when circulating a Memorandum addressed, we understand, to all Members of Parliament, said:

> "The Society is very deeply concerned that while such a claim is admissible in England[2] it is not admissible in Scotland, and feels that there is no justification for the difference in the two conflicting approaches by the courts."

Accordingly, the Society pressed for immediate legislation. This problem, however, though of considerable urgency, is only part of a series of wider questions relating to the admissibility of certain heads of claim in actions by an injured person who survives his injuries. Should, for example, a value be placed on the personal services which an injured wife is no longer able to render to her family? This is not a question on which we specifically requested views in our consultative Memorandum No. 21.[3] However, we did allude to the problem and we received a number of comments. Moreover, all these questions were examined by the Law Commission in their *Report on Personal Injury Litigation—Assessment of Damages,*[4] and we think it right to consider the relevance of the Law Commission's recommendations to Scots law and to Scottish practice.

3. But this report also considers the special and somewhat technical problem of deductions in actions of damages by an injured person, that is to

[1]Scot. Law Com. No. 31 (1973), H.C. 393, which we refer to in this report as "our earlier report".

[2]See *Wattson* v. *Port of London Authority* [1969] 1 Lloyd's Rep. 95 at pp. 101-2; *Cunningham* v. *Harrison* [1973] Q.B. 942; *Donnelly* v. *Joyce* [1973] 3 W.L.R. 514; and *Taylor* v. *Bristol Omnibus Co.* [1975] 2 All E.R. 1107 at p. 1112.

[3]*Damages for Personal Injuries: Deductions and Heads of Claim,* referred to in this report as "our Memorandum".

[4]Law Com. No. 56 (1973), H.C. 373.

say the question whether in calculating the amount of the losses suffered by an injured person as a result of an accident, account should be taken of benefits which are alleged to accrue to him in consequence of the same event. We examined this problem in relation to fatal accidents in our earlier report, and our recommendations on this matter were implemented by section 1(5)(b) of the Damages (Scotland) Act 1976. It seems appropriate to consider whether, against the new background of the law in fatal accident cases, similar principles should be applied in actions at the instance of the injured party himself. The problem, however, is both wider and more complicated in the context of actions by an injured person and raises important questions of principle, for example the question whether unemployment benefit should continue to be a relevant deduction in computing the injured party's losses.

4. The questions discussed in this report fell within the terms of reference of the Royal Commission on Civil Liability under the Chairmanship of Lord Pearson.[5] Those terms of reference were wider than our own, in that the Royal Commission were invited to consider the underlying principles of the law of reparation, including the possible introduction of strict liability and no-fault liability, and the possible abolition of delictual remedies in all or any spheres of activity. Our concern, on the other hand, has been to identify what anomalies or uncertainties exist within the present framework of law relating to damages for personal injuries, in which the underlying principle is that of fault. In the event the Royal Commission did not recommend the abolition of delictual liability except in a few isolated areas[6] and reached conclusions very similar to our own on most of the matters discussed in this report.

5. In our review of this branch of the law we have sought:

(*a*) to take account of the general principles of Scots law relating to delictual liability, and to suggest departures from those principles only where required to meet a practical need;

(*b*) to ensure, so far as practicable, that where losses are sustained, directly or indirectly, as a result of injuries occasioned by another, those losses should be compensated;

(*c*) to ensure that the compensation will be such that, so far as practicable, the injured person will be placed in the same position as he would have been if he had not sustained the injuries, and not in a position either more or less financially beneficial;

(*d*) to ensure, so far as practicable, that there should be no duplication of compensation, *inter alia* by taking into account benefits arising directly or indirectly from the injury;

(*e*) to ensure, so far as practicable, that the person alleged to be responsible for the loss should not be exposed to the risk of a multiplicity of actions;

[5]Hansard, O.R.,H.C., 19 December 1972: vol. 848, col. 1119.

[6]They would restrict, for example, the right of a child to sue a parent for antenatal injury (*Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*: Cmnd. 7054, March 1978, vol. I, paras. 1471 and 1472.)

(*f*) to ensure, so far as practicable, that where, to avoid the risk of a multiplicity of actions, the injured person is enabled to recover damages for losses in fact sustained by others, he should be placed under a legal duty to account; and

(*g*) to avoid introducing into this branch of the law refinements which are of little practical advantage and are likely to increase the length of proceedings and the cost of litigation.

6. In framing our proposals we have had regard to these objectives and to the comments which we received upon the proposals which we canvassed in our Memorandum. That Memorandum elicited many other useful comments and criticisms, and we are grateful to all those who submitted them.[7] There was general approval of our tentative conclusions and, while we have in the main adhered to these, we propose some changes in substance and several modifications in detail in response to the comments received.

7. In this report we deal first with the admissibility of claims for services, and second with the question what deductions should be taken into account.

PART II ADMISSIBILITY OF CLAIMS FOR SERVICES

8. In this part of our report we deal with two classes of question. We deal first with claims by an injured person or by other persons in respect of services rendered to him by those other persons, and secondly with claims by an injured person or by other persons in respect of services which, by reason of his injuries, the injured person can no longer render to those other persons. Both classes of claims present difficulty: the first because the appropriate solution to the problem may involve a departure from the principle of the Scots law of reparation that damages may be claimed only by the person who actually suffered the loss, and the second because the solution to it may involve a departure, not only from that principle, but from the rule (settled by authority) that damages are not awarded in Scotland for loss of services.

(1) Services rendered to the injured person by others

(a) *Direct claim by the person who rendered the services*

9. In a number of recent cases in Scotland claims have been presented in respect of services voluntarily rendered to an injured person by other persons. In some cases the claim has been presented directly by the person who rendered the services and in others as a head of damage in the injured person's own claim. In the former case the claimant has argued that the defender owes a duty to the person who rendered the services (usually the wife or a near relative of the injured person) not to cause him loss by

[7] A list of those who submitted comments is contained in Appendix II.

injuring his wife or relative. The cases include *Soutar* v. *Mulhern*[1] where the tenant of a house sued his landlord *inter alia* 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 to recover the cost of visiting her in hospital. While the Second Division remitted those aspects of his claim 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*,[2] however, 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 had a relevant claim for his expenditure in visiting his wife in hospital and in employing a housekeeper during the period of his wife's disability. The essence of this approach is to reject the view that the defender must owe 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."[3]

10. In subsequent cases, however, *M'Bay* has been distinguished, followed with reluctance, or simply not followed. In *Robertson* v. *Glasgow Corporation*[4] 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."[5]

In *Higgins* v. *Burton*[6] a father claimed reimbursement of outlays incurred in visiting his children in hospital after they had been injured in an accident. Lord Avonside, without coming to a concluded view on the relevancy of the claim, remitted the case to proof before answer. He made it clear that he would not have done so but for *Soutar v. Mulhern*[1] and the persuasive effect of Lord Cameron's judgment in *M'Bay* v. *Hamlett.*[2] *Jack* v. *M'Dougall & Co (Engineers)*[7] is also relevant in this context. A husband had suffered serious burning injuries while at work and, in an action of damages raised by himself and his wife, the latter claimed in her own right for the losses 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

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[1]1907 S.C. 723.
[2]1963 S.C. 282.
[3]At p. 287.
[4]1965 S.L.T. 143.
[5]At p. 144.
[6]1967 S.L.T. (Notes) 61.
[7]1973 S.C. 13.

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 such claims had not hitherto been recognised in actions other than those arising from fatal accidents and that, even in that domain, the courts were not disposed to extend them. He explained that such derivative claims

> "are not based upon any duty owed by the defender to the pursuer at the time when the injuries which cause 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 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."[8]

11. In the present state of the authorities, therefore, it is at best doubtful whether a person, even a close relative of the injured person, has a direct right of action in respect of any losses he may have sustained in rendering services to the injured person.

(b) *Indirect claim by the injured person*

12. Whether the injured person himself may include as items of his own claim for damages the losses and expenses sustained by others in rendering services to him rests on a different line of authorities. These suggest that the answer may depend upon whether or not the services were rendered in terms of a contract with the injured person. In *Edgar* v. *Lord Advocate*[9] the pursuer had been injured in a road accident by a Post Office van. He averred, *inter alia*, that as a result of the accident he required assistance at home and that, to furnish this assistance, his wife exchanged her full-time employment for part-time employment, and so lost wages. The wife was not a party to the action. This head of claim was admitted neither by the Lord Ordinary nor by the Inner House (Lord Guthrie dissenting) on appeal. Lord President Clyde remarked:[10]

> "If . . . the averment is intended to form the basis for a claim for domestic assistance for which the pursuer would have had to pay if he had not been able to secure it gratuitously, the claim is, in my opinion, an irrelevant one. It would have been another matter altogether if the pursuer had actually paid some third party, or had entered into a contract to pay some third party for this domestic assistance. It could then have formed a relevant item in his claim for damages. But if the assistance which he got was given gratuitously, and there is no undertaking or understanding by him to pay for it (and that is the situation in the present case), then I am quite unable to see how he can claim to be reimbursed for a payment which he has not made and cannot be

[8] 1973 S.C. 13 at pp. 16-17; see also *Collins* v. *S.S.E.B.* 1977 S.L.T. (Notes) 2.
[9] 1965 S.C. 67.
[10] At p. 71.

compelled to make. In Scotland damages necessarily involve a loss, either actual or prospective, and the plain fact of the matter is that the pursuer has sustained no such loss at all in regard to this item."

13. 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. That situation might perhaps be represented as a loss which bore primarily on the pursuer as head of the house."[11]

This remark was founded upon by the husband in *Jack* v. *M'Dougall & Co (Engineers)*.[7] The husband, in his own 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 may be added that in *Jack* the husband also included in his own claims an item in respect of the expenses incurred by his wife in connection with her visits to him in hospital. Lord Keith did not allow the husband's averments relating to those expenses to be remitted to probation.

14. In addition to the possible qualification to the rule in *Edgar* v. *Lord Advocate*[9] admitted in *Jack* v. *M'Dougall & Co (Engineers)*,[7] it could be argued that, apart from antecedent contract or understanding, an injured person may come under a legal obligation to reimburse expenditure on services reasonably incurred on his behalf by another, on the principle of *negotiorum gestio*. This report is not the place to speculate on possible developments in the law relating to *negotiorum gestio* which would, in any case, be of wider application than the field of reparation claims by injured persons against wrongdoers. In the law as it at present stands, however, the doctrine of *negotiorum gestio* has not been applied to services of a personal kind, and any attempt to invoke it, for example by members of the family, might well encounter the objection that they must have intended to render these services gratuitously. It is also a principle of the law of *negotiorum gestio* that the *gestor* may be entitled to reimbursement of his outlays, or relief from obligations already incurred, but not to any remuneration.[12]

(c) *Approach of the English courts*

15. The approach of the Scottish courts to these problems distinctly contrasts with that of the English courts which, in a series of cases, have gone far to meet the specific problem of compensating a person, in particular a

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[11]At pp. 72-73.
[12]Erskine, *Institute*, III, 3.52.

husband or wife, who has incurred expense or who has suffered loss of earnings in rendering services to an injured person.[13]

16. Perhaps the most significant of these decisions is that of the Court of Appeal in *Donnelly* v. *Joyce*.[14] This case established that, under 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:

> "[Counsel'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. [Counsel'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.
>
> "We do not agree with the proposition, inherent in [this] 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 supplying 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.
>
> "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

[13]See *Wattson* v. *Port of London Authority* [1969] 1 Lloyd's Rep. 95 at pp 101-2; *Cunningham* v. *Harrison* [1973] Q.B. 942; *Donnelly* v. *Joyce* [1973] 3 W.L.R. 514; and *Taylor* v. *Bristol Omnibus Co.* [1975] 2 All E.R. 1107 at p. 1112.

[14]*Supra*, applied in *Davies* v. *Tenby Corporation*, The Times, November 30 1974.

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.

"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."[15]

17. We note, too, that the Law Commission in their report[16] (published prior to the decision in *Donnelly* v. *Joyce*) concluded 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 tortfeasor."[17]

The Commission reached this conclusion 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.[18]

(d) Proposals for reform

18. Our own approach to this general problem starts from the view that if, in personal injury cases, the losses sustained by a relative in tendering reasonable assistance to the injured person are not compensated, there is a risk of serious injustice to those most closely concerned. Where the service is rendered by a person within the family unit, it seems wrong that the losses sustained by the family as a unit should be compensated only where the injured person arranges by contract to receive assistance from, or in fact remunerates, his relative. It is unreasonable to expect the relative to pause to consult a solicitor about the legal implications of his proposed course of conduct. The need for a contract, indeed, seems artificial in a context where the parties come under contingent legal obligations of assistance and support.[19] We would not wish to encourage the public to place a monetary value upon services which ordinarily are rendered freely and from feelings of charity towards the injured person. The cases show, however, that there are situations where it would be inequitable that the loss should be borne by the family as a unit. Perhaps the hardest case, as well as the most frequent case, is that of the wife who gives up her own employment to give necessary support to her husband. This is a matter which has attracted, in

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15pp. 519-520.

16*Report on Personal Injury Litigation—Assessment of Damages:* Law Com. No. 56 (1973), H.C. 373.

17Recommendation 12(a), p. 90.

18Para. 112.

19Lord Cameron in *M'Bay* v. *Hamlett* 1963 S.C. 282 at p. 288, after referring to fatal accident cases such as *Eisten* v. *North British Railway Co.* (1870) 8 M. 980, remarked:

"Such a case as the present, however, is not founded on a claim for loss or destruction of the legal obligation of support, but *is in respect of pecuniary loss arising out of the fulfilment of that mutual and current obligation as between husband and wife*" (italics supplied).

particular, the attention of the Law Society of Scotland. They have explained in a Memorandum[20] that:

> "It is now commonplace in Scotland for both husband and wife to be in employment and, in the case of serious injury to the husband, it is almost inevitable that the wife will give up her employment temporarily to look after him. Only in exceptional cases would a nurse be hired or would there be another member of the family or friend available to look after the husband without that other member of the family or friend also having to give up their employment for a period"

and state that:

> "it is unfair in these circumstances that this loss of family income should not be borne by the party who has caused the accident."

We are in entire agreement. The law, we are firmly persuaded, ought to make some provision for repairing such losses, and the question is mainly one of the form this provision should take.

19. We consider that no direct right of action in delict should be conceded by statute to the person who renders the services. We do so partly because it would involve a serious breach in the ordinary principles of the law of reparation.[21] We reject the idea also because, quite independently of the rule that all actions arising out of the same injuries should be litigated in the same action,[22] we think it important—if at all possible—to prevent a multiplicity of rights of action arising out of the same wrong. The case for channelling all claims through the injured person is a strong one, not only because this will tend to reduce inconvenience to all the parties and cost to the defender, but because it will tend to facilitate the settlement of claims. It will also help to deal with the question of contributory negligence.[23] This view was shared by those who commented on our Memorandum.[24]

20. We agree, in principle, with the Law Commission and the Royal Commission[25] that the value of the services of persons who have assisted the injured person should be recoverable by the latter in his action against the wrongdoer. We differ from the Law Commission, however, on two points of detail. The first is that, contrary to their view, which has been

[20]"*Wife's Loss of Earnings and Related Problems*", 26 September 1975 (published shortly before our Memorandum).

[21]Reference was made in para. 52 of our Memorandum to the "rescue cases". In those cases, however, the claim is one of damages for personal injuries and is made by a person whose intervention is (to use the words of L. J.-C. Cooper in *Steel* v. *Glasgow Iron and Steel Co.* 1944 S.C. 237 at p. 248) "the direct and immediate response to the apprehension of danger" with a view to averting that danger. Their ratio could hardly be extended to a person who has not been injured himself and who claims damages for a loss which he has suffered only in consequence of his own considered choice.

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

[23]See para. 29 below.

[24]The Royal Commission in their report (Cmnd. 7054, March 1978) do not in terms recommend that the person who rendered the services should not have a direct right of action against the wrongdoer, although this is to be inferred from paragraphs 343 to 351, and especially from the recommendation at paragraph 351.

[25]Paras. 345 and 351.

followed by the Royal Commission,[26] we consider that the principle should apply only as between members of the injured person's family group or circle. This was a point which we did not make in our Memorandum but is one which was forcefully made to us on consultation. While such a restriction might lead to anomalies between the treatment of persons rendering identical services, one of whom is within the family group and the other without it, in the absence of such a restriction the class of persons whose services must be taken into account might include, according to the circumstances, such bodies as hospitals, ambulance services, the police and fire services. It would, no doubt, be possible in the relevant legislation to allow only private individuals to present claims, but there is a preliminary question whether it would be desirable to admit claims by persons outside the family group. Services rendered by persons within the family group are often motivated by a high sense of duty, and in order to render them members of the family may be prepared to make considerable sacrifices, including leaving their employment. But they may expect, in the long run, to receive some benefit as a counterpart, though not necessarily a benefit of a tangible nature. That such services are frequently rendered by persons within the family group is a matter of common experience and is reasonably foreseeable. The occasions on which persons outside the family group render such services are less frequent, and less readily foreseeable. When they are rendered they are normally given in a spirit of disinterested philanthropy, without any prospect or even thought of benefits in counterpart. In our view, it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered. To admit claims, moreover, from outside the family group would considerably complicate the procedure for settling claims, because it would in many cases be far from easy to determine who might be entitled to present such a claim. There is a risk, too, that any widening of the class of persons entitled to present a claim might increase the number of spurious claims. This is not to say that the law should prevent an injured person from entering into a legal obligation to pay for services rendered by persons outside the family group, including an obligation contingent upon the recovery of damages. The family group should comprise those relatives who, in a fatal accident claim, would be entitled to claim damages for loss of support.[27]

21. We also differ from the Law Commission[28] and from the Royal Commission[29] in so far as they consider that the injured person should not be placed under a duty to account for the damages recovered to the person who actually suffered the loss. The Royal Commission, explaining their approach, adopt the view of Lord Justice Megaw in *Donnelly*[30] that the loss is truly the loss of the injured person:

> "If the plaintiff needs to have services rendered or expenses incurred for his benefit, and if this need arises from an injury for which a defendant is liable, then we think he should be able to recover damages. The way in which the need is met is indeed irrelevant."[31]

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[26]Para. 346.
[27]Under s.1 and sch. 1 of the Damages (Scotland) Act 1976.
[28]Para. 155.
[29]Paras. 344 and 345.
[30]See para. 16 above.
[31]Para. 345.

22. We cannot accept this view. It is inconsistent with the recommendations of the Royal Commission itself in Chapter 13 of its report relating to the offsetting of benefits received by the injured person or his dependants as a result of an injury for which damages are awarded. The offsetting of benefits received is based, as the Royal Commission explain, on a conception of a system of tort or delict directed to the compensation of loss: "The aim should be for the damages to be equal to the actual net loss suffered".[32] In cases where services have been rendered gratuitously to an injured person, it is artificial to regard that person as having suffered a net loss in the events which happened. The loss is in fact sustained by the person rendering the services, a point vividly illustrated in cases where he has lost earnings in the course of rendering those services. We suggest, therefore, that it is wrong in principle, in cases where services have been rendered gratuitously by another to an injured person, to regard the latter as having in fact suffered a net loss.

23. Our principal objection, however, to the approach adopted by the two Commissions is a practical one, best focused by the Law Commission's dismissal of the problem presented where an injured person does not compensate his relative for the services rendered. The Law Commission said:

> "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."[33]

In our Memorandum we expressed reservations about this approach on the view that while, in most cases, the problem would not be a real one, it would be serious in the smaller number of cases in which the injured person ignored his moral responsibilities. It would be unfair to the person who actually sustained the loss.[34] This view attracted overwhelming support on consultation.[35] It seems to us, therefore, that it would be right to devise an approach which will enable the injured person to recover in his own action the value of services which have been rendered to him by relatives but which would, at the same time, enable the relative to recover, if he so wished, the value of these services from the injured person.

24. We offered in our Memorandum the tentative suggestion that the two problems of the extent of the liability of the wrongdoer and the duty of the injured person could be met simultaneously by the introduction of a rule that a person who renders necessary services should be presumed not to have done so gratuitously but on such terms as to remuneration or repayment as might in the circumstances of the case seem reasonable to the

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[32]Para. 472.

[33]Published Working Paper No. 41, para. 207, referred to in the Law Commission's report, para. 155.

[34]Para. 45.

[35]It gains some support, too, from the remarks of Paull, J. in *Schneider* v. *Eisovitch* [1960] 1 All E.R. 169 at p. 174, since he made an undertaking as to payment a condition of the award. In *Cunningham* v. *Harrison* [1973] Q.B. 942, Lord Denning M.R. considered that the compensation for the value of the services should be held in trust for the person who rendered them.

court.[36] This suggestion was welcomed in principle by most of those who commented on our Memorandum, although certain difficulties were mentioned. We discuss these in the paragraphs which follow.

25. In our Memorandum, we explained that by "necessary services" we envisaged 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 might seem to the court to be reasonably necessary. It was suggested to us that this expression is too wide and that only services of an extraordinary nature should be taken into account. While we sympathise with what we take to be the purpose of this suggestion—to avoid a proliferation of minor claims—we do not think that such a restriction would be appropriate: the ordinary test of reasonableness and the ordinary requirement of minimisation of loss should apply in determining the competency of the claim.

26. One body which submitted comments spoke in terms of enabling the intervening party to recover damages for his loss of earnings, but this would not necessarily be the appropriate measure of damages. It is the duty of the injured person in an action of damages to minimise, as far as possible, his losses and we do not imagine that the court would permit, say, an injured husband to recover the lost earnings of his wife in excess of the cost of appropriate domestic help.[37] We consider, however, that it is unnecessary to recommend the introduction of a specific provision to this effect, since the court would normally reach this result through the application of the ordinary principles of the law of reparation.

27. In our Memorandum we did, however, raise the question whether it would be desirable to offer a statutory definition of a term such as "necessary services".[38] We note that the Law Commission, in a similar context, used the same expression and suggested that it should be defined by stating that "services" includes attending, visiting or communicating with the injured person and that "necessary services" means services which it was reasonably necessary for the injured person to receive in consequence of the personal injuries suffered by him, having regard to all the circumstances of the case, including the extent to which it is likely that he would have had to obtain the like services at his own expense if he had not received them gratuitously.[39] The views which we received on consultation were divided, but we have concluded that the term "necessary" is self-explanatory

[36]Para. 46.

[37]A different conclusion was reached in England in the admittedly special circumstances of *Mehmet* v. *Perry* [1977] 2 All E.R. 529, where, after the death of his wife, the husband gave up his employment in order to render services to his children which could not, in the circumstances, have been rendered by anyone else. It was held that damages should be assessed by reference to his loss of wages and not the reasonable cost of employing a housekeeper. Two of his children suffered from a rare blood disorder and, according to the medical evidence, it was desirable for the father to be with them; no other relative was available to take charge of the children and there was no room in his house for a resident housekeeper.

[38]Para. 47.

[39]Clause 4 of the draft Bill annexed to the Law Commission's report, p. 104.

and that the context makes sufficiently plain the type of services which are envisaged.

28. Some commentators, while welcoming the general principle that this head of claim should be competent, questioned whether the introduction of a presumption that the services had not been rendered gratuitously was the appropriate device. It was feared that this solution would create problems of proof and would lead to additional expense. On reconsidering this question we are persuaded that this point has considerable force, and that the presumption against gratuity may in practice be easily displaced. There is a possibility that, even if all the other conditions as to recovery of damages are satisfied, the relative may admit under cross-examination that he did not contemplate remuneration at the time when he rendered the services. If these other conditions are satisfied it does not seem right to permit recovery of damages only if, in effect, the parties had actually contemplated remuneration. As we observed earlier,[40] it is unreasonable to expect the relatives to consult a solicitor about the legal implications of this course of conduct, and to introduce a rebuttable presumption would, in our opinion, represent little or no improvement on the present law, where recovery of damages depends on the existence of a contract or on actual remuneration.

29. For the reasons already stated,[41] we consider that the injured person should be placed under a duty to account to the relative for any sum recovered under this head. The duty must be so formulated as to deal with cases where the damages recovered have been reduced by reason of the injured person's contributory negligence, because the case has been settled, or because there is a statutory limitation on the amount of damages. One possible approach would be to apply a rigorous contractual analysis and to say that the injured person should be liable for the whole notional cost of the services irrespective of the amount actually recovered. Within the family group, however, we believe that the parties would normally contemplate remuneration or repayment only if and only in so far as the injured person recovers damages.

30. Several of those who commented on our Memorandum were concerned to protect the person rendering the services. The Law Society of Scotland, for example, suggested that a machinery be introduced to permit of a direct remittance by the "wrongdoer" to the person rendering the services. One possibility would be to confer a direct right of action on the relative, but we have already examined and rejected this approach.[42] Another option would be to enable the relative to enter the injured person's action as a Minuter and to empower the court, at the request of the Minuter or of its own motion, to order the defender to pay the amount recoverable in respect of the services directly to the relative. We gave serious consideration to this possibility, but concluded that in the ordinary case it would be a superfluous formality. In the rare cases, however, where conflicting interests

[40]Para. 18.
[41]See paras. 21-23 above.
[42]In para. 19.

between the injured person and the Minuter emerged, the procedure would be likely to be cumbersome and expensive. It would, moreover, be of little practical assistance in protecting the relative in the numerous cases where the parties settle.

31. A simpler and broader solution to the problem would seem to be called for, which at the same time adequately protected the interest of the relative. We consider that, in any proceedings, the injured person should not be able to make a competent claim under this head unless he lodges in process a statement which specifies the services and is signed by the relative. Such a formality should not be required unless and until an action of damages is raised. This approach would have the advantages of diminishing the chance of spurious claims by injured persons and of alerting the relative to his right to reimbursement. Because the pursuer would be under an obligation to account the relative could, if necessary, enforce this right by action. The Royal Commission foresaw difficulties where a claim is settled without recourse to the courts.[43] The amount recovered under this head may not be specified, and we concede that, if the injured person and the relative cannot reach agreement on the proportion of the sum recovered which relates to the services rendered, and the relative seeks to enforce his right by action, an enquiry will be needed. This will be a rare occurrence, but it is a possibility that cannot altogether be eliminated if the injured person is to be placed under a legal duty to account to the relative.

32. The Royal Commission also foresaw difficulties where services were expected to be rendered at some time in the future.[44] We do not understand the relevance of this problem to the question of services which have been actually rendered. Nothing in our proposals would affect an injured person's claim for damages for functional loss and his consequential need for services in the future.

33. **Recommendations**

1. Where, following an accident causing personal injuries, a third party renders services to the injured person, the injured person should be entitled to recover from the person responsible for the accident such sum by way of remuneration for the services rendered to him by the third party (and repayment of any expenses incurred) as may seem reasonable to the court in the circumstances, unless it is proved that the third party expressly waived the right to payment (paragraphs 18, 24 and 28).

2. This provision should apply only if the person who renders the services and the injured person belong to the same family. The "family" should comprise those relatives who, in a fatal accident claim, would be entitled to claim damages for loss of support (paragraph 20).

3. The expression "necessary services" should not be defined and there should be no express limitation to services of an extraordinary nature (paragraphs 25-27).

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[43]Para. 349.
[44]Para. 349.

4. The injured person should be under an obligation to account to the relative who rendered the services for any damages in respect of those services recovered from the person responsible for the accident (paragraphs 21-23 and 29-32).

5. Before damages may be recovered under this head in any proceedings, a statement must be lodged in process which specifies the services and is signed by the relative who rendered the services (paragraph 31).

6. The relative rendering the services should have no direct right of action in delict in respect of those services against the person responsible for the accident (paragraph 19).

(2) **Personal services which the injured person can no longer render to others**

34. The Law Commission, in their report, proposed 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 tort-feasor."[45]

They gave as the most obvious example the case where a housewife is injured and her family is thus deprived of her services. The Royal Commission have made a recommendation in substantially the same terms.[46]

35. 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. In Scots law "damages necessarily involve a loss, either actual or prospective":[47] it is one thing to concede to an injured person damages for losses which he has sustained and which he would have sustained but for the services rendered to him by others, but it is quite a different thing to concede to an injured person damages for losses which *prima facie* only others will sustain. The Law Commission based their 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. They point 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.[48] The Law Commission considered that this species of compensation should not be limited to such a narrowly circumscribed class and so, in effect, recommended its extension to the class of those who would be entitled to claim under the Fatal Acci-

[45]Para. 159b.
[46]Para. 358.
[47]*Edgar* v. *Lord Advocate* 1965 S.C. 67 *per* Lord President Clyde at p. 71.
[48]Paras. 117-118.

dents Acts. They considered, however, that the right of recovery should belong only to the injured person 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."[49]

36. 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.[50] The leading case here is *Allan* v. *Barclay*,[51] where the employer of a carter raised an action against an engineer concluding *inter alia* for damages for the loss of the services of the carter occasioned by injuries alleged to have been caused by the engineer's negligence. The Lord Ordinary (Kinloch), after pointing out that in Scots law there was no equivalent to the English rule allowing a master to maintain an action for the loss of services of his employee, pointed out that from a Scottish standpoint:

> "The difficulty in the present case is, that the injury done the servant was in its own nature not committed against him in that capacity, nor aimed, directly or indirectly, against the master . . . It is not alleged to have been even known to the defender, before or at the time of the accident, that Hill was the servant of the pursuer . . . The grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer. Tried by this test, the present claim appears to fail. The personal injuries of the individual himself will be properly held to have been in the contemplation of the wrongdoer. But he cannot be held bound to have surmised the secondary injuries done to all holding relations with the individual, whether that of a master, or any other."[52]

The Inner House dismissed the action on another ground, but Lord Kinloch's statement of the law has been treated as authoritative in subsequent cases.[53] The Law Reform Committee for Scotland were invited to reconsider this rule but, in their Eleventh Report,[54] recommended that there should be no legislation on the subject of the remit, largely because in their view such legislation would occasion difficulties and lead to anomalies.

37. In our Memorandum[55] we conceded that the absence of such a rule may cause anxiety to the injured person and hardship to those to whom he has been rendering gratuitous services. We explained that the hardship is

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[49]Para. 157.

[50]*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.

[51](1864) 2 M. 873.

[52]At p. 874.

[53]See, in particular, *Reavis* v. *Clan Line Steamers* 1925 S.C. 725.

[54]Cmnd. 1997 (1963).

[55]At para. 56.

particularly acute when, by reason of her injuries, 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 her children. Because of his wife's injuries, the husband may have to employ a housekeeper to look after himself and the children, and may be directly out of pocket as a result of the accident. We hesitated, however, to concur in the recommendation made by the Law Commission, both for the reason of principle that it would introduce in a limited spectrum of cases a right to damages for incidental economic loss, and for the practical reason that there was no requirement that the injured person should account to the person who actually suffers the loss.

38. The problem is a difficult one but, on reconsidering it in the light of the comments received, we believe it to be reasonable that, when an injured person is prevented by his injuries from performing his ordinary duties within the family group, he should receive compensation. The loss suffered by the family may in practice be substantial, and we are advised that few families insure against it. It may be objected that it is not the injured person himself but his family who suffer the loss. We think, however, that this is an artificial way of looking at the matter. The injured person will normally have some earning capacity outside the family which he will have lost as a result of the accident. Within the family group, for practical reasons, a system of division of labour and pooling of income obtains in which, though in law the services are rendered gratuitously, they are in practice a species of counterpart for the benefits which that member receives as a member of the family group. If by reason of an accident a member of the family group loses the ability to offer the appropriate counterpart for the benefits he receives, he should be compensated for this loss. In this sense we are not advocating a departure from the principle of reasonable foresight as the test of liability for damages, since the system which we have described reflects the normal pattern of family relations in this country. The same test of reasonable foresight, however, would seem to exclude the application of this principle outside the family group. The law cannot take into account unusual instances of gratuitous philanthropy. The Royal Commission, in endorsing this approach, said that

> "the loss suffered by those not dependent on the plaintiff seems to us to be altogether more remote."[56]

39. We have considered whether the consequential losses to the family should include those losses of a non-patrimonial kind which may be recovered as a loss of society award by a relative of a person who dies as a result of his injuries.[57] We have decided against this approach, mainly because a loss of society award is based on the consideration that members of the deceased person's family lose the benefit of the counsel and guidance which he might have been expected to give them while he remained alive. The award, therefore, takes for granted that the injured person is no longer alive.

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[56]Para. 356.
[57]Damages (Scotland) Act 1976, s.1(4).

40. We consider, too, as did the Law Commission, that the claim should be restricted to the loss of personal services which, when rendered by a relative, are normally rendered gratuitously, but which otherwise are ordinarily obtainable on payment, for example, the services of a nurse, housekeeper, or domestic servant.[58] We have also considered in this context whether it would be appropriate to confer on members of the injured person's family a direct right of recovery from the defender. We do not think this would be appropriate, not merely because the defender might be exposed to a multiplicity of actions, but because, during his life, apart from the accident, the injured person would have remained free to choose who is to benefit by his services. For the latter reason we do not consider that, in this context, the injured person should be placed under any obligation to account to the individual relatives who may have suffered from his inability to render the services. The matter must here be left to the moral sense of the injured person, an additional reason for restricting the claim to services rendered within the family.

41. The next question is what effect the death of the injured person should have on his right to claim damages under this head and on the right of his relatives to receive, directly or indirectly, compensation in respect of it. It would certainly be paradoxical if the relatives' rights ceased on the very occasion when their loss is likely to be greatest, and we consider that the general principles in relation to vesting of claims on death embodied in the Damages (Scotland) Act 1976 should be applied. The description of the personal services envisaged in paragraph 40 above makes it clear that the loss with which we are concerned is one of a patrimonial character. It follows that the right to recovery of damages in respect of any period up to the injured person's date of death should transmit to his executors in terms of section 2(1) of the 1976 Act. We consider, however, that it would be preferable to clarify this point in any legislation which may follow on this report.

42. The scheme of the 1976 Act, moreover, envisages that since patrimonial loss may be suffered only by living persons, any claims for such loss in respect of the period after an injured person's date of death must be a claim on the part of the relatives who survived him. It would follow, therefore, that where an injured person has died, the right to claim damages in respect of his inability to render personal services should vest directly in each relative who suffers thereby, in effect as an element in his claim for loss of support. This proposal does not breach the principle of avoiding the exposure of the defender to the risk of multiple actions[59] having regard to the terms of section 5 of the 1976 Act.

43. Our proposals are confined to personal services which the injured person might otherwise have rendered gratuitously to a defined class of relatives, and restrict the right of action in respect of the injured person's inability to render those services to the injured person himself during his lifetime and to his executors and relatives after his death. While this

[58]Clause 5 of the draft Bill annexed to the Law Commission's report, p. 106.
[59]See para. 5(e) above.

should be made explicit in any legislation which may follow on this report, we do not intend to express any view on claims for loss of services other than personal services gratuitously rendered to relatives, and in particular we express no view on claims by an employer for the loss of the (remunerated) services of an employee.[60]

44. **Recommendations**

7. Where a person has been deprived by reason of his injuries of the ability to render personal services to members of his family which, but for his injuries, he might have been expected to render gratuitously to them, he should be entitled to recover from the person responsible for the accident a reasonable sum by way of damages (paragraphs 34-38).

8. For this purpose "personal services" should be restricted to personal services of a kind which may ordinarily be obtained by payment (paragraph 40).

9. "Family" should comprise those relatives who, in a fatal accident claim, would be entitled to claim damages for loss of support (paragraphs 39 and 41-42).

10. Each relative entitled to claim damages for loss of support in terms of section 1(3) of the Damages (Scotland) Act 1976 should be entitled to recover, as an element in his claim for loss of support, a reasonable sum in respect of the loss of personal services (paragraphs 41-42).

11. The right to recover damages under recommendation 7 in respect of any period up to the injured person's date of death should transmit to the executors in terms of section 2(1) of the Damages (Scotland) Act 1976 (paragraph 41).

12. Except as provided in the preceding recommendations, a relative shall have no direct right of action in delict against the person responsible for the accident in respect of the loss of personal services (paragraph 43).

PART III ADMISSIBLE DEDUCTIONS

1. Introduction

45. In this part of our report we consider what benefits received by an injured person should be taken into account in assessing his claim for damages. As we explained in the Introduction to this report, we considered an analogous problem in relation to claims by a relative for loss of support in our earlier report, and our recommendations on this matter were implemented by section 1(5) of the Damages (Scotland) Act 1976. This provides that:

> "In assessing for the purposes of this section the amount of any loss of support suffered by a relative of a deceased no account shall be taken of—

[60] A matter discussed in para. 36 above.

(*a*) any patrimonial gain or advantage which has accrued or will or may accrue to the relative from the deceased or from any other person by way of succession or settlement;

(*b*) any insurance money, benefit, pension or gratuity which has been, or will be or may be, paid as a result of the deceased's death."

46. It is by no means clear, however, whether a similar relatively simple solution would be appropriate in the context of claims by the injured person himself. To put the matter no higher, it is not clear whether in assessing an injured person's damages for loss of earnings there should be deducted in whole or in part the amount of wages which he has actually received or the amount of payments in lieu of wages, such as unemployment benefit or supplementary benefit. Nor is it clear whether account should be taken of benefits which he may obtain from the state, such as sickness benefits or health service facilities.

47. In our approach to the problem of "deductions" we have taken for granted the general principle of the Scots law of reparation that damages are intended to be compensatory. It follows that we do not consider that a benefit should be ignored merely because taking it into account would reduce the liability of the wrongdoer. We also take for granted as the broad general principle in the assessment of damages for loss of earnings

> "that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries."[1]

It is a corollary to this principle that a pursuer should receive compensation only for those losses that he in fact suffers. But to place too much emphasis on this corollary or to interpret it too widely would be to risk doing an injustice to the injured person. It has been suggested to us that there are other principles relevant in this field, including the principle of remoteness. In *British Transport Commission* v. *Gourley* Lord Reid remarked:

> "A loss which the plaintiff has suffered, or will suffer, or a compensatory gain which has come or will come to him following on the accident, may be of a kind which the law regards as too remote to be taken into account."[2]

48. The difficulty, however, in placing reliance on remoteness is that its ordinary test is what "may reasonably be supposed to have been in the view of the wrongdoer";[3] and it is not clear to us why the quantum of a defender's liability should depend upon whether or not he could reasonably have foreseen matters which depend on the personal finances of the injured person or the adventitious philanthropy of others. We note that in *Parry* v.

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[1] *British Transport Commission* v. *Gourley* [1956] A.C. 185 *per* Earl Jowitt at p. 197.

[2] [1956] A.C. 185 at p. 212; see *Browning* v. *The War Office* [1963] 1 Q.B. 750, *per* Diplock L. J. at p. 770.

[3] *Allan* v. *Barclay* (1864) 2 M. 873, *per* Lord Kinloch (Ordinary) at p. 874: cited in para. 33 above.

Cleaver[4] Lord Reid himself tended to discount the utility of the concept of remoteness in this context.[5] It does seem reasonable, however, to have regard to the purpose of those who contracted for or made provision for the benefits in question, since there is otherwise a risk that these purposes may be frustrated. As Windeyer J. remarked in the Australian case of *The National Insurance Company of New Zealand* v. *Espagne:*

> "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."[6]

49. It seems clear that no single principle offers a ready solution to the problems in this field. There are a number of competing principles which, as Lord Wilberforce stressed in *Parry* v. *Cleaver*,[7] must be taken into account in the context of each particular benefit, whether a gift, the proceeds of an insurance policy, private pension rights, state retirement benefits or state sickness and supplementary benefits. In choosing between those competing principles we have had regard both to the equities of the situation and to practical considerations. It is important not to introduce into this domain refinements which may complicate litigation and increase its duration and expense.[8]

50. We have not sought to make recommendations over the whole range of circumstances where it may be contended that some deduction should be made from an award of damages for personal injuries. Most of the matters which we discuss in the following paragraphs have also been examined by the Royal Commission, and in one case, while we express a general view, we do not ourselves make specific legislative proposals on the main issue.[9] Two problems referred to in this Part are not discussed by the Royal Commission: redundancy payments[10] and foreign benefits.[11] In addition there are a number of benefits which we do not discuss in this report.[12] We do not think that it would be either practicable or desirable to elaborate a comprehensive statutory code in this domain, since any such code would rapidly be overtaken by events. Except in areas of specific hardship, diffi-

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[4]1970 A.C. 1.

[5]At p. 15.

[6](1961) 105 C.L.R. 569, quoted by Sheriff J. Irvine Smith in *Dougan* v. *Rangers Football Club Ltd* 1974 S.L.T. (Sh.Ct.) 34 at p. 37.

[7]At p. 42.

[8]See *British Transport Commission* v. *Gourley, supra, per* Lord Reid at p. 214.

[9]The benefits specified in s.2(1) of the Law Reform (Personal Injuries) Act 1948: see paras. 88-90.

[10]See paras. 84-87.

[11]See paras. 100-103.

[12]e.g. attendance allowance, invalid care allowance and non-contributory invalidity pension, which are regulated by Part II, Chapter II of the Social Security Act 1975. These benefits are discussed by the Royal Commission (Cmnd. 7054, March 1978, vol. I, paras 490, 491 and 493).

culty or doubt, it seems appropriate to allow the courts to apply the general principles of the law of damages.

2. Private means

51. In our Memorandum we considered the question whether, in claims for damages for loss of earnings by an injured person following an accident, account should be taken of his fortune or private income.[13] Though there appeared to be no Scottish decisions directly in point, it seemed clear to us that, in principle, a negative answer should be given to that question. What requires to be compensated is the loss directly occasioned by the wrongful act, and a person who suffers injuries which deprive him of earnings and of earning capacity suffers loss irrespective of his own private fortune and means. It is true that, in the context of claims by the relatives of a person who has died as a result of wrongful injuries, it was formerly argued that what the relative receives from the estate of the injured person must be taken into account, on the view that it is a benefit arising in consequence of the death. But if, following *Cruikshank* v. *Shiels*,[14] there was any doubt that this argument was irrelevant, that doubt has been resolved by section 1(5) of the Damages (Scotland) Act 1976.[15]

52. We do not consider, however, that it is necessary to propose similar legislation in relation to claims by an injured person himself, partly because we consider that the general principle stated above is too clear for controversy and partly because, like all general principles in the law, it could not be stated in legislative form without a precise delimitation of the exceptions to it. In this context it is clear that, while the fortune and means of the injured person are not directly relevant to whether he has lost income or earnings in consequence of an accident, they may in some cases be indirectly relevant. The pursuer's means, for example, may be relevant in the computation of the capitalised value of his loss in so far as the court may require to take into account his present and future liability for taxation.[16] His means might also be relevant in considering the reasonableness of certain heads of claim, for example a claim for the cost of private medical treatment or, possibly, in assessing when a person would be likely to retire from business.[17]

53. Recommendation

13. It would be undesirable specifically to affirm by statute the proposition that, in the assessment of damages, no account should be taken of an injured person's private fortune or private means.

3. Benevolent payments; benefits deriving from employment

(a) *The general principle*

54. The question has occasionally arisen whether an injured person must deduct from the damages which he claims the value of benefits coming to

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[13]Para. 6.
[14]1951 S.C. 741; 1953 S.C. (H.L.) 1.
[15]See para. 45 above.
[16]*British Transport Commission* v. *Gourley* [1956] A.C. 185.
[17]See *Phillips* v. *London and South Western Railway Co* (1879) 5 Q.B.D. 78 at p. 84.

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.

55. 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*[18] Asquith J. made a deduction from a widow's claim of a gratuitous payment of £160 which she had received from the Police Charitable Fund, the general view in England is that such payments do not fall to be deducted. Thus in *Liffen* v. *Watson*,[19] a case where the plaintiff's loss included board and lodging from her employer as well as a weekly wage, the Court 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*,[20] where the wife of the plaintiff had died as a result of injuries sustained while a passenger on the defendants' miniature railway. The deceased left none of her estate to her husband, but her children (the husband's step-children) had voluntarily paid to him about one-third of her estate. There are also numerous dicta of persuasive authority on this subject, including dicta of the House of Lords in *Parry* v. *Cleaver*.[4, 21]

56. Apart from English authority, it has been held in Northern Ireland in *Redpath* v. *Belfast and County Down Railway Co*[22] 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 victim.

57. In Scotland, the only authority relating to relief funds subscribed by the public is the decision of Sheriff J. Irvine Smith in *Dougan* v. *Rangers Football Club Ltd*.[23] The action was one for damages brought by the widow and children of a person killed in the course of an accident at a football ground. It was held that the payments received by the widow and 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.

58. In our Memorandum[24] we expressed our agreement with the learned sheriff's conclusion. We noted different weight attached to the concept of remoteness in this context respectively by Diplock L. J. in *Browning* v.

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[18] [1942] 1 All E.R. 230.
[19] [1940] 1 K.B. 556; cf. *Moore* v. *Babcock & Wilcox Ltd* [1966] 3 All E.R. 882 at p. 887.
[20] [1954] 2 All E.R. 689.
[21] See also *Browning* v. *The War Office* [1963] 1 Q.B. 750 at p. 759.
[22] [1947] N.I. 167.
[23] 1974 S.L.T. (Sh.Ct.) 34.
[24] Paras. 11-13.

The War Office[25] and by the House of Lords in *Parry* v. *Cleaver*.[26] We noted, too, the stress laid by the Australian High Court in *The National Insurance Company of New Zealand* v. *Espagne*[27] on the intentions of the donor. We attached importance also to the view that the deduction of benevolent payments in computing damages might discourage philanthropy and, in effect, divert these payments from their intended object.

59. Those who commented on our Memorandum were unanimous in agreeing that benevolent payments should not be deducted in calculating the amount of an injured person's loss of earnings, some on the view that their existence is merely a collateral matter, others on the view that to take them into account would be both unfair to the victim and likely to divert benevolent payments or donations from their intended object. We see no reason, therefore, to depart from our provisional view that, as a general principle, such payments should not be deducted. The Royal Commission have reached a similar conclusion.[28] Before considering, however, what legislative recommendations, if any, are appropriate in this context it seems right to consider two special circumstances: where the benefit is received from the wrongdoer, and where it is received from the injured person's employer.

(b) *Benefits received from the wrongdoer*

60. In our Memorandum[29] we conceded that the arguments for taking no account of private benevolence were of less force where the donation emanates from the person alleged to be responsible for the injuries. We considered, however, in accordance with the decision in *Dougan*,[23] that such a donation should not be taken into account unless it was made on the express understanding that it was to be regarded, in the event of a successful claim against the wrongdoer, as an interim payment to account of damages. If such a payment was made to an injured person or his dependants without such a proviso, or was paid directly into a benevolent fund, it should be regarded as purely benevolent.

61. Although such comments as we received on this part of our Memorandum favoured this approach, we now think that it would be preferable to presume donations made by the wrongdoer directly to the injured person or to members of his family to be payments to account of damages, if civil liability on the part of the donor is ultimately established. If the case, on equitable grounds, for taking collateral benefits into account is weakest where the injured person has paid for those benefits, it is strongest where the defender in an action of damages himself paid for or supplied those benefits. Moreover, it would be undesirable to discourage a defender from making a payment of a benevolent character to an injured person, whether in the form of the continuing payment of wages or any other form. In the absence of an express provision, there is a danger that a person who has

25 [1963] 1 Q.B. 750 at p. 770.
26 [1970] A.C. 1, especially *per* Lord Reid at p. 15 and Lord Pearson at p. 49.
27 (1961) 105 C.L.R. 569.
28 Para. 532.
29 Para. 12.

reason to believe that he may incur civil liability to the injured person may be reluctant to make such a payment, and express qualifications to a gift detract from its appeal both to donor and donee. We have therefore concluded that in the absence of an express provision to the contrary, any payments, whether in cash or in kind, made to an injured person or to members of his family group following an accident by the wrongdoer, should be taken into account in the assessment of damages. This principle should apply where the wrongdoer is also the injured person's employer. The Royal Commission have recommended to the same effect.[30]

(c) *Benefits received from the employer*

62. The circumstances contemplated in this and the following paragraph are where, following an accident, an injured employee continues to be paid his wages or to receive benefits in kind from his employer. It seems clear, under the existing principles of the law of reparation, that in such a case an employee cannot be regarded as having lost the wages or benefits received and so cannot recover damages for this loss.[31] The employer, however, without being under any legal obligation to do so, may pay wages or may confer other benefits on the condition that they are to be treated as advances to the employee for his support, repayable in the event of the recovery of damages. The court is not disinclined to infer such a condition, and where an employer continued to pay the wages of his housekeeper injured in a road accident on the understanding that if she recovered damages she would repay those wages, the court held that, in assessing the amount of the housekeeper's damages, the jury were entitled to take into account her obligation to repay her employer.[32]

63. It is, however, equally unsatisfactory in this case, as in the case where an injured person receives assistance from a member of his family, that the injured person's right to damages should depend on the existence or inexistence of a contractual arrangement, perhaps artificially devised after the accident. There would appear to be clear social advantages in so framing the law as not to discourage employers from continuing to allocate to their disabled employees, for a time at least, their pre-accident emoluments, or from conferring other benefits upon them. We consider that this problem might be met by the following proposals. First, any benevolent payments made by an employer (unless he is the wrongdoer) should not be taken into account in the assessment of damages: where the employer is also the wrongdoer, however, the proposal in paragraph 61 should apply and a deduction should be made. The Royal Commission have recommended to the same effect.[33] Second, any payments made by an employer, or benefits conferred by him, to or upon an injured person or members of his family group following an accident should not be taken into account in the assessment of damages if they were made or conferred upon the condition that

[30]Para. 536.

[31]*Metropolitan Police District Receiver* v. *Croydon Corporation*; *Monmouthshire County Council* v. *Smith* [1957] 2 Q.B. 154.

[32]*Doonan* v. *S.M.T. Co.* 1950 S.C. 136.

[33]Para. 501.

they are to be repaid or restored in the event of damages being recovered. The Royal Commission have made a similar recommendation.[34]

64. Recommendations

14. As a general principle, and subject to the following recommendations, no deduction should be made, in the assessment of damages, in respect of any benevolent payments, whether in cash or in kind, received by the injured person or by members of his family following an accident (paragraphs 54-59).

15. Any such benevolent payments made by an employer (unless he is the wrongdoer) should not be taken into account in the assessment of damages (paragraphs 62-63).

16. Any payments or benefits made or conferred by an employer to or upon the injured person or members of his family following an accident, on condition that they are to be repaid or restored in the event of damages being recovered, should not be taken into account in the assessment of damages (paragraphs 62-63).

17. In the absence of an express contractual provision to the contrary, all payments made directly by the wrongdoer to the injured person or to members of his family, even payments of an ostensibly benevolent character, should be taken into account in the assessment of damages (paragraphs 60-61).

4. Contractual benefits: insurance policies, friendly society benefits, private pensions arising from employment etc.

65. In our Memorandum[35] we dealt together with benefits arising from private insurance policies, friendly society schemes and pensions arising out of employment, because we considered that, on analysis, similar principles might be considered to be applicable to all benefits privately contracted for and not arising out of state schemes for social security.

66. In relation to insurance policies we explained that there was no direct Scottish authority whether, in actions for damages at the instance of injured persons, benefits received under accident insurance policies should be deducted. In an old case[36] referred to by Lord Reid in *Parry* v. *Cleaver*,[37] the pursuer had been assaulted by the defender and claimed damages for his injuries. During 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."[38]

The Lord Chief Commissioner clearly assumed that neither insurance benefits nor friendly society benefits fell to be deducted. We also explained that

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[34] Para. 505.
[35] Paras. 14-21.
[36] *Forgie* v. *Henderson* (1818) 1 Murray 410.
[37] [1970] A.C. 1 at p. 14.
[38] At p. 418.

it has not been the practice of the Scottish courts to deduct accident insurance benefits in assessing claims for damages.[39]

67. We considered this practice to be sound, and referred to the reasons for its adoption stated in *Bradburn* v. *The Great Western Railway Co,*[40] where Pigott, B. remarked:

> "I think that the plaintiff is entitled to recover from the railway company the full amount 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."[41]

This approach, we explained, had been approved in many subsequent decisions, including that of the House of Lords in *Parry* v. *Cleaver.*[4]

68. *Parry* v. *Cleaver* was concerned with deductibility of a pension. A police constable had been injured by the negligent 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 police 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,[40] 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

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[39]*Adams* v. *James Spencer & Co* 1951 S.C. 175 *per* Lord Jamieson at p. 188.

[40]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.

[41]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.

rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums.

"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."[42]

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. A similar rule now applies in Scotland by virtue of section 1(5)(b) of the Damages (Scotland) Act 1976 in relation to claims for loss of support by the relatives of a deceased person.

69. The Law Commission, in their report, expressed agreement with the reasoning in *Parry* v. *Cleaver*[43] and suggested, in effect, that it should be given legislative authority.[44] It remains to consider whether the same approach should be adopted in Scotland. We concede that accident insurance policies present greater difficulties than life insurance policies. The latter, particularly if the policies are endowment ones, may be in essence a form of saving or investment, and the analogy with private means is strong. The case for allowing cumulation of damages and the proceeds of accident insurance policies is less strong, for the latter cannot be regarded as "investments" in the conventional sense of that term. We are persuaded, however, that the proceeds of accident policies should not be taken into account. We do so largely for the reasons given by Pigott, B. in *Bradburn* v. *The Great Western Railway Co.*[40] The law would seem out of touch with the realities of life if the prudence of an injured person in effecting accident insurance principally benefited not himself but the person responsible for the injuries.

70. Before formulating the precise terms of our conclusion on this matter, we refer to a matter discussed in our Memorandum but not in the Law Commission's report, 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. In our Memorandum we came to the provisional conclusion that no account should be taken of such pensions. We conceded that this would introduce a measure of duplication of damages if the primary purpose of the pension was to compensate the employee for the risks of accident associated with certain types of employment. We thought, nevertheless, that no account should be taken of such pensions. We said:

"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

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[42]At p. 37.
[43]Para. 152.
[44]Clause 1 of the draft Bill annexed to the Law Commission's report, p. 96.

case the ultimate basis for the benefit is the work done by the employee."[45]

Those who commented upon our Memorandum assented to this proposal, though it was pointed out that there "are certain high risk, high earning employment areas, such as deep-sea diving", where "employers offer generous disability compensation schemes to provide security for their employees". This is undoubtedly true, but it is possible to incorporate in the pension scheme some provision either for its modification or for repayment if and when damages are awarded. We adhere, therefore, to our provisional conclusion.

71. The several conclusions which we have reached in this section of our report 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, it would make for consistency and clarity in the law if the same principle were applied. In the case of pensions payable in terms of a contract of employment it will be open to those framing the scheme to provide specifically for the contingency of damages being awarded. The Royal Commission's recommendations, which deal separately with first party contracts of insurance,[46] occupational disability pensions,[47] and permanent health insurance[48] are to the same effect.

72. **Recommendation**

18. No account should be taken, in the assessment of damages, of contractual benefits payable in consequence of the accident occasioning the injuries, notably money paid under insurance policies, payments by a friendly society or trade union, and pensions arising from employment (paragraphs 65-71).

5. **State retirement pensions**

73. It has been decided in England, following the reasoning of Lords Reid and Pearce in *Parry* v. *Cleaver*,[4] that retirement pensions paid by the state are not to be taken into account.[49] In terms of section 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*[50] 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 on this

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[45]Para. 20.
[46]Para. 516.
[47]Para. 520.
[48]Para. 529.
[49]*Hewson* v. *Downs* [1970] 1 Q.B. 73.
[50]1951 S.C. 175.

matter was subsequently altered by section 1 of the Law Reform (Personal Injuries) (Amendment) Act 1953, a provision now repealed but substantially re-enacted in section 1(5) of the Damages (Scotland) Act 1976.[51]

74. In our Memorandum[52] we expressed the provisional view that the same principle should apply to a claim by an injured person. We considered that the analogy with private pensions was close and that, even if the injured person did not obtain the benefit by virtue of a contract in which he himself assumed obligations, his entitlement to the pension depended ultimately on his own work and his participation in the pension scheme. This view was generally endorsed by those who commented on our Memorandum. It was also pointed out to us that it is rare for state or local authority retirement pensions to accrue simply in consequence of injuries from which a damages claim flows. This is the dominant factor underlying the Royal Commission's recommendation[53] that state retirement pensions should be disregarded. We are persuaded that this is so and that, in most relevant respects, such pensions may be equated with the private means which an injured person may possess. On either view, therefore, it seems inappropriate to deduct the value of state pensions when computing claims for damages. It has been suggested to us that this is so clear as to render unnecessary its legislative statement, since the Scottish courts would almost certainly arrive at the result reached by the English court in *Hewson* v. *Downs*.[54] While this result might well be reached, it would depend on the accidents of ligitation, and we consider it would be desirable to put the matter beyond doubt by legislation.

75. **Recommendation**

19. No account should be taken, in the assessment of damages, of any pension or retirement benefit payable from public funds.

76. There is a residue of pensions not covered by the preceding two recommendations, i.e. *ex gratia* pensions paid by the employer. It is not necessary to make specific provision for these pensions, because they would be regarded as payments of a benevolent character and accordingly would not be deductible in terms of our earlier recommendations.[55]

6. Supplementary benefits and other means-tested benefits

77. The second category of benefits which presents problems are supplementary benefits and other means-tested benefits. In two English cases, *Eldridge* v. *Videtta*[56] and *Foxley* v. *Olton*[57] it was decided that supplementary allowances should not be taken into account because of their discretionary character. We understand, however, that supplementary benefits are pay-

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[51]See para. 42 above.
[52]Para. 23.
[53]Para. 581.
[54][1970] 1 Q.B. 73.
[55]See paras. 54-64 above.
[56](1964) 108 S.J. 137.
[57][1965] 2 Q.B. 306.

able as of right, although the nature of the scheme requires the conferment of a residual discretion in marginal cases.[58]

78. The Law Commission, in their report, did not deal with supplementary benefits specifically, but concluded that in the absence of specific legislation all social security benefits should be ignored.[59] In our Memorandum[60] we reached the provisional conclusion that supplementary benefits should not be taken into account in the assessment of damages for personal injuries. This conclusion was not based on the view that they are of a discretionary character, 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 seemed 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 noted that the Committee on Alternative Remedies reached the same conclusion in relation to national assistance.[61] While this reasoning would not exclude the taking into account of supplementary benefits actually received, we thought that such benefits should be ignored on the view that there would otherwise be an incentive to delay the settlement of claims.

79. This view met with general acceptance on consultation. In two respects, however, qualifications were proposed. In our Memorandum[62] we expressed the view that the same principle should be applied to other benefits whose object is to ensure that, when account is taken of other income, the person concerned is provided with the necessities of life.[63] Though one commentator expressed reservations about such an extension, we consider that if the benefit has the same purpose the same principle should apply. In our Memorandum, moreover, we conceded that the reasoning on which our conclusion was based might not support the non-deduction of supplementary benefits which had actually been received by the injured person. We note that the Royal Commission have recommended that supplementary benefits and family income supplements actually received up to the date of the award should be deducted,[64] and on reconsidering this question we concur in their view.

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[58]Supplementary Benefits Act 1976, 1st Sch., para. 4; see *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; *McCarrol* v. *McCarrol* 1966 S.L.T. (Sh.Ct.) 45.

[59]Para. 137.

[60]Para. 26.

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

[62]Paras. 25-6.

[63]The rules of entitlement to each benefit do, however, vary.

[64]Para. 494.

80. **Recommendation**

20. Where the object of a benefit is to secure that, after other sources of income have been taken into account, the recipient attains a minimum level of subsistence, the receipt of any such benefit by the injured person or by members of his family[65] relating to any period up to the date of the award should be taken into account in the assessment of damages, but should otherwise be disregarded.

7. **Health service facilities**

81. It is provided in section 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.[66] 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."[67]

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 defender to contend that the services were not necessary or that the expense was unreasonable.[68]

82. In our Memorandum[69] we stated that section 2(4) of the 1948 Act might lead to over-compensation in cases where it was patent that, sooner or later, the injured person would utilise National Health Service facilities, and that it was clearly for consideration whether a mandatory requirement to ignore this possibility was just to defenders. We mentioned the argument that the ordinary test of reasonableness would lead to more satisfactory results. This view was supported by those who offered us comments. On the general principle the Royal Commission share our view, and have

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[65]We have adopted the same definition of "family" as in Part II: see recommendations 3 and 9 in paras. 33 and 34.

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

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

[68]Para. 56.

[69]Para. 28.

recommended that section 2(4) should be repealed. In its place they recommend that:

> "private medical expenses should be recoverable in damages if and only if it was reasonable on medical grounds that the plaintiff should incur them."[70]

We are not ourselves convinced that the addition of the words "on medical grounds" would achieve a desirable result. When we advocate the application of the ordinary test of reasonableness, we contemplate that the courts will be able to take into account all the relevant circumstances. It may be reasonable for an injured person to obtain a private room in a hospital and a private telephone in order to carry out his business commitments and so reduce his claim for loss of earnings, despite the fact that this might not be regarded as reasonable on medical grounds alone. It also seems appropriate to take into account the standards to which the injured person has been accustomed in the past. In our view, therefore, all that is necessary is to repeal section 2(4).

83. **Recommendation**

21. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed.

8. Redundancy payments

84. The English courts have 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*[71] it was agreed by counsel for both parties that account must be taken of redundancy payments. In *Stocks v. Magna Merchants Ltd*[72] (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 of a sum for redundancy under the 1965 Act than there is between the payment of a retirement pension and a redundancy payment",[73]

and accordingly held that a deduction should be made.

85. In our Memorandum[74] we reached the provisional conclusion that no deduction should be made from an award of damages for personal injuries in respect of redundancy payments. We conceded that redundancy payments might 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. We considered, however, that the analogy with unemployment benefit seemed weak: the Redundancy Payments Act 1965 prescribes the circum-

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[70] Para. 342.
[71] [1971] 1 W.L.R. 1773.
[72] [1973] 2 All E.R. 329.
[73] At p. 333. This decision was not, however, followed in another wrongful dismissal case: *Yorkshire Engineering and Welding Co.* v. *Burnham* [1974] 1 W.L.R. 206.
[74] Para. 36.

stances in which an employer has to make redundancy 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);[75] and where the requirements of the business cease or diminish.[76] 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. It seemed to us, therefore, applying this principle, that in assessing damages for personal injuries, redundancy payments should be ignored.[76a]

86. No dissent from this approach was expressed on consultation. Indeed, as we have pointed out, loss of wages is irrelevant to the assessment of a redundancy payment, which is designed solely to compensate for the disruption involved in a change of employment. It is payable even if the redundant person obtains better paid employment elsewhere. We remain, therefore, of the view expressed in our Memorandum. While it has been suggested to us that a statutory provision embodying this view is unnecessary we have concluded that, in view of previous English authority, there would be some utility in placing the matter beyond doubt. There is the further point that our recommendation should extend not merely to payments made under the 1965 Act itself[77] but to payments made in corresponding circumstances.[78]

87. **Recommendation**

22. No account should be taken, in the assessment of damages, of any redundancy payment under the Redundancy Payments Act 1965 or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 1 of that Act had applied.

9. Industrial injury benefit, industrial disablement benefit, sickness benefit, invalidity benefit and invalidity pension

88. It was the task of the Departmental Committee on Alternative Remedies (the Monckton Committee) 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 Monckton Committee *inter alia* considered the idea, reiterated to us in comments on our Memorandum, that the social security fund should be subrogated *pro tanto* to the injured person's claim against the wrongdoer, but they rejected this idea on practical grounds. The Committee pointed out that it would involve the

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[75]S.1(2)(a).

[76]S.1(2)(b).

[76a]It is for this reason that Lord Brand has held, in a case reported very recently, that redundancy payments should be ignored in the assessment of damages: *Wilson* v. *National Coal Board* 1978 S.L.T. 129.

[77]By virtue of s.1.

[78]See s.41.

Minister in the invidious task of deciding whether or not to institute, or require the institution of, proceedings in such cases:

> "it would be necessary to provide a staff large enough to investigate the circumstances of each accident and to decide what action should be taken. This would involve heavy expenses, and unless action were taken in a large number of cases, the expense would be likely to offset the sums which would be recovered for the Insurance Fund."[79]

89. We ourselves take the view that, for the reasons given by the Monckton Committee, a system of subrogation would be impracticable. The Royal Commission have reached the same conclusion, commenting that the idea would introduce an element of fault into schemes which were intended to dispense with it.[80] The majority of the Monckton 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 or they 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.[81] 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.[82] Eventually, in section 2(1) of the Law Reform (Personal Injuries) Act 1948, Parliament enacted a species of compromise, later extended to invalidity benefit[83] and non-contributory invalidity pension,[84] in the following terms:

> "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 benefit for the five years beginning with the time when the cause of action accrued."[85]

90. The Monckton Committee's recommendations were considered in some detail by the Royal Commission,[86] which adopted the general conclusion that there should be no overlap between the compensation to be provided by delict and that to be provided by social security. This principle com-

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[79]*Final Report*, Cmd. 6860 (1946), para. 41.
[80]Para. 297.
[81]Paras. 38, 48 and 92.
[82]Annex A, p. 56.
[83]National Insurance Act 1971, s.14 and sch.5, para. 1.
[84]Social Security (Benefits) Act 1975, s.6(9)(a).
[85]S.2(2) of the 1948 Act provides that any increase of an industrial disablement pension in respect of the need of constant attendance is to be disregarded entirely. As a result, the increased benefit for constant attendance provided for in s.61 of the Social Security Act 1975, and the increased benefit for exceptionally severe disablement provided for in s.63 of that Act, are both to be left out of account.
[86]Chapter 13, especially paras. 477-498.

mends itself to us. We have some hesitation, however, in relation to the specific recommendations for implementing it which are proposed by the Royal Commission, in particular the proposal to take into account social security benefits which may accrue to the injured person's dependants[87] and the specific proposal of the majority of the Commission for the categorisation of social security benefits in calculating the net amount of the loss.[88] We are conscious, however, that we have not consulted on these matters, and therefore confine ourselves to the view that, where possible, there should be no overlap between the compensation provided by delict and by social security.

91. Section 2(1) does, however, contain a technical defect, and if the subsection is to remain on the statute book, this defect should be removed. In *Bond* v. *British Railways Board*[89] the period of the pursuer's disability during which he suffered loss of earnings was only eight months, but Lord Fraser held that the value of the social security benefits to be taken into account was not simply the value of those accruing during the period of disablement but the value of those benefits for the whole period of five years from the time when the cause of action accrued. In the result, the pursuer was considered to have suffered no net loss of earnings. We do not consider that this result can have been intended.

92. **Recommendation**

23. If the principle embodied in section 2(1) of the Law Reform (Personal Injuries) Act 1948 is to be retained, its drafting should be revised to make it plain that the pursuer need only deduct the relevant proportion of the benefits in question accrued or likely to accrue during the period of his loss of earnings.

10. Unemployment benefit

93. Section 2(1) of the Law Reform (Personal Injuries) Act 1948 does not apply to unemployment benefits. 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*,[90] 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 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*,[57] 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 com-

[87]Para. 482.
[88]Para. 490.
[89]1970 S.L.T. (Notes) 44.
[90][1964] 1 Q.B. 95.

pensation from the defendant. I must, therefore, deduct the unemployment benefit received by the plaintiff."[91]

94. In Scotland the question whether a deduction should be made for unemployment benefit arose in 1965 in the case of *Rigley* v. *Remington Rand Ltd*,[92] but the court did not dispose of the question because there was unsatisfactory evidence of the amount of the benefit received.[93] Two years later, however, in *McPherson* v. *Kelsey Roofing Industries Ltd*[94] 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*[95] 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."[96]

Lord Kissen reached the same conclusion subsequently in *Gallagher* v. *Imperial Chemical Industries Ltd*,[97] and did so although he was aware of the views of the House of Lords in *Parry* v. *Cleaver*.[4]

95. The Law Commission in their report[98] recommended that unemployment benefit should no longer be taken into account in personal injuries cases. The Commission felt that section 2(1) of the 1948 Act represented a pure compromise and that, since it lacked any basis in principle, its operation should not be extended. They considered that there was an analogy with pensions and concluded that, in line with the legislative policy of section 2 of the Fatal Accidents Act 1959, unemployment benefit should not be taken into account. The Royal Commission have reached a different conclusion, on the ground that the benefit diminishes the pursuer's loss of earnings.[99]

96. The problem is as much one of social policy as of legal judgment, but it seems to us difficult to defend a solution which does not take into account the risk of double compensation. Unemployment benefit is a species of surrogatum offered by the state's social security scheme for loss of earnings. It would seem, therefore, that the Scottish courts have been right to make deductions in respect of unemployment benefits received and likely to be received. It is true that there is an analogy between unemployment benefit and other social security benefits, but the analogy is not a strong one because, in relation to the former, there is a direct causal connection between the earnings lost and the benefit received.

91At p. 311.
921965 S.L.T. 322.
93cf. *Coull* v. *Sutherland* 1970 S.L.T. (Notes) 2, where the court declined to take account of unemployment benefit received because there was no foundation for the defender's claim on record.
941967 S.L.T. (Notes) 93.
951951 S.C. 175 at p. 189.
96At p. 94.
971970 S.L.T. (Notes) 41.
98Paras. 136-7.
99Para. 492.

97. **Recommendation**

24. Unemployment benefit payable to an injured person should be taken into account in the assessment of damages.

98. If, however, contrary to the views expressed above,[1] the principle embodied in section 2(1) of the Law Reform (Personal Injuries) Act 1948 is to remain on the statute book, we see some logic in applying the same rule to unemployment benefits. The two types of benefit correspond to each other in amount. In personal injury cases the injured person typically receives sickness benefit for a period before, on his recovery or partial recovery, receiving unemployment benefit until he obtains employment. We canvassed this suggestion in our Memorandum and it attracted considerable support.[2]

99. **Recommendation**

25. If the principle embodied in section 2(1) of the Law Reform (Personal Injuries) Act 1948 is to be retained, it should be extended to unemployment benefit.

11. **Foreign benefits**

100. In *McGinty* v. *John Howard & Co Ltd*[3] 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 section 2(1) of the 1948 Act, "the whole of it should be taken into account in assessing damages".[4] This decision has been criticised[5] on the ground that the Irish Social Welfare Act of 1952[6] 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 from which are not taken into account.

101. In our Memorandum,[7] we suggested that, arguably, it would be anomalous if different rules were applied respectively to United Kingdom state benefits and to foreign state benefits. The advice which we received on consultation was varied. There were some who suggested that the principles adopted in the case of United Kingdom state benefits should be applied to foreign state benefits; but there were others who, stressing the need for simplicity in the law, thought that such benefits should be entirely ignored.

[1]Paras. 85-86.
[2]Para. 33.
[3]1969 S.L.T. (Notes) 83.
[4]At p. 84.
[5]1970 S.L.T. (News) 53.
[6]No. 11 of 1952.
[7]Para. 34.

102. We have re-examined this problem in the light of the recommendations contained elsewhere in this Part of the report. It is apparent that some examination of the nature of a benefit is called for even in a domestic context, for example to determine whether the benefit is designed to secure to the injured person a minimum level of subsistence[8] or is a state retirement benefit.[9] Neither of these recommendations—nor that relating to contractual benefits[10]—requires the court to examine the extent of the injured person's contributions, if any. There seems no reason, therefore, why the court cannot carry out a similar enquiry where the injured person is in receipt of a similar benefit from another country. The recommendations in this report do not extend, by any means, to all state benefits,[11] and unless future legislation deals comprehensively with all United Kingdom state benefits the courts will have to apply the principles of the general law.

103. **Recommendation**

26. Any legislation which follows on this report should be so drafted as not to preclude the court from taking into account, where appropriate, corresponding foreign benefits.

PART IV SUMMARY OF RECOMMENDATIONS

Admissibility of claims for services

Services rendered to the injured person by others (paragraph 33).

1. Where, following an accident causing personal injuries, a third party renders services to the injured person, the injured person should be entitled to recover from the person responsible for the accident such sum by way of remuneration for the services rendered to him by the third party (and repayment of any expenses incurred) as may seem reasonable to the court in the circumstances, unless it is proved that the third party expressly waived the right to payment.

2. This provision should apply only if the person who renders the services and the injured person belong to the same family. The "family" should comprise those relatives who, in a fatal accident claim, would be entitled to claim damages for loss of support.

3. The expression "necessary services" should not be defined and there should be no express limitation to services of an extraordinary nature.

4. The injured person should be under an obligation to account to the relative who rendered the services for any damages in respect of those services recovered from the person responsible for the accident.

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[8]See para. 80.
[9]See para. 75.
[10]See para. 72.
[11]e.g. the benefits specified in s.2(1) of the Law Reform (Personal Injuries) Act 1948; and Part II, Chapter II of the Social Security Act 1975.

5. Before damages may be recovered under this head in any proceedings, a statement must be lodged in process which specifies the services and is signed by the relative who rendered the services.

6. The relative rendering the services should have no direct right of action in delict in respect of those services against the person responsible for the accident.

Personal services which the injured person can no longer render to others (paragraph 44).

7. Where a person has been deprived by reason of his injuries of the ability to render personal services to members of his family which, but for his injuries, he might have been expected to render gratuitously to them, he should be entitled to recover from the person responsible for the accident a reasonable sum by way of damages.

8. For this purpose "personal services" should be restricted to personal services of a kind which may ordinarily be obtained by payment.

9. "Family" should comprise those relatives who, in a fatal accident claim, would be entitled to claim damages for loss of support.

10. Each relative entitled to claim damages for loss of support in terms of section 1(3) of the Damages (Scotland) Act 1976 should be entitled to recover, as an element in his claim for loss of support, a reasonable sum in respect of the loss of personal services.

11. The right to recover damages under recommendation 7 in respect of any period up to the injured person's date of death should transmit to the executors in terms of section 2(1) of the Damages (Scotland) Act 1976.

12. Except as provided in the preceding recommendation, a relative shall have no direct right of action in delict against the person responible for the accident in respect of the loss of personal services.

Admissible deductions

Private means (paragraph 53)

13. It would be undesirable specifically to affirm by statute the proposition that, in the assessment of damages, no account should be taken of an injured person's private fortune or private means.

Benevolent payments; benefits deriving from employment (paragraph 64).

14. As a general principle, and subject to the following recommendations, no deduction should be made, in the assessment of damages, in respect of any benevolent payments, whether in cash or in kind, received by the injured person or by members of his family following an accident.

15. Any such benevolent payments made by an employer (unless he is the wrongdoer) should not be taken into account in the assessment of damages.

16. Any payments or benefits made or conferred by an employer to or upon the injured person or members of his family following an accident, on condition that they are to be repaid or restored in the event of damages being recovered, should not be taken into account in the assessment of damages.

17. In the absence of an express contractual provision to the contrary, all payments made directly by the wrongdoer to the injured person or to members of his family, even payments of an ostensibly benevolent character, should be taken into account in the assessment of damages.

Contractual benefits (paragraph 72).

18. No account should be taken, in the assessment of damages, of contractual benefits payable in consequence of the accident occasioning the injuries, notably money paid under insurance policies, payments by a friendly society or trade union, and pensions arising from employment.

State retirement pensions (paragraph 75).

19. No account should be taken, in the assessment of damages, of any pension or retirement benefit payable from public funds.

Supplementary benefits and other means-tested benefits (paragraph 80).

20. Where the object of a benefit is to secure that, after other sources of income have been taken into account, the recipient attains a minimum level of subsistence, the receipt of any such benefit by the injured person or by members of his family relating to any period up to the date of the award should be taken into account in the assessment of damages, but should otherwise be disregarded.

Health service facilities (paragraph 83).

21. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed.

Redundancy payments (paragraph 87).

22. No account should be taken, in the assessment of damages, of any redundancy payment under the Redundancy Payments Act 1965 or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 1 of that Act had applied.

Industrial injury benefit, etc. (paragraph 92).

23. If the principle embodied in section 2(1) of the Law Reform (Personal Injuries) Act 1948 is to be retained, its drafting should be revised to make it

plain that the pursuer need only deduct the relevant proportion of the benefits in question accrued or likely to accrue during the period of his loss of earnings.

Unemployment benefit (paragraphs 97 and 99).

24. Unemployment benefit payable to an injured person should be taken into account in the assessment of damages.

25. If the principle embodied in section 2(1) of the Law Reform (Personal Injuries) Act 1948 is to be retained, it should be extended to unemployment benefit.

Foreign benefits (paragraph 103)

26. Any legislation which follows on this report should be so drafted as not to preclude the court from taking into account, where appropriate, corresponding foreign benefits.

APPENDICES

APPENDIX I

Damages (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause
1. Damages in respect of services.
2. Services rendered to injured person.
3. Services to injured person's relative.
4. Assessment of damages for personal injuries.
5. Interpretation.
6. Amendment and repeal of enactments.
7. Citation, application to Crown, etc.

DRAFT

OF A

BILL

TO

Make further provision in the law of Scotland relating to the recovery by an injured person or his executor or relative of the value of services and to the assessment of damages in respect of personal injuries; and for purposes connected therewith.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Damages in respect of services.

1. Where a person (in this Act referred to as "the injured person")—

(*a*) has sustained personal injuries, or

(*b*) has died in consequence of personal injuries sustained,

as a result of an act or omission of another person giving rise to liability in any person (in this Act referred to as "the responsible person") to pay damages, the responsible person shall also be liable to pay damages in accordance with the provisions of sections 2 and 3 of this Act.

EXPLANATORY NOTES

Clause 1

Clause 1 is of a preliminary nature, and states in broad terms the circumstances in which the Bill is to apply, namely where liability to pay damages arises in consequence of personal injuries or death. The clause also selects, for general use throughout the Bill, the expressions "the injured person" and "the responsible person" to identify respectively the party to whom liability is incurred and the party who incurs liability.

Services rendered to injured person.

2.—(1) Where necessary services have been rendered to the injured person by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed that no payment should be made in respect of those services, the responsible person shall be liable to pay to the injured person by way of damages such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith.

EXPLANATORY NOTES

Clause 2

Clause 2 implements Recommendations 1 to 4 and 6 of the report (see paragraph 33).

Subsection (1)

Subsection (1) implements Recommendations 1 to 3 of the report. It confers upon the injured person a right to recover from the responsible person by way of damages such sum as may enable the injured person reasonably to remunerate a relative who provides him, in consequence of his injuries, with necessary services, and to defray his expenses. Under the present law the injured person may include such a head of damages only where (a) he has actually remunerated another person, or defrayed his expenses, or (b) has come under an obligation to do so. The subsection removes this formality where the person rendering the services is a relative. The class of relatives is defined in clause 5 and comprises those who are entitled, in terms of section 1 of the 1976 Act, to sue for loss of support on the death of the injured person (see Recomendation 2).

Where the injured person has died, the right to claim damages under this subsection transmits to his executor by virtue of section 2 of the 1976 Act.

To preclude any argument that the relative must be deemed to have tacitly waived any right to remuneration or repayment of his expenses, the subsection provides that the right arises unles the relative has expressly agreed that no payment should be made.

The nature of the services is not prescribed other than by the qualification that they should have been necessary (see Recommendation 3). What is envisaged is chiefly services for nursing and attendance. In terms of Recommendation 1 the amount of the damages is not necessarily to be calculated on the basis of the relative's loss of earnings (if any) but rather on the basis of what, in the circumstances of the case, would be reasonable remuneration to the relative together with repayment of his incidental expenses.

(2) The relative shall have no direct right of action in delict against the responsible person in respect of the services or expenses referred to in this section, but the injured person shall be under an obligation to account to the relative for any damages recovered from the responsible person under this section.

Services to injured person's relative.

3.—(1) The responsible person shall be liable to pay to the injured person (or, where he has died, to his executor in respect of any period up to the date of death) a reasonable sum by way of damages in respect of his inability to render the personal services referred to in subsection (3) below.

Subsection (2)

Subsection (2) implements Recommendation 6 and ensures that, apart from exceptional cases, (e.g. where there is an agreement directly between the person rendering the services and the responsible person), the responsible person will be faced with only one action in respect of services rendered to the injured person in consequence of his injuries. This coheres with a principle embodied in the law relating to damages for personal injuries, reflected in section 5 of the 1976 Act. This subsection overrules the decision in *M'Bay* v. *Hamlett* 1963 S.C. 282 (see paragraphs 9-11 of the report).

Subsection (2) also implements Recommendation 4 and provides that the injured person is required to account to the relative for the amount received in terms of the preceding subsection. Since the damages may be reduced for various reasons, including his own contributory negligence, the injured person is placed under an obligation to account to the relative only for such sum as he actually recovers.

Clause 3

Clause 3 implements Recommendations 7 to 12 inclusive of the report (see paragraph 44).

Subsection (1)

Subsection (1), read in conjunction with subsection (3), introduces into the law of Scotland the principle that an injured person has the right to claim by way of damages a reasonable sum in respect of his inability to render personal services to a relative (see Recommendation 7). The class of relatives is defined in clause 5, and again comprises those who are entitled, in terms of section 1 of the 1976 Act, to sue for loss of support on the death of the injured person (see Recommendation 9). The term "personal services" is defined in subsection (3). Since these services are to be of a kind which would ordinarily be obtainable on payment, the injured person's loss is of a patrimonial character, and is therefore to transmit to his executors in respect of the period up to his date of death (see Recommendation 11).

(2) Where the injured person has died, any relative of his entitled to damages in respect of loss of support under section 1(3) of the Damages (Scotland) Act 1976 shall be entitled to include as a head of damage under that section a reasonable sum in respect of the loss to him of the personal services referred to in subsection (3) below.

1976 c.13.

(3) The personal services referred to in this subsection are personal services—

(*a*) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and

(*b*) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative.

(4) Subject to subsection (2) above, the relative shall have no direct right of action in delict against the responsible person in respect of the personal services referred to in subsection (3) above.

Subsection (2)

Under subsection (1), the responsible person is liable to the injured person alone (and to his executor), and not to the persons who may have lost the services he rendered. The rule has been so cast to avoid exposing the responsible person to a multiplicity of actions. Express provision is made in subsection (2), in implement of Recommendation 10, for the case where the injured person has died. The subsection avoids the problem of multiplicity of actions by treating the dependant's claim as one for loss of support and so attracting the provisions precluding a multiplicity of actions embodied in section 5 of the 1976 Act.

Subsection (3)

Subsection (3) partly implements Recommendation 7 and implements Recommendation 8. It identifies the nature of the services referred to in the preceding subsections.

Paragraph (a) indicates that the losses are of a patrimonial character and are not non-patrimonial benefits, for example of the character of a loss of society award under section 1(4) of the 1976 Act.

Paragraph (b) indicates not only that loss is confined to such personal services as the injured person is prevented from rendering by reason of the accident, but to such personal services as he might otherwise have been expected to render gratuitously.

Subsection (4)

Subsection (4) implements Recommendation 12 and ensures that, except as elsewhere provided in this clause, no claim for damages in delict shall be competent against the responsible person in respect of the injured person's inability to render personal services to a relative, or in respect of another person's loss of the personal services. The subsection does not in terms preclude other claims for compensation for loss of services, though present case law appears to preclude such claims (see paragraph 36 of the report).

Assessment of damages for personal injuries.

4. Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount—

(*a*) any contractual pension or benefit (including any payment under an insurance policy and any payment by a friendly society or trade union);

(*b*) any pension or retirement benefit payable from public funds;

(*c*) any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence;

(*d*) any redundancy payment under the Redundancy Payments Act 1965, or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 1 of that Act had applied;

1965, c.62

(*e*) any payment made to the injured person or to any relative of his by the injured person's employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;

(*f*) any payment of a benevolent character made to the injured person or to any relative of his by any person other than the responsible person following upon the injuries in question;

but there shall be taken into account—

(i) any remuneration or earnings from employment;

(ii) any unemployment benefit;

(iii) any benefit referred to in paragraph (c) above payable in respect of any period prior to the date of the award of damages;

(iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following upon the injuries in question.

Clause 4

Clause 4 implements Recommendations 14 to 22 and 24 of the report. The clause applies only to actions at the instance of the injured person or his executor, because the principles applying to actions by relatives for loss of support are laid down in section 1(5) of the 1976 Act. Contractual freedom to vary the rules set out in this clause is retained.

Paragraph (a) implements Recommendation 18. In effect it equiparates the rights of the injured person (and his executor) with those of his relatives in claims for loss of support (see 1976 Act, section 1(5)(b)).

Paragraph (b) implements Recommendation 19. It is couched in language wide enough to apply to any existing or future benefits payable on retirement by the state or by a public authority, whether or not the injured person is an employee of the state or public authority. The expression "public funds" is not defined but it is thought that any doubt as to whether a pension or benefit is payable from public funds is immaterial, because the same rule applies to contractual pensions or benefits under paragraph (a) and to payments of a benevolent character under paragraph (f).

Paragraph (c) partly implements Recommendation 20. Unlike the preceding paragraphs it refers expressly to payments made to members of the injured person's family.

Paragraph (d) implements Recommendation 22. It applies to redundancy payments made by an employer on the termination of an employee's services.

Paragraph (e) implements Recommendation 16. It confirms the existing law as illustrated by *Doonan* v. *S.M.T. Co.* 1950 S.C. 136 (see paragraph 63).

Paragraph (f) implements Recommendations 14 and 15. It reflects the existing law that, in principle, benevolent payments made to an injured person or to members of his family are not to be taken into account in the assessment of damages. This rule, however, is not applied to payments made by the responsible person for the reasons stated in paragraph 61. Any payment made by an employer which does not fall within this or the preceding paragraphs, notably continued remuneration, would be taken into account because to this extent the injured person would not be regarded as having suffered loss of earnings (see paragraph (i) below).

Paragraph (i) restates the existing principle that remuneration or earnings from employment diminish the injured person's loss of earnings and are therefore to be taken into account in the assessment of damages. Paragraph (f) provides otherwise if the payment is of a benevolent character.

Paragraph (ii) implements Recommendation 24, and confirms the existing law as illustrated by *McPherson* v. *Kelsey Roofing Industries Ltd* 1967 S.L.T. (Notes) 93 and *Gallagher* v. *ICI Ltd* 1970 S.L.T. (Notes) 41 (see paragraph 94 of the report).

Paragraph (iii) partly implements Recommendation 20, and provides that only benefit payable to the injured person or to members of his family which relates to a period prior to the date of award is to be taken into account in the assessment of damages.

Paragraph (iv) implements Recommendation 17 and provides an exception, justified in paragraph 61, to the general rule that benevolent payments are not to be taken into account so as to reduce the amount of damages. This exception applies only to payments made by or on behalf of the responsible person to the injured person or to a member of his family. It is so drafted as to ensure that, where the responsible person makes a payment into a relief fund from which the injured person or a member of his family ultimately benefits, the courts will ignore that payment in computing damages.

Interpretation.

5.—(1) In this Act, unless the context otherwise requires—

"personal injuries" includes any disease or any impairment of a person's physical or mental condition;
"relative", in relation to the injured person, means—

(*a*) the spouse or divorced spouse;

(*b*) any ascendant or descendant;

(*c*) any brother, sister, uncle or aunt; or any issue of any such person;

(*d*) any person accepted by the injured person as a child of his family.

In deducing any relationship for the purposes of the foregoing definition—

(a) any relationship by affinity shall be treated as a relationship by consanguinity; any relationship of the half blood shall be treated as a relationship of the whole blood; and the stepchild of any person shall be treated as his child; and

(*b*) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

(2) Any reference in this Act to a payment, benefit or pension shall be construed as a reference to any such payment, benefit or pension whether in cash or in kind.

Amendment and repeal of enactments. 1976, c.13.

6.—(1) Section 1(7) of the Damages (Scotland) Act 1976 is hereby amended by inserting after the word "section" the words "or in the Damages (Scotland) Act 1978".

1948, c.41.

(2) Section 2(4) of the Law Reform (Personal Injuries) Act 1948 (disregard of National Health Service facilities) is hereby repealed

Clause 5

Subsection (1)

The definition of "personal injuries" follows the definition used in the Law Reform (Limitation of Actions, etc.) Act 1954, s.6(3), and in the Damages (Scotland) Act 1976, s.10(1). The definition of "relative" is in essence the same as the definition of "relative" contained in Schedule 1, paragraph 1 of the 1976 Act. Verbal changes have been made to take account of the fact that in the 1976 Act "relative" was defined exclusively in relation to deceased persons, whereas the present context envisages claims by injured persons during their lifetime.

Subsection (2)

This subsection makes it clear that the various references to payments, benefits and pensions in clause 4 include payments, etc, in kind as well as in cash.

Clause 6

Subsection (1)

Section 1(7) of the 1976 Act will have the effect, if so amended, of excluding claims by relatives on the death of an injured person unless those claims are recognized by section 1 of the 1976 Act and the present Bill.

Subsection (2)

This subsection implements Recommendation 21, and in effect provides that private medical expenses should be recoverable from the responsible person if they satisfy the ordinary test of reasonableness.

Citation, application to Crown, etc.

7.—(1) This Act may be cited as the Damages (Scotland) Act 1978.

(2) This Act binds the Crown.

(3) This Act shall come into operation on the expiration of one month beginning with the day on which it is passed.

(4) Without prejudice to the provisions of Parts II and III of the Prescription and Limitation (Scotland) Act 1973, this Act shall apply to rights of action which accrued before, as well as rights of action which accrue after, the coming into operation of this Act; but nothing in this Act shall affect any proceedings commenced before this Act comes into operation.

(5) This Act extends to Scotland only.

Clause 7

Subsection (3)

This subsection provides for the Bill to come into operation after an interval of one month. This will allow time for rules of court to be made, notably to implement Recommendation 5. Section 37 of the Interpretation Act 1889 enables such rules to be made between the passing of an Act and its coming into operation.

Subsection (4)

Section 12(4) of the 1976 Act merely provides that "Nothing in this Act affects any proceedings commenced before this Act comes into operation". A recent case, however, has raised doubts as to the meaning of that provision (*Hartley* v. *Scottish Omnibuses,* 1978 S.L.T. (Sh. Ct.) 35). This subsection is designed to make it clear that the Bill applies even to rights of action accruing before the Bill comes into operation.

APPENDIX II

List of those who submitted comments on Memorandum No. 21

Faculty of Advocates

Law Society of Scotland

Scottish Law Agents Society

Royal Faculty of Procurators in Glasgow

Faculty of Law, University of Glasgow

British Insurance Association

Lloyd's

Sheriff Principal F. W. F. O'Brien, Q.C.

Dr J. Blaikie, University of Aberdeen

W. Leitch, Law Reform Consultant, Office of the Legislative Draftsmen, Belfast

A. C. McKay, Solicitor, Glasgow

Professor I. P. Miller, University of Strathclyde

Professor D. M. Walker, Q.C., University of Glasgow

Printed in Scotland for Her Majesty's Stationery Office by McQueen Printers Ltd., Galashiels
Dd 610257/3834 K14 7/78

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