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## Damages for Death and Personal Injuries

The law relating to damages for personal injuries is a large and complicated subject, and only a few of the topics can be dealt with here, and even then only in outline. The object of this chapter is to give some idea of what damages are awarded for and how they are calculated, but the subject is highly unscientific and can really only be understood by experience.

### SECTION 1: TYPES OF ACTION FOR DAMAGES

Where a live claimant sues, the award will usually be for a lump sum to compensate for such matters as loss of future income, loss of amenity and pain and suffering. This once and for all payment has the advantage of finality and is preferred by claimants, but there may be occasions where it is inappropriate. Accordingly the court can now order that the damages should be paid by way of periodic payments, and in cases where the prognosis is uncertain there can be an interim payment. Furthermore, a claimant may prefer to negotiate a structured settlement which essentially is a lump sum commuted to an annuity. This has considerable tax advantages.

Where a person dies as the result of a tort there are two methods of claiming damages and their relationship can be complicated. First, there is an action for personal injuries by the deceased through his estate under the Law Reform (Miscellaneous Provisions) Act 1934. Secondly, there can be an action by the dependants of the deceased under the Fatal Accidents Act 1976 for the extent to which they were dependent on the deceased. This is independent of the action by the estate (*Reader v Molesworths* [2007] 3 All ER 108), for the dependants sue for their own loss, although their right to sue is conditional upon the deceased having had a right of action. There can be an action both by the estate and by the dependants for their separate losses. Note also that any damages received by the estate will be distributed according to the deceased's will (or on the deceased's intestacy), and the money may not have been left to the dependants.

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### DAMAGES ACT 1996

#### 2. Periodical payments

- (1) A court awarding damages for future pecuniary loss in respect of personal injury—
  - (a) may order that the damages are wholly or partly to take the form of periodical payments, and
  - (b) shall consider whether to make that order.

(2) A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.

(3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.

#### NOTES

1. This section was amended by the Courts Act 2003 and allows for a periodic payment order in relation to future income loss without the consent of the parties. An order is 'reasonably secure' if (a) there is a Financial Services Compensation Scheme set up under the Financial Services and Markets Act 2000, s. 213 or (b) a Minister has provided a guarantee in relation to a designated body under the Damages Act 1996, s. 6 or (c) the defendant is a government or health service body. The Damages (Variation of Periodical Payments) Order 2004 allows for a variable order to be made.
2. A periodic payment includes a structured settlement which is an arrangement whereby a claimant purchases an annuity from an insurance company with the damages he has been awarded or is entitled to. It works in the same way as any insurance policy whereby the insurer agrees to make a regular payment to the insured. If the policy is to last for the life of the claimant, the insurance company will make the usual actuarial assessments of his life expectancy. The advantage of a structured settlement is the tax benefit, but in negotiations with the insurance company as to the amount of the annuity some of this benefit may well accrue to them rather than to the claimant. See generally Law Commission Report No. 224, 'Structured settlements and interim and provisional damages'.

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### SENIOR COURTS ACT 1981 (formerly Supreme Court Act 1981)

#### 32A. Orders for provisional damages for personal injuries

(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

(2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgement is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person—

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
  - (b) further damages at a future date if he develops the disease or suffers the deterioration.
- (3) [omitted]
- (4) Nothing in this section shall be construed—
- (a) as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs; or
  - (b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

NOTE: This provision is intended for the cases where liability is clear but the medical prognosis is not. In that situation the claimant may apply for the loss known at the time of the trial and return to court for a further award if his condition deteriorates as a result of the tort. By the Civil Procedure Rules (CPR) 1998, r. 25.7, the section only applies if: (a) the defendant has admitted liability; or (b) the claimant has obtained judgment for damages to be assessed; or (c) if the action proceeded to trial the claimant would obtain substantial damages. Furthermore,

the defendant must either: (a) be insured; or (b) be a public authority. Note also that where a claimant has been awarded provisional damages and he subsequently dies within three years of the original cause of action arising, then the dependants may still claim under the Fatal Accidents Act 1976. (See the Damages Act 1996.)

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## LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934

### 1. Effect of death on certain causes of action

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation...

(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include:

- (i) any exemplary damages;
- (ii) any damages for loss of income in respect of any period after that person's death.

(b) [repealed]

(c) Where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) [repealed]

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act 1976, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Act as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

NOTE: The question of 'lost years' has caused considerable difficulty. This refers to the years the claimant would have lived but for the act of the defendant. If the estate is suing under the 1934 Act, damages for those lost years are not recoverable, but rather the dependants will have an action under the Fatal Accidents Act 1976 for the years they would have been supported by the deceased had he remained alive. Note that if a victim sues while he is alive he is able to recover for the lost years, because in those circumstances the dependants will not have an action and the damages for the lost years will be needed to support them after the claimant's death.

## FATAL ACCIDENTS ACT 1976

### 1. Right of action for wrongful act causing death

(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ('the deceased') whose death has been so caused.

(3) In this Act 'dependant' means—

- (a) the wife or husband or former wife or husband of the deceased;
- (aa) the civil partner or former civil partner of the deceased;
- (b) any person who—
  - (i) was living with the deceased in the same household immediately before the date of the death; and
  - (ii) had been living with the deceased in the same household for at least two years before that date; and
  - (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;
- (c) any parent or other ascendant of the deceased;
- (d) any person who was treated by the deceased as his parent;
- (e) any child or other descendant of the deceased;
- (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership;
- (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

(4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

(4A) The reference to the former civil partner of the deceased in subsection (3)(aa) above includes a reference to a person whose civil partnership with the deceased has been annulled as well as a person whose civil partnership with the deceased has been dissolved.

(5) In deducing any relationship for the purposes of subsection (3) above—

- (a) any relationship by marriage or civil partnership shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child, and
- (b) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

(6) Any reference in this Act to injury includes any disease and any impairment of a person's physical or mental condition.

### 1A. Bereavement

(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall only be for the benefit—

- (a) of the wife or husband or civil partner of the deceased; and
- (b) where the deceased was a minor who was never married or a civil partner—
  - (i) of his parents, if he was legitimate; and
  - (ii) of his mother, if he was illegitimate.

(3) Subject to subsection (5) below, the sum to be awarded as damages under this section shall be £11,800.

(4) Where there is a claim for damages under this section for the benefit of both the parents of the deceased, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).

(5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above.

## 2. Persons entitled to bring the action

(1) The action shall be brought by and in the name of the executor or administrator of the deceased.

(2) If—

- (a) there is no executor or administrator of the deceased, or
- (b) no action is brought within six months after the death by and in the name of an executor or administrator of the deceased,

the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it.

(3) Not more than one action shall lie for and in respect of the same subject matter of complaint.

(4) The plaintiff in the action shall be required to deliver to the defendant or his solicitor full particulars of the persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered.

## 3. Assessment of damages

(1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

(2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.

(3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.

(4) In an action under this Act where there fall to be assessed damages payable to a person who is a dependant by virtue of section 1(3)(b) above in respect of the death of the person with whom the dependant was living as husband or wife or civil partner there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together.

(5) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.

(6) Money paid into court in satisfaction of a cause of action under this Act may be in one sum without specifying any person's share.

## 4. Assessment of damages: disregard of benefits

In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

## 5. Contributory negligence

Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 the damages recoverable would be reduced under section 1(1) of the Law Reform (Contributory Negligence) Act 1945, any damages recoverable in an action under this Act shall be reduced to a proportionate extent.

## NOTES

1. The Law Commission has proposed a number of reforms of the Fatal Accidents Act ('Claims for Wrongful Death', Report No. 263). It recommends that the present structure should remain, but with the following amendments:
  - (a) *Who can claim?* The fixed list in s. 1 would remain but with the addition of a general clause to cover anyone who 'was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death'.
  - (b) *Prospects of re-marriage*—see note 2 below.
  - (c) *Collateral benefits*. A new section would specify that in addition to benefits accruing from the estate, insurance money, pensions and gifts should also not be deducted.
  - (d) *Bereavement*—see note 3 below.
2. *Prospects of remarriage*. Section 3(3) states that the chances of a widow remarrying are not to be taken into account in assessing damages. This rule was introduced because it was felt to be disparaging for a woman's looks and character to be assessed by judges with a view to her eligibility in the marriage market. Nevertheless, the rule does have some absurd consequences: in *Thompson v Price* [1973] 2 All ER 846 the widow had already remarried before the trial, and this fact was ignored in assessing damages. Thus she received damages for the support she would have received from the deceased, even though her new husband was now legally obliged to support her. Further oddities are that the widow's chances of remarriage *can* be taken into account when assessing the children's damages, and that, where the deceased is the wife, the husband's chances of marrying again can be taken into account.

The Law Commission has recommended (Report No. 263) that prospects of remarriage should be taken into account only where at the time of the trial the defendant has actually remarried, or is engaged to marry or has entered into financially supportive cohabitation. Equally, prospects of divorce or separation should not be taken into account unless at the time of the death the parties were not living in the same household, or one of the parties was petitioning for divorce, separation or nullity.

A related problem is whether a widow's prospects of earning should be taken into account. Should a widow of 25 who has no children be provided with the equivalent of income for the rest of her life, even though she is able to earn for herself? In fact such issues are ignored (see *Howitt v Heads* below).

3. *Bereavement*. The statute now provides for a fixed sum of £11,800 for bereavement. One function of this is to provide damages where no other loss is apparent. Thus, in the case of the death of a young child this will be the only loss. There has been much criticism by parents in such cases that this grossly undervalues a life, but the fact remains that the purpose of damages here is to compensate for a pecuniary loss, and such parents have in fact suffered no monetary loss. (The hard hearted would point out that, economically speaking, the parents have made a gain by the loss of their child, in that they will no longer be put to the expense of its upbringing.)

The Law Commission states that the function of bereavement damages is 'to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of non-pecuniary benefits of the deceased's care, guidance and society'. It suggests that the standard award should be index-linked. Those entitled to the payment would be a spouse, a parent, a child, a brother or sister, a person engaged to be married and cohabitants (including persons of the same sex) for at least two years. Where more than one person would be entitled the maximum payable by the defendant would be £30,000, index-linked. If there were more than three claimants they would share pro rata.

## SECTION 2: CALCULATION OF LOSS OF EARNINGS

This is the most difficult part of the subject, for the principles involved are wholly unscientific, and assessments are made on the basis of assumptions which need to

be explained. The problem is to calculate a future income stream as a lump sum, and the situation is the same in the case of both fatal accident cases and claims by living claimants.

The objective of an award of damages is to provide the equivalent of the income which would have been received by the claimant (whether the victim himself or the dependants of a deceased victim) for the period during which he is unable to earn due to the tort committed by the defendant. There are three steps in the calculation:

- (1) Work out the period for which the earnings have been lost, or, in a fatal accident case, the period during which the dependants would have been supported by the deceased.
- (2) Second, work out the amount of loss, or the dependency, in weekly, monthly or annual terms.
- (3) Work out the present capital value of that future loss.

It is the third step which produces the problems: obviously you do not simply multiply the amount of the loss by the number of years for which it will occur, because when you give the claimant a lump sum he or she will be able to earn interest on that money, and that must be taken into account. Thus, if a person has lost £10,000 per year for ten years, the person would be overcompensated if awarded £100,000, for he or she would be able to earn, say, £6,000 per year interest on this sum. What is needed is to work out a capital sum from which the person can, after investing it, withdraw £10,000 per year, and which will be exhausted at the end of the period of loss. What this sum will be will depend to a great extent on the assumed rate of interest gained on the capital sum, the 'discount rate', and this is now set at 2.5 per cent as this is approximately what might be gained on top of inflation.

In practice, the judges talk about a 'multiplier'. This is the figure which, when multiplied by the amount of annual loss, will produce a capital sum from which the amount of the loss may be drawn (net of tax) for the period of loss. For example, in the first case, *Howitt v Heads*, the loss was £936 per year for 40 years, and the judge awarded a capital sum of £16,848, that is 18 times the annual loss. The figure 18 was chosen because if the capital sum ( $18 \times 936$ ) is invested at about 5 per cent, then £936 could be drawn out of the fund each year for 40 years. Another way to explain the multiplier is to say that if A gives B £18 he should be able to draw out £1 per year for 40 years, assuming that it is invested at about 5 per cent net of tax.

The actual multiplier selected will also be affected by other uncertainties about the future: for example, a slight reduction will be made for what are called 'the vicissitudes of life', that is the chance that the claimant will not survive for the period of the loss or that some other injury will occur to the claimant. In the past calculating these chances was often a matter of intuition and guesswork but now, by virtue of the Civil Evidence Act 1995, s. 10, actuarial tables prepared by the government actuary (the so-called 'Ogden tables') may be used in assessing the chance of future risks materializing.

The first case, *Howitt v Heads*, is given as a simple example of the application of the Fatal Accidents Act and of the calculation of the multiplier.

**Howitt v Heads**

Queen's Bench Division [1973] 1 QB 64; [1972] 2 WLR 183; [1972] 1 All ER 491

The claimant was a widow aged 21 who had a young son, and she was suing under the Fatal Accidents Act for the loss of her husband. The dependency was calculated at £936 per year for a period of 40 years. Held: neither prospects of remarriage nor of the claimant being able to earn should be taken into account, and a multiplier of 18 should be applied, giving damages of £16,848.

CUMMING-BRUCE J: On the basis of that dependency [of £18 per week] I approach the next problem, which is the problem of the capital sum which fairly represents the injury to the wife occurring from the death. I have to do it with rather less guidance from authority than has for many years been possible in fatal accident cases, as a consequence of the new situation flowing from the effect of section 4(1) of the Law Reform (Miscellaneous Provisions) Act 1971. Here is a young lady now, I think, 21, with one child. Her prospects of remarriage are not to be taken into account. The situation as I see it is this: on the wife's evidence it is likely, being evidently a lady of ability, that when it is convenient for her to make suitable arrangements for their son, she probably will at some stage—perhaps when the boy starts going to school—resume employment, not only to have the advantage of the money, but also because obviously it is likely to make life more interesting for her. And so, peering into the future, I envisage a situation in which it is likely that after a period of years, probably not very far ahead, she will resume employment and make a good deal of money every week as a result. That, of course, is upon the contingency that she does not remarry with all the implications that that might have—implications which I have to leave out of account.

What is the correct approach in a Fatal Accidents Act case to the situation of a widow who has an earning capacity which she will probably use after a fairly short period of years? As far as I know there is no explicit authority in English cases, though there is a good deal of authority to the effect that a wife's private means are not to be taken into account. There is a useful discussion in the well known textbook of *Kemp and Kemp, The Quantum of Damages*, 2nd ed., vol. 2 (1962), p. 272, upon the relevance or otherwise of a widow's capacity to support herself, and there have been two cases in Australia, which were approved in the High Court of Australia, dealing with the matter: see *Carroll v Purcell* (1927) 35 ALJR 384. And in *Goodger v Knapman* [1924] SASR 347 (and I rely on the citation from that case given in the textbook to which I have referred) Murray CJ said, at p. 358:

'Mr Thomson asked me to make a further reduction by reason of the widow being relieved from the heavier part of her domestic duties, and thereby set free to go out and earn something on her own account. I do not accede to the suggestion, as I am unable to see how liberty to work can reasonably be brought within the description of a pecuniary advantage she has derived from the death of her husband. Any money she might earn would be the result of her labour, not of his death.' The same decision was made by Wolff J in Western Australia in *Usher v Williams* (1955) 60 WALR 69, 80: 'The argument for the diminution of the claim by some allowance of the widow's earning potential proceeds on the theory that the husband's death has released a flood of earning capacity. . . . In my opinion the plaintiff's ability to earn is not a gain resulting from the death of her husband within the principle established by *Davies v Powell Duffryn Collieries Ltd* [1942] AC 601. The widow's ability to work was always there and she could perhaps, as many women do—particularly in professions—have preferred to work after marriage. The same argument that is put forward for the defendants could be applied to any woman who goes out to work through necessity to support herself and her children following her husband's death; and if it can be applied to the widow there is no reason why it should not be used to diminish or extinguish the children's claims in a case where, by her efforts, she is able to support them as well as her husband did in his lifetime. . . . I therefore hold that the widow's earning capacity is not to be taken into account in diminution of damages.'

I agree with the principle enunciated in those cases and I follow them. I therefore make no deduction in respect of the widow's capacity to earn, even though I am satisfied as a matter of probability that she will fairly soon be obtaining a significant degree of financial independence. . . .

The exercise upon which I embark, in seeking to capitalise her loss therefore, has two elements of some artificiality, but by statute I consider that I am bound to postulate one artificiality and on principle, having regard to the approach of the court to the widow's own capacity to earn, I think it is my duty to introduce the second artificiality. Having regard to the age and good health of the husband, subject to what is commonly described as the changes and chances of life, he had a prospect of remunerative employment of not less than 40 years, and having regard to the lady's health and youth, her expectation of life is at least as good as his. And so, subject as I say to changes and chances of the unknown future, this widow has been deprived of the prospect of a settled and stable financial future afforded by her husband over a period of some 40 years.

Mr Cobb put in, as an aid to testing the effect of an award of £15,000 some tables showing what the effect would be if such a sum was invested to yield either 3 per cent or 4 per cent and I approach the case on the basis of the guidance given in the House of Lords in *Taylor v O'Connor* [1971] AC 115. I cite in particular a passage from the speech of Lord Pearson, which I think Mr Cobb had in mind when he caused to be prepared the tables that he put before me. Lord Pearson said, at p. 143:

'The fund of damages is not expected to be preserved intact. It is expected to be used up gradually over the relevant period—15 or 18 years in this case—so as to be exhausted by the end of the period.' The case with which their Lordships were dealing was a case where the deceased was 53 at the time of death and the respondent 52. 'Therefore, what the widow received annually—£3,750 in this case—is made up partly of income and partly of capital. As the fund is used up, the income becomes less and less and the amounts withdrawn from the capital of the fund become greater and greater, because the total sum to be provided in each year—£3,750—is assumed (subject to what is said below) to remain constant throughout the relevant period. It is not difficult, though somewhat laborious, to work out without expert assistance how long a given fund will last with a given rate of interest and a given sum of money to be provided in each year.'

Then he gives the first few lines of such a calculation to show the method, which was the method Mr Cobb presented to me. And when one looks at Mr Cobb's figures showing the consequences of an award of £15,000 invested at 3 per cent on the basis that the loss of dependency was £1,000, so that that is the income one is seeking to afford the widow throughout the future, it appears that on that investment of 3 per cent the fund disappears altogether in the 20th year. And at 4 per cent it disappears in the 23rd year. . . . On an £18 a week dependency the annual loss of dependency is £936. So that I seek by my award to provide the widow with capital that will afford her and her son over the foreseeable future an income of £936, and I find in the speeches of the House of Lords in *Taylor v O'Connor*, an indication that it is by the management of the capital fund that the widow may reasonably expect to counteract the probable fall in the value of money as a consequence of inflation. I have looked at annuity tables and I have taken them into account as providing one test of the appropriateness of the calculations, but I accept unhesitatingly the view frequently expressed that the actual evidence of such computations (and there is no evidence in this case of an actuarial character), is of limited value in assistance in a fatal accidents case.

I hope that I have thus indicated the factors that have affected my mind, and I have decided that the capital value that should be placed on the loss of dependency by this widow is the sum of £16,848. If my arithmetic is correct it will be found that can be represented as a multiplier of 18. . . .

NOTE: This case illustrates the traditional method of calculating damages and what is meant by a 'multiplier'. It also shows the relationship between the three elements in the calculation (period of loss, amount of loss and present capital value of future income) and how the total is arrived at.

### **Wells v Wells**

House of Lords [1999] 1 AC 345; [1998] 3 WLR 329; [1998] 3 All ER 481

This case involved the assessment of damages in three personal injury cases. The particular point at issue was the amount of 'discount' to be applied in capitalising the loss of future earnings, and thus how future inflation should be dealt with. The

traditional view was to ignore inflation but to apply a rate of discount which would represent earnings on investments in times of stable currencies. This was taken to be 4–5 per cent. The alternative (adopted here) is to use the rate available for Index Linked Government Stock (ILGS) which pays approximately 2.5–3.5 per cent on top of inflation. The rate is now fixed by statutory instrument at 2.5 per cent.

LORD LLOYD: ... The starting-point is the multiplicand, that is to say the annual loss of earnings or the annual cost of care, as the case may be... The medical evidence may be that the need for care will increase or decrease as the years go by, in which case it may be necessary to take different multiplicands for different periods covered by the award. But to simplify the illustration one can take an average annual cost of care of £10,000 on a life expectancy of 20 years. If one assumes a constant value for money, then if the court were to award 20 times £10,000 it is obvious that the plaintiff would be over-compensated. For the £10,000 needed to purchase care in the twentieth year should have been earning interest for 19 years. The purpose of the discount is to eliminate this element of over-compensation. The objective is to arrive at a lump sum which by drawing down both interest and capital will provide exactly £10,000 a year for 20 years, and no more. This is known as the annuity approach. It is a simple enough matter to find the answer by reference to standard tables. The higher the assumed return on capital, net of tax, the lower the lump sum. If one assumes a net return of 5 per cent the discounted figure would be £124,600 instead of £200,000. If one assumes a net return of 3 per cent the figure would be £148,800.

The same point can be put the other way round. £200,000 invested at 5 per cent will produce £10,000 a year for 20 years. But there would still be £200,000 left at the end.

So far there is no problem. The difficulty arises because, contrary to the assumption made above, money does not retain its value. How is the court to ensure that the plaintiff receives the money he will need to purchase the care he needs as the years go by despite the impact of inflation? In the past the courts have solved this problem by assuming that the plaintiff can take care of future inflation in a rough and ready way by investing the lump sum sensibly in a mixed 'basket' of equities and gilts. But the advent of the index-linked government stock ('I.L.G.S.') (they were first issued in 1981) has provided an alternative. The return of income and capital on I.L.G.S. is fully protected against inflation. Thus the purchaser of £100 of I.L.G.S. with a maturity date of 2020 knows that his investment will then be worth £100 plus  $x$  per cent of £100, where  $x$  represents the percentage increase in the retail price index between the date of issue and the date of maturity (or, more accurately, eight months before the two dates). Of course if the plaintiff were to invest his £100 in equities it might then be worth much more. But it might also be worth less. The virtue of I.L.G.S. is that it provides a risk-free investment.

The first-instance judges in these appeals have broken with the past. They have each assumed for the purpose of the calculation that the plaintiffs will go into the market, and purchase the required amount of I.L.G.S. so as to provide for his or her future needs with the minimum risk of their damages being eroded by inflation. How the plaintiffs will in fact invest their damages is, of course, irrelevant. That is a question for them. It cannot affect the calculation. The question for decision therefore is whether the judges were right to assume that the plaintiffs would invest in I.L.G.S. with a low average net return of 2.5 per cent, instead of a mixed portfolio of equities and gilts. The Court of Appeal has held not. They have reverted to the traditional 4 to 5 per cent with the consequential reduction in the sums awarded.

### *Conclusion*

My conclusion is that the judges in these three cases were right to assume for the purpose of their calculations that the plaintiffs would invest their damages in I.L.G.S. for the following reasons.

(1) Investment in I.L.G.S. is the most accurate way of calculating the present value of the loss which the plaintiffs will actually suffer in real terms.

(2) Although this will result in a heavier burden on these defendants, and, if the principle is applied across the board, on the insurance industry in general, I can see nothing unjust. It is true that insurance premiums may have been fixed on the basis of the 4 to 5 per cent discount rate indicated in

*Cookson v Knowles* [1979] AC 556 and the earlier authorities. But this was only because there was then no better way of allowing for future inflation. The objective was always the same. No doubt insurance premiums will have to increase in order to take account of the new lower rate of discount. Whether this is something which the country can afford is not a subject on which your Lordships were addressed. So we are not in a position to form any view as to the wider consequences.

(3) The search for a prudent investment will always depend on the circumstances of the particular investor. Some are able to take a measure of risk, others are not. For a plaintiff who is not in a position to take risks, and who wishes to protect himself against inflation in the short term of up to 10 years, it is clearly prudent to invest in I.L.G.S. It cannot therefore be assumed that he will invest in equities and gilts. Still less is it his duty to invest in equities and gilts in order to mitigate his loss.

(4) Logically the same applies to a plaintiff investing for the long term. In any event it is desirable to have a single rate applying across the board, in order to facilitate settlements and to save the expense of expert evidence at the trial. I take this view even though it is open to the Lord Chancellor under section 1(3) of the Act of 1996 to prescribe different rates of return for different classes of case. Mr Leighton Williams conceded that it is not desirable in practice to distinguish between different classes of plaintiff when assessing the multiplier.

(5) How the plaintiff, or the majority of plaintiffs, in fact invest their money is irrelevant. The research carried out by the Law Commission suggests that the majority of plaintiffs do not in fact invest in equities and gilts but rather in a building society or a bank deposit.

(6) There was no agreement between the parties as to how much greater, if at all, the return on equities is likely to be in the short or long term. But it is at least clear that an investment in I.L.G.S. will save up to 1 per cent per annum by obviating the need for continuing investment advice.

(7) The practice of the Court of Protection when investing for the long term affords little guidance. In any event the policy may change when lump sums are calculated at a lower rate of return.

(8) The views of the Ogden Working Party, the Law Commission and the author of *Kemp & Kemp, The Quantum of Damages* in favour of an investment in I.L.G.S. are entitled to great weight.

(9) There is nothing in the previous decisions of the House which inhibits a new approach. It is therefore unnecessary to have resort to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

## NOTES

1. In the event the House set the rate at 3 per cent, but this has now been superseded by a statutory instrument setting the rate at 2½ per cent. Nevertheless, the point is that rather than set a rate based on the total returns from equities (which would include sufficient return to cover inflation), the new method uses a return based on what might be gained over and above inflation. Note that the lower the rate of discount the higher will be the damages.
2. The rate of discount has been a matter of debate for many years and most commentators have recommended a change of the kind now adopted. The result will be an increase in personal injury damages and thus an increase in insurance premiums. This was felt to be necessary if we are to retain the notion of 'full compensation'. Lord Steyn discussed whether this should be so, noting that judges have in practice adopted a maximum multiplier of 18 and have made deductions for the future uncertainties of life. He noted *Atiyah's* criticism of the full compensation principle, that it is very expensive and reduces the incentive to return to work (see now *Cane, Atiyah's Accidents, Compensation and the Law*, 6th edn., p. 131).

## DAMAGES ACT 1996

### 1. Assumed rate of return on investment of damages

(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) above may prescribe different rates for different classes of case.

NOTE: The discount rate to be applied under this Act has now been set at 2½ per cent by the Damages (Personal Injury) Order 2001, SI No. 2301. For a discussion of when this rate may be departed from see *Warriner v Warriner* [2003] 3 All ER 447, where it was said that certainty was extremely important and a different rate could only be applied where there were special features material to the rate of return and it could be shown that these were factors which had not been taken into account by the Lord Chancellor when setting the rate. A long life expectancy would not justify a different rate. (The claimant had a life expectancy of 46 years and asked for a 2 per cent rate to be applied: this was refused.)

### SECTION 3: INTANGIBLE LOSSES

Intangible losses include damages for pain and suffering and loss of amenity, and the amounts awarded tend to be conventional and are arrived at on the basis of experience. Thus *Kemp and Kemp*, *Quantum of Damages* lists awards under these heads, and these are used as guidelines in any given case.

‘Loss of amenity’ means loss by the claimant of the ability to enjoy life to the full. However, one issue over which there has been disagreement is whether damages should be awarded under this head for a person who is unable to appreciate his loss, such as someone in a coma. Are the damages for the deprivation or for the awareness of the deprivation? *West v Shepherd* deals with that problem.

#### *West v Shepherd*

House of Lords [1964] AC 326; [1963] 2 WLR 1359; [1963] 2 All ER 625

The claimant, aged 41, was injured in a road accident and she suffered from ‘post-traumatic spastic quadriplegia and intellectual deficit’. She may have been aware of her condition to a slight degree, but the House of Lords discussed the question of the basis of awards for loss of amenities. Held: that a person would be entitled to damages even if unaware of the loss.

LORD PEARCE: My Lords, the appellants seek to use the plaintiff’s condition as the foundation for two arguments in extinction or diminution of damages claimed in respect of her injuries and pain and loss of amenities.

First it is argued that such damages are given as compensation or consolation, and therefore, when the plaintiff’s condition is so bad that they cannot be used by her to compensate or console they should either be greatly reduced or should not be awarded at all. No authority is cited in favour of such a proposition nor can I see any principle of common law that supports it.

The argument contains the assumption, which in my opinion is fallacious, that the court is concerned with what happens to the damages when they have been awarded. The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum. It does not look beyond the judgment to the spending of the damages. If it did so, many difficult problems would arise. Similar sums awarded for similar suffering may produce wholly different results. To a poor man who is thereby enabled to achieve some cherished object such as the education of his

family the sum awarded may prove to be a more than adequate consolation. To a man who already has more money than he wants, it may be no consolation at all. But these are matters with which the court is not concerned. Whether the sum awarded is spent or how it is spent is entirely a matter for the plaintiff or the plaintiff's legal representatives. If the plaintiff's personal ability to use or enjoy the damages awarded for injury and pain and loss of amenity were a condition precedent to their award, it would be impossible for the executors of an injured person to obtain such damages. Yet they did so in *Rose v Ford* [1937] AC 826 and *Benham v Gambling* [1941] AC 157 and many other cases.

The second argument is founded on *Benham v Gambling* and would affect the whole basis of damages awarded for personal injury, apart, of course, from economic loss with which the argument is not concerned. Substantial damages are not awarded, it is said, for physical injury simpliciter, but only for the pain and suffering and general loss of happiness which it occasions. Therefore the deprivation of a limb can only command any substantial compensation in so far as it results in suffering or loss of happiness; and where there is little or no consciousness of deprivation there can be little or no damages. For this argument the appellants rely on *Benham v Gambling* and on the minority judgment of Diplock LJ in *Wise v Kaye* [1962] 1 QB 368.

The practice of the courts hitherto has been to treat bodily injury as a deprivation which in itself entitles a plaintiff to substantial damages according to its gravity. In *Phillips v London and South Western Railway Co* 4 QBD 406 Cockburn CJ in enumerating the heads of damage which the jury must take into account and in respect of which a plaintiff is entitled to compensation, said: 'These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss.' In *Rose v Ford* Lord Roche said: 'regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself.' If a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered a serious physical deprivation no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb—if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in future be debarred, that too increases the assessment. If there is a particular consequential injury to the nervous system, that also increases the assessment. So, too, with other personal and subjective matters that fall to be decided in the light of common sense in particular cases. These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for general damages. . . .

The loss of happiness of the individual plaintiffs is not, in my opinion, a practicable or correct guide to reasonable compensation in cases of personal injury to a living plaintiff. A man of fortitude is not made less happy because he loses a limb. It may alter the scope of his activities and force him to seek his happiness in other directions. The cripple by the fireside reading or talking with friends may achieve happiness as great as that which, but for the accident, he would have achieved playing golf in the fresh air of the links. To some ancient philosopher the former kind of happiness might even have seemed of a higher nature than the latter, provided that the book or the talk were such as they would approve. Some less robust persons, on the other hand, are prepared to attribute a great loss of happiness to a quite trivial event. It would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award. Under the present practice there is no call for a parade of personal unhappiness. A plaintiff who cheerfully admits that he is happy as ever he was, may yet receive a large award as reasonable compensation for the grave injury and loss of amenity over which he has managed to triumph.

NOTE: The Pearson Commission (para. 398) disagreed with this view, saying that non-pecuniary damages should not be recoverable for permanent unconsciousness. They took the view that damages should be paid under this head only where they can serve some useful purpose, such as providing some alternative source of satisfaction to replace one that has been lost. The

High Court of Australia, in *Skelton v Collins* (1966) 39 AJLR 480, also, by a majority, took this view, saying that the subjective element could not be ignored, although some damages should be awarded for the objective elements.

#### SECTION 4: DEDUCTION OF OTHER BENEFITS

The law of tort may not be the only source of compensation available to an injured person, and a difficult question is the extent to which benefits received from other quarters should be deducted from the damages. It is agreed that gifts to the claimant should not be deducted, nor should the proceeds of private insurance taken out by the claimant, since these are the result of the claimant's own payments and are not caused by the defendant's negligence. Also it would be odd if the defendant's liability to pay damages is reduced because of the claimant's payment of premiums. It is also agreed (*Parry v Cleaver* [1970] AC 1) that a pension is not deductible from damages, for a pension is different from lost wages. Also, in fatal accident cases, s. 4 of the 1976 Act makes it clear that insurance payments or pensions are not to be deducted from damages payable to the dependants.

However, two important areas of collateral benefit remain: sick pay and social security payments. *Hussain v New Taplow Mills* deals with the first, and statutory provisions deal with the second.

#### *Hussain v New Taplow Paper Mills*

House of Lords [1988] AC 514; [1988] 2 WLR 266; [1988] 1 All ER 541

The claimant was injured at work and his left arm was amputated below the elbow. Under his contract of employment the claimant was entitled to receive full pay for 13 weeks and, if fully incapacitated, half pay thereafter. Held: dismissing the appeal, that the sick pay should be deducted from the damages.

LORD BRIDGE: In *Parry v Cleaver* [1970] AC 1, Lord Reid, discussing the general principles applicable to the assessment of damages for financial loss said, at p. 13:

Two questions can arise. First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages. *British Transport Commission v Gourley* [1956] AC 185 did two things. With regard to the first question it made clear, if it had not been clear before, that it is a universal rule that the plaintiff cannot recover more than he has lost. And, more important, it established the principle that in this chapter of the law we must have regard to realities rather than technicalities. The plaintiff would have had to pay tax in respect of the income which he would have received but for the accident. So what he really lost was what would have remained to him after payment of tax. . . . But *Gourley's* case had nothing whatever to do with the second question.

This dichotomy, however, must not be allowed to obscure the rule that prima facie the only recoverable loss is the net loss. Financial gains accruing to the plaintiff which he would not have received but for the event which constitutes the plaintiff's cause of action are prima facie to be taken into account in mitigation of losses which that event occasions to him. In many, perhaps most cases, both losses and gains will come into the calculation. Just as in a claim for damages

for wrongful dismissal the plaintiff must, if he can, mitigate his damage by securing other employment, so also a plaintiff disabled by personal injury from continuing his pre-accident occupation mitigates his damage suffered by the loss of the whole of his earnings in that occupation by exercising some other skill, which he already possesses or acquires by training, to earn money in a new occupation which, but for the accident, he would never have pursued. One may ask either 'What is his real loss?' or 'Is the gain accruing from earnings in the new occupation deductible from the loss of earnings of the old occupation?' to arrive at the same answer. But to the prima facie rule there are two well established exceptions. First, where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor: *Bradburn v Great Western Railway Co* (1864) LR 10 EX 1. Secondly, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, the amount received is again to be disregarded: *Redpath v Belfast and County Down Railways* [1967] NI 147. In both these cases there is in one sense double recovery. If the award of damages adequately compensates the plaintiff, as it should, the additional amounts received from the insurer or from third party benevolence may be regarded as a net gain to the plaintiff resulting from his injury. But in both cases the common sense of the exceptions stares one in the face. It may be summed up in the rhetorical question: 'Why should the tortfeasor derive any benefit, in the one case, from the premiums which the plaintiff has paid to insure himself against some contingency, however caused, in the other case, from the money provided by the third party with the sole intention of benefiting the injured plaintiff?'

Given the inevitable divergencies of judicial opinion as to what justice, reasonableness and public policy require, it is not surprising that courts in different common law jurisdictions should sometimes have solved similar problems in this field in different ways, nor that, in the leading case of *Parry v Cleaver* [1970] AC 1 itself, this House should have reversed the Court of Appeal by a majority of three to two in holding that a disability pension payable to a police officer compelled to retire from the police force by injury caused by the defendant's negligence was not to be taken into account in mitigation of his loss of earnings and loss of earning capacity up to the date of police retiring age, but only in mitigation of his loss of police retirement pension after that age. Lord Reid said, at p. 15: 'Surely the distinction between receipts which must be brought into account and those which must not must depend not on their source but on their intrinsic nature.'

He went on to consider the nature of the police disability pension and concluded, in effect, that it was the fruit of a form of insurance for which the plaintiff had in substance contributed the premiums by his pre-accident service. He contrasted it with sick pay in the following passage, at p. 16:

Then it is said that instead of getting a pension he may get sick pay for a time during his disablement—perhaps his whole wage. That would not be deductible, so why should a pension be different? But a man's wage for a particular week is not related to the amount of work which he does during that week. Wages for the period of a man's holiday do not differ in kind from wages paid to him during the rest of the year. And neither does sick pay; it is still wages. So during the period when he receives sick pay he has lost nothing. We never reach the second question of how to treat sums of a different kind which he would never have received but for his accident.

Later he said, pp. 20–21:

As regards police pension, his loss after reaching police retiring age would be the difference between the full pension which he would have received if he had served his full time and his ill-health pension. It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier period. The answer is that in the earlier period we are not comparing like with like. He lost wages but gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance

from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind....

Mr Andrew Collins, for the plaintiff, seeks to apply by analogy a principle said to be established by *Parry v Cleaver* [1970] AC 1 in support of the argument that all payments to an employee enjoying the benefit of the defendants' permanent health insurance scheme are effectively in the nature of the fruits of insurance accruing to the benefit of the employee in consideration of the contributions he has made by his work for the defendants prior to incapacity. Much emphasis was laid on the long term nature of the scheme payments to which the plaintiff has become entitled and it was submitted that they are strictly comparable to a disability pension. Both these arguments fall to the ground, as it seems to me, in the light of the concession rightly made at an early stage that the nature of payments under the scheme is unaffected by the duration of the incapacity which determines the period for which payments will continue to be made. The question whether the scheme payments are or are not deductible in assessing damages for loss of earnings must be answered in the same way whether, after the first 13 weeks of incapacity, the payments fall to be made for a few weeks or for the rest of an employee's working life. Looking at the payments made under the scheme by the defendants in the first weeks after the expiry of the period of 13 weeks of continuous incapacity, they seem to me indistinguishable in character from the sick pay which the employee receives during the first 13 weeks. They are payable under a term of the employee's contract by the defendants to the employee qua employee as a partial substitute for earnings and are the very antithesis of a pension, which is payable only after employment ceases. The fact that the defendants happen to have insured their liability to meet these contractual commitments as they arise cannot affect the issue in any way.

...From the point of view of justice, reasonableness and public policy the case seems to me far removed from the principle underlying the insurance cases stemming from *Bradburn v Great Western Railway Co*, LR 10 Ex 1. It positively offends my sense of justice that a plaintiff, who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity to work from two different sources, his employer and the tortfeasor. It would seem to me still more unjust and anomalous where, as here, the employer and the tortfeasor are one and the same.

NOTE: One exception to the principle in *Hussain* is the 'benevolence principle' where payments have been made to the claimant by a third party from motives of sympathy. These are not deducted as it 'would be revolting to the ordinary man's sense of justice and therefore contrary to public policy'. However it was held in *Gaca v Pirelli* [2004] 3 All ER 348, [2004] EWCA (Civ) 373, that where it is the *tortfeasor* who makes a voluntary payment the payment is deducted from the claimant's damages. Thus where an employer has voluntarily arranged insurance to cover his employees, payments made under this policy to an injured employee will be deducted, unless it can be shown that the employee has directly or indirectly contributed to paying the premium. (Merely being an employee will not be regarded as an indirect contribution.)

#### ■ QUESTIONS

1. If the claimant is dismissed and becomes eligible for a disability pension rather than sick pay, should this be deducted?
2. Lord Bridge said that in *Hussain* the claimant had not paid insurance premiums as such. If an employee was given a choice of being covered by a sick pay scheme or receiving higher wages, would this alter the situation? If he is not given a choice, could the provision of cover be regarded as forgone wages?
3. If the contract of employment had stated that if the claimant recovered damages from a tortfeasor he must repay the sick pay to the employer, should the sick pay have been deducted?

## ADMINISTRATION OF JUSTICE ACT 1982

### 5. Maintenance at public expense to be taken into account in assessment of damages

In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries (including any such action arising out of a contract) any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in a hospital, nursing home or other institution shall be set off against any income lost by him as a result of his injuries.

## LAW REFORM (PERSONAL INJURIES) ACT 1948

### 2. Measure of damages

(4) In an action for damages for personal injuries (including any such action arising out of a contract), 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 Act 2006 or the National Health Service (Wales) Act 2006 or the National Health Service (Scotland) Act 1978, or of any corresponding facilities in Northern Ireland.

### 3. Definition of 'personal injury'

In this Act the expression 'personal injury' includes any disease and any impairment of a person's physical or mental condition, and the expression 'injured' shall be construed accordingly.

## SOCIAL SECURITY (RECOVERY OF BENEFITS) ACT 1997

### *Introductory*

### 1. Cases in which this Act applies

- (1) This Act applies in cases where—
  - (a) a person makes a payment (whether on his own behalf or not) to or in respect of any other person in consequence of any accident, injury or disease suffered by the other, and
  - (b) any listed benefits have been, or are likely to be, paid to or for the other during the relevant period in respect of the accident, injury or disease.
- (2) The reference above to a payment in consequence of any accident, injury or disease is to a payment made—
  - (a) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of the accident, injury or disease, or
  - (b) in pursuance of a compensation scheme for motor accidents;
 but does not include a payment mentioned in Part 1 of Schedule 1.
- (3) Subsection (1)(a) applies to a payment made—
  - (a) voluntarily, or in pursuance of a court order or an agreement, or otherwise, and
  - (b) in the United Kingdom or elsewhere.
- (4) In a case where this Act applies—
  - (a) the 'injured person' is the person who suffered the accident, injury or disease,
  - (b) the 'compensation payment' is the payment within subsection (1)(a), and
  - (c) 'recoverable benefit' is any listed benefit which has been or is likely to be paid as mentioned in subsection (1)(b).

### 3. 'The relevant period'

- (1) In relation to a person ('the claimant') who has suffered any accident, injury or disease, 'the relevant period' has the meaning given by the following subsections.
- (2) Subject to subsection (4), if it is a case of accident or injury, the relevant period is the period of five years immediately following the day on which the accident or injury in question occurred.

(3) Subject to subsection (4), if it is a case of disease, the relevant period is the period of five years beginning with the date on which the claimant first claims a listed benefit in consequence of the disease.

(4) If at any time before the end of the period referred to in subsection (2) or (3)—

- (a) a person makes a compensation payment in final discharge of any claim made by or in respect of the claimant and arising out of the accident, injury or disease, or
- (b) an agreement is made under which an earlier compensation payment is treated as having been made in final discharge of any such claim,

the relevant period ends at that time.

#### *Certificates of recoverable benefits*

#### **4. Applications for certificates of recoverable benefits**

(1) Before a person ("the compensator") makes a compensation payment he must apply to the Secretary of State for a certificate of recoverable benefits.

#### *Liability of person paying compensation*

#### **6. Liability to pay Secretary of State amount of benefits**

(1) A person who makes a compensation payment in any case is liable to pay to the Secretary of State an amount equal to the total amount of the recoverable benefits.

(2) The liability referred to in subsection (1) arises immediately before the compensation payment or, if there is more than one, the first of them is made.

(3) No amount becomes payable under this section before the end of the period of 14 days following the day on which the liability arises.

(4) Subject to subsection (3), an amount becomes payable under this section at the end of the period of 14 days beginning with the day on which a certificate of recoverable benefits is first issued showing that the amount of recoverable benefit to which it relates has been or is likely to have been paid before a specified date.

#### *Reduction of compensation payment*

#### **8. Reduction of compensation payment**

(1) This section applies in a case where, in relation to any head of compensation listed in column 1 of Schedule 2—

- (a) any of the compensation payment is attributable to that head, and
- (b) any recoverable benefit is shown against that head in column 2 of the Schedule.

(2) In such a case, any claim of a person to receive the compensation payment is to be treated for all purposes as discharged if—

- (a) he is paid the amount (if any) of the compensation payment calculated in accordance with this section, and
- (b) if the amount of the compensation payment so calculated is nil, he is given a statement saying so by the person who (apart from this section) would have paid the gross amount of the compensation payment.

(3) For each head of compensation listed in column 1 of the Schedule for which paragraphs (a) and (b) of subsection (1) are met, so much of the gross amount of the compensation payment as is attributable to that head is to be reduced (to nil, if necessary) by deducting the amount of the recoverable benefit or, as the case may be, the aggregate amount of the recoverable benefits shown against it.

(4) Subsection (3) is to have effect as if a requirement to reduce a payment by deducting an amount which exceeds that payment were a requirement to reduce that payment to nil.

(5) The amount of the compensation payment calculated in accordance with this section is—

- (a) the gross amount of the compensation payment, less
- (b) the sum of the reductions made under subsection (3), (and, accordingly, the amount may be nil).

*Courts***15. Court orders**

(1) This section applies where a court makes an order for a compensation payment to be made in any case, unless the order is made with the consent of the injured person and the person by whom the payment is to be made.

(2) The court must, in the case of each head of compensation listed in column 1 of Schedule 2 to which any of the compensation payment is attributable, specify in the order the amount of the compensation payment which is attributable to that head.

**17. Benefits irrelevant to assessment of damages**

In assessing damages in respect of any accident, injury or disease, the amount of any listed benefits paid or likely to be paid is to be disregarded.

**SCHEDULE 2 CALCULATION OF COMPENSATION PAYMENT**

<b>(1)</b> <i>Head of compensation</i>	<b>(2)</b> <i>Benefit</i>
1. Compensation for earnings lost during the relevant period	Disablement pension payable under section 103 of the 1992 Act Incapacity benefit Income support Invalidity pension and allowance Jobseeker's allowance Reduced earnings allowance Severe disablement allowance Sickness benefit Statutory sick pay Unemployability supplement Unemployment benefit
2. Compensation for cost of care incurred during the relevant period	Attendance allowance Care component of disability living allowance Disablement pension increase payable under section 104 or 105 of the 1992 Act
3. Compensation for loss of mobility during the relevant period	Mobility allowance Mobility component of disability living allowance

**NOTES**

- Exempt payments include any contractual payment paid to an employee by his employer in respect of incapacity for work, payments in pursuance of a claim under the Fatal Accidents Act 1976, or awards under the Vaccine Damage Payments Act 1979 or through the Criminal Injuries Compensation Scheme.
- The Law Commission ('Claims for Wrongful Death', Report No 263) recommends that this scheme should also apply to claims under the Fatal Accidents Act.