

## THE LAW COMMISSION

# DAMAGES FOR PERSONAL INJURY: MEDICAL, NURSING AND OTHER EXPENSES

## CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
<b>PART I: INTRODUCTION</b>	<b>1.1-1.7</b>	<b>1</b>
<b>PART II: THE PRESENT LAW</b>	<b>2.1-2.83</b>	<b>4</b>
1. MEDICAL AND NURSING EXPENSES AND OTHER COSTS OF CARE	2.2-2.38	4
(1) The General Position	2.2-2.4	4
(2) Section 2(4) of the Law Reform (Personal Injuries) Act 1948	2.5-2.15	6
(a) <i>The statutory wording</i>	2.5	6
(b) <i>Legislative history</i>	2.6-2.8	7
(c) <i>Empirical evidence</i>	2.9	8
(d) <i>The case law</i>	2.10-2.14	8
(e) <i>Road Traffic Act 1988, sections 157-158</i>	2.15	10
(3) Care provided free of charge to the plaintiff by relations or other private parties	2.16-2.36	11
(a) <i>Who suffers the loss?</i>	2.21-2.29	12
(b) <i>Care provided by defendant</i>	2.30-2.32	15
(c) <i>The quantum of damages</i>	2.33-2.36	17
(4) Loss of the plaintiff's ability to do work in the home	2.37	19
(5) Hospital visits	2.38	20
2. THE PLAINTIFF'S ACCOMMODATION	2.39-2.47	20
3. THE MANAGEMENT OF THE PLAINTIFF'S AFFAIRS	2.48-2.52	24
(1) Court of Protection	2.48-2.51	24
(2) Financial advisers' fees	2.52	25
4. OTHER EXPENSES	2.53-2.58	26
(1) Aids and appliances	2.54	26
(2) Cost of a car	2.55-2.56	26
(3) Holidays	2.57	27
(4) Other items	2.58	27
5. LOSSES ARISING OUT OF THE PLAINTIFF'S DIVORCE	2.59-2.63	28

	<i>Paragraphs</i>	<i>Page</i>
6. THE MULTIPLIER	2.64-2.74	29
(1) The multiplier approach	2.64-2.65	29
(2) Period of expense	2.66	30
(3) The traditional rate of discount	2.67	31
(4) The multiplier method - our critique	2.68	31
(5) The recent legislation	2.69	32
(6) The Court of Appeal's reaffirmation of the traditional approach	2.70-2.74	32
7. INTEREST ON DAMAGES FOR PECUNIARY LOSS	2.75-2.83	34
<b>PART III: OPTIONS FOR REFORM</b>	<b>3.1-3.118</b>	<b>39</b>
1. MEDICAL AND NURSING EXPENSES AND OTHER COSTS OF CARE	3.2-3.80	39
(1) Section 2(4) of the Law Reform (Personal Injuries) Act 1948	3.2-3.18	39
(a) <i>Duty to mitigate</i>	3.7-3.9	40
(b) <i>Plaintiff using NHS facilities having obtained damages for private medical expenses</i>	3.10-3.13	41
(c) <i>Insurance and cost</i>	3.14-3.18	42
(2) Recoupment of costs by the National Health Service	3.19-3.42	44
(a) <i>Introduction</i>	3.19-3.20	44
(b) <i>The argument of principle</i>	3.21	45
(c) <i>Analogies</i>	3.22-3.24	45
(d) <i>Some possible policy or practical objections to recoupment</i>	3.25-3.35	46
(i) <i>"Taking with one hand to give back with the other"?</i>	3.25-3.27	46
(ii) <i>Cost of recoupment</i>	3.28-3.30	47
(iii) <i>Costing NHS treatment</i>	3.31-3.33	49
(iv) <i>Hindering settlements</i>	3.34	50
(v) <i>Encouraging unnecessary treatment</i>	3.35	50
(e) <i>What form should the recoupment scheme take?</i>	3.36-3.42	50
(3) Care provided free of charge to the plaintiff by relations or other private individuals	3.43-3.72	56
(a) <i>The general position</i>	3.43-3.58	56
(b) <i>Care provided by the defendant</i>	3.59-3.68	62
(c) <i>The quantum of damages</i>	3.69-3.72	66
(4) Loss of the plaintiff's ability to do work in the home	3.73-3.78	68
(5) Hospital visits	3.79-3.80	70
2. THE PLAINTIFF'S ACCOMMODATION	3.81-3.97	71
(1) Purchase of suitable accommodation	3.81-3.91	71
(a) <i>The basic approach</i>	3.81-3.84	71
(b) <i>The appropriate rate</i>	3.85-3.89	72
(c) <i>Accommodation purchased by persons other than the plaintiff</i>	3.90-3.91	74
(2) The cost of alterations	3.92-3.97	76
(a) <i>Alterations enhancing value</i>	3.93-3.96	76
(b) <i>Alterations not enhancing value</i>	3.97	78

	<i>Paragraphs</i>	<i>Page</i>
3. THE MANAGEMENT OF THE PLAINTIFF'S AFFAIRS	3.98-3.103	78
(1) Court of Protection	3.98-3.100	78
(2) Financial advisers' fees	3.101-3.103	79
4. LOSSES ARISING OUT OF THE PLAINTIFF'S DIVORCE	3.104-3.111	81
5. INTEREST ON DAMAGES FOR PECUNIARY LOSS	3.112-3.117	84
6. OTHER QUESTIONS	3.118	86
<b>PART IV: SUMMARY OF RECOMMENDATIONS AND CONSULTATION ISSUES</b>	<b>4.1-4.25</b>	<b>87</b>
<b>APPENDIX: OTHER JURISDICTIONS</b>	<b>A.1-A.85</b>	<b>93</b>
SCOTLAND	A.1-A.16	93
IRELAND	A.17-A.29	99
AUSTRALIA	A.30-A.44	104
NEW ZEALAND	A.45-A.56	110
CANADA	A.57-A.66	114
THE UNITED STATES	A.67-A.77	119
OTHER EUROPEAN JURISDICTIONS	A.78-A.85	123

# PART I

## INTRODUCTION

1.1 In this paper we deal with the damages that are awarded, in a personal injury claim, for the victim's medical, nursing and other expenses. It is a topic that raises several questions of wide-ranging interest and importance, such as:-

- ◆ Even if a plaintiff could have avoided expense by using the National Health Service,<sup>1</sup> that possibility must be disregarded by the court in awarding the plaintiff damages for the expenses of private medical and nursing care. Should this be changed?<sup>2</sup>
- ◆ Where a plaintiff *does* take advantage of treatment by the NHS, the treatment is provided free of charge, but there is generally no mechanism whereby the NHS can recoup its expenses in providing the care from the defendant. Should such a mechanism be introduced?<sup>3</sup>
- ◆ A large proportion of the care of victims of personal injury is carried out by individual carers such as spouses and other family members. The burden involved is often very great.<sup>4</sup> What, then, should the approach be to the award of compensation in respect of the services which are provided free of charge by carers?<sup>5</sup>

1.2 This is the fifth consultation paper arising from the Law Commission's current review of damages. Under item 2 of the Sixth Programme of Law Reform<sup>6</sup> we are to examine "the principles governing, and the present effectiveness of, damages for monetary and non-monetary loss, with particular regard to personal injury litigation". Certain matters to which "specific consideration is to be given include: ... (b) awards to cover medical, nursing and other expenses incurred by the plaintiff..." We should emphasise from the outset that, in line with our terms of reference,<sup>7</sup> our role in this review is not to advocate the replacement of the

<sup>1</sup> For the sake of brevity, we shall throughout this paper be referring to the National Health Service as "the NHS".

<sup>2</sup> Law Reform (Personal Injuries) Act 1948, s 2(4). See paras 2.5-2.14 and 3.2-3.18 below.

<sup>3</sup> See paras 3.19-3.42 below.

<sup>4</sup> See our empirical report Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, para 3.11, where one carer described his situation to our researchers:

*Driving me bloody crackers sometimes, I'll tell you. You know what I mean; it's affecting me in a way ... having to look after her ... I've been doing this since she came out of hospital which is six years ago ... I need a break, and I do need a break, there's no doubt about it.*

<sup>5</sup> See paras 2.16-2.36 and 3.43-3.72 below.

<sup>6</sup> Sixth Programme of Law Reform (1995) Law Com No 234, item 2; formerly Fifth Programme of Law Reform (1991) Law Com No 200, item 11.

<sup>7</sup> See especially the description of item 11 of the Fifth Programme of Law Reform (1991) Law Com No 200.

existing tort system but rather, assuming its continued existence, to recommend improvements to it.

- 1.3 The four previous consultation papers dealt with structured settlements and interim and provisional damages;<sup>8</sup> aggravated, exemplary and restitutionary damages;<sup>9</sup> liability for psychiatric illness;<sup>10</sup> and non-pecuniary loss in personal injury cases.<sup>11</sup> We have published a Report on structured settlements and interim and provisional damages,<sup>12</sup> and its recommendations have largely been implemented.<sup>13</sup> We have also published a report containing a study based on the results of a large-scale survey of victims of personal injury.<sup>14</sup> The data in that empirical report have been particularly relevant to our work on this paper.
- 1.4 Damages recoverable for medical, nursing and other expenses can often be very substantial when the plaintiff suffers a serious injury.<sup>15</sup> The general rule is that the plaintiff can recover medical, nursing and other expenses reasonably incurred, or reasonably to be incurred, as a result of an actionable personal injury.<sup>16</sup> Typically, expenses incurred by seriously injured victims range, at one end of the scale, from the expenses of surgery and treatment provided by doctors, through the expenses of skilled nursing care, physiotherapy and other forms of therapy, to more ancillary, but still essential, expenses such as the cost of a carer to help with washing and dressing, laundry and shopping. In addition to these expenses, the plaintiff will be entitled to recover the cost of rehabilitative measures such as special appliances needed to cope with physical disability, the cost of new accommodation or of altering the plaintiff's existing home to take account of the plaintiff's disability, the cost of modifications to the plaintiff's car, and other

<sup>8</sup> (1992) Consultation Paper No 125.

<sup>9</sup> (1993) Consultation Paper No 132.

<sup>10</sup> (1994) Consultation Paper No 137.

<sup>11</sup> (1996) Consultation Paper No 140.

<sup>12</sup> (1994) Law Com No 224. The Report also deals with other aspects of the assessment of lump sum damages in personal injury actions, such as the use of actuarial tables and discounting using the rates of return on Index-Linked Government Securities.

<sup>13</sup> The recommendations on the tax treatment of structured settlements were implemented by the Finance Act 1995, s 142, inserting new sections 329A and 329B into the Income and Corporation Taxes Act 1988; the recommendation relating to the admissibility, as evidence, of the actuarial tables issued by the Government Actuary's Department (the Ogden Tables) was implemented by the Civil Evidence Act, s 10. The remainder of the recommendations have been substantially implemented by the Damages Act 1996, which received Royal Assent on 24 July 1996, and came into force on 24 September 1996.

<sup>14</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225.

<sup>15</sup> A recent example is *Wells v Wells*, *The Times* 24 October 1996, in which the plaintiff, who suffered brain damage in a road accident, recovered £582,680 for damages for care and other expenses as part of a total award of £700,364, the Court of Appeal substituting these figures for an award made at first instance totalling £1,594,040.

<sup>16</sup> See, eg, *Cunningham v Harrison* [1973] QB 942. It is sometimes added that the services must be reasonably necessary in order for their cost to be recoverable. But in our view this notion is encompassed by the wider principle that the expenses must be reasonably incurred.

increased living expenses such as higher fuel bills and the additional costs of holidays.

- 1.5 The plaintiff's needs can be met from various sources. Apart from, for example, the possibility of obtaining and paying for nursing privately, nursing care may be, and frequently is, provided free of charge by a spouse or other relation, or by friends. In addition, free treatment will generally be available through the NHS. As we shall see, the availability of such free treatment and care gives rise to some difficult issues in determining a victim's entitlement to damages.
- 1.6 Part II of this paper deals with the current law<sup>17</sup> relating to the topics under discussion;<sup>18</sup> in Part III we set out the options for reform; and Part IV contains a summary of our provisional recommendations and of the issues on which we invite responses. This is followed, in the Appendix, by a brief survey of the law in some other jurisdictions.
- 1.7 We would like to thank the following for the help they have given us with this paper: the Association of British Insurers, the Association of Personal Injury Lawyers, the British Medical Association, Mr A Edwards of the Department of Health and Mr J W Davies of Brasenose College, Oxford.

<sup>17</sup> While we have delayed the publication of this paper to take account of the Court of Appeal's decision in *Wells v Wells*, *Thomas v Brighton HA* and *Page v Sheerness Steel plc*, *The Times* 24 October 1996 (see paras 2.39-2.52, 2.64-2.74 and 3.81-3.97), consultees should note that we have had a very short period of time in which to consider that judgment.

<sup>18</sup> This excludes matters of practice and procedure. See, however, the report of Lord Woolf's recently completed review of civil procedure *Access to Justice: Final Report* (1996) (and see also *Access to Justice: Interim Report* (1995)). In the course of our work on this paper we identified two areas of procedure in personal injury actions which might particularly benefit from further examination, namely the standardisation of schedules of expenses claimed by the plaintiff, and the use of standard tables to quantify certain items of expense such as commercially provided nursing care and motoring expenses. We have drawn these to the attention of the Lord Chancellor's Department, which is responsible for the implementation of the recommendations of Lord Woolf's review.

## PART II

# THE PRESENT LAW

- 2.1 We divide our analysis of the present law into seven sections as follows:- 1. Medical and Nursing Expenses and Other Costs of Care;<sup>1</sup> 2. The Plaintiff's Accommodation;<sup>2</sup> 3. The Management of the Plaintiff's Affairs;<sup>3</sup> 4. Other Expenses;<sup>4</sup> 5. Losses Arising out of the Plaintiff's Divorce;<sup>5</sup> 6. The Multiplier;<sup>6</sup> 7. Interest on Damages for Pecuniary Loss.<sup>7</sup>

### 1. MEDICAL AND NURSING EXPENSES AND OTHER COSTS OF CARE

#### (1) The General Position

- 2.2 A plaintiff is entitled to recover any medical and nursing expenses, and any other costs of care (for example, the costs of engaging a housekeeper or paying for hospital visits) that have been reasonably incurred, or will reasonably be incurred, as a result of his or her actionable injuries.<sup>8</sup> But if the plaintiff does not incur these expenses, because he or she makes use of the NHS or services provided free of charge by a local authority,<sup>9</sup> the plaintiff cannot recover what would have

<sup>1</sup> See paras 2.2-2.38 below.

<sup>2</sup> See paras 2.39-2.47 below.

<sup>3</sup> See paras 2.48-2.52 below.

<sup>4</sup> See paras 2.53-2.58 below.

<sup>5</sup> See paras 2.59-2.63 below.

<sup>6</sup> See paras 2.64-2.74 below.

<sup>7</sup> See paras 2.75-2.83 below.

<sup>8</sup> See para 1.4 and n 16 above. See also, generally, J Munkman, *Damages for Personal Injuries and Death* (9th ed 1993) p 80 ff; *McGregor on Damages* (15th ed 1988) p 940 ff. Past expenses and an estimate of future expenses should be included in the plaintiff's claim for special damages; Rules of the Supreme Court O 18 r 12 (1A-C); County Court Rules O 6 r 1(5)-(7). Many other jurisdictions apply a reasonableness criterion: see, eg, paras A.30 and A.57 below.

<sup>9</sup> Under the Health and Social Services and Social Security Adjudications Act 1983, s 17, a local authority is entitled to recover such charge (if any) as the authority considers reasonable from the recipient of services provided under various statutory provisions (such as National Assistance Act 1948, s 29). If the recipient satisfies the local authority that his or her means are insufficient for it to be reasonably practicable to pay the amount which would otherwise have been charged, the authority may not charge more than the sum which is reasonably practicable. (Provisions which are slightly different in detail, but similar in terms of the relevance of means, are contained in the Children Act 1989, s 17, in relation to services provided to disabled children and other children in need.) In *Avon CC v Hooper* (unreported, 22 February 1996) the Court of Appeal held that "means" for these purposes includes the existence of a claim for negligence. Therefore, where a charge for services can be made it is likely that the local authority will charge the plaintiff who has a personal injury claim for those services, and he or she will have to recover the past and future expenses in the same way as the expense of services provided by the private sector.

been paid if he or she had had private treatment or care.<sup>10</sup> So as not to overcompensate the plaintiff, the ordinary living expenses that he or she would have incurred had the injury not occurred are deducted from the cost of staying in a private hospital or home.<sup>11</sup> This “domestic element” includes such expenses as the cost of food, and board and lodging.<sup>12</sup> In addition, section 5 of the Administration of Justice Act 1982 provides that any saving to the injured person which is attributable to his or her maintenance, either wholly or partly, at public expense in a hospital, nursing home or other institution is to be set off against loss of earnings.<sup>13</sup> Where private medical or nursing or hospital expenses have been incurred, or will be incurred, section 2(4) of the Law Reform (Personal Injuries) Act 1948 requires the courts, in determining the reasonableness of the expenses, to disregard the possibility of avoiding them by taking advantage of the NHS. We examine the operation of section 2(4) below.<sup>14</sup>

- 2.3 Whether a particular expense is reasonable will clearly depend on a range of factors. For example, a course of treatment is likely to be regarded as reasonably undertaken if it has been recommended by the plaintiff’s doctor and vice versa. The existence, or absence, of scientific proof of the efficacy of a possible new treatment will be relevant as to whether the cost of that treatment is reasonably incurred, but not conclusive.<sup>15</sup> There may also be some scope for the “unreasonableness” argument, even if it is accepted that it is reasonable to have the treatment in question, where the plaintiff chooses a provider which offers private treatment much more expensively than another provider of the same treatment outside the NHS. Again it may be reasonable for a severely injured plaintiff to be cared for in the family home, and the defendant liable in damages

<sup>10</sup> *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617, 635; *Cunningham v Harrison* [1973] QB 942; *Lim Poh Choo v Camden & Islington HA* [1980] AC 174; see para 3.11 below.

<sup>11</sup> See *Shearman v Folland* [1950] 2 KB 43, 50-51; *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 191-192. See also, eg, *Fletcher v Autocar & Transporters Ltd* [1968] 2 QB 322, per Cantley J; *Fairhurst v St Helens and Knowsley HA* [1995] PIQR Q1, Q8-Q9. See also Report on Personal Injury Litigation - Assessment of Damages (1973) Law Com No 56, paras 508-512. Many other countries make similar deductions: see paras A.5, A.21, A.35, A.59, A.71 and A.83 below.

<sup>12</sup> *Shearman v Folland* [1950] 2 KB 43, 50 where hotel expenses beyond the element of board and lodging were held to be non-deductible, as they were not equivalent to the nursing home expenses which were being compensated.

<sup>13</sup> This enactment, which followed a recommendation of the Pearson Commission (Report on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054 (hereafter referred to as “the Pearson Report”) vol 1, paras 508-512), reverses the effect of the Court of Appeal decision in *Daish v Wauon* [1972] 2 QB 262. See A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 129; A Borkowski & K Stanton, “The Administration of Justice Act 1982 (Parts I and III): Darning Old Socks?” (1983) 46 MLR 191, 197.

<sup>14</sup> See paras 2.5-2.14 below.

<sup>15</sup> See, eg, *Bishop v Hannaford* (unreported, 22 March 1990), in which Otton J awarded the costs of the Somerset regime, a therapy devised by the British Society for the Brain Injured; cf *Duhelan v Carson* (1986) Kemp and Kemp, *The Quantum of Damages* (hereafter “*Kemp & Kemp*”), A4-006, in which the costs of the Philadelphia regime, a therapy advised by the British Institute of Brain Injured Children were held by Stuart Smith J not to be recoverable.



for the reasonable cost of caring for the plaintiff there, even though he or she could be cared for substantially more cheaply in a private institution.<sup>16</sup> However, there are limits to the extent to which English courts will award damages for home nursing care, and in *Cunningham v Harrison*<sup>17</sup> the court declined, when considering the plaintiff's nursing expenses, to take into account the fact that the plaintiff's personality was such that he would not fit well with others in a home for the disabled. Where the plaintiff prefers a form of treatment or care which is more expensive than other alternatives within the private sector, he or she will bear the evidential burden of proving the reasonableness of the expenses.<sup>18</sup> Expert evidence will be of vital importance in this respect.<sup>19</sup>

- 2.4 Where the expenses in question are claimed for the future, there will inevitably be difficult decisions made as to the plaintiff's likely needs.<sup>20</sup> It is especially difficult to cater for possible future changes in the plaintiff's condition, for better or worse. For example, in *Cassel v Hammersmith and Fulham Health Authority*,<sup>21</sup> Rose J rejected the argument that, on the evidence before the court, likely improvements in the sleeping patterns of the infant plaintiff would enable his parents to negotiate reduced rates of pay with the plaintiff's night carers. The defendant's appeal on this issue failed.<sup>22</sup> Furthermore, it is foreseeable that, even though a medical condition remains stable, a particular plaintiff's needs may well change during the course of his or her life. This is especially the case with a plaintiff who is a young child, where care needs will have to be projected for his or her childhood, adolescence, and adulthood.<sup>23</sup>

## **(2) Section 2(4) of the Law Reform (Personal Injuries) Act 1948**

### ***(a) The statutory wording***

- 2.5 Section 2(4) of the Law Reform (Personal Injuries) Act 1948 provides that:

<sup>16</sup> See *Rialas v Mitchell*, *The Times* 17 July 1984 (CA), approving the decision of Forbes J at first instance. This conclusion was reached after an examination of s 2(4) of the Law Reform (Personal Injuries) Act 1948 and *Cunningham v Harrison* [1973] QB 942 and *Lim Poh Choo v Camden & Islington HA* [1980] AC 174. See also *Willett v North Bedfordshire HA* [1993] PIQR Q166, in which Hobhouse J rejected the alternatives of institutional care and full time care by the plaintiff's parents assisted by one professional, in favour of care at home by two professionals, although the amount awarded reflected the likelihood that the plaintiff would in any case have to spend some time in an institution. Other jurisdictions have also taken the view that the cost of home care is recoverable where such care is reasonable, even though private care is less expensive. See paras A.1 and A.58 below.

<sup>17</sup> [1973] QB 942, 952.

<sup>18</sup> See *Rialas v Mitchell*, *The Times* 17 July 1984.

<sup>19</sup> See *Kemp & Kemp* vol 1 para 5-021 n 24.

<sup>20</sup> See, eg, *Leon Seng Tan v Bunnage* (1986) *Kemp & Kemp* A2-103, in which the plaintiff was awarded the cost of a housekeeper and helper, but refused the cost of assistance at night to turn him over in bed, on the basis that this could be carried out mechanically.

<sup>21</sup> [1992] PIQR Q1, Q8.

<sup>22</sup> [1992] PIQR Q168, 181-182, 184, 191, *sub nom Cassel v Riverside HA*.

<sup>23</sup> See, eg, *Willett v North Bedfordshire HA* [1993] PIQR Q166.

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.

**(b) Legislative history**

- 2.6 The sub-section was enacted in the wake of the Beveridge Report<sup>24</sup> and the Monckton Committee's Report.<sup>25</sup> The original Beveridge proposal contrasts sharply with what later became section 2(4). It was suggested by Beveridge 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.<sup>26</sup>

- 2.7 The Monckton Committee, however, rejected this argument. Whilst accepting that the introduction of a comprehensive health service would strengthen the argument that the plaintiff ought to have been content with the service provided by the State,<sup>27</sup> two essential reasons militated against their adopting this approach. First,

[t]o decide between the respective merits of the State and other services would be a difficult and invidious duty, and the Court's attempt to discharge it would probably lead to different decisions in circumstances which would appear to the public to be substantially identical.<sup>28</sup>

Second, it would be "inconsistent with the liberty of the individual",<sup>29</sup> meaning the plaintiff's freedom to take private treatment, if he or she were prevented from claiming the cost of it from the defendant.

- 2.8 The final recommendation of the Monckton Committee, which became section 2(4) of the 1948 Act, was that the reasonable cost of private medical and nursing services ought to be recoverable as damages, notwithstanding that similar services might have been obtained through the NHS. However it was stressed that

[s]uch an enactment would still leave it open to the defendant to contend that the services were not necessary or that the charge incurred was unreasonable.<sup>30</sup>

<sup>24</sup> (1942) Cmd 6404, para 262.

<sup>25</sup> Final Report of the Departmental Committee on Alternative Remedies (1946) Cmd 6860, paras 55-56.

<sup>26</sup> (1942) Cmd 6404, para 262.

<sup>27</sup> (1946) Cmd 6860, para 56.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Quere whether, as the Scottish Law Commission suggest (Memo 21, p 19), s 2(4) excludes this defence: see para A.4 below. The wording of s 2(4) itself suggests otherwise.

**(c) Empirical evidence**

- 2.9 The law on this issue should be seen in the context of the evidence provided by our empirical report.<sup>31</sup> A sizeable proportion of those who took part in the survey - 34% of those whose settlement had been between £5,000 and £19,999 (“band 1”) and 44% of those whose settlement had been £20,000 or more (“bands 2 to 4”) - had received some form of private medical treatment, including tests. However, the proportions of respondents whose treatment had been *exclusively* private was very small indeed: 4% and 2% respectively of the two groups.<sup>32</sup> Therefore, the pattern, where private treatment has been used at all, seems to be one of recourse to both public and private sectors. Various reasons were cited for the use of private rather than NHS facilities, but the chief ones were the necessity of a private examination for the compensation claim to proceed (22% of band 1 and 30% of bands 2 to 4), and perceived differences in the speed (36% and 27%) and quality (22% and 20%) of private treatment as compared with the NHS.

**(d) The case law**

- 2.10 The case law shows the limits of the scope of section 2(4). A conceivable interpretation of the subsection is that, in assessing the future costs of care, the possibility of the plaintiff avoiding those future costs by making use of the NHS is to be disregarded. But in *Harris v Brights Asphalt Contractors Ltd*,<sup>33</sup> Slade J said of the subsection:

I think all that means is that, when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the National Health Service Act, 1946, those reasonable expenses might have been avoided. I do not understand section 2(4) to enact that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur.<sup>34</sup>

- 2.11 In *Cunningham v Harrison*<sup>35</sup> it was pointed out<sup>36</sup> that the plaintiff, a tetraplegic, would not always be able to secure privately full domestic and nursing help in the future. During such periods, he would have to make use of the NHS, or even benevolent organisations. The court also gave consideration to the likelihood of the plaintiff taking advantage of the services for the disabled which his local

Similarly, the case law supports the view that medical and allied expenses must satisfy the general test of reasonableness to be recoverable: *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 188; *Cunningham v Harrison* [1973] QB 942, 952.

<sup>31</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225. For the purposes of the survey respondents were divided into four “bands” according to the size of their settlements. Band 1 consisted of respondents with settlements of between £5,000 and £19,999; band 2, between £20,000 and £49,999; band 3 between £50,000 and £99,999; and band 4 £100,000 and above.

<sup>32</sup> *Ibid*, para 3.6.

<sup>33</sup> [1953] 1 QB 617.

<sup>34</sup> *Ibid*, 635.

<sup>35</sup> [1973] QB 942.

<sup>36</sup> See [1973] QB 942, 952-953, *per* Lord Denning MR; 954-955, *per* Orr LJ; 956, *per* Lawton LJ.

authority was statutorily bound to provide, which included the provision of suitable accommodation, and nursing and general assistance.<sup>37</sup> The plaintiff's award was reduced. Approving the dictum of Slade J, Lawton LJ construed the subsection in the following terms:

The plaintiff is entitled to compensation for the expense to which he will be put in obtaining domestic and nursing help; and the defendant cannot say that he could avoid that expense by falling back on the National Health Service. The statute forbids that defence. What she can, however, submit is that he will probably not incur such expenses because he will be unable to obtain the domestic and nursing help which he requires.<sup>38</sup>

Orr LJ said:

To make such a reduction does not, in my view, conflict in any way with the provision of section 2(4) of the Law Reform (Personal Injuries) Act 1948, since, as was pointed out by Slade J in *Harris v Brights Asphalt Contractors Ltd*, that section does not provide that a plaintiff shall be entitled to recover expenses which he will not in fact incur.<sup>39</sup>

- 2.12 In *Lim Poh Choo v Camden & Islington Health Authority*<sup>40</sup> the plaintiff sustained extensive and serious brain damage so that she was barely sentient and totally dependent on others. Lord Scarman, with whom the other Law Lords concurred, stated that he agreed with the interpretation of section 2(4) adopted by Slade J, and by the Court of Appeal in *Cunningham*. On the facts, he expressed doubts as to whether it would always be possible to obtain for the plaintiff, outside the NHS, the domestic and nursing help which she required. However, in the absence of any conclusive negative evidence, the sum awarded for future care was not reduced.<sup>41</sup>
- 2.13 In *Woodrup v Nicol*,<sup>42</sup> the court applied, to that part of the claim which represented physiotherapy costs, a "balance of probabilities" test to determine the likelihood of the plaintiff using private facilities. The plaintiff had had no physiotherapy since he had been discharged from hospital because local services were heavily over-subscribed. The court found that the plaintiff would probably pay for physiotherapy himself. Regular check-ups and emergency services were presently available within the NHS. Wright J at first instance had refused to speculate as to the future shape of the NHS but nevertheless found that there

<sup>37</sup> Chronically Sick and Disabled Persons Act 1970, s 2.

<sup>38</sup> [1973] QB 942, 957.

<sup>39</sup> [1973] QB 942, 955.

<sup>40</sup> [1980] AC 174. See also *Housecroft v Burnett* [1986] 1 All ER 332, 341.

<sup>41</sup> [1980] AC 174, 187-188.

<sup>42</sup> [1993] PIQR Q104. See also *Withers v Curtis* (unreported, 22 March 1990), in which the court refused to award treatment expenses, having found that the plaintiff, who had sustained injuries in an industrial accident which had left him permanently disabled, would continue to be treated in the public sector if the need for further treatment arose. The plaintiff's use of NHS facilities prior to judgment was decisive.

was a risk that at some time in the future the plaintiff might have to have recourse to his own resources if he was to have regular check-ups. He found that overall the plaintiff would fund half of his future medical expenses privately, and as to the other half rely on the NHS. On the basis of these findings, the Court of Appeal held that the plaintiff was only entitled to recover the “private” half of those expenses. Russell LJ was eager to point out that this was not an attempt to reintroduce the argument prohibited by section 2(4) through the back door:

[I]f, on the balance of probabilities, the plaintiff is going to use private medicine in the future as a matter of choice, the defendant cannot contend that the claim should be disallowed because National Health Service facilities are available. On the other hand, if, on the balance of probabilities, private facilities are not going to be used, *for whatever reason*, the plaintiff is not entitled to claim for an expense which he is not going to incur. That view, in my judgement, is amply borne out by authority.<sup>43</sup>

- 2.14 The law on the scope of section 2(4) is therefore not in doubt. The courts have adopted a clear and uniform - and, in our view, indisputably correct - interpretation of the subsection.

***(e) Road Traffic Act 1988, sections 157-158***

- 2.15 Although not directly relating to section 2(4) of the 1948 Act, it is convenient to mention here that sections 157 and 158 of the Road Traffic Act 1988<sup>44</sup> are exceptions to the general rules that the NHS can neither charge the plaintiff for the treatment provided, nor can recoup from the defendant tortfeasor the costs that it has incurred in treating the injured plaintiff.<sup>45</sup> Section 157, in summary, places an obligation on third-party insurers which have made any payment in respect of death or injury arising out of a road accident, where the injured person has received any treatment in a hospital,<sup>46</sup> to pay the reasonable expenses of the hospital incurred in providing that treatment.<sup>47</sup> The obligation applies whether or not liability has been admitted in relation to the injuries.<sup>48</sup> Section 158 applies where emergency medical treatment is required as a result of a road accident, in which case the person using the vehicle at the time of the accident must, upon receiving a claim under the Act, pay to the practitioner providing the treatment the fee and mileage allowance prescribed by the section.<sup>49</sup> It is expressly provided

<sup>43</sup> [1993] PIQR Q104, Q114 (emphasis added).

<sup>44</sup> Formerly Road Traffic Act 1972, ss 154 and 155.

<sup>45</sup> Similar provisions operate in Ireland under the Health (Amendment) Act 1986: see para A.20 below.

<sup>46</sup> Including either in-patient or out-patient treatment. There is no requirement that the treatment must be provided under the NHS, but it is clear that the section is directed at NHS-provided care given that nearly all casualty services are provided via the NHS, and that private hospitals in any event charge for treatment.

<sup>47</sup> The recoverable amounts are subject to statutory maxima, currently £2,586 for in-patient treatment and £286 for out-patient treatment: Road Traffic Accidents (Payment for Treatment) Order 1993, SI 1993 No 2474.

<sup>48</sup> Road Traffic Act 1988, s 157(1)(a).

that, in the case of claims under section 158, liability incurred under the section by a person using a vehicle will, where the event out of which it arose was caused by the wrongful act of another person, be treated, for the purposes of any claim to recover damages by reason of that wrongful act, as damage sustained by the person using the vehicle.<sup>50</sup>

### **(3) Care provided free of charge to the plaintiff by relations or other private parties**

2.16 In the Commission's empirical report<sup>51</sup> the proportion of those respondents receiving skilled nursing care was small - 11% of those in band 1, the band of respondents with the smallest settlements,<sup>52</sup> rising to 38% of those in band 4.<sup>53</sup> The vast majority of nursing care which was received was provided by community nurses and health visitors, and the proportion of those receiving paid private nursing care was very small indeed: none in band 1, and only 3% of respondents in bands 2 to 4.<sup>54</sup> But the proportion of respondents needing help with daily tasks such as dressing, washing, cooking and general mobility was very large: 77% in band 1 rising to 93% in band 4. The proportion of those who paid for this sort of help was extremely small: 5% in band 1 and 5% in bands 2 to 4. This meant that the burden of the care fell on unpaid persons, who were, typically, close members of the victim's family, for example, spouse or partner (51% of those requiring help in band 1; 53% in bands 2 and 4), parent (22% in band 1; 28% in bands 2 to 4) or son or daughter (21% in band 1; 13% in bands 2 to 4).<sup>55</sup> It was also anticipated, in a fairly high proportion of cases - including 66% of band 4 respondents - that care of this nature would or might be needed in future.<sup>56</sup> It is against this background that we consider the law's approach to gratuitously provided care.

2.17 It is well established<sup>57</sup> that an injured plaintiff is able to recover damages for the value of nursing services provided gratuitously by a friend or relative. Where the services are provided by a close relative, for example, a parent or a spouse, the carer need not necessarily have given up employment for damages to be

<sup>49</sup> £20.65 in respect of each person receiving treatment, and an allowance of 40p per mile (or part of a mile) covered over and above two miles: Road Traffic Accidents (Payment for Treatment) Order 1993, SI 1993 No 2474. Again the section is not limited to care provided under the NHS, but see the comments in para 2.15 n 46 above.

<sup>50</sup> Road Traffic Act 1988, s 158(4).

<sup>51</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225.

<sup>52</sup> For an explanation of the "bands" of settlements used in the report see para 2.9 n 31 above.

<sup>53</sup> *Ibid*, paras 3.7 and 8.2.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*, paras 3.8 and 8.3.

<sup>56</sup> *Ibid*, para 3.11.

<sup>57</sup> See, eg, *Hunt v Severs* [1994] 2 AC 350.

recoverable, but the care given must be over and above that which would have been given in the ordinary course of family life.<sup>58</sup>

- 2.18 Apart from the physical and psychological burden of providing this care, there can also be considerable financial cost, in terms of reduction or complete elimination of the carer's income: for example, in the case of respondents in band 4 in the Commission's empirical report,<sup>59</sup> 39% were cared for by a relation giving up work, 11% were cared for by a relation working shorter hours, and a further 4% by a relation who postponed starting a job.<sup>60</sup>
- 2.19 There are three principal legal problems which have been addressed by the case law in relation to gratuitous nursing care. The first problem is that of who actually suffers loss where a victim receives free nursing care. The second relates to the particular situation where the person providing the care is the defendant. The third problem is that of the quantum of damages recoverable under this head.
- 2.20 The first two questions were the subject of the recent controversial decision of the House of Lords in *Hunt v Severs*.<sup>61</sup> In that case, the plaintiff suffered catastrophic injuries as a result of an accident caused by the defendant's negligence, in which the plaintiff was a passenger on the motor-cycle driven by the defendant. The plaintiff was subsequently cared for by the defendant, and they married. The plaintiff claimed, inter alia, the cost of providing the necessary care from the defendant, who was fully insured. The House of Lords held that she was not entitled to recover these costs.

**(a) Who suffers the loss?**

- 2.21 Where the plaintiff is receiving free nursing care, for example from a member of his or her family, one must ask who has incurred the loss that is being compensated by the award of damages for that care. If the loss is the plaintiff's, then, in the absence of any legal or equitable obligation to account to the carer for the expenses, the plaintiff, in receipt of both the care and the money intended to pay for it, experiences a "windfall" gain, unless he or she passes on the money out of a sense of moral obligation. On the other hand, if the loss is the carer's, then it seems that the plaintiff should not be able to recover the expenses, because he or she has not suffered a loss in this respect; but the carer cannot recover them either because he or she has no cause of action against the defendant.

<sup>58</sup> See *Mills v British Rail Engineering Ltd* [1992] PIQR Q130, in which the carer was the wife of a husband dying from cancer. The Court of Appeal held that for damages to be recoverable it was not necessary for the plaintiff's wife, who was a housewife, to have foregone earnings, but an award would only be made for care "well beyond the ordinary call of duty for the special needs of the sufferer": *per* Dillon LJ at p Q137.

<sup>59</sup> Ie respondents who recovered over £100,000.

<sup>60</sup> Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, para 9.3.

<sup>61</sup> [1994] 2 AC 350.

- 2.22 In his speech in *Hunt* Lord Bridge of Harwich reviewed<sup>62</sup> a line of cases dealing with this problem, culminating in the decision of the Court of Appeal in *Donnelly v Joyce*.<sup>63</sup>
- 2.23 The approach of the courts in *Roach v Yates*,<sup>64</sup> *Schneider v Eisovitch*,<sup>65</sup> and *Watson v Port of London Authority*<sup>66</sup> involved finding an obligation on the plaintiff's part to pay to the carer the cost of the care. Once the obligation was established in each case, the court was able to bridge the gap between the plaintiff's cause of action and the carer's loss, because that loss became the plaintiff's rather than the carer's. The exact nature of the obligation necessary to have this effect was unclear. In *Roach v Yates* the basis of the obligation was that "[the plaintiff] would naturally feel that he ought to compensate [the carers] for what they have lost",<sup>67</sup> which seems to point to a merely moral obligation. However, in *Schneider v Eisovitch* Paull J held that there must be an undertaking on the plaintiff's part to reimburse the providers of the care,<sup>68</sup> so that a merely moral obligation was not sufficient, but on the other hand this did not need to amount to a legally enforceable contract. In *Watson v Port of London Authority*, Megaw J cited *Schneider v Eisovitch* with approval, but considered it unnecessary that there should be any "firm undertaking".<sup>69</sup>
- 2.24 A different approach was proposed, obiter, by Lord Denning MR in *Cunningham v Harrison*, whereby the plaintiff would recover the damages but hold them on trust for the carer.<sup>70</sup> However on the day following that on which the Court of Appeal gave its judgment in *Cunningham v Harrison*, a differently constituted Court of Appeal in *Donnelly v Joyce*<sup>71</sup> rejected the "obligation" analysis outright, and held that the plaintiff was entitled to recover the cost of care, not because of any obligation, moral or otherwise, on the plaintiff's part, but because the cost genuinely represented part of the plaintiff's loss. Megaw LJ, who delivered the court's judgment, said:

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...all irrelevant. The plaintiff's loss... is not the expenditure of money... to pay for the

<sup>62</sup> [1994] 2 AC 350, 358-361.

<sup>63</sup> [1974] QB 454.

<sup>64</sup> [1938] 1 KB 256.

<sup>65</sup> [1960] 2 QB 430.

<sup>66</sup> [1969] 1 Lloyd's Rep 95.

<sup>67</sup> [1938] 1 KB 256, 263, *per* Greer LJ.

<sup>68</sup> [1960] 2 QB 430, 440.

<sup>69</sup> [1969] 1 Lloyd's Rep 95, 102.

<sup>70</sup> [1973] QB 942, 952.

<sup>71</sup> [1974] QB 454.



nursing attention. His loss is the existence of the need for... those nursing services.<sup>72</sup>

- 2.25 This reasoning was subsequently followed by the Court of Appeal in *Housecroft v Burnett*.<sup>73</sup> It has also been adopted by the Australian courts following the decision of the High Court of Australia in *Griffiths v Kerkemeyer*.<sup>74</sup>
- 2.26 However, that approach has been rejected, and *Donnelly v Joyce*<sup>75</sup> overruled, by the House of Lords in *Hunt v Severs*.<sup>76</sup> Lord Bridge, with whom the other Law Lords agreed, preferred the reasoning of Lord Denning MR in *Cunningham v Harrison*, and held that the plaintiff would hold damages recovered under this head in trust for the carer, although he did not specify the exact nature of the trust under which the monies were to be held.<sup>77</sup> So the loss was perceived to be that of the carer, not of the plaintiff.
- 2.27 This arrangement achieves, as Lord Bridge pointed out,<sup>78</sup> a position which is similar to that under current Scottish law.<sup>79</sup> The Scottish Law Commission, in its report on the admissibility of claims for services, had recommended that the plaintiff should be under a legal duty to account for such damages as are recovered in respect of the services.<sup>80</sup> Their reasons were twofold. First, they disagreed with the reasoning of the court in *Donnelly* and took the view that the loss in question was sustained by the person rendering the services. Secondly, the Commission expressed concern about the situation where an injured person ignored the moral responsibility to compensate his or her benefactor for the services rendered. It would be unfair to the person who actually sustained the loss. Their recommendation was implemented by section 8 of the Administration of Justice Act 1982. Section 8(2) reads:

The injured person shall be under an obligation to account to the relative for any damages recovered from the responsible person under subsection (1) above.<sup>81</sup>

<sup>72</sup> [1974] QB 454, 462.

<sup>73</sup> [1986] 1 All ER 332.

<sup>74</sup> (1977) 137 CLR 161; see also *Van Gervan v Fenton* (1992) 175 CLR 327; para A.36 below.

<sup>75</sup> [1974] QB 454.

<sup>76</sup> [1994] 2 AC 350, 361, 363.

<sup>77</sup> See, eg, A Reed, "A Commentary on *Hunt v Severs*" (1995) OJLS 133, 138-139, in which it is suggested that the trust might be a remedial constructive trust, or possibly a simple beneficiary trust in favour of the carer.

<sup>78</sup> [1994] 2 AC 350, 363.

<sup>79</sup> Though not identical: see paras 3.49-3.53 below.

<sup>80</sup> Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services (2) Admissible Deductions (1978) Scot Law Com No 51, paras 21-23.

<sup>81</sup> See paras A.6-A.10 below.

2.28 However, the “trust” approach had, before its adoption by the House of Lords in *Hunt*, already been subject to criticism. For example, the Pearson Commission had indicated its practical difficulties:

A requirement to set up a trust fund could present practical difficulties if several people were involved. The court would have to ascertain the amount expended and the value of the services rendered by each, so that the plaintiff could hold the right sum in trust for each of them.<sup>82</sup>

The Pearson Commission, accepting the reasoning of Megaw LJ in *Donnelly v Joyce*, thought that any formal provision for reimbursement was unnecessary for the reason that the loss would often be suffered in practice by a family income pool.

2.29 It has also been suggested that the carer may already have a claim against the plaintiff in the law of restitution.<sup>83</sup> This possibility can be analysed in different ways. One is to apply an analogy with the cases which provide a remedy, in certain circumstances, to a third party who intervenes to provide services in situations of necessity.<sup>84</sup> The law, however, is far from certain, in the absence of any cases directly in point. It is doubtful whether the situation of a relative providing long-term nursing care to a chronically disabled, but medically stable, plaintiff has the element of emergency found in the “necessity” cases. It is also possible that, in these circumstances, there would have to be an intention on the part of the carer to require payment for the services, which would be difficult to establish.<sup>85</sup> An alternative analysis views the claim as resting on the “free acceptance” of the services by the recipient. But even if the free acceptance doctrine is accepted as correct,<sup>86</sup> its application depends on the recipient of the services (that is, here, the plaintiff/victim) knowing, or at least being in a position where he or she ought to know, that the services are not being provided gratuitously.<sup>87</sup> Although this would seem a serious “stumbling block”<sup>88</sup> it may be

<sup>82</sup> (1977) Cmnd 7054, vol 1 para 349.

<sup>83</sup> See, eg, P Matthews and M Lunney, “A Tortfeasor’s Lot is not a Happy One?” (1995) 58 MLR 395, 400.

<sup>84</sup> See, generally, A Burrows, *The Law of Restitution* (1993) ch 8; Goff and Jones, *The Law of Restitution* (4th ed 1993) ch 15.

<sup>85</sup> In *Re Rhodes*, (1890) 44 ChD 94, for example, which concerned the recoverability, from a patient’s estate, of money paid by her relatives to maintain her in a mental hospital, it was held that it was necessary for the relatives to have the intention to be repaid and, on the facts, they failed to establish this (at p 106 *per* Cotton LJ). But this requirement has been criticised: see A Burrows, *The Law of Restitution* (1993) p 244; P Birks, *An Introduction to the Law of Restitution* (Revised ed 1989) p 199.

<sup>86</sup> For criticism of the free acceptance doctrine see, eg, A Burrows, “Free Acceptance and the Law of Restitution” (1988) 104 LQR 576 and G Mead, “Free Acceptance: Some Further Conclusions” (1989) 105 LQR 460. For a defence of the doctrine, see P Birks, “In Defence of Free Acceptance” in *Essays on the Law of Restitution* (ed Burrows) (1991) pp 105-146.

<sup>87</sup> See, eg, Goff and Jones, *The Law of Restitution* (4th ed 1993) p 19; P Birks, *An Introduction to the Law of Restitution* (Revised ed 1989) pp 281-283.

possible to establish the required knowledge where damages have been awarded to the victim, or the carer anticipates that damages will be awarded, in respect of the care.

***(b) Care provided by defendant***

- 2.30 The second of the three problems mentioned above is the special case where the person providing the gratuitous care is the defendant himself or herself. This situation typically occurs where the plaintiff is a member of the defendant's family, or has a similarly close relationship with the defendant, and the injury occurs when the plaintiff is a passenger in a car or, as in *Hunt v Severs*, on a motor cycle, driven by the defendant. In *Hunt*, the Court of Appeal had followed *Donnelly v Joyce*,<sup>89</sup> and supported this decision with an argument based on policy,<sup>90</sup> namely that, if plaintiffs were denied damages in these circumstances, there would be incentives to the plaintiff to obtain the care she needed by adopting other, comparatively less desirable, routes which would enable her to recover the cost. These means were: relying on paid help from third parties; relying on unpaid assistance from persons other than the defendant; and entering into a contract under which the defendant would provide the services for payment.<sup>91</sup>
- 2.31 However, in his speech disallowing the plaintiff's claim and allowing the defendant's appeal from the Court of Appeal's decision, Lord Bridge proceeded from the proposition that plaintiffs should hold the damages, representing the cost of gratuitously provided care, on trust for the provider of that care.<sup>92</sup> It then logically followed that as, where the carer is the defendant, the plaintiff would be recovering damages from the defendant only to hold them in trust for the defendant, no damages should be recoverable in this situation.<sup>93</sup>
- 2.32 In addition to this line of argument, Lord Bridge considered a number of Australian cases dealing with this situation.<sup>94</sup> In *Gowling v Mercantile Mutual Insurance Co Ltd*,<sup>95</sup> a claim for the value of services provided by the defendant in looking after his son was refused on the basis that the services were no more than those usually provided by a dutiful parent; that the father did not lose any income; and that it was not reasonable that the defendant (who would be the true beneficiary of the damages) should benefit from something which had accrued from his own infringement of the plaintiff's rights. In *Jones v Jones*<sup>96</sup> the plaintiff

<sup>88</sup> But for an alternative view see P Birks, "Restitution for Services" [1974] CLP 13, 34-35: "[T]he victim [cannot] reasonably deny knowledge of his helper's expectation of being taken care of financially."

<sup>89</sup> [1974] QB 454.

<sup>90</sup> [1993] QB 815, 831, *per* Sir Thomas Bingham MR.

<sup>91</sup> Cf *Donnelly v Joyce* [1974] QB 454, 463-464, *per* Megaw LJ.

<sup>92</sup> See para 2.26 above.

<sup>93</sup> [1994] 2 AC 350, 363.

<sup>94</sup> [1994] 2 AC 350, 363-364. See also para A.38 below.

<sup>95</sup> (1980) 24 SASR 321.

<sup>96</sup> [1982] Tas SR 282.

failed to recover from the defendant, her husband, in respect of his services because to do so would be to require the husband to pay twice over for his negligence, once in services rendered and once in damages. In *Gutkin v Gutkin*<sup>97</sup> a similar approach was adopted in deciding that the plaintiff, again the defendant's wife, could not recover damages since, where a defendant had already met part of the plaintiff's loss, this must be taken to reduce the amount of the defendant's liability. In these cases and in all but one of the other Australian cases cited by Lord Bridge<sup>98</sup> the court, impliedly or in some cases expressly, gave no weight to the fact that, had the claim been successful, it would have been met by the defendant's insurers rather than the defendant. The exception was *Lynch v Lynch*,<sup>99</sup> where Clarke JA refused to follow the other cases and allowed the plaintiff's claim on the basis that the existence of the defendant's compulsory third-party insurance created a decisive policy argument in favour of liability.

**(c) The quantum of damages**

- 2.33 The third problem is that of the quantum of damages. Before the House of Lords' decision in *Hunt v Severs* changed the approach which the law took to damages for gratuitous care, the leading case on this subject was *Housecroft v Burnett*.<sup>100</sup> In that case, the Court of Appeal was applying the now overruled approach of *Donnelly v Joyce* in regarding the loss as the plaintiff's rather than the carer's. O'Connor LJ referred to "two extreme solutions"<sup>101</sup> in resolving the problem of assessing the "proper and reasonable cost" of supplying the plaintiff's needs<sup>102</sup> where care is provided by a relative or friend gratuitously. The first was to assess the carer's contribution at the full commercial rate for the services provided by the carer. The second was to assess the cost as nil, just as it is where the plaintiff is treated under the NHS. O'Connor LJ concluded that neither of the extreme solutions was correct, and that any assessment should be somewhere between the two, depending on the facts of the case. The award would have to be:

... sufficient to enable the plaintiff, among other things, to make reasonable recompense to the relative. So, in cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to enable the plaintiff to achieve that result. The ceiling would be the commercial rate.<sup>103</sup>

<sup>97</sup> [1983] 2 Qd R 764.

<sup>98</sup> *Maan v Westbrook* [1993] 2 Qd R 267; *Snape v Reid* (1984) Aust Torts Reps 80-620; *Motor Accidents Insurance Board v Pulford* (1993) Aust Torts Reps 81-235.

<sup>99</sup> (1991) 25 NSWLR 411.

<sup>100</sup> [1986] 1 All ER 332.

<sup>101</sup> [1986] 1 All ER 332, 342.

<sup>102</sup> *Donnelly v Joyce* [1974] QB 454, 462.

<sup>103</sup> [1986] 1 All ER 332, 343. See also, eg, *Bell v Gateshead AHA* (1986) *Kemp & Kemp* A4-101, in which the plaintiff's mother had given up plans to return to work. Allott J took her lost earnings as the starting point to value her services, past and future, but applied the commercial ceiling.

- 2.34 In *Bishop v Hannaford*<sup>104</sup> Otton J, taking as the starting point of his assessment the obiter dicta of O'Connor LJ in *Housecroft v Burnett*, was faced with the difficult task of applying the compromise solution advocated by the Court of Appeal to a complex set of facts.<sup>105</sup> The first difficulty, at least as regards the period when the plaintiff was still in hospital, was in determining which of the parents was needed to care for the plaintiff. Further problems were presented by the employment record of the plaintiff's father. Notwithstanding the speculative nature of any assessment of Mr Bishop's earnings after the accident, Otton J was satisfied that he would have gained employment of some nature had it not been for the accident and took this into account when assessing the joint value of the parents' services. There was insufficient evidence before the court to establish what the precise commercial cost of the care would have been, but in order to verify that the commercial ceiling was not exceeded, the judge applied a very rough calculation on the basis of his estimate of the lowest hourly rates which might be applicable. In *Woodrup v Nicol*<sup>106</sup> the Court of Appeal cited the decision in *Housecroft v Burnett* and on this basis reduced the damages awarded by Wright J at first instance in relation to the care provided by the plaintiff's father. These damages consisted of the father's estimated loss of earnings for the period in question, amounting to twice the commercial cost of his services, although the sum awarded by the Court of Appeal still exceeded the commercial rate.<sup>107</sup> In at least one case<sup>108</sup> the court has expressly regarded the ceiling as a guideline rather than as a binding rule of law.
- 2.35 In cases where there has been no loss of earnings as such, courts have tended to calculate damages for care by relatives by taking the commercial rate for home helps and applying a discount to it.<sup>109</sup> The discount may be reduced if the plaintiff can show a likely future need for commercial care.<sup>110</sup> It may also be reduced if the quality of the care required from the carers is of a particularly high level.<sup>111</sup> In exceptional cases courts have refrained from making a discount at all,<sup>112</sup> and in one case, the Court of Appeal upheld an award based on one and a half times the

<sup>104</sup> Unreported, 21 December 1988.

<sup>105</sup> The plaintiff had been irreversibly brain damaged as a result of a road accident, and was severely physically disabled. On his arrival home he was cared for exclusively by his parents. His father, then aged 58, had recently been made redundant from his job as an ice-cream salesman and was in the course of setting up on his own account in the same field of business. He gave up these plans when the accident happened, however, in order to help care for the plaintiff.

<sup>106</sup> [1993] PIQR Q104.

<sup>107</sup> The estimated cost, at commercial rates, was £2,400 for the period in question. Wright J had awarded £5,000, which was reduced to £3,500 on appeal.

<sup>108</sup> *Lamey v Wirrall HA* (1993) *Kemp & Kemp* A4-120 (Morland J).

<sup>109</sup> See, eg, *Nash v Southmead HA* [1993] PIQR Q156, in which Allott J applied a one-third discount to the commercial rates.

<sup>110</sup> In *Maylen v Morris* (1988) *Kemp & Kemp* A3-105 it was anticipated that future care would be by the plaintiff's mother and two other relatives, but it was anticipated that the mother might later become unable to cope because of old age. The Court of Appeal refused the defendant's appeal against the 25% discount set by Mann J.

<sup>111</sup> Eg *Fairhurst v St Helens and Knowsley HA* [1995] PIQR Q1 (25% discount).

<sup>112</sup> See *Lamey v Wirrall HA* (1993) *Kemp & Kemp* A4-120 (Morland J).

earnings which the plaintiff's mother, a qualified nurse, would have earned, on the basis that the mother was doing the work of the two nurses who would otherwise have been needed to provide the care.<sup>113</sup>

- 2.36 It is too early as yet to gauge the effect which the decision in *Hunt v Severs*<sup>114</sup> (which views the provision of the care as a loss to the carer rather than a loss to the plaintiff) will have on the quantum of damages for gratuitous care.<sup>115</sup> It might, for example, result in an increase in the number of cases in which courts award damages beyond the "commercial ceiling". Where, however, a carer gives up well-paid employment to look after the plaintiff, and the income which he or she forgoes is far beyond the cost of obtaining the same care commercially, it may be that the general duty to mitigate will impose a control on the damages, even in the absence of a strict commercial ceiling. There are other reasons why the practical difference which *Hunt v Severs* makes to the quantum of awards may be limited. First, although the object of damages for gratuitous care before *Hunt v Severs* was to compensate the plaintiff rather than the carer, it was clear that the adequate compensation of the carer was an important, if not the most important, factor in deciding the level of damages.<sup>116</sup> Secondly, in many cases, where the carer is not forgoing an income, the only available starting point in calculating the damages will still be the commercial rate.

#### **(4) Loss of the plaintiff's ability to do work in the home**

- 2.37 The leading case recognising lost ability to carry out household services as a head of damages is *Daly v General Steam Navigation Co Ltd.*<sup>117</sup> The services whose loss would fall within this head include housekeeping (as in *Daly* itself), home maintenance,<sup>118</sup> and gardening. However, the reasoning of the Court of Appeal in that case is, with respect, confusing. This confusion stems from the fact that, although it was recognised that it was illogical to do so, past and future loss of the ability to undertake housekeeping was treated in very different ways. As regards the future, it was held that, where a plaintiff's ability to carry out housework is impaired, he or she may recover damages in respect of future work which will need to be done, based on the cost of having the work done on a commercial

<sup>113</sup> *Hogg v Doyle* (unreported, 6 March 1991). See *Kemp & Kemp* vol 1 para 5-024.

<sup>114</sup> [1994] 2 AC 350.

<sup>115</sup> In Australia, the loss is clearly regarded as the plaintiff's and the High Court has held that the carer's lost earnings are not an appropriate measure of damages for gratuitous care. See *Van Gervan v Fenton* (1992) 175 CLR 327; para A.37 below.

<sup>116</sup> See, eg, *Housecroft v Burnett* [1986] 1 All ER 332, 343. See also *Aboul-Hosn v Trustees of the Italian Hospital* (1987) *Kemp & Kemp* A4-104.

<sup>117</sup> [1981] 1 WLR 120. Before the abolition of consortium actions by the Administration of Justice Act 1982, a husband could also claim damages for the loss of his wife's housekeeping services. Similar rights, enjoyed by husbands and sometimes other relatives of the injured person, continue to exist in some other jurisdictions. See paras A.22-A.23, A.41 and A.63 below. In Scotland, s 9 of the Administration of Justice Act 1982 gives the injured person a right to recover in respect of services which he or she is not longer able to provide to other family members: see paras A.11-A.13 below.

<sup>118</sup> See, eg, *Hoffmann v Sofaer* [1982] 1 WLR 1350, in which the plaintiff recovered the cost of maintenance and decoration work which the plaintiff would have done himself but for the accident.

basis by a third party. This was treated as a pecuniary loss, although it was thought immaterial whether the plaintiff actually intended to engage a housekeeper or not. However, there will be no equivalent head of pecuniary loss in respect of periods *before* the trial unless the plaintiff has paid for housekeeping assistance or unless the person doing that work has given up paid employment to enable him or her to do so. So, on the facts, the Court of Appeal awarded the plaintiff the cost that had been incurred in paying for her sister-in-law's full time assistance for a few weeks (£633) plus £930 in respect of income lost by the plaintiff's husband when he left a part-time job to help with the housework. In awarding this money the court adopted the approach taken in *Donnelly v Joyce*,<sup>119</sup> so that the relevant loss was treated, for these purposes, as a loss to the plaintiff wife.<sup>120</sup> Following the House of Lords' decision in *Hunt v Severs*,<sup>121</sup> the loss would now be treated as the husband's and awarded to the wife to hold on trust for him.<sup>122</sup> But the Court of Appeal in *Daly* held that, where inability to carry out the housework had not in the past resulted in a pecuniary loss, it should instead be taken into account as part of the award for pain, suffering and loss of amenity.<sup>123</sup>

### (5) Hospital visits

- 2.38 It is also well established that the costs reasonably incurred by, for example, relatives in visiting the plaintiff in hospital are recoverable by the plaintiff,<sup>124</sup> but any earnings foregone by visiting relatives will not be recoverable, even where the visits are reasonable.<sup>125</sup> Any such damages recovered by the plaintiff will be held on trust by him or her for the person who incurred the expense, following *Hunt v Severs*.<sup>126</sup> These expenses are not recoverable, however, if the person making the visits and incurring the expenses is the tortfeasor.<sup>127</sup>

## 2. THE PLAINTIFF'S ACCOMMODATION

- 2.39 If a disabled plaintiff is to live at home, it is likely that the accommodation will need to be altered and adapted. Typical alterations include installation of ramps for a wheelchair; alterations in the internal layout of the premises; installation of a hoist and any strengthening of the structure which this might necessitate; constructing a tarmac drive; and creation of extra storage space to accommodate

<sup>119</sup> [1974] QB 454.

<sup>120</sup> [1981] 1 WLR 120, 129, *per* Templeman LJ.

<sup>121</sup> [1994] 2 AC 350.

<sup>122</sup> See para 2.26 above.

<sup>123</sup> The Court of Appeal simply added the damages which had been awarded by Brandon J as a pecuniary loss for past incapacity to carry out housekeeping (less wages actually foregone by the plaintiff's husband in doing household work, which were awarded as special damages) onto the award for non-pecuniary loss: [1981] 1 WLR 120, 128, *per* Bridge LJ.

<sup>124</sup> See, eg, *Walker v Mullen*, *The Times* 19 January 1984 (Comyn J). See also *Hunt v Severs* [1994] 2 AC 350, 356-357, *per* Lord Bridge.

<sup>125</sup> *Walker v Mullen*, *The Times* 19 January 1984. See also *Kirkham v Boughey* [1958] 2 QB 338.

<sup>126</sup> [1994] 2 AC 350.

<sup>127</sup> *Hunt v Severs* [1994] 2 AC 350, 357, 363.

wheelchairs and other aids and appliances. In some cases it may be necessary to create accommodation for a resident nurse or carer.<sup>128</sup> The plaintiff's existing home may well be unsuitable to be adapted in this way, and it may therefore be reasonable to move to more suitable accommodation.

2.40 Clearly the acquisition of more suitable and, generally, more expensive accommodation will involve expense on the plaintiff's part. But if the court were to award the total purchase price of the property, less the proceeds from the sale of the existing property, the plaintiff would appear to be overcompensated because the capital value of the property would remain intact on the plaintiff's death and represent a windfall to his or her estate. The solution developed by the courts to this problem<sup>129</sup> is to treat the loss to the plaintiff, not as a straightforward capital loss, but as the loss of an annual sum representing either the loss of the income on the capital expended,<sup>130</sup> or the cost of borrowing the capital expended. This computation requires a rate of interest to turn the capital expenditure into an annual figure, and so the question arises of what that rate should be. In *George v Pinnock*<sup>131</sup> the Court of Appeal thought that the appropriate rate was the mortgage rate of borrowing that capital sum (or alternatively the market rate of return on investing that sum). But the difficulty with this is that when one then applies the appropriate multiplier to that sum one would very often arrive at the same (or a higher) figure than the capital cost of the accommodation, which the court had refused to award.

2.41 In the leading case of *Roberts v Johnstone*,<sup>132</sup> the Court of Appeal dealt with this difficulty by holding that the correct rate to be applied was two per cent per annum. This was the rate which, in *Wright v British Railways Board*,<sup>133</sup> the House of Lords had endorsed as the appropriate rate of interest on damages for non-pecuniary loss.<sup>134</sup> The rationale behind the use of this figure to calculate the annual expense of accommodation was that, as with non-pecuniary loss in *Wright*, two per cent represented a real rate of return on a risk-free investment. Implicit in this was the assumption that any return over two per cent would reflect either anticipated inflation or risk; and that neither of those factors was relevant to the acquisition of the property because any inflation would be reflected in an enhancement of its capital value, and residential property

<sup>128</sup> See P Noble, E Fanshawe and B Hellyer, *Special Damages for Disability* (2nd ed 1988) pp 25-27.

<sup>129</sup> Beginning with the decision of the Court of Appeal in *George v Pinnock* [1973] 1 WLR 118.

<sup>130</sup> Ie, the cost of the new house less the proceeds from the sale of the old one, if any.

<sup>131</sup> [1973] 1 WLR 118.

<sup>132</sup> [1989] QB 878, 889-894, *per* Stocker LJ. This contrasted with the higher rates used in previous cases where the plaintiff had recovered accommodation costs. See, *eg*, *Chapman v Lidstone* (unreported, 3 December 1982), referred to by Stocker LJ in *Roberts v Johnstone* [1989] QB 878, 891, in which a rate of 7% was used.

<sup>133</sup> [1983] 2 AC 773, approving the earlier decision of the Court of Appeal in *Birkett v Hayes* [1982] 1 WLR 816.

<sup>134</sup> See our Consultation Paper on Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140, paras 4.119-4.120.



represented a risk-free investment. The rate of two per cent per annum has been upheld by the Court of Appeal in *Thomas v Brighton Health Authority*.<sup>135</sup>

- 2.42 The plaintiff may, additionally or alternatively, incur expenses in altering property so as to be suitable for use by a disabled person. It is often, but not always, the case that those alterations will increase its capital value. In *Roberts v Johnstone* the Court of Appeal took the total cost of the alterations (£38,284), and deducted from that a figure representing the part of the expenditure that increased the value of the property (£10,000). It then added this net figure (£28,284) onto the damages awarded for the cost of acquiring the new property (£21,920).<sup>136</sup> However, in *Willett v North Bedfordshire Health Authority*,<sup>137</sup> Hobhouse J treated the cost of alterations to the property to provide a second bedroom, in which a carer would live, as part of the capital cost of the property, and therefore to be taken into account in the interest calculations. Hobhouse J said:

It was drawn to my attention that in *Roberts v Johnstone* a similar item was not included in the capital value allowance of the property. The matter does not appear to have been the subject of argument, and indeed the smallness of the figures that result from this method of assessment for marginal items of capital expenditure amply explains why they should not often be the subject of the attention that they have received in the present case. But notwithstanding the way the figure was treated in *Roberts v Johnstone*, I consider there is no escape from the logical and proper approach of treating appropriate capital expenditure which is incurred after the purchase which enhances the value of the house in the same way as expenditure which is incurred in the acquisition of the house itself. Any other approach produces not only mathematically and logically inaccurate results but also an unjust result.

- 2.43 Where the alterations do not enhance the market value of the property (they may even reduce it), the cost of the works will presumably simply be added to the damages. Although we are not aware of any direct authority, it has also been suggested that where there is a reduction in value, the amount of that reduction should be added to the cost of the alterations, but that the figure to be used in the *Roberts v Johnstone* calculation should be the reduced value of the altered property, rather than the higher figure of the acquisition cost.<sup>138</sup>
- 2.44 The conversion into a capital figure of the annual sum ascertained by the *Roberts v Johnstone* interest calculation will require the use of a multiplier based on the period of the anticipated loss. The principle on which this multiplier is assessed is broadly similar to that governing multipliers for other types of expenditure,<sup>139</sup> although the accommodation multiplier may be adjusted in certain cases

<sup>135</sup> *The Times* 24 October 1996. The Court of Appeal overturned Collins J's decision that the current rate, according to the principles laid down in *Roberts v Johnstone*, should be 3% rather than 2%: [1996] PIQR Q44.

<sup>136</sup> [1989] QB 878, 893, *per* Stocker LJ.

<sup>137</sup> [1993] PIQR Q166; see also *Almond v Leeds Western HA* (1990) 1 Med LR 370.

<sup>138</sup> See *Kemp & Kemp* vol 1 para 5-049.

<sup>139</sup> See paras 2.64-2.74 below.

according to factors specific to the plaintiff's accommodation needs. For example, the fact that a room to accommodate a resident carer will not be required until some time in the future may justify a reduction in the multiplier.<sup>140</sup> Similarly, the multiplier will, in appropriate cases take account of the likely date when the plaintiff would have bought a house but for the injury.

- 2.45 As with other types of expense, the touchstone of recoverability in relation to housing costs is reasonableness. It may, for example, be reasonable for the plaintiff to move house more than once during the period for which the damages are being awarded.<sup>141</sup> Reasonableness will also be relevant to the type and location of the property acquired: and the court will not discount damages merely because the quality of the accommodation goes beyond that which is strictly necessary for the plaintiff's needs, as long as the price of the property falls within the range of sums which it is reasonable for a person in the plaintiff's position to spend on a property.<sup>142</sup>
- 2.46 At first sight it appears that this approach to the purchase of new housing is inconsistent with, and less restrictive than, the approach taken to alterations which, to be recoverable, must be reasonably necessary to the plaintiff's needs.<sup>143</sup> But it is doubtful whether there is any real conflict. Accommodation is plainly a necessity and the courts are merely emphasising that one should allow the plaintiff a broad range of choice in deciding on what classes as reasonable accommodation. As regards alterations, the central question is whether the alterations are reasonably necessary (so that the cost of the alterations is reasonable). If an alteration is reasonably necessary, then the approach of the courts is again likely to be one of allowing the plaintiff a broad range of choice on the precise nature of the alteration. So, for example, if a swimming pool were a necessity, the courts would no doubt allow the plaintiff the costs of purchase and installation even if the size and style of swimming pool went beyond what was strictly necessary for the plaintiff's needs.
- 2.47 Costs incidental to the sale and purchase of the properties, such as legal costs and estate agents' fees, are simply added on to total damages, rather than being

<sup>140</sup> *Willett v North Bedfordshire HA* [1993] PIQR Q166.

<sup>141</sup> *Almond v Leeds Western HA* (1990) 1 Med LR 370.

<sup>142</sup> See *Willett v North Bedfordshire HA* [1993] PIQR Q166, where the property included a swimming pool, which was not necessary to the plaintiff's needs. Nevertheless the cost of buying that property was held to be reasonable and recoverable. Cf *Cassel v Riverside HA* [1992] PIQR Q168; para 2.46 n 143 below. For the treatment of the problem of "betterment" in other contexts, see *The Gazelle* (1844) 2 Wm Rob 279; 166 ER 759; *Harbutts Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447; *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397; and A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) pp 166-167.

<sup>143</sup> In *Cassel v Riverside HA* [1992] PIQR Q168, the Court of Appeal held that the plaintiff was not entitled to recover the cost of installing a swimming pool at his home, given that there was no evidence that swimming was therapeutically necessary, although it was a desirable form of exercise. It was held that if the plaintiff was to have a private pool, its installation should be paid for out of the plaintiff's damages for loss of amenity (Q181, *per* Ralph Gibson LJ; Q190-Q191, *per* Purchas LJ). See also the Law Commission's consultation paper *Damages for Personal Injury: Non-Pecuniary Loss* (1996) Consultation Paper No 140, para 4.31.

treated as part of the costs to be included in the notional interest calculation. Other extra costs likely to be incurred over time may be converted into capital sums and added to the damages, for example additional heating costs.

### 3. THE MANAGEMENT OF THE PLAINTIFF'S AFFAIRS

#### (1) Court of Protection

- 2.48 Where the injuries have resulted in, for example, brain damage and the plaintiff is under the jurisdiction of the Court of Protection, the plaintiff will incur fees charged by his or her receiver and by the Court of Protection in connection with the administration and management of the capital fund represented by the damages.<sup>144</sup> These fees are recoverable from the defendant.<sup>145</sup>
- 2.49 There is a commencement fee and an annual administration fee based on the "clear annual income" from the assets. The scale upon which the administration fee is calculated will depend on whether the Public Trustee is appointed as the plaintiff's receiver. If not, there will also be a separate fee charged on each transaction with the assets. In addition, there may be solicitors' costs, which may be fixed or taxed.<sup>146</sup> The major item, however, is the annual fee. Since it will depend on the overall level of damages it will generally be calculated once damages awarded under all other heads have been ascertained. Since the fund represented by the damages is expected to be reduced as capital is used up over the plaintiff's life, the income will fall and so, therefore, should the Court of Protection fees. This argument was accepted by Allott J in the first-instance judgment in *Roberts v Johnstone*.<sup>147</sup> However, he refused the fifty per cent discount argued for by the defendant, and applied what he described as a "broad brush" approach which took into account the likelihood of costs in the administration of the estate other than the annual management fee. This part of the judgment was not subject to appeal.
- 2.50 There is some uncertainty as to the effect which contributory negligence will have on the amount of fees recoverable. In *Ellis v Denton*,<sup>148</sup> Rougier J awarded the whole of the Court of Protection fees calculated on the basis of damages which had been reduced by thirty per cent because of the plaintiff's contributory negligence. In doing so, he held that to have reduced the recoverable fees by thirty per cent would have been to make an unwarranted double deduction from the damages. However, in *Cassel v Riverside Health Authority*,<sup>149</sup> where,

<sup>144</sup> Court of Protection Rules 1984, SI 1984 No 2035, rr 42 (receivers) and 79 (Court of Protection administration fee). See *Heywood & Massey: Court of Protection Practice* (12th ed 1991) pp 23 and 84-86.

<sup>145</sup> The first case giving authority for this proposition seems to be the relatively recent decision in *Futej v Lewandowski* (1980) 124 SJ 777, approved by the Court of Appeal in *Rialas v Mitchell*, *The Times* 17 July 1984. See *McGregor on Damages* (15th ed 1988) p 941.

<sup>146</sup> See *Wells v Wells*, *The Times* 24 October 1996, in which the Court of Appeal awarded the reasonable solicitors' costs expected to be incurred in the future by the plaintiff's daughter, in her capacity as the plaintiff's receiver.

<sup>147</sup> Unreported, 22 October 1986; quoted in *Kemp & Kemp*, vol 1 para 5-055.

<sup>148</sup> Unreported, 30 June 1989; noted in *Kemp & Kemp*, C2-002.

<sup>149</sup> [1992] PIQR Q168.

presumably on the basis of causation, it had been agreed that the defendant would be liable for ninety per cent only of the damages to be assessed,<sup>150</sup> the Court of Appeal held that the reduction applied to the Court of Protection fees as to all the other damages. Although not a contributory negligence case, it would seem that the approach adopted in *Cassel* ought also to apply to a reduction for contributory negligence.

- 2.51 In addition to the fees of the Court of Protection and of the receiver, the plaintiff will be able to recover the cost of instructing his or her own solicitor in relation to the application to the Court of Protection and in relation to the plaintiff's continuing dealings with the Court of Protection, but only if the incurring of those fees is found to be reasonable.<sup>151</sup> Where the damages are to be held on a trust distinct from the Court of Protection the plaintiff's reasonable costs in setting up and administering the trust will be recoverable as damages.<sup>152</sup>

## **(2) Financial advisers' fees**

- 2.52 A successful plaintiff whose affairs are not being administered by the Court of Protection is likely to need professional help so as to invest the damages wisely.<sup>153</sup> It is probable, but not certain, that any fees charged, or expected to be charged, to the plaintiff are recoverable as damages.<sup>154</sup> Where a plaintiff's affairs *are* subject to the jurisdiction of the Court of Protection, the fees of professional financial advisers, as distinct from a receiver, are not recoverable.<sup>155</sup>

## **4. OTHER EXPENSES**

- 2.53 There are many types of expenses which the injured plaintiff may incur other than the major ones mentioned above. The general rule, here as elsewhere, is that damages will be recoverable if the expenditure is reasonable.

<sup>150</sup> There was no reference in the judgment of the Court of Appeal or in the judgment, at first instance, of Rose J [1992] PIQR Q1, as to the exact reason for this reduction, although since the plaintiff was an infant suing in respect of incidents at and before his birth it is obvious that contributory negligence was not involved.

<sup>151</sup> In *Hodgson v Trapp* [1988] 1 FLR 69, Taylor J awarded past costs but not future costs under this head. This part of the award was not challenged on direct appeal to the House of Lords: [1989] AC 807.

<sup>152</sup> *Bell v Gateshead AHA* (unreported, 22 October 1986); see *Kemp & Kemp*, A4-013.

<sup>153</sup> Although our empirical report *Personal Injury Compensation: How Much is Enough?* (1995) Law Com No 225 raised doubts as to the availability and, sometimes, the helpfulness to plaintiffs of such advice: see paras 10.5-10.7.

<sup>154</sup> In *Francis v Bostock*, *The Times* 8 November 1985, Russell J had refused to award such damages, on the basis that the court was not concerned with the disposal of the award, once made, and that they were too remote: however in *Anderson v Davis* [1993] PIQR Q87 the judge (R Bell QC) refused to follow that decision, treating the costs as analogous to Court of Protection fees and the latter approach seems to be supported, obiter, by the Court of Appeal in *Wells v Wells*, *The Times* 24 October 1996.

<sup>155</sup> *Cunningham v Camberwell HA* [1990] 2 Med LR 49.

### (1) Aids and appliances

- 2.54 The plaintiff may need the use of various aids and appliances to enable him or her to live as conventional a life as possible.<sup>156</sup> These may vary in cost and sophistication up to and including technologically advanced computer systems giving the plaintiff the ability to communicate and to control his or her home environment,<sup>157</sup> and, especially in the case of visually handicapped people, guide dogs or other trained animals.<sup>158</sup> Some items of expenditure will need to be incurred on a continuous daily and weekly basis, and will generally be dealt with by calculating an annual figure and applying a multiplier. Even where particular items can be treated as capital expenditure because they do not recur on a regular basis, they may still recur in the future when the equipment wears out, and damages should be assessed accordingly. The reasonable cost of providing these aids will be recoverable even if the same items are available through the NHS.<sup>159</sup>

### (2) Cost of a car

- 2.55 The plaintiff's condition may make it desirable to purchase a car or other vehicle. It is quite likely that the car will have to be of a particular size and design so as to accommodate the plaintiff and any equipment which he or she may need to carry, and may have to be specially adapted, for example by installing a wheelchair hoist. A car is, of course, a considerable financial asset, and in *Woodrup v Nicol*<sup>160</sup> Wright J at first instance had accepted the defendant's argument that the fact that the plaintiff had the benefit of the car's capital value meant that the plaintiff ought not to be able to recover the capital cost of buying the car, an argument which treated the car analogously with real property such as a house.<sup>161</sup> The Court of Appeal rejected this view, and held that a car ought to be treated as a wasting asset, in the same way as a piece of equipment such as a special bed, which might be expected to wear out periodically.<sup>162</sup> Therefore the correct approach was to assess a figure which would purchase the car, and leave a surplus which, when invested, would enable the plaintiff to replace the car as many times as necessary within the period to be covered, taking into account the

<sup>156</sup> See P Noble, E Fanshawe and B Hellyer, *Special Damages for Disability* (2nd ed 1988) pp 13-14. See also the detailed discussion, in later chapters of that book, of typical needs relating to plaintiffs with particular medical conditions. Awards for serious injuries invariably include a sum in respect of equipment: see, generally, the cases reported or noted in *Kemp & Kemp*, vol 2.

<sup>157</sup> Although in *Leon Seng Tan v Bunnage* (1986) *Kemp & Kemp* A2-103 Gatehouse J refused to award the cost of a computer because he found that the plaintiff, who had been studying with a view to a possible career in electronics, would have bought one anyway. With the increasingly widespread purchase of computers for personal use, the difficulty in recovering damages in respect of at least a *conventional* computer is presumably increasing.

<sup>158</sup> See *Kemp & Kemp*, vol 1, paras 5-029 to 5-030.

<sup>159</sup> *Bishop v Hannaford* (unreported, 21 December 1988), Otton J applying section 2(4) of the Law Reform (Personal Injuries) Act 1948.

<sup>160</sup> [1993] PIQR Q104.

<sup>161</sup> See paras 2.39-2.47 above.

<sup>162</sup> [1993] PIQR Q104, Q107-Q109, *per* Russell LJ, with whom Taylor and Fox LJ concurred. Nevertheless, on the facts the Court of Appeal refused to interfere the actual figure which Wright J had awarded under this head.

likely “trade-in” value of the car.<sup>163</sup> However, any award must take into account the fact that, but for the accident, the plaintiff would have incurred expenditure on a car in any case.

- 2.56 In addition to the damages associated with the *capital* cost of a car, the plaintiff will also be entitled to damages in respect of the annual running costs, in so far as these exceed the costs which the plaintiff would have incurred but for the accident. The annual figure is generally calculated by estimating the annual mileage<sup>164</sup> and applying to it a figure representing cost per mile.<sup>165</sup>

### (3) Holidays

- 2.57 A disabling condition will mean that a plaintiff will probably have to spend more money on holidays than he or she would otherwise have done, since cheaper types of transport and accommodation may no longer be available, and in serious cases it may be necessary for the plaintiff to be accompanied by carers who will attend to his or her needs.<sup>166</sup> The courts have rejected the arguments that the multiplier should be reduced to reflect the possibility that the plaintiff may have the benefit of free holidays provided by friends,<sup>167</sup> or that the sum recoverable in respect of each holiday should be reduced because some of the care required by the plaintiff may be provided by members of the family, or friends, who will be paying for their own holiday.<sup>168</sup>

### (4) Other items

- 2.58 Other items for which the plaintiff may recover damages include:
- (1) Additional clothing expenses, owing to a need for special clothing and/or increased wear and tear;<sup>169</sup>
  - (2) Increased laundry expenses;

<sup>163</sup> Of course the calculations must take account of the particular situation. For example, the trade-in price will probably be reduced by any special adaptations made to the car to suit it to the plaintiff's needs, and a disabled plaintiff's car may be expected to depreciate more quickly than other cars because of factors such as decreasing reliability, greater mileages and greater than usual wear and tear. See P Noble, E Fanshawe and B Hellyer, *Special Damages for Disability* (2nd ed 1988) pp 22-25.

<sup>164</sup> See *Woodrup v Nicol* [1993] PIQR Q104, Q109-Q110.

<sup>165</sup> The tables of motoring expenses produced by the AA are commonly used for these calculations.

<sup>166</sup> See P Noble, E Fanshawe and B Hellyer, *Special Damages for Disability* (2nd ed 1988) pp 27-28.

<sup>167</sup> *Leon Seng Tan v Bunnage* (1986) *Kemp & Kemp* A2-103 (Gatehouse J).

<sup>168</sup> *Brittain v Gardner*, *The Times* 18 February 1989. Of course the damages recoverable under this sub-head will include the costs of travelling and accommodation and other incidental costs, but the cost of the care itself, whether provided professionally or free of charge, will be included in the general award for nursing and care expenses.

<sup>169</sup> Although in *Ellis v Denton* (1989) *Kemp & Kemp* C2-103 Rougier J refused to take increased wear and tear into account because he found it to be offset by a reduction in the variety and quality of the clothes needed by the plaintiff.

- (3) Additional expenditure on food, owing to a need for a special diet and/or a reduced ability to cook, leading to a reliance on more expensive ready-prepared foods.<sup>170</sup>

## 5. LOSSES ARISING OUT OF THE PLAINTIFF'S DIVORCE

- 2.59 It is possible that the injuries suffered by the plaintiff may lead to his or her becoming divorced. The financial arrangements which are ordered by the court, or agreed by the spouses, as a result of the divorce may well represent a loss to the plaintiff.<sup>171</sup> Although such a loss goes beyond “expenses”, it is clearly closely related to expenses and is therefore conveniently discussed in this paper.
- 2.60 Even if the divorce is an obviously foreseeable consequence of the injuries, the plaintiff will not be entitled to recover damages for his or her loss. This follows the decision of the Court of Appeal in *Pritchard v F H Cobden Ltd.*<sup>172</sup> In refusing to award damages under this head, the Court of Appeal declined to follow its decision in *Jones v Jones*,<sup>173</sup> in which a plaintiff succeeded in recovering the loss represented by a lump sum order. The Court pointed out that the principle of the recovery of such payments had not been argued by counsel in *Jones*, and it was therefore entitled to treat *Jones* as not being binding authority.<sup>174</sup>
- 2.61 The Court of Appeal relied on three principal arguments. First, it took the view that the lump sum did not represent a genuine loss to the plaintiff at all, but merely a redistribution of the spouses' assets. The second argument was that to allow compensation for this sort of loss would produce “infinite regress” in deciding on the orders to be made after divorce. Any award of damages would itself be part of the total assets to be taken into account in making an order for (for example) a lump sum in the matrimonial proceedings,<sup>175</sup> and the lump sum would then be paid out of those assets. However, if the lump sum were to be regarded as a loss to the plaintiff, recoverable as part of the plaintiff's damages, it would have to be reckoned as part of the matrimonial assets, which would necessitate a fresh calculation of the lump sum, which would in turn lead to a reassessment of the damages, and so on.<sup>176</sup> If the assessment of the damages and the orders for ancillary relief were treated as entirely independent matters, so omitting the cost of the divorce from the plaintiff's damages, the infinite regress could, in the Court of Appeal's view, be avoided.

<sup>170</sup> See *Kemp & Kemp* vol 1, paras 5-036 - 5-036/1. See also the Scottish decision (cited by *Kemp & Kemp*) *Duffy v Shaw* 1995 SLT 602.

<sup>171</sup> Ie lump sum and periodical payments under s 22A, and property adjustment order under s 23A, of the Matrimonial Causes Act 1973, as amended by the Family Law Act 1996.

<sup>172</sup> [1988] Fam 22. The applications in the matrimonial proceedings were heard together with the plaintiff's claim for damages.

<sup>173</sup> [1985] QB 704.

<sup>174</sup> See [1988] Fam 22, 40, *per* O'Connor and Croom-Johnson LJJ (joint judgment); 49, *per* Sir Roger Ormrod. The refusal to follow *Jones v Jones* has been described as “a curious side-stepping of an authoritative precedent”: S Juss, “An ‘Unusual Claim’ in the Court of Appeal” [1987] CLJ 210, 212.

<sup>175</sup> See, eg, *Daubney v Daubney* [1976] Fam 267; *Wagstaff v Wagstaff* [1992] 1 All ER 275.

<sup>176</sup> [1988] Fam 22, 39, *per* O'Connor and Croom-Johnson LJJ; 48, *per* Sir Roger Ormrod.

- 2.62 The third main argument advanced by the Court of Appeal was that the court deciding the quantum of damages in the personal injury case would be involved in an inappropriate exercise of predicting, and applying, the likely outcome of future court proceedings conducted for wholly different purposes.<sup>177</sup>
- 2.63 These three arguments led to the conclusion that, although the divorce and its attendant loss to the plaintiff were foreseeable, the plaintiff should nevertheless not be entitled to recover the cost. According to O'Connor and Croom-Johnson LJJ, this was because such loss was too remote;<sup>178</sup> Sir Roger Ormrod found it unimportant to attach a "label" to the reason for the exclusion, but considered remoteness, *novus actus interveniens* (and therefore lack of causation) and the general rule against recovery, in tort, of damages for consequential economic loss as contenders.<sup>179</sup> Other arguments put forward by the court included the argument that an award of damages under this head would lead to "abuse", meaning, presumably, divorces deliberately contrived by collusion between the spouses with a view to obtaining damages under this head,<sup>180</sup> or that it would act as an incentive to divorce sooner rather than later,<sup>181</sup> and the difficulty and expense of quantifying claims.<sup>182</sup>

## 6. THE MULTIPLIER

### (1) The multiplier approach

- 2.64 Given that damages for future medical expenses are awarded in the form of a lump sum rather than an income stream,<sup>183</sup> and assuming that the expenses are to be incurred on a continuous basis, the assessment of those damages requires the conversion of an annual figure into a capital sum. This is a process which is parallel to the one used in the assessment of damages for loss of future earnings. In both cases the courts generally apply a "multiplier" approach.<sup>184</sup> A multiplier, based on the expected duration of the loss, is applied to an amount representing the annual expense, producing a capital figure.<sup>185</sup>
- 2.65 As the money intended to compensate the future loss is being received at the time the calculation is made,<sup>186</sup> rather than when the loss or expense is actually

<sup>177</sup> *Ibid*, 39, *per* O'Connor and Croom-Johnson LJJ; 48-49, *per* Sir Roger Ormrod.

<sup>178</sup> *Ibid*, 39.

<sup>179</sup> *Ibid*, 48.

<sup>180</sup> *Ibid*, 40, *per* O'Connor and Croom-Johnson LJJ.

<sup>181</sup> *Ibid*, 49, *per* Sir Roger Ormrod.

<sup>182</sup> *Ibid*, 40, *per* O'Connor and Croom-Johnson LJJ; 49, *per* Sir Roger Ormrod.

<sup>183</sup> The parties may, as an alternative, agree that some or all of the damages form part of a structured settlement, under which an annuity paid for by the defendant will provide the plaintiff with an income: see, generally, the Law Commission's report *Structured Settlements and Interim and Provisional Damages* (1994) Law Com No 224, Part III.

<sup>184</sup> Cf the actuarial approach used in, eg, Ireland and Canada; paras A.18 and A.59 below.

<sup>185</sup> See, eg, *Mitchell v Mulholland (No 2)* [1972] 1 QB 65. See *McGregor on Damages* (15th ed 1988) paras 1501-1503.

<sup>186</sup> Ie the time of judgment or the settlement of the action.



incurred, the multiplier is adjusted downwards. If the loss is not expected to *begin* until some time in the future, there must be an additional adjustment of the discount for accelerated receipt. A further and separate downward adjustment will be made to the multiplier to reflect the “contingencies of life”. These principles apply to both future expenses and loss of future earnings. In order to effect the discount for accelerated receipt, it is necessary to apply a notional rate of interest, which the plaintiff is assumed to obtain by investing the “accelerated” lump sum. There are therefore two main factors that determine the multiplier, namely the period of loss and the discount rate.

## (2) Period of expense

- 2.66 The courts have recognised that the multiplier which, in general, should be applied to calculate future expenses will reflect the fact that the loss will be incurred over the plaintiff’s whole life, not (as is the case with loss of earnings) just his or her working life.<sup>187</sup> This effect may be particularly marked in the case of a plaintiff who is an infant, in whose case a long time would have elapsed before he or she would have started work,<sup>188</sup> or a plaintiff who would have been near to retirement. On the other hand, where the plaintiff would have had a relatively long time left until retirement, the court may disregard the differences between the periods of lost earnings and of expenses and apply the same multiplier for both heads of damages.<sup>189</sup> But where the plaintiff’s expectation of life has been reduced it will not be appropriate for the multiplier in relation to future expenses to be set so as to allow recovery during the “lost years”, as it generally is with future earnings.<sup>190</sup> It is very common for multipliers for expenses to be split so as to reflect, for example, a projected nursing regime divided into phases, each involving different levels of expense.<sup>191</sup>

<sup>187</sup> Cf the position with loss of earnings, which would not commence until the plaintiff would have started work, and will not extend beyond the date when the plaintiff would have retired.

<sup>188</sup> See, eg, *Connolly v Camden & Islington AHA* [1981] 3 All ER 250; *Croke v Wiseman* [1982] 1 WLR 71.

<sup>189</sup> In *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, for example, the plaintiff was 36 years old at the time of the trial. The Court of Appeal, in applying a multiplier of 14 for both expenses and loss of earnings, held that any difference between the respective periods of loss was offset by the possibility that the plaintiff’s nursing care, and the consequent expenditure, could end at some time in the future.

<sup>190</sup> *Pickett v British Rail Engineering Ltd* [1980] AC 136. Recovery of income which would have been earned during the “lost years” does not apply (other than in exceptional cases) where the plaintiff is a child: see, eg, *Connolly v Camden & Islington AHA* [1981] 3 All ER 250; *Croke v Wiseman* [1982] 1 WLR 71.

<sup>191</sup> See, eg, *Bristow v Judd* [1993] PIQR Q117, in which the Court of Appeal upheld the overall multiplier of 18 applied by the judge, but allowed the appeal in relation to the way in which it was split, so that the plaintiff recovered for 4 years’ care at £1,000 per annum and 14 years at £4,000 per annum, instead of the 8 years and 10 years given at first instance. Indeed, because of changes in the plaintiff’s condition and projections of his or her care needs over the period of litigation it is quite possible for the applicable multiplier to change over this period: see, eg, *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 192-193, 195-196.

### **(3) The traditional rate of discount**

- 2.67 The courts have generally applied a discount rate in the region of 4.5 per cent in calculating expenses multipliers, as they have done with “loss of earnings” multipliers. This practice has recently been affirmed by the Court of Appeal.<sup>192</sup>

### **(4) The multiplier method - our critique**

- 2.68 In our Report on Structured Settlements and Interim and Provisional Damages<sup>193</sup> we examined the methods used in calculating future pecuniary loss, both in relation to loss of earnings and in relation to expenses. We were critical of the methods traditionally used, whereby multipliers are calculated using a discount rate of 4.5 per cent, without regard to actuarial evidence. We made two principal recommendations in this area:

(i) that the actuarial tables published by the Government Actuaries’ Department<sup>194</sup> should be admissible evidence in any proceedings for damages for personal injury where it is desired to establish the capital value of the sum to be awarded as general damages for future pecuniary loss;<sup>195</sup> and

(ii) that the courts should be required, when determining the return to be expected from the investment of the sum awarded,<sup>196</sup> to take account of the net return upon an index-linked government security (ILGS), permitting departure from the rates where it can be shown that a different rate would be more appropriate in the individual case.<sup>197</sup>

### **(5) The recent legislation**

- 2.69 The first of those two recommendations received Royal Assent as section 10 of the Civil Evidence Act 1995.<sup>198</sup> In relation to the second, section 1 of the Damages Act 1996<sup>199</sup> now provides:

- (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

<sup>192</sup> *Wells v Wells, Thomas v Brighton HA and Page v Sheerness Steel plc*, *The Times* 24 October 1996. See paras 2.70-2.73 below. See also *Hunt v Severs* [1994] 2 AC 350, 366, *per* Lord Bridge of Harwich.

<sup>193</sup> (1994) Law Com No 224, paras 2.1-2.41. See also (1993) Consultation Paper No 125, paras 2.1-2.13.

<sup>194</sup> Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident cases (2nd ed 1994). These tables are often referred to as “the Ogden Tables” after Sir Michael Ogden QC, who chaired the working party responsible for their production.

<sup>195</sup> (1994) Law Com No 224 paras 2.9-2.23.

<sup>196</sup> *Ie* in setting the discount rate.

<sup>197</sup> (1994) Law Com No 224 paras 2.24-2.32, 2.36.

<sup>198</sup> The Act is not yet in force.

<sup>199</sup> The Act received Royal Assent on 24 July 1996, and came into force on 24 September 1996.

return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.<sup>200</sup>

- (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.

#### **(6) The Court of Appeal's reaffirmation of the traditional approach**

2.70 The traditional practice of fixing the discount rate at 4.5 per cent has now been reaffirmed by the Court of Appeal in three cases which it heard together, *Wells v Wells*, *Thomas v Brighton HA* and *Page v Sheerness Steel plc*.<sup>201</sup> The Court of Appeal there reversed judgments at first instance which had applied discount rates based on the rates of return on ILGS.<sup>202</sup> The plaintiffs had put forward two propositions, namely that:

- (i) [t]he award must be fixed on the assumption that the plaintiff is entitled to invest it taking the minimum risk; and
- (ii) the test is not whether it would be prudent to invest in equities but whether to invest in ILGS would achieve the necessary object<sup>203</sup> with the greatest precision.

Underlying both propositions (but especially the first) was the argument that the plaintiff was not to be treated as equivalent to an ordinary investor, since he or she has suffered loss and receives, in compensation, damages on a once-and-for-all basis as his sole protection for the foreseeable future.

2.71 The Court of Appeal rejected those arguments. An injured plaintiff was to be treated no differently from any other investor. The correct test to be applied in ascertaining the rate of discount should be that of the rate of return on the investments which a prudent investor would select. That this was the correct test was supported by the high probability that the plaintiff would invest prudently. Since the court found that a prudent investor would not invest a large fund in ILGS, but rather invest it in a portfolio consisting, at least to a great extent, of equities, because of the higher rate of return on equities, it followed that the appropriate rate of discount should remain 4.5 per cent.

2.72 Although the court re-established the traditional position as far as the present law is concerned, Thorpe LJ mooted the possibility of replacing the existing multiplier method, not with the use of actuarial tables, as we had

<sup>200</sup> No such order has yet been made.

<sup>201</sup> *The Times* 24 October 1996 (Hirst LJ, who gave the judgment of the court; Auld and Thorpe LJJ). We understand that one or more of the plaintiffs may be seeking leave to appeal to the House of Lords.

<sup>202</sup> *Wells v Wells* [1996] PIQR Q62 (Judge Wilcox); *Thomas v Brighton HA* [1996] PIQR Q44 (Collins J); *Page v Sheerness Steel plc* [1996] PIQR Q26 (Dyson J).

<sup>203</sup> Ie providing the plaintiff with a fund whose capital and income would, over time, compensate the plaintiff for his or her future loss and expense, but be exhausted on the plaintiff's death.

recommended,<sup>204</sup> but with the use of calculations of the kind currently used to calculate the quantum of large lump sum adjustments in “clean break” divorce cases.<sup>205</sup> Using this approach, a lump sum could, with the aid of a computer program, be calculated, whose capital and income would meet the recipient’s needs for life, on the basis of assumptions in relation to life expectancy, and future income yield, capital growth, inflation and tax.

- 2.73 Given the likelihood of an appeal to the House of Lords, we do not think that it would be appropriate here to offer views on the Court of Appeal’s approach to the fixing of multipliers. Nor at this stage would we wish to respond to some of the comments made about the reasoning in our report on Structured Settlements and Interim and Provisional Damages<sup>206</sup> and our empirical report on Compensation for Personal Injury.<sup>207</sup>
- 2.74 For the purposes of this paper it is sufficient to emphasise that our work in relation to multipliers generally has been completed. We do not think that there are problems on multipliers specific to future expenses (as opposed to other future pecuniary losses). We shall not therefore be making any further recommendations on multipliers in this paper. **However, we would ask consultees to draw to our attention any problems with multipliers that relate solely to the calculation of future expenses (as opposed to other future pecuniary losses).**

## 7. INTEREST ON DAMAGES FOR PECUNIARY LOSS<sup>208</sup>

- 2.75 In many cases the injured person may have to wait a number of years before receiving compensation from the defendant,<sup>209</sup> during which time the sum to which he or she is entitled could have been earning interest if prudently invested. The principle of full compensation suggests that he or she ought to be compensated for this loss. However, prior to 1970 it was not the courts’ practice to make awards of interest on damages for personal injury, although they had the power to do so under section 3(1) of the Law Reform (Miscellaneous Provisions)

<sup>204</sup> See para 2.68 above.

<sup>205</sup> Known as “Duxbury” calculations, after *Duxbury v Duxbury* [1987] 1 FLR 7, the first case in which they were used.

<sup>206</sup> (1994) Law Com No 224.

<sup>207</sup> Compensation for Personal Injury: How Much Is Enough? (1994) Law Com No 225. We explain at para 1.6 n 17 above that we have had a very short period of time in which to consider the Court of Appeal’s judgment.

<sup>208</sup> We have not yet discussed, in our damages project, interest on damages for pecuniary loss generally. Therefore, although the main subject of this paper is the recovery, as part of damages, of the plaintiff’s expenses, the discussion of interest in this section relates to all forms of pecuniary loss including, eg, loss of earnings. For discussion of interest on damages for *non-pecuniary* loss, see Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140, paras 2.41-2.47 and 4.105-4.125.

<sup>209</sup> See, eg, (1994) Law Com No 225, para 4.2, pp 70-72, which found that a substantial proportion of the cases surveyed remained unresolved four years after the date of the accident; and *Access to Justice* (June 1995), Interim Report by Lord Woolf to the Lord Chancellor on the civil justice system in England and Wales, pp 12-15, 184.

Act 1934. Section 22 of the Administration of Justice Act 1969<sup>210</sup> made the award of interest on damages exceeding £200 compulsory in personal injury claims, in the absence of special reasons to the contrary. The relevant statutory provisions are now found in section 35A of the Supreme Court Act 1981<sup>211</sup> and section 69 of the County Courts Act 1984.<sup>212</sup> Under these provisions, as under those which preceded them, the court must make an award of interest<sup>213</sup> on damages for personal injury exceeding £200 but it is given a discretion as to what part(s) of the total award should carry interest, in respect of what period, and at what rate.

- 2.76 No interest will be recovered on damages for future pecuniary loss:<sup>214</sup> the rationale behind the award of interest, that there is a delay between the loss and the receipt of the damages compensating that loss for which the plaintiff must be compensated, clearly does not apply.<sup>215</sup> The general rule as to how courts should exercise their discretion in awarding damages for *past* pecuniary loss was laid down in *Jefford v Gee*.<sup>216</sup> In that case, the plaintiff had lost earnings over the period from the accident until the trial, and had also incurred medical expenses and some other pecuniary loss soon after the accident. It was held that the plaintiff could recover interest on the damages awarded for the lost earnings: the figure was ascertained by applying the appropriate rate of interest<sup>217</sup> to the total loss over the period from the date of the accident to trial, and halving the resulting figure.<sup>218</sup> The court acknowledged that this method of calculation was less accurate than calculating interest on the loss on a week-by-week basis,<sup>219</sup> but regarded the “rough and ready” alternative as sufficiently fair. Interest on the expenses was calculated in the same way. Although it was recognised that in principle the interest on each of the expenses should run from the date on which it was incurred, it was held that the size of the amounts involved did not warrant separate calculation, and so, for the purposes of calculating interest, those items were simply added onto the figure representing lost earnings.

<sup>210</sup> Amending s 3(1) of the 1934 Act. This followed the recommendations of the Winn Committee (1968) Cmnd 3691.

<sup>211</sup> Inserted by s 15 of the Administration of Justice Act 1982. This applies to proceedings before the High Court.

<sup>212</sup> For proceedings in the county courts. This replaces s 97A of the County Courts Act 1959 (inserted by s 15 of the Administration of Justice Act 1982) and its terms are virtually identical to those which apply in the High Court.

<sup>213</sup> Which under the terms of the legislation is simple, not compound interest. We did not favour compounding interest in our *Report on Interest* (1978) Law Com No 88, Cmnd 7229, para 85. As the question of compounding goes to interest generally, and not merely to interest on damages for personal injury, we shall not be re-examining it in this paper.

<sup>214</sup> *Jefford v Gee* [1970] 2 QB 130, 147, *per* Lord Denning MR.

<sup>215</sup> Indeed, awards for future loss and expenses are discounted to reflect the fact that the plaintiff has been compensated *before* the loss or expense is incurred: see para 2.65 above.

<sup>216</sup> [1970] 2 QB 130.

<sup>217</sup> See para 2.77 below.

<sup>218</sup> [1970] 2 QB 130, 146-147, *per* Lord Denning MR (giving the judgment of the court). He said (at p 146) that “the total loss could be taken from accident to trial: and interest allowed only on half of it, or for half the time, or at half the rate.”

<sup>219</sup> Ie, by calculating interest for each week by applying a weekly rate to that week’s lost income, and then aggregating all the weekly figures.

- 2.77 The rate used for calculating interest on pecuniary loss is the rate of interest applicable to the “special account”.<sup>220</sup> If the rate changes during the period for which interest is being calculated, the rate used in the calculation will be the average of those applicable during the period.<sup>221</sup> The rate used contrasts with the rate of two per cent now applied in respect of damages for non-pecuniary loss.<sup>222</sup> Whilst both of the two rates represent returns on a risk-free investment, the two per cent used for non-pecuniary loss is a real rate that omits any element of actual or anticipated inflation, since awards of damages for non-pecuniary loss are made according to the value of money at the time of the trial, and so the effect of inflation is reflected in the amount of the award, rather than in the interest.<sup>223</sup> The amount of damages awarded for past pecuniary loss, on the other hand, does not take account of inflation between the time when the loss is incurred and the trial, and so it is considered appropriate to include an inflationary element in the rate at which interest on such damages is calculated.
- 2.78 *Jefford v Gee*, then, laid down the general rule for calculating interest on damages for pecuniary loss. But the question remains as to the circumstances in which courts may depart from that rule. In *Ichard v Frangoulis*,<sup>224</sup> Peter Pain J had awarded interest at the full rate on special damages of £2,000 which had been incurred very soon after the accident, and distinguished *Jefford v Gee* on the basis that *Jefford* had involved interest on a continuing loss of earnings.<sup>225</sup> Moreover, in some other cases judges awarded interest at the full rate on lost earnings where the loss had ceased a long time before the trial.<sup>226</sup> Then, in the unreported case of *Prokop v Department of Health and Social Security*<sup>227</sup> the Court of Appeal upheld an award by Taylor J of interest at the full rate on the plaintiff’s special damages. Those damages were awarded largely to compensate earnings lost during the period before the end of 1979, nearly three years before the trial, and the interest

<sup>220</sup> Formerly the short term investment account: *Jefford v Gee* [1970] 2 QB 130, 148-149. The interest rate on the special account is set from time to time by the Lord Chancellor with the concurrence of the Treasury: Court Fund Rules 1987, r 27. See also Supreme Court Practice 1995, vol 2 para 1253. The current rate, applicable since 1 February 1993, is 8%.

<sup>221</sup> In *Jefford v Gee* [1970] 2 QB 130, 149, *per* Lord Denning MR, this average was calculated by simply taking the mean of the three rates which had been in force during the period (about 2½ years) between the accident and the trial.

<sup>222</sup> Following *Wright v British Railways Board* [1983] 2 AC 773, approving the earlier decision in *Birkett v Hayes* [1982] 1 WLR 816. See Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140, paras 2.42-2.46.

<sup>223</sup> Although we have questioned whether awards have actually kept pace with, and fully reflected, inflation: see (1996) Consultation Paper No 140, paras 4.34-4.51.

<sup>224</sup> [1977] 1 WLR 556.

<sup>225</sup> The interest in *Ichard v Frangoulis* was calculated from a date about three months after the date of the accident, to adjust for the fact that “the defendant [*sic*: this must be a reference to the plaintiff] may not have paid all his bills immediately”: [1977] 1 WLR 556, 558. It is not clear from the report exactly what the special damages comprised, but it is assumed, from the reference to “bills”, that they must have consisted of medical or similar expenses.

<sup>226</sup> See, eg, *Dodd v Rediffusion (West Midlands) Ltd* (unreported, 4 December 1979).

<sup>227</sup> Unreported, 5 July 1983 (Stephenson, Griffiths and May LJ). See *Kemp & Kemp* vol 1 para 16-020; N J Worsley, “Rate of Interest on Special Damages in Personal Injury Cases” [1986] Law Soc Gazette 2826.

was calculated over the period from the beginning of January 1980 to the date of the trial. May LJ said,

...[I]t is, I think, quite clear from the judgment, and indeed from the application of arithmetical commonsense, that the half-rate approach there [in *Jefford v Gee*] referred to is only applicable to cases where the special damages comprise more or less periodical losses which are continuous from the date of the accident to the date of the trial; these are more often than not lost earnings.

2.79 However, in *Dexter v Courtaulds Limited*,<sup>228</sup> a few months after the decision in *Prokop*, a differently constituted Court of Appeal<sup>229</sup> strongly affirmed a broad application of the *Jefford v Gee* principle. The plaintiff sued his employers in respect of an accident at work which took place in August 1977. The damages for loss of earnings covered an absence from work for four months from the time of the accident, and a shorter absence of six weeks in 1978: the trial took place in 1982. The Court of Appeal rejected the plaintiff's cross-appeal, in which he had argued that the interest on the lost earnings should be calculated at the full rate for the whole of the periods of loss, and instead applied the approach used in *Jefford v Gee*, which ought to be applied in cases "falling within the broad spectrum of personal injury cases".<sup>230</sup>

2.80 Giving the court's judgment, Lawton LJ said, however, that there may be special circumstances in which courts would be justified in applying a different approach, and gave two examples:

...a high-earning self-employed man. He is off work for something like three or four months, thereby having sustained a very substantial loss of income, but for some reason the trial does not come on for four or five years. ... Another kind of case where there may be special circumstances ... is where a man sustains an injury so serious that it requires an expensive operation, which he pays for out of his own pocket and which is successful, so that he is able to go back to work soon after the accident. Again, for some reason beyond his control, the trial does not come on for four or five years.<sup>231</sup>

2.81 Lawton LJ referred to the first-instance decisions of *Ichard v Frangoulis*<sup>232</sup> and *Dodd v Rediffusion (West Midlands) Ltd*,<sup>233</sup> both of which had been cited by the plaintiff's counsel, and whilst not expressly disapproving either decision, made it clear that the approach adopted in those two cases should only be applied very narrowly. He added that where a plaintiff was seeking to make an exception to *Jefford v Gee* this, and the special circumstances justifying the exception, should

<sup>228</sup> [1984] 1 WLR 372.

<sup>229</sup> Lawton, Fox and Kerr LJJ.

<sup>230</sup> [1984] 1 WLR 372, 376, *per* Lawton LJ.

<sup>231</sup> *Ibid*, 375.

<sup>232</sup> [1977] 1 WLR 556: see para 2.78 above.

<sup>233</sup> Unreported, 4 December 1979: see para 2.78 above.

be specifically pleaded.<sup>234</sup> There was, however, no mention, either in the judgment or in the arguments of counsel, of the Court of Appeal's previous decision in *Prokop v Department of Health and Social Security*.<sup>235</sup>

- 2.82 It is difficult to reconcile the decision in *Dexter v Courtaulds Limited* with the one in *Prokop v Department of Health and Social Security*, in deciding in any individual case whether or not to apply the method used in *Jefford v Gee* for calculating interest. No doubt, the longer the period between the date of the loss and the trial, the more likely it is that the rule in *Jefford v Gee* will not be applied. Furthermore, it seems more likely that the rule will be applied strictly in relation to an ongoing loss such as a loss of earnings than in relation to single items of expenditure, although even in *Dexter v Courtaulds Limited* the Court of Appeal envisaged the possibility of disapplying the rule where the trial had been very delayed and the amount of earnings was substantial.<sup>236</sup> But the overall position is far from clear.<sup>237</sup>
- 2.83 We should add that, for the purposes of calculating interest, damages awarded in respect of care given gratuitously to the plaintiff will be treated as damages for pecuniary loss, rather than non-pecuniary loss,<sup>238</sup> and so the interest rate applied will be the special account rate rather than the lower rate of two per cent applied to damages for non-pecuniary loss.

<sup>234</sup> [1984] 1 WLR 372, 376-377. Kerr LJ had made the same suggestion in the course of the arguments. See *McGregor on Damages* (15th ed 1988) paras 602 and 1771.

<sup>235</sup> Unreported, 5 July 1983: see para 2.78 above.

<sup>236</sup> [1984] 1 WLR 372, 375, *per* Lawton LJ.

<sup>237</sup> For discussions of the position from different perspectives, see R L Denyer, "Rate of Interest on Special Damages in Personal Injury Actions" [1986] Law Soc Gazette 1293 and N J Worsley, "Rate of Interest on Special Damages in Personal Injury Cases" [1986] Law Soc Gazette 2826.

<sup>238</sup> *Roberts v Johnstone* [1989] QB 878, 895.



## PART III

# OPTIONS FOR REFORM

- 3.1 We divide our discussion of the options for reform into five main sections: 1. Medical and Nursing Expenses and Other Costs of Care;<sup>1</sup> 2. The Plaintiff's Accommodation;<sup>2</sup> 3. The Management of the Plaintiff's Affairs;<sup>3</sup> 4. Losses Arising out of the Plaintiff's Divorce;<sup>4</sup> 5. Interest on Damages for Pecuniary Loss.<sup>5</sup>

### 1. MEDICAL AND NURSING EXPENSES AND OTHER COSTS OF CARE

#### (1) Section 2(4) of the Law Reform (Personal Injuries) Act 1948<sup>6</sup>

- 3.2 Ever since its inception, section 2(4) has attracted criticism from the judiciary and academics alike.<sup>7</sup> Recommendations for reform have been made by the Pearson Commission and by the Scottish Law Commission.

- 3.3 In the Pearson Report it was recommended that

...section 2(4) of the Law Reform (Personal Injuries) Act should be repealed; and that in [its] place it should be provided 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.<sup>8</sup>

- 3.4 This recommendation has itself attracted criticism. It has been suggested that the reference to "medical grounds" is inappropriate.

There are valid reasons other than medical ones why a particular person should elect to be treated privately, such as the opportunity that private treatment provides for the patient to choose the time least inconvenient to himself for a non-urgent operation... it would be

<sup>1</sup> See paras 3.2-3.80 below.

<sup>2</sup> See paras 3.81-3.97 below.

<sup>3</sup> See paras 3.98-3.103 below.

<sup>4</sup> See paras 3.104-3.111 below.

<sup>5</sup> See paras 3.112-3.117 below.

<sup>6</sup> If the reforms referred to at paras 3.19-3.42 below were implemented (enabling the NHS to recoup the cost of treating tortiously injured patients from the tortfeasor) the importance of section 2(4) of the 1948 Act would be reduced in the sense that a defendant would have to pay the medical costs whether to the plaintiff (for private treatment) or to the NHS (if the victim was treated on the NHS). But section 2(4) would remain of central importance to the extent that the private costs exceeded the costs that the NHS could recoup.

<sup>7</sup> See, for example, *Lim Poh Choo v Camden & Islington HA* [1980] AC 174, 188, *per* Lord Scarman; P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) pp 181-183; A Ogus, *The Law of Damages* (1973) p 175.

<sup>8</sup> (1978) Cmnd 7054, para 342.

unfortunate if courts were to be precluded from giving weight to considerations of this kind.<sup>9</sup>

3.5 The Scottish Law Commission suggested that the application of the ordinary test of reasonableness to private medical expenses would lead to more satisfactory results than the present section 2(4).<sup>10</sup> But this test encounters the difficulties raised by the Monckton Committee,<sup>11</sup> that is, that courts would be involved in making very difficult and politically sensitive comparisons of the respective merits of NHS and private services.

3.6 The specific criticisms directed at section 2(4) can be grouped under three main headings:

(a) arguments based on the duty to mitigate;

(b) arguments based on the possibility that the plaintiff might use NHS facilities having obtained damages for private health care; and

(c) arguments based on the ultimate incidence, spread by insurance, of the cost of the damages.

**(a) Duty to mitigate**

3.7 It is a settled principle both in contract and in tort, that a plaintiff may not recover damages in respect of loss which he or she ought to have avoided.<sup>12</sup> This is referred to by saying that the plaintiff has a duty to mitigate his or her loss. The operation of the principle in relation to the tort of negligence might be illustrated by supposing that a plaintiff owns a small car, for example, a Mini, which is damaged in a collision caused by the defendant's negligence. Suppose also that the plaintiff needs the continuous use of a car, but it will take a week to repair the Mini. The plaintiff would be entitled to recover from the defendant the cost of hiring a similar car while the Mini was being repaired: he or she would not, however, be entitled to recover the cost of hiring a Rolls-Royce.<sup>13</sup> If the plaintiff were allowed to recover the cost of hiring the Rolls-Royce, this would clearly be unjust from the defendant's point of view, given that the object of awarding compensatory damages is to put the plaintiff, as far as possible, in the same position as if the tort had not occurred,<sup>14</sup> and this result would, for the period of the hiring, put the plaintiff in a much *better* position. It could also be viewed as an inefficient diversion of scarce resources from those who ultimately pay the

<sup>9</sup> J A Jolowicz, "Compensation for Personal Injury and Fault" in *Accident Compensation after Pearson* (ed Allen, Bourn and Holyoak) p 64.

<sup>10</sup> Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services (2) Admissible Deductions (1978) Scot Law Com No 51, paras 81-83.

<sup>11</sup> See para 2.7 above.

<sup>12</sup> See, eg, *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689, per Viscount Haldane LC: this case involved an action for breach of contract. See also *McGregor on Damages* (15th ed 1988) pp 171-196.

<sup>13</sup> See *Watson Norie v Shaw* (1967) 111 SJ 117.

<sup>14</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, per Lord Blackburn.

damages, through third party insurance premiums, to a use which the plaintiff would not have chosen to pay for out of his or her own money.

- 3.8 It must be asked, then, whether the choice facing the plaintiff in the example, between hiring a Mini and hiring a Rolls-Royce, is in any way parallel to the choice facing a plaintiff, between relying on treatment by the NHS and arranging treatment in the private sector. Under section 2(4) of the 1948 Act, this choice must be disregarded.<sup>15</sup> To answer the question it is necessary to consider the differences between NHS treatment and private treatment. It will be assumed, for these purposes, that the quality of the actual medical care is comparable as between the two. Nevertheless, differences do exist, in matters such as the speed with which the patient can receive treatment, the degree of choice in the time and location of the treatment, with resulting convenience to the patient, and, possibly, the degree of privacy and comfort in the hospital surroundings. Unlike the hire of the Rolls-Royce in the above example, however, it would seem that these “extras” are closely connected with the matter of putting the plaintiff into a state as near as possible to his or her pre-accident state, and should not therefore be excluded from recovery.<sup>16</sup>
- 3.9 Moreover, although plaintiffs are, as a general rule, required to mitigate their loss, the standard of reasonableness demanded of the plaintiff is not a high one.<sup>17</sup> It can also be argued, although the authorities are divided, that the onus of proof, to show that the plaintiff has behaved unreasonably, is on the defendant who, after all, has caused the damage.<sup>18</sup> In our view, therefore, it is not contrary to the mitigation principle to give the plaintiff a choice between NHS and private treatment. Exercising that choice in favour of private treatment may bring the plaintiff additional benefits<sup>19</sup> but it is reasonable to allow the plaintiff those benefits, provided that the expenditure is not unreasonably incurred in itself.

***(b) Plaintiff using NHS facilities having obtained damages for private medical expenses.***

- 3.10 Where the plaintiff receives damages for future medical expenses, there is no obligation on the plaintiff to spend the award on private medical treatment. There is nothing to prevent the plaintiff from subsequently seeking treatment under the NHS, notwithstanding that the damages were awarded upon the

<sup>15</sup> Of course, if there is no choice, because the relevant treatment is not available through the NHS, then the question does not arise, and there can be no objection to the recovery of the cost of private treatment, as long as it satisfies the usual criteria of reasonableness.

<sup>16</sup> Indeed, in some circumstances the extra cost of private treatment may be offset by a mitigating effect on damages awarded under another head, for example where a plaintiff is able to have private treatment at times which do not conflict with his or her work commitments, and is thereby able to reduce his or her loss of earnings.

<sup>17</sup> See, eg, *Banco de Portugal v Waterlow* [1932] AC 452, 506, *per* Lord Macmillan (a case involving a breach of contract rather than a tort).

<sup>18</sup> *Roper v Johnson* (1873) LR 8 CP 167; *Garnac Grain Co Inc v Faure & Fairclough Ltd* [1968] AC 1130 (note). Cf *Selvanayagam v University of West Indies* [1983] 1 WLR 585.

<sup>19</sup> See para 3.8 above.

assumption that he or she would seek private medical treatment. A plaintiff who behaves in this way is being overcompensated for his or her loss.<sup>20</sup>

- 3.11 It must be doubted, however, whether this is a real problem in practice. Case law shows that the courts are careful in assessing the plaintiff's intention in claims for private medical expenses.<sup>21</sup> Damages awards will be reduced where the court is persuaded that the plaintiff will not always be able to acquire permanent nursing help in the future, for example because suitable employees are in short supply, thus causing the plaintiff to fall back on the NHS. In any event, an element of prediction - with the inherent risk of over-compensation or under-compensation - is necessarily present in any calculation of future loss, assuming the existence of a system which awards lump-sum damages once-and-for-all rather than, for example, damages in the form of reviewable periodic payments.<sup>22</sup>
- 3.12 If there is thought to be a significant problem, one possible solution would be to require an undertaking from the plaintiff that he or she would actually use the damages for the purpose of paying for private medical treatment. But it is unclear how such an undertaking would be enforced and by whom. Another possible solution would be to make payment conditional on the production of bills. But it is unclear by whom the bills should be received and checked, and this approach would not only increase administrative costs but would lead to potential continuing disputes.
- 3.13 It seems to us that this supposed objection to section 2(4) is, at root, one that could be equally well directed at all assessments of future loss. For good reasons, based on the advantages of finality in litigation, the law has in general adopted a system of once-and-for-all assessments, with its corollary that, having recovered those damages, the plaintiff is free to spend them as he or she wishes. We would regard it as odd to depart from that conventional system solely in relation to damages for future costs of care.

**(c) Insurance and cost**

- 3.14 It can be argued that, even if it is appropriate for the additional financial burden of providing health care that results from the operation of section 2(4) to fall on a tortfeasor, it is inequitable for it to fall on the public as a whole. And, arguably, the public does generally pay for tort damages, because they are not ultimately paid by individuals or isolated sources, but rather by "risk pools", comprising

<sup>20</sup> Pearson Report, vol 1, para 341. See also para A.61 below.

<sup>21</sup> *Cunningham v Harrison* [1973] QB 942; *Lim Poh Choo v Camden & Islington HA* [1980] AC 174; *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617; *Woodrup v Nicol* [1993] PIQR Q104. See paras 2.10-2.14 above.

<sup>22</sup> Consideration of the viability of periodic damages falls outside the scope of this paper, but see, eg, our consultation paper on Structured Settlements and Interim and Provisional Damages (1992) Consultation Paper No 125, paras 2.3-2.42, for a discussion of the advantages and disadvantages of lump sum damages.

large sections of the community, which absorb the cost through insurance or other loss-spreading processes.<sup>23</sup> Hence the following criticism:-

It is not at all obvious why, nearly forty years after the beginning of the National Health Service, we should continue to subsidize those who seek private treatment in the way that the tort system does. No doubt private treatment is often desirable. Private nursing at home is better than hospitalisation, and a private room in a nursing home is doubtless more comfortable than a public ward in a hospital. If these “luxuries” were really paid for by negligent defendants, they might be justified. But it is the public who pays in some form or another for these luxuries. And the obvious question arises: why should persons with a tort claim enjoy such public benevolence when others desiring private hospital or nursing care must provide it for themselves? It seems difficult to justify the present position.<sup>24</sup>

3.15 This argument raises fundamental questions about the basis and justification of the tort system. Acceptance of it would require not only a repeal of section 2(4) but also that the common law entitlement to damages for reasonably incurred private health costs be abolished. Moreover, carried to its logical conclusion the argument would seem to cast doubt on the very existence of the tort system for personal injuries. For if we ignore the defendant’s individual responsibility, and instead regard tort as being a system that is concerned to spread a victim’s loss amongst the public at large, one may conclude that there can be little, if any, justification for a system which (compared to, say, a social welfare system) costs so much to compensate so few.<sup>25</sup>

3.16 In this project, however, our terms of reference require us to consider improvements to the present tort system rather than replacement of it.<sup>26</sup> In any event, we are prepared to accept the traditional view that tort is justified as a system for ensuring that full compensation is paid to those who have been injured by another’s negligence (or other legal wrong). In Jane Stapleton’s words:-

“[Tort is concerned with] restoration of the victim to his pre-misfortune position so far as money is able. No state system of support provides this level of cover. Tort does, but also predicates the level of support on the party responsible for the misfortune being identified: and that party alone is required to make the payment to the victim.”<sup>27</sup>

3.17 On our approach, therefore, we confess and avoid the objection that section 2(4) results in the public paying for private health care. Put another way, as the central

<sup>23</sup> See Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death*, p 188. See also A Ogus, *The Law of Damages* (1973) p 175.

<sup>24</sup> P Cane, *Atiyah’s Accidents, Compensation and the Law* (4th ed 1987) p 182. This is a fuller version of the argument contained at p 137 of the 5th edition.

<sup>25</sup> In the sense that the costs inherent in operating the tort system are extremely great in relation to the number of people compensated by that system.

<sup>26</sup> See para 1.2 above.

<sup>27</sup> J Stapleton, “Tort, Insurance and Ideology” (1995) 58 MLR 820, 823.

tort principle that the victim is entitled to be fully compensated by the tortfeasor means that damages should cover reasonably incurred private health costs, it is simply a non-argument to point to who ultimately may share the burden of those costs.

- 3.18 **Having considered the perceived disadvantages of section 2(4), our provisional view is that section 2(4) should not be repealed or reformed. We invite consultees to say whether they agree with that provisional view. If consultees do not agree we invite them to say, with their reasons, whether they would prefer a simple reasonableness test, as the Scottish Law Commission recommended,<sup>28</sup> or a test of reasonableness on medical grounds, as the Pearson Commission recommended.<sup>29</sup>**

## **(2) Recoupment of costs by the National Health Service<sup>30</sup>**

### ***(a) Introduction***

- 3.19 It has been seen<sup>31</sup> that where a plaintiff has received, or is expected to receive, treatment free of charge through the NHS, he or she will recover no damages in respect of that treatment. As between the plaintiff and the defendant this rule is justified, because it means the plaintiff does not recover damages for items for which he or she has not paid. However, once one looks at the position in terms of achieving a fair solution for all three parties involved, including the NHS, this outcome is open to question. If P receives from the NHS treatment worth £1,000 and does not recover damages for that treatment, there is no gain or loss as between P and D but the NHS loses £1,000.
- 3.20 A right for the NHS to recoup from the tortfeasor costs caused by the tort would cover this loss and the question addressed in this section of the paper is whether or not such a right should be granted.<sup>32</sup> It may be helpful at the outset to summarise our central conclusions on this issue as a guide to what follows. There is an argument of legal principle that the NHS should have a recoupment right. Furthermore such a right has already been granted by statute in a number of analogous situations, notably to enable the DSS to recover from tortfeasors benefit paid to those they have injured. Also private medical insurers and individual carers are indirectly able to recoup from tortfeasors, through the victim's claim, care costs as a result of the tort. The principled case for recoupment is not outweighed by an argument about who would ultimately bear the cost of NHS recoupment, although it may be outweighed by the cost of it and in our view the detail of any proposed arrangements for recoupment should

<sup>28</sup> See para 3.5 above.

<sup>29</sup> See para 3.3 above.

<sup>30</sup> This section concentrates solely on services provided free of charge by the NHS, although much care is also provided free of charge by local authorities, eg under Chronically Sick and Disabled Persons Act 1970, s 2. Not all services provided by local authorities are free: see para 2.2 n 9 above.

<sup>31</sup> Para 2.2 above.

<sup>32</sup> Many other jurisdictions allow for some form of recoupment, usually through subrogation but in some cases through a direct claim for the care provider. See paras A.60, A.70 and A.81-A.82 below.

therefore be subject to a cost-benefit analysis. A further issue is whether it is practically possible to cost NHS care to be recouped. Assuming that it was thought that there should be NHS recoupment we consider that it should take the form of the NHS having a direct claim against the tortfeasor which is parasitic on the victim being awarded damages, or on there being an agreement by the tortfeasor to pay the victim damages. We also conclude that it would be sensible to adopt similar administrative arrangements to those used for the recoupment of social security benefits.

**(b) The argument of principle**

- 3.21 To grant the NHS a right in tort to recover from the tortfeasor damages to cover its care costs caused by the tort, may be said to be contrary to the normal negligence principle that pure economic loss is irrecoverable. However, the restitutionary principle of unjust enrichment arguably supports such a right for the NHS. In providing free care the NHS, under legal compulsion, in reality discharges a part of the tortfeasor's liability.<sup>33</sup> It is arguable, therefore, that the tortfeasor is unjustly enriched at the expense of the NHS so that prima facie the NHS has a restitutionary right against the tortfeasor to recover its outlay.<sup>34</sup>

**(c) Analogies**

- 3.22 NHS costs can be recouped from defendants' third-party insurers or owners of vehicles in limited circumstances pursuant to sections 157 and 158 of the Road Traffic Act 1988.<sup>35</sup> Even more significantly, the state is entitled, by statute, to recoup payments of social security benefit from damages.<sup>36</sup> There is an argument

<sup>33</sup> In *Metropolitan Police District Receiver v Croydon Corpn* [1957] 2 QB 154 the Court of Appeal denied a restitutionary right to recover from the tortfeasor sick pay, paid to the victim pursuant to statutory obligation, on the basis that the tortfeasor's liability had not been discharged by the sick pay, because a court would deduct it in assessing the victim's damages. This can be criticised as an over-technical approach and is to be contrasted with the judgment of Slade J at first instance. In reality, as Slade J recognised, the tortfeasors had been relieved of part of their liability. See A Burrows *The Law of Restitution* (1993) p 218. The first-instance decision is reported at [1956] 1 WLR 1113.

<sup>34</sup> For the acceptance of the principle against unjust enrichment in English law, see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 WLR 802. It should be noted that resting recoupment on the tortfeasor's unjust enrichment at the expense of the NHS (rather than seeking to compensate the NHS for a wrong done to it) means that there is a clear principled difference between the recoupment that we are here considering and the non-recovery of costs for the treatment of self-inflicted illness (due to, eg, smoking or alcohol). Similarly, the case of the NHS is distinct from other emergency services (eg the police and fire brigade) in that, if it were not for the NHS, the defendant would be liable for the cost of similar services, available elsewhere at a price. In contrast, the services provided by the police and fire brigade in response to a tort are rarely, if ever, available elsewhere.

<sup>35</sup> See para 2.15 above.

<sup>36</sup> Social Security Administration Act 1992, Part IV. The Government has announced that it proposes to reform certain aspects of the scheme for benefit recovery, although compensators will remain liable to repay all relevant Social Security benefits (which is almost all benefits) paid to successful tort plaintiffs in respect of their injuries. (The central reform is that compensators will only be allowed to offset the sum repaid to the DSS against compensation to the victim for losses similar to those for which the benefits were paid. It will no longer be possible for the victim's damages for pain, suffering, and loss of amenity to be reduced by the operation of DSS recoupment.)

by analogy for recoupment of expenses incurred by the state in providing NHS care.

- 3.23 Furthermore if, in our example in paragraph 3.19 above, P had been treated privately, the care-provider would be paid by P who would in turn be able to claim compensation from D. Moreover, if a plaintiff has private health insurance, and so does not itself incur any expense, the indemnity insurer can recoup the money paid out from the tortfeasor through its subrogation rights. Hence it has been argued:

Private medical insurers such as BUPA are entitled to recover their outlays, and the NHS should not be put in a more disadvantageous position than a medical insurer.<sup>37</sup>

- 3.24 A possible counter-argument is that the NHS' function is entirely different to that of providers of private health care, in that its *raison d'être* is to provide services free of charge. The fact that services are provided gratuitously to a plaintiff is, however, not necessarily a bar to the recoverability of those costs in other contexts. A parallel can be drawn with nursing care provided to the plaintiff free of charge. It is clearly established that such costs are recoverable, albeit as part of the plaintiff's claim.

#### ***(d) Some possible policy or practical objections to recoupment***

*(i) "Taking with one hand to give back with the other"?*

- 3.25 It may be said that regardless of legal principle and analogous rights, NHS recoupment would be pointless because it would involve recovering money from those who contribute to liability insurance for the benefit of taxpayers who fund the NHS, when these are two large groups which significantly overlap.<sup>38</sup> But we reject this counter-argument. First, these two groups are not identical. Some would say that this is significant, for example on the basis that there is a benefit in burdening the first group (insurance premium payers) in favour of the second (all taxpayers), because this confines the cost of tort compensation to those who benefit from activities leading to tort liability.<sup>39</sup>
- 3.26 Secondly, it is likely that recoupment provisions would have no effect on the tax burden as a whole, but would rather be seen as providing an extra valuable source of public finance which could be used by the state for some purpose which would otherwise have to be forgone.<sup>40</sup> If this is an accurate estimation of

<sup>37</sup> See A Dismore and F Whitehead, *Personal Injury Law* in D Bean (ed), *Law Reform for All* (1995) pp 193-194.

<sup>38</sup> See Cane in *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) pp 339-342 for detailed analysis of who pays the costs of tort compensation. Analogous arguments seem to have been the justification for the abandonment of subrogation rights in relation to state benefits in Sweden: see para A.81 n 233 below.

<sup>39</sup> Although there will be persons who benefit to a greater or lesser extent from the activity without paying insurance premiums, eg passengers in motor vehicles.

<sup>40</sup> In *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 329 Cane says the following of the point that under the 1989 DSS recoupment scheme it is the state which benefits from deduction from tort damages of benefits rather than the defendant, as was



the effect of NHS recoupment, it is not true to say that recoupment recovers money for taxpayers, and it is irrelevant to what extent that group overlaps with contributors to liability insurance.

- 3.27 It may affect views on the merits of NHS recoupment if sums recouped went direct to the NHS. We have, however, assumed this not to be the case, given our understanding of how the DSS scheme works in this respect<sup>41</sup> and our impression that it would be unrealistic to imagine that the State would fetter its discretion to spend public funds as it saw fit.

*(ii) Cost of recoupment*

- 3.28 While we believe that there are good arguments in favour of a recoupment right for the NHS, we recognise that the desirability of this may be outweighed by its cost.<sup>42</sup> For example, in respect of sections 157 and 158 of the Road Traffic Act 1988, while NHS costs attributable to motor accidents were about £50 million in 1976, the amount collected under these statutory provisions in 1981-1982 was only about £3.8 million, with the cost of collection being about twenty-five per cent of this figure.<sup>43</sup> Stapleton says of this issue

...we might think it morally incoherent if our compassionate desire to provide victims of particularly worrisome misfortunes with a social safety net is interpreted as equally extending to shield those who caused those very misfortunes, even if in the end we are forced to acknowledge that the cost of the necessary techniques to claw back from injurers the cost of the support provided to the victim by the scheme of socialised risk is often so high that they are not administratively viable or would undercut the efficiency of the safety net.<sup>44</sup>

- 3.29 The precise cost of NHS recoupment would depend on the detail of any mechanism advocated. Indeed, a final decision should not be taken on adopting a particular recoupment scheme without a detailed cost-benefit analysis. It has, however, been estimated that the cost of accidents to the NHS is in the region of

previously the case: "From one point of view, this difference is not of great importance because, at the end of the day, compensation for personal injuries and social security benefits are both paid for by a large section of members of the public. But the difference between public expenditure and private expenditure is of great political importance, and the main motivation for the 1989 provisions is to reduce public spending."

<sup>41</sup> For example there was no suggestion in discussion of the scheme in the 1994-5 enquiry by the Social Security Select Committee that the benefits recouped would be "earmarked" for additional social security expenditure.

<sup>42</sup> See P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 321 where he says: "Even if we thought that subrogation was in principle a good idea in certain circumstances (for example, under the Social Security Act 1989), we might want to reconsider the matter if it turned out that the cost of enforcing rights of subrogation was very high relative to the amounts recovered."

<sup>43</sup> *Ibid*, p 342-343.

<sup>44</sup> Jane Stapleton, "Tort, Insurance and Ideology" (1995) MLR 820, 844.

£1 billion a year.<sup>45</sup> It is very problematic even to “guesstimate” the amount which may potentially be recouped by the NHS. An obvious problem is that the amount spent by the NHS on tort victims depends on the seriousness of individual cases, but we do not know if the group of accident cases in respect of which tort damages are recovered has different overall characteristics, for example as to average seriousness, from accidents in general. Assuming that accidents which lead to the recovery of tort damages do not differ on average from accidents in general, on the estimate that 12 per cent of accident victims are successful in tort claims,<sup>46</sup> the NHS would stand to recover £120,000,000 from accident claims. On this admittedly extremely rough calculation the cost of the recoupment scheme would have to be high to overcome on its own the case for it. Indeed, the cost-benefit analysis could be favourably adjusted by imposing a threshold so that, if the cost of treatment was below that threshold, the NHS would not be entitled to recoup it.<sup>47</sup>

- 3.30 There is another way in which the costs argument against recoupment provisions might be put. Recoupment provisions can be seen as a means to raise money for the State from those who contribute to liability insurance costs.<sup>48</sup> Some would say that, irrespective of whether recoupment is justified, there are much cheaper ways to achieve this policy objective, for example direct taxation whether of specific groups, such as motorists, or in general.<sup>49</sup> Our response to this is that the

<sup>45</sup> *Action on Accidents; The Unique Role of the Health Service* (National Association of Health Authorities, 1990), cited in P Cane *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 342.

<sup>46</sup> D Harris, M Maclean, H Genn, S Lloyd-Bostock, P Fenn, P Corfield and Y Brittan, *Compensation and Support for Illness and Injury* (1984) p 46

<sup>47</sup> Analogous to the threshold of £2,500 which applies in relation to DSS recoupment: see para 3.37 below. The Compliance Cost Assessment (“CCA”) referred to at para 3.30 n 48 below discusses the costs consequences of removing the DSS small payments limit. If, as we propose below, the NHS were to have a direct recoupment claim against the tortfeasor (so that the victim’s damages would not be affected by the recoupment) there would seem be no incentive on the parties to use the threshold for tactical purposes. There is such an incentive under the DSS recoupment provisions. For example, if a plaintiff has a claim worth (disregarding recoupment) £5,000, but has received £5,000 in social security payments, it is generally in his or her interest to settle for damages of £2,500 because he or she will keep the whole amount, whereas if the settlement is for any greater sum all the damages will be recouped by the DSS. (But note that the Government has announced its intention to remove the small payments limit because the CCA showed that it had influenced the amount of compensation in some cases.) Note that the cost-benefit analysis could also be adjusted by imposing a ceiling or cap on NHS recoupment. This would be unfavourable as regards the administrative cost of recoupment but would be favourable in terms of reducing the cost to defendants and liability insurers of recoupment.

<sup>48</sup> See the document commissioned by the DSS from Price Waterhouse *Compliance Cost Assessment Compensation Recovery Scheme*, January 1996, which estimates the extra costs involved, for example to insurers and liability insurance premium payers, of changes to the DSS recoupment scheme proposed by the Social Security Select Committee in June 1995. The changes proposed would involve both an increase in the total benefit recovered and additional administrative costs. This is a useful example of a detailed analysis of the true costs implications of recoupment of third party expenditure from tortfeasors.

<sup>49</sup> See P Cane *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 321 where he says “A classic example of the fatuity of subrogation is provided by the statutory rights given to hospitals to recover from insurers in respect of the cost of medical treatment given to road accident victims. The amount collected is much less than the full cost to the

justice of a recoupment scheme, both from principle and by analogy to recoupment mechanisms for the DSS, private medical insurers and individual carers, should not be disregarded. Furthermore while it may theoretically be possible to devise techniques which do even better on a cost-benefit analysis than a mechanism for NHS recoupment, we are not aware of one which is likely to command support at this point in time in the way that an NHS recoupment scheme may do.

*(iii) Costing NHS treatment*

3.31 Aside from the costs of a recoupment scheme, a further practical problem is how one can put a cost on NHS treatment and care. This is a problem that does not arise with the recoupment of social security benefits where not only is the benefit in monetary form, but also there are clear records kept of payments made to the victim, irrespective of the recoupment scheme.

3.32 Stapleton says:

The current requirement in the NHS “internal market” that some of the cost of support to patients be evaluated and recorded may provide the basis for cheaper administration of more aggressive reimbursement systems. It is worth noting that it is a controversial question whether the cost of such evaluations at present undermines the efficiency of the NHS’ delivery of services to an unacceptable degree.<sup>50</sup>

3.33 This raises crucial issues about how NHS recoupment might work in practice. Do recent changes to the NHS mean that the costing information needed for recoupment is available? If so, is that position likely to change and if it did, how would that affect a recoupment scheme? If not, is it possible to establish systems for this information to be recorded, which do not outweigh the benefit of NHS recoupment, and do not have an unacceptably adverse effect on delivery of NHS services? At what point in time would the costing be carried out, given that it might be wasteful for it to be carried out “just in case” it was required for recoupment? Could future costs be accurately assessed? Could one adopt a scale of standardised costs for different types of treatment? We are particularly concerned that recoupment might affect patient care, for example through putting an unacceptable burden on busy GPs or by interfering in the doctor/patient relationship. Indeed it may be that to avoid unduly burdening general practitioners, a recoupment scheme would need to be confined to the cost of care and treatment in hospital. The patient’s right to confidentiality must

National Health Service of treating motor accident victims and the costs of collection are high in relation to the sums involved. If it is desired to make motorists pay a part of these costs, it would be far simpler and cheaper for the state to impose a levy on insurance companies or an additional tax on motorists, which could then be used to help pay for the National Health Service. In 1976 the Government decided to levy a charge on motor insurance premiums to defray the full cost to the NHS of road accidents, but after lengthy discussions with the insurance industry, the proposals were abandoned as impractical.” Other European countries, eg Belgium, have used taxation to distribute funds from motorists: see para A.82 n 235 below.

<sup>50</sup> Jane Stapleton “Tort, Insurance and Ideology” (1995) MLR 820, 844.

also be respected. Our preliminary investigations suggest that there are serious difficulties here but we are not convinced that they are insurmountable. Clearly, however, our final recommendations will be heavily dependent on the views of those consultees who have detailed technical knowledge of how the NHS works.

*(iv) Hindering settlements*

- 3.34 One must bear in mind the likely effect of NHS recoupment on pursuit by tort victims of their own claims. If recoupment is likely to have a substantial effect, for example by delaying claims settlements, this would be a good practical argument against it.<sup>51</sup>

*(v) Encouraging unnecessary treatment*

- 3.35 It might be objected that the NHS would have an incentive to provide tortiously injured persons with unnecessary treatment if it could recoup the cost. We disagree. Any recoupment provision would be subject to the same basic reasonableness criterion that applies to the recoverability of the cost of private medical treatment, and there would be no more incentive for the NHS to provide treatment, which was not reasonable in the circumstances, than exists at present for providers of private health care.

***(e) What form should the recoupment scheme take?***

- 3.36 If, despite the problems identified, it were accepted that the law should be reformed to give the NHS a right of recoupment from the tortfeasor, the next question would be what precise legal mechanism and administrative system should be used to achieve this. At first sight, it might be thought that one could simply apply the fundamental elements of the DSS recoupment scheme. But, in our view, this is not appropriate. To explain why, it is necessary to give a brief account of the DSS scheme.
- 3.37 The DSS recoupment scheme applies to compensation payments in excess of £2,500<sup>52</sup> and prescribed benefits (almost all the social security benefits) paid to the plaintiff over five years from the date of the accident, or, if shorter, from the date of the accident to the settlement of the plaintiff's claim. In its written submission to the Social Security Select Committee in 1995, the Department of Social Security described the mechanics of the scheme thus:

Legislation require[s] compensators to advise the Department within 14 days of a claim being made against them for an amount in excess of the threshold. The scheme is administered by a special Compensation Recovery Unit based in Hebburn, Tyne and Wear, which is legally required to issue a Certificate of Benefit Paid within 28 days of receiving a request from the compensator for such a Certificate. The compensator must then send the amount specified in

<sup>51</sup> See also para 3.40(2)(b) below.

<sup>52</sup> See para 3.29 n 47 above, in relation to the proposed removal of this threshold.

the Certificate to the unit no more than 14 days after making the compensation payment.<sup>53</sup>

- 3.38 On receipt of a certificate of benefit, the plaintiff's solicitor can request that it be reviewed if there seems to be an error. If, on review, the CRU concedes that the certificate is incorrect, a fresh certificate is issued. If the review is decided against the plaintiff, there is a formal appeals procedure to a social security appeal tribunal and then, on a point of law, to a Social Security Commissioner. Any medical questions are referred to a medical appeal tribunal, whose decision on those questions is binding on the social security appeal tribunal. The initial appeal must be made within three months from the date of payment to the DSS.<sup>54</sup>
- 3.39 One cannot simply apply a fundamentally similar scheme to the recoupment of NHS costs because it would be inappropriate to deduct NHS costs from the plaintiff's damages. Social security benefits represent positive monetary gains that, if retained by the plaintiff on top of damages for full loss of earnings, would overcompensate him or her. Deduction of those benefits from the damages payable for loss of earnings therefore seems reasonable. But there is no equivalent prospect of overcompensating the plaintiff in respect of NHS costs because a plaintiff does not recover any damages in relation to these costs (and any "saving of expense" to the plaintiff is already deducted under section 5 of the Administration of Justice Act 1982).<sup>55</sup> It follows that one cannot use the scheme

<sup>53</sup> Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, Minutes of Evidence, p 10.

<sup>54</sup> J Hendy, M Day, A Buchan, *Personal Injury Practice* (1992) p 55; P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) p 329. Incidentally, legal aid is not available for the social security appeal. The Social Security Administration Act 1992, s 98(6) provides that a medical appeal tribunal must take into account any decision of any court relating to the same issues arising in connection with the accident, injury or disease in question. In evidence on 8 February 1995 before the Social Security Select Committee, Andrew Dismore, on behalf of the Association of Personal Injury Lawyers, a plaintiff personal injury organisation, said of the appeal procedure "...when one gets medical disputes it can create all sorts of problems because you can often not tell the client how much they will end up with at the end of the day. You can say, 'We think you will have to pay back to the DSS so-and-so' but you cannot be certain because of the medical issues which have to be resolved with the DSS later...The court may say, 'You have been off work four years but only two years of that is related to the accident, therefore I am only giving you compensation for two years.' The DSS may take a different view and will take off four years' worth of benefits and then you have to go through the appeal system to convince the Medical Appeal Tribunal months later that the judge who has heard all the medical evidence, argued and tested under our adversarial system, was wrong, whereas the Medical Appeal Tribunal on an inquisitorial basis, which may not even be composed of the right specialities of doctor compared to those who were called in court, has got it right. They tend to err on the side of keeping benefits rather than necessarily what the position was as found by the judge. Clients often find that difficult to understand." Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, Minutes of Evidence, p 47.

<sup>55</sup> See para 2.2 above.

of DSS recoupment which depends on a deduction being made from the damages that would otherwise be payable by the defendant.<sup>56</sup>

3.40 What alternative recoupment mechanisms might be adopted?<sup>57</sup> The possibilities subdivide into two classes:<sup>58</sup> in the first are mechanisms whereby the NHS' claim is against the tort victim and in the second are those where the NHS' claim is directly against the tortfeasor.

(1) NHS' claim against tort victim

(a) The NHS could charge the tort victim for the care, which costs could then be recovered by the victim from the tortfeasor. We reject this option. It would be unacceptable to require some people to pay for NHS care, even if they had the right to get their money back, when for others treatment remained entirely free. This would be particularly unfair when one takes account of the fact that by definition the tort victim has been injured by another's wrong. Furthermore, tort victims subject to NHS charges would be under pressure to sue, when the statistics show that many choose not to, and there would be no guarantee that they would be able to recover the sums paid to the NHS.<sup>59</sup> It would also be necessary for an ad hoc administrative judgment to be made by the NHS as to whether or not an injured person had a good tort claim, which we consider to be an unsatisfactory way of determining legal entitlements.

(b) A variant of (a) above would be to provide for the NHS to charge tort victims, conditional on their recovering the cost of NHS care from the tortfeasor. One possible model here is the scheme in operation in Ireland in relation to traffic accidents, under which the Health Board, providing health care in a similar way to the NHS, is required to charge victims for the care they receive where they have a claim in negligence, so that the charge then becomes part of the loss claimed by the plaintiff.<sup>60</sup> The legislation gives the

<sup>56</sup> Cf the scheme formerly in force in Australia in relation to the cost of Commonwealth benefits provided under health insurance legislation: see para A.34 n 95 below.

<sup>57</sup> In *Enterprise Responsibility for Personal Injury, Volume II: Approaches to Legal and Institutional Change* (1991) ch 6, the American Law Institute rejected "rehabilitation" of the US collateral source rule including more effective subrogation/reimbursement arrangements and said "an attempt to rehabilitate the rule...would involve the daunting task of developing procedures for effectively implementing subrogation and reimbursement of collateral sources. It is no surprise that such procedures have never been terribly effective" (p 179).

<sup>58</sup> We do not cite subrogation as one of the two main possibilities. Subrogation, in this context, would depend on the tort victim having a claim to recover NHS costs from the tortfeasor which the NHS could then take over. But under the present law the tort victim has no such claim. And to reform the law to give the victim such a claim, to which the NHS would then be automatically subrogated, seems needlessly complicated given that the NHS could instead be given a direct claim against the tortfeasor. For an excellent analysis of the general law on subrogation, see C Mitchell, *The Law of Subrogation* (1994).

<sup>59</sup> See para 3.29 above.

<sup>60</sup> Health (Amendment) Act 1986, s 2 (Ireland). See para A.20 below.

Health Board a right to waive or reduce the charge in the event of contributory negligence, or otherwise, having regard to the damages received by the plaintiff.<sup>61</sup> The cause of action in respect of the statutory charge does not accrue until, at the earliest, the date on which the damages are received by the plaintiff.<sup>62</sup> This approach would not have the major disadvantages of (a) set out above, but nevertheless some would be unhappy even with a notional NHS charge to some people and not to others. Also there would be technical problems to address, such as the priority between the victim's claim and the NHS' claim;<sup>63</sup> and if a case was settled without coming to court it would often be difficult to identify that part of the damages covering the cost of NHS care.<sup>64</sup>

- (c) The tort victim could be given a claim for damages for the cost of NHS care, which the victim would be required to hold in trust for, or to account for to, the NHS. This is the *Hunt v Severs*<sup>65</sup>/gratuitous carer model.<sup>66</sup> This mechanism would, however, be inappropriate in this context. There would be no incentive for the tort victim to include the NHS' claim in its action and it would be unacceptable to require that such claims be brought.

(2) NHS' claim against tortfeasor

- (a) The NHS could have a claim against the tortfeasor to recover its costs independently of whether the victim has claimed damages.<sup>67</sup> We reject this option for a number of reasons. Duplication of litigation over similar issues should be avoided. There would be a danger of this if the NHS' claim were independent of the victim's claim, as the same question might be the subject of different actions.<sup>68</sup> And if the NHS' claim in any sense barred the victim's claim (for example, if the NHS claimed first and failed to secure a finding of liability) the tort victim may feel aggrieved not to have an opportunity to argue the case himself. There is also the need to

<sup>61</sup> *Ibid*, s 2(2)(a).

<sup>62</sup> *Ibid*, s 3(2). If later than the date of receipt of damages, the charge will accrue when the services are provided.

<sup>63</sup> The problem of determining priority between a claim by the victim of the injuries and a claim by a third party is also encountered in jurisdictions where relatives of the injured person have an action for loss of services and consortium: see, eg, para A.23 below.

<sup>64</sup> Indeed it might be tactically advantageous for the parties to agree that no damages were being paid for the cost of NHS care.

<sup>65</sup> [1994] 2 AC 350.

<sup>66</sup> See paras 2.26-2.27 above.

<sup>67</sup> Cf the discussion, in paras 3.56-3.58 below, of a possible right for unpaid carers to recover direct from tortfeasors the cost of the care which they provide.

<sup>68</sup> The fact that the NHS was not a party to the main action for damages would presumably mean that the doctrine of *res judicata* would not be applicable.

respect the patient's right of confidentiality. This appears to mean that there could in any event only be an NHS claim where the victim had either put the medical effects of the tort in issue through proceedings, or given his or her consent. We have concerns about a system which provided for the patient's consent to be sought, as individuals may feel pressured to give this, although admittedly in the case of a private medical insurance the insurer has an automatic third party right.

- (b) The NHS could have a claim against the tortfeasor to recover its costs, parasitic on the victim being awarded (or there being an agreement by the tortfeasor to pay the victim) damages. Only once the victim's damages had been awarded (or agreed) could the NHS pursue its claim.<sup>69</sup> Analogously we would envisage that any finding of, or bona fide agreement on, contributory negligence would govern the percentage liability of the tortfeasor to the NHS as much as to the immediate tort victim.<sup>70</sup> This mechanism would avoid all of the problems identified with the other mechanisms discussed above. For example, no charge for NHS care would have to be made; there would be no issue as to the priority between the two claims; duplication of litigation over similar issues would be avoided; and the NHS would not be in breach of its duty of confidentiality.<sup>71</sup> For all of these reasons this is the recoupment mechanism which we would favour, if the NHS were to be given a third party claim. This is not to say that there are no difficulties. In particular, we are concerned as to whether there would be a significant hindering of settlements.<sup>72</sup> This might follow, for example, because settlements with victims would trigger a defendant's liability to the NHS; and because defendants would have an incentive to reach a settlement on there having been (and the percentage reduction for) contributory negligence.

3.41 Finally, consideration must be given to how best to minimise the administrative and litigation costs of such a recoupment mechanism.<sup>73</sup> It is in this context that

<sup>69</sup> The defendant's agreement to pay damages in an out-of-court settlement would therefore trigger liability to the NHS. For these purposes, the settlement would operate to establish the defendant's liability to the victim: cf s 1(4) of the Civil Liability (Contribution) Act 1978.

<sup>70</sup> The purpose of emphasising that the agreement on contributory negligence must be bona fide would be to prevent abuse by the parties (the parties might otherwise undermine the scheme by agreeing a higher percentage contributory negligence than they would have agreed had recoupment not been a possibility): cf s 1(4) of the Civil Liability (Contribution) Act 1978.

<sup>71</sup> Incidentally, a direct claim to the NHS means that there is no question of the NHS recovering its care costs where the NHS is the defendant: the NHS would otherwise be recovering from itself and we would not envisage different parts of the NHS (eg different trusts) having separate recoupment rights.

<sup>72</sup> See, generally, para 3.34 above.

<sup>73</sup> The issue of who bears the costs of DSS recoupment is interesting. In its written submission to the Social Security Select Committee in 1995, The Department of Social Security said, "One of the most important features of the current scheme is its



aspects of the administrative arrangements adopted under the DSS recoupment scheme may be made use of. For example, it may be convenient for the NHS claim to be in the name of a distinct recovery unit, on the model of the Compensation Recovery Unit. Again, a similar certification procedure could be devised. For example, compensators might be required to serve notice on receipt and/or settlement of a tort claim, following which the unit would within a certain period be required to issue a certificate of NHS costs claimed, whether past or future, for a finite period as in the DSS scheme, or for as long as the effects of the tort were anticipated to continue. If the compensator agreed the NHS claim, it could be required to send the amount specified in the certificate to the NHS claimant. If the compensator did not agree the causation or reasonableness of any aspect of the claim it could be required to serve notice of this, although some features of the certificate, such as the costing of NHS care, may best be deemed mandatory. It might even be possible - and would be advantageous in avoiding disputes and minimising bureaucracy - to attribute mandatory fixed costs to different treatments. A streamlined procedure would be needed to settle disputes about the certificate, either by administrative decision, as in the case of the DSS, or through the courts.

3.42 The recoupment of costs by the NHS can fairly be said to touch on questions of a party political nature which are outside the remit of the Law Commission. We believe, however, that there is much to be gained from a legal analysis of the issues and it is in that spirit that we have approached the subject. Although anything that we say on this must be regarded as of a very provisional kind, **we would find it helpful to know the views of consultees on the following questions:**

- (1) **Do consultees agree with our provisional view that, as a matter of legal principle, the NHS should have a claim to recover from tortfeasors (or other legal wrongdoers) the costs of NHS care resulting from a tort (or other legal wrong)?**
- (2) **Do consultees consider that there are policy or practical reasons, and if so what are these reasons, that mean that no such right of recoupment should be introduced (and please note that we would very much welcome the views of those with detailed knowledge of the workings of the NHS on the issues raised in paragraph 3.33)?**

workability” (Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, Minutes of Evidence, p 7). It is arguable that an aspect of this workability is that the parties to the tort action bear some of the cost of DSS recoupment. At p 329 of *Atiyah's Accidents, Compensation and the Law* (5th ed 1993) Cane says “From the Government’s point of view, the 1989 scheme also has the advantage of casting some of the administrative cost of recoupment on the defendants and their insurers.” In its written submission to the Social Security Select Committee the Association of Personal Injury Lawyers said “It is unfair to expect a plaintiff to take the risk of financing a legal action, only for the main beneficiary of the legal action to be the Government, which has taken none of the risk of the litigation. This applies even in legal aid cases, in that legal aid is in effect a loan, repayable out of a successful plaintiff’s damages.” (Social Security Committee, Fourth Report, *Compensation Recovery* (1994-1995) HC 196, Minutes of Evidence, p 39) Rejection for the NHS of an approach similar to the DSS, which to some extent spreads the costs of DSS recoupment, will affect the cost-benefit analysis from the state’s point of view, whatever the recoupment mechanism.

- (3) **Do consultees agree with our provisional view that if a recoupment scheme were to be introduced, it should take the form of the NHS having a direct claim against the tortfeasor (or other legal wrongdoer) which is parasitic on the victim having recovered damages?**
- (4) **Do consultees agree with our provisional view that, if a recoupment scheme were introduced, it would be sensible to adopt similar administrative arrangements to those used for the recoupment of social security benefits?**

**(3) Care provided free of charge to the plaintiff by relations or other private individuals**

**(a) The general position**

- 3.43 We have described how the courts have for a considerable time recognised that damages should be recovered in respect of care provided gratuitously to the plaintiff by relations or other individuals.<sup>74</sup> Whilst the principle of recovery has been recognised in this jurisdiction,<sup>75</sup> the approach taken by the courts to the principle has been far from consistent.<sup>76</sup> There have been three main approaches: the analysis used in the cases preceding *Cunningham v Harrison*,<sup>77</sup> which depended on the existence of a contractual, or perhaps moral, obligation of some sort by the plaintiff towards the carer;<sup>78</sup> the approach taken by the Court of Appeal in *Donnelly v Joyce*,<sup>79</sup> whereby the loss incurred was treated as the loss of the plaintiff rather than the carer, irrespective of any obligation between plaintiff and carer; and solutions based on a trust, which is the approach in force in England now, following its adoption by the House of Lords in *Hunt v Severs*.<sup>80</sup> Another alternative is that the plaintiff should be under a personal obligation to account for the damages to the carer, which is the rule in Scotland under section 8 of the Administration of Justice Act 1982.<sup>81</sup> It must therefore be asked which is the best approach to this question.
- 3.44 We regard the correct rationale for the award of damages under this head to be the remuneration of the carer; that is, that the loss is that of the carer not the plaintiff. For this reason, we are unable to agree with the approach taken in

<sup>74</sup> See paras 2.16-2.36 above.

<sup>75</sup> Cf the position in some other jurisdictions, eg Tasmania, where there are statutory bars on the awarding of damages under this head for some or all claims: see para A.39 below.

<sup>76</sup> A vivid example of this inconsistency is the very different analyses employed by different divisions of the Court of Appeal giving judgment on successive days in *Cunningham v Harrison* [1973] QB 942 and *Donnelly v Joyce* [1974] QB 454: see para 2.24 above.

<sup>77</sup> [1973] QB 942.

<sup>78</sup> Para 2.23 above.

<sup>79</sup> [1974] QB 454.

<sup>80</sup> [1994] 2 AC 350. See para 2.26 above.

<sup>81</sup> See para 2.27 above.

*Donnelly v Joyce*, which is also adopted in Australia.<sup>82</sup> Furthermore, we are in agreement with the criticisms which have been levelled at the analysis which requires, as a necessary condition for recovery of damages under this head, the existence of a contractual or, perhaps, moral obligation on the part of the plaintiff towards the carer to pay the carer for the services rendered. If the obligation needs to be contractual, it falls foul of the policy argument, which we regard as cogent, that it is objectionable to expect or encourage the making of contracts between plaintiffs and their carers who are, in most cases, close relatives.<sup>83</sup> If, on the other hand, recovery of damages rested on a moral obligation, we should regard this as too vague to be workable as a test. In any case, it seems very likely that if any sort of moral obligation (and the same goes for some contractual obligations) to reimburse the cost of care can be inferred from the relationship of the plaintiff and the carer, the obligation to pay would be conditional upon the plaintiff's receipt of damages. If the existence of the obligation is conditional on the receipt of the damages, it seems circular reasoning to base the award of the damages upon the existence of the obligation.<sup>84</sup>

3.45 We should add here that, while the law of restitution may in time develop in such a way as to give a carer a direct restitutionary claim against the victim (irrespective of the receipt of damages by the victim) one cannot regard the present law as giving that right, whether based on the rendering of "necessitous services" or on the doctrine of free acceptance.<sup>85</sup>

3.46 There remain to be considered, then, the approach adopted by the House of Lords in *Hunt v Severs*, under which the plaintiff recovers the damages but holds them on trust for the carer, and the Scottish approach involving a personal obligation on the plaintiff's part to account to the carer for the damages. Both these approaches are similar, in so far as they involve the channelling of the damages from the plaintiff to the carer, although the means by which this channelling occurs is different. We believe that both of these approaches can fulfil the primary requirement of remunerating the carer. It is recognised that to take this view is to support, to some extent, a derogation from the principle that a plaintiff should only be permitted to recover damages in respect of his or her own loss, not that of third parties. We consider, however, that such a derogation is justified by the desirability of compensating the providers of gratuitously provided care.

3.47 Either the trust approach or the obligation to account approach can only be considered to remunerate the carer in a proper manner if it deals satisfactorily with the provision of any *future* care which the plaintiff might need, as well as past care. Neither of the two approaches, as they are currently applied in England and in Scotland, seem to achieve this. In neither of the reported English cases that

<sup>82</sup> See para A.36 below. The Pearson Commission also accepted the reasoning in *Donnelly v Joyce*: see para 2.28 above.

<sup>83</sup> See, eg, *Donnelly v Joyce* [1974] QB 454, 463-464, *per* Megaw LJ; *Hunt v Severs* [1993] QB 815, 831, *per* Sir Thomas Bingham MR (CA).

<sup>84</sup> This circularity, in relation to *moral* obligations, was highlighted in *Donnelly v Joyce* [1974] QB 454, 436, *per* Megaw LJ.

<sup>85</sup> See para 2.29 above.

have supported the trust approach did the court consider the details of how a trust would operate in respect of the cost of future care. In *Hunt v Severs*<sup>86</sup> it was not necessary to consider the question because no damages were awarded under this head. In *Cunningham v Harrison*<sup>87</sup> all the damages awarded had been for past care because the plaintiff's wife, who provided the care, died before the trial.<sup>88</sup> In Scotland the statutory provision requiring the pursuer to account to the carer for the damages refers only to past care.<sup>89</sup> Section 8(3) of the Administration of Justice Act 1982 provides for the payment of damages to the pursuer in respect of anticipated future care, but there is no corresponding obligation on the pursuer to account to the carer.<sup>90</sup>

3.48 Linked to this is the point that, in designing a suitable scheme, whether it follows the trust approach or the obligation to account approach, it is necessary to decide who should be allowed to claim the cost of providing care. One possibility is that the right, under the trust or under the obligation, would be limited to a named person or persons, who would be identified at the date of the trial. This has the virtue of simplicity, but we do not consider it to have sufficient flexibility to cater for changes of circumstances. It is possible, for example, that a carer may become unable or unwilling to provide care. Therefore, we are in favour of rights being given to anyone who gratuitously provides care to the plaintiff, either before or after the trial. It must also be asked whether the class of carers who are eligible to claim should be limited to relatives, as it is in Scotland.<sup>91</sup> Although "relative" is defined fairly broadly in the Scottish legislation,<sup>92</sup> we are concerned that to follow a similar route might exclude persons from being able to recover the cost of providing care who deserved to do so.<sup>93</sup>

3.49 Given, then, that we are in favour of giving rights to all carers, past and future, to claim the cost of the care provided, the choice lies between creating a trust, so that carers have a proprietary right in the relevant part of the damages, and giving carers a right against the plaintiff personally. In the vast majority of cases, where the carer is a member of the same household as the plaintiff, it may make little difference which of the two approaches is taken. As Lord Bridge said in *Hunt v Severs*:

Differences between the English common law [trust] route and the Scottish statutory [obligation] route to this conclusion are, I think,

<sup>86</sup> [1994] 2 AC 350.

<sup>87</sup> [1973] QB 942.

<sup>88</sup> In any case the plaintiff had, on legal advice, entered into a contract with his wife for the provision of care, so that even if she had not died any future care would have been provided on a paid rather than gratuitous basis.

<sup>89</sup> Administration of Justice Act 1982, s 8(2).

<sup>90</sup> See para A.10 below.

<sup>91</sup> Administration of Justice Act 1982, s 8.

<sup>92</sup> Administration of Justice Act 1982, s 13(1): see para A.8, n 16 below.

<sup>93</sup> Eg the friends who provided care to the plaintiff in *Hodgson v Trapp* [1989] AC 807.

rarely likely to be of practical importance, since in most cases the sum recovered will simply go to swell the family income.<sup>94</sup>

3.50 Nevertheless the two approaches are different, and carry attendant advantages and disadvantages, in a number of respects:

(i) It is necessary to deal satisfactorily, not only with care in the future given by the same carer, but also with care given by different carers.<sup>95</sup> Although it seems possible<sup>96</sup> to impose a trust for the benefit of past and future carers, with the beneficial interests being contingent upon the provision of services,<sup>97</sup> it might be simpler to deal with changes of carer through a personal obligation to account to a carer as and when the caring services have been provided.

3.51 (ii) Where the plaintiff, having recovered damages,<sup>98</sup> dies early (that is, before the damages intended for the cost of care are exhausted) the remaining damages will form part of the deceased plaintiff's estate, if the carer is only entitled to the benefit of a personal obligation. On a trust analysis the remaining damages would either be held for the carers, whose beneficial interests have vested, or would result back to the tortfeasor. Matthews and Lunney argue:-

[Applying the trust approach in this situation] there are two choices. First, to give the remaining money back to the tortfeasor on a resulting trust. Second, to give it to the carer on the basis that he is the beneficiary and he is still willing and able to provide the services. Neither is attractive; the second because the carer does not fulfil the contingency for benefit, the first because it violates the principle that tort damages are awarded once-and-for-all as a kind of "clean break," and normally you cannot go back later on to say that, in the light of

<sup>94</sup> [1994] 2 AC 350, 363.

<sup>95</sup> The Pearson Commission in its Report (1977) Cmnd 7054 vol 1 para 349 considered that there were practical difficulties in setting up a trust fund if several people were involved: see para 2.28 above.

<sup>96</sup> See, however, P Matthews and M Lunney, "A Tortfeasor's Lot is not a Happy One?" (1995) 58 MLR 395, 401-402, in which the question is raised as to whether it is possible to create a valid trust in favour of the carers because of doubts as to whether someone who has provided value can be a beneficiary. Those doubts centre around a series of old cases *Shaw v Lawless* (1838) 5 Cl & Fin 129; 7 ER 353; *Finden v Stephens* (1846) 2 Ph 142; 41 ER 896; and *Foster v Elsley* (1881) 19 Ch D 518, in which directions by testators to their trustees to engage named individuals as their estate's agent or solicitor were held not to impose a trust. We do not see these cases as creating any obstacle to the creation of a valid trust imposed by operation of law clearly *as a trust*, for the benefit of carers.

<sup>97</sup> It seems to us that this trust, being imposed by operation of law, would be a constructive trust, and a beneficiary, rather than a purpose, trust. See P Matthews and M Lunney, "A Tortfeasor's Lot is not a Happy One?" (1995) 58 MLR 395, 401-402 for discussion of the nature of the trust imposed in *Hunt v Severs*. Cf A Reed, "A Commentary on *Hunt v Severs*" (1995) OJLS 133, 139, who considers the possibility that the trust may be a remedial constructive trust.

<sup>98</sup> If the plaintiff dies, before recovering damages, his or her right to claim damages for the medical and nursing care provided gratuitously by the carer survives for the benefit of the estate. Applying *Hunt v Severs*, the estate would presumably then hold the damages on trust for the carer. Alternatively, if a personal obligation only were favoured, the personal representatives would presumably be personally liable to account to the carer for those damages.

subsequent events, the award was too much (or too little). The one thing you cannot do is leave the fund in the deceased plaintiff's estate: on the hypothesis laid down by the House of Lords, it does not belong to him or, to put it another way, on the analysis here suggested to follow from that hypothesis, he is no beneficiary of the trust.<sup>99</sup>

- 3.52 (iii) If the plaintiff becomes insolvent, the trust approach would mean that the carer would effectively have preference over the plaintiff's other creditors; if the plaintiff were treated as having merely a personal obligation to account to the carer, the carer would rank equally with the plaintiff's ordinary creditors. It could be argued, on the one hand, that carers should have no greater claim upon an insolvent plaintiff's assets than other creditors without security or preference. But, on the other hand, it could be said that to apply the damages to pay the plaintiff's creditors would defeat the very specific purpose for which they were awarded, namely to reimburse the plaintiff's carers.<sup>100</sup>
- 3.53 (iv) Another consequence of regarding the plaintiff as a trustee is that (arguably) he or she would have strict fiduciary obligations to the carer and indeed the carer would be able to trace the trust money into substitute assets. This type of consequence of imposing a trust has recently led the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*<sup>101</sup> to favour personal, as opposed to proprietary, restitutionary remedies for the recovery of money paid under void contracts. Although the factual context of that decision is very different from that now being considered, the central point remains the same, namely that the law should be wary of imposing a trust, with its attendant consequences, unless there is a clear justification for going beyond a mere personal obligation. It could, however, be argued that the desirability of reimbursing the carer provides such a justification.
- 3.54 The advantages and disadvantages of the two approaches seem finely balanced, and we have not at this stage formed a view as to whether the trust favoured by the House of Lords in *Hunt v Severs* should be departed from in favour of there being merely a personal obligation to account.<sup>102</sup>

<sup>99</sup> P Matthews and M Lunney, "A Tortfeasor's Lot is not a Happy One?" (1995) 58 MLR 395, 403.

<sup>100</sup> If the plaintiff became insolvent and the damages awarded under this head were applied to pay the plaintiff's creditors then, if the carer ceased to provide care and the plaintiff was forced to rely on the NHS, the burden of providing that care would be effectively transferred from the defendant to taxpayers.

<sup>101</sup> [1996] 2 WLR 802.

<sup>102</sup> We share some of the concerns expressed by P Matthews and M Lunney, "A Tortfeasor's Lot is not a Happy One?" (1995) 58 MLR 395, to the effect that the consequences of the "trust" approach were not fully analysed by the House of Lords. They write, at p 404:

Given the critical nature of trust issues arising in relation to the remedy awarded or to be awarded in such cases in the future, it is little short of astonishing to find that none of them is even alluded to, let alone discussed or resolved by the House.... The failure to distinguish between pre- and post-trial damages and the imposition of a trust remedy have introduced doubt into relatively certain areas of both tort and trusts law, apparently without their

3.55 **We provisionally recommend: (a) that the availability of damages in respect of care provided gratuitously to the plaintiff is justified in order to permit the carer to be remunerated for his or her services, and should continue; and (b) that accordingly either (i) the plaintiff should hold those damages on trust for the providers of past and future care or (ii) a personal obligation should be imposed on the plaintiff to account to the providers of past and future care for those damages. We invite consultees to say whether they agree with this provisional view and, if so, which of the two approaches (if either) they support. We would be particularly interested to hear whether any problems have been experienced in practice with the “trust” approach.**

3.56 Another much more radical possibility, which would fulfil the primary goal of remunerating the carer, would be to confer a right of action on the carer enabling him or her to recover the cost of providing the care *direct* from the defendant.<sup>103</sup> This would have the virtue of permitting the carer to claim the value of his or her services without the necessity of an arguably contrived mechanism such as a trust or an obligation to act as a conduit for the damages. A direct action would involve the cost of another tier of litigation; and there may be difficulties in working out a satisfactory relationship between the rights enjoyed by the carer and those enjoyed by the plaintiff.<sup>104</sup> We are also very mindful that the granting of a direct right of action in tort would offend against the general principle that a plaintiff should not be entitled to recover damages in the tort of negligence for pure economic loss which he or she suffers as a result of physical damage caused to a third party.<sup>105</sup> However, it can be counter-argued that the main argument justifying this general rule, that to allow recovery of such pure economic loss would lead to liability to an infinitely wide class of potential plaintiffs (in other words, open the “floodgates” of litigation) does not apply in this context, because the number of potential carers in relation to any one victim of personal injury is usually very small.

3.57 In some jurisdictions, carers do have direct rights against the tortfeasor, usually through the “traditional” actions for loss of consortium and services.<sup>106</sup> Those actions are essentially the same as the action *per quod consortium et servitium amisit*, which existed in England until its abolition by the Administration of Justice Act

Lordships realising it. The only consolation is that the decision may be sufficiently inadequate to invoke prompt legislative action to answer the many questions left unanswered.

<sup>103</sup> See, eg, P Matthews and M Lunney, “A Tortfeasor’s Lot is not a Happy One?” (1995) 58 MLR 395, 400. Note that a *restitutionary* right of action, based on the discharge of the defendant’s liability, would be much more difficult to maintain in this sphere than in respect of ‘recoupment by the NHS’ because the carer here is not acting under legal compulsion; see para 3.21 above.

<sup>104</sup> These difficulties led to the recommendation, by the Ontario Law Reform Commission, of the abolition of carers’ direct rights in that jurisdiction, in favour of a trust structure akin to the one adopted in *Hunt v Severs*. See paras 3.57 and A.63 below.

<sup>105</sup> See, eg, *Winfield and Jolowicz on Tort* (14th ed 1994) pp 93-102.

<sup>106</sup> Eg in Ireland and some jurisdictions in Australia and Canada. See, respectively, paras A.22, A.41 and A.63 below.

1982,<sup>107</sup> and enabled a husband to claim damages from a tortfeasor in respect of the loss of the society (consortium) and services of his wife, and a parent in respect of the loss of services of a child. Reciprocal rights did not exist, in England, for wives to claim in respect of the loss of a husband's services, or a child in respect of a parent's, although the right to claim has been conferred on wives in some jurisdictions.<sup>108</sup> Such rights sometimes exist concurrently with rights for injured plaintiffs to recover the cost of care. Under the Ontario Family Law Act 1990,<sup>109</sup> certain relatives have the right to recover costs of care and other expenses direct from the defendant. This right, however, exists concurrently with the plaintiff's right to claim in respect of the same services.

**3.58 We ask consultees whether, instead of or in addition to the injured victim's claim, they would support reform which would enable the carer to make a direct claim against the tortfeasor (or other legal wrongdoer).**

***(b) Care provided by the defendant***

3.59 It has been seen that the House of Lords in *Hunt v Severs* moved from the premise that the plaintiff in a "gratuitous care" case should recover damages but hold them on trust for the carer, to the conclusion that where the defendant is the carer no damages should be recovered because, if they were recoverable, they would be recovered from and held in trust for the same person.<sup>110</sup> The decision that no damages are recoverable from the defendant carer has been criticised on a number of grounds.<sup>111</sup> In David Kemp QC's words: "Though the logic of their Lordships' decision may be impeccable, it is doubtful how far it serves the interest of public policy."<sup>112</sup> In particular:

3.60 (i) It still remains possible for a plaintiff and defendant, placed in the position of the plaintiff and defendant in *Hunt v Severs*, to enter into an agreement under which the defendant will provide the requisite care for money. Provided that this contract is not a sham, it was apparently accepted by the House of Lords that the plaintiff can recover the sums payable under that contract. The decision in *Hunt v Severs* therefore encourages defendant carers and plaintiffs to enter into contracts for the carers' services: indeed it has been suggested that failure, on the

<sup>107</sup> Administration of Justice Act 1982, s 2.

<sup>108</sup> Eg South Australia and Queensland: see para A.41 below. The Irish Law Reform Commission has recommended the extension of the right to make a consortium claim to wives and siblings: see para A.22 below.

<sup>109</sup> Section 61(2)(d). This provision was originally contained in the Family Law Reform Act 1978. The Ontario Law Reform Commission recommended the abolition of the direct right in 1987, but the recommendation was not acted on: Report on Compensation for Personal Injuries and Death (1987) pp 149-152. See para A.63 and n 193 below.

<sup>110</sup> See paras 2.30-2.32 above.

<sup>111</sup> See, eg, D Kemp, "Voluntary Services Provided by Tortfeasor to his Victim" (1994) 110 LQR 524; L C H Hoyano, "The Dutiful Tortfeasor in the House of Lords" [1995] Tort L Rev 63, 69; A Reed, "A Commentary on *Hunt v Severs*" (1995) OJLS 133, 137-138; P Matthews and M Lunney, "A Tortfeasor's Lot is not a Happy One?" (1995) 58 MLR 395, 399.

<sup>112</sup> Kemp, *op cit*, 526.



part of legal advisers, to consider this possibility may constitute negligence.<sup>113</sup> Yet one surely does not wish to encourage such contracts, nor the inevitable disputes that would arise in determining what, in this context, would constitute a sham contract. Disquiet about the possibility of needlessly encouraging contracts for services with relatives was expressed generally in *Donnelly v Joyce*. Megaw LJ said:

[I]s there not something repulsive in the idea that the extent of a wrongdoer's liability for a part of the consequences of his wrongdoing should depend upon the willingness or otherwise of a would-be provider to require such a legally binding bargain to be made with the injured person as a condition of his assistance? Suppose that a wife has been seriously injured. Is the defendant's liability to depend upon whether, and if so when, the injured woman's husband, or her sister or her neighbour, had made a bargain with her, perhaps while she is lying gravely injured, that she will repay? ... If such were the law, legal advisers would, we believe, often be gravely embarrassed at having the duty to advise that such agreements should be made.<sup>114</sup>

And in the specific context of the defendant-carer, Sir Thomas Bingham MR in the Court of Appeal in *Hunt v Severs* cited the above passage and said,

It would be no less regrettable if the law were to encourage the making of contracts between plaintiffs and those in the position of the defendant.<sup>115</sup>

3.61 Commentators too have seized on this point. Roderick Doggett writes:-

What is and what is not a bona fide care contract may trouble the courts for many years. Insurers who wish to argue that the contract was a sham would have to be separately represented from their insured defendant who would want his victim to obtain the highest award possible, including the sums payable under the care contract.<sup>116</sup>

And in the words of Alan Reed:-

It means that, paradoxically, the very outcome, which in both *Donnelly* and *Housecroft* it was thought should be strenuously avoided, has been achieved. Legal advisers, although it may seem intrusive and repulsive, must advise their clients in the *Hunt* scenario to enter legally binding relations as to the provision of services by the carer. It seems clear that the House of Lords never for one moment envisaged such a possibility. However, it is hard to see the ground on which the contract could be set aside, once it is proved that it is not a sham and that there was an intention to create legal relations. The decision is a

<sup>113</sup> See, eg, Kemp, *ibid*.

<sup>114</sup> [1974] QB 454, 463-464.

<sup>115</sup> [1993] QB 815, 831.

<sup>116</sup> R Doggett, "Hunt v Severs - A Pyrrhic Victory for Insurers?" *Quantum*, 6 May 1994.

catalyst to the proliferation of such arrangements which objectively seems reprehensible.<sup>117</sup>

- 3.62 (ii) Even if the plaintiff were not encouraged to enter into contracts with the defendant to pay for services, the effects of *Hunt v Severs* might be to encourage the plaintiff, on the advice of his or her lawyers, to accept the nursing services of relatives or friends other than the defendant. Again this would be unfortunate. The plaintiff should receive gratuitous care from the most appropriate person free from tactical constraints regarding the award of damages. Moreover, the fact that care by different relatives will determine whether damages for care are recoverable can be expected to create evidential difficulties. Alan Reed makes the point as follows:-

If the care had been provided by the plaintiff's sister, mother, brother, grandmother or even her children (if she had any) the head of damages would have been fully recoverable. Legal advisers must advise their clients accordingly in the future. This raises the spectre of an unpalatable evidential dispute at trial as to which family member actually rendered the care provision. This will particularly be the case where the plaintiff, tortfeasor and alleged carer all live in the same residence. Such evidential difficulties appear insurmountable. Additionally it was the husband (tortfeasor) who in *Hunt* was the best placed and best able to render the necessary care services. It seems unsatisfactory that the implications from the case are that it is beneficial for the plaintiff, viewed in purely financial terms, that a third party or other family member should provide the care, irrespective of suitability for the task.<sup>118</sup>

- 3.63 (iii) The plaintiff may, again on legal advice, be discouraged by *Hunt v Severs* from accepting gratuitous care either from the defendant or from other relatives and friends, but instead engage professional care, supplied at the full commercial rate.<sup>119</sup> The cost of such care will be recoverable provided that it is reasonable. This again has the disadvantage, from the plaintiff's point of view, that his or her care regime is being dictated by tactical considerations related to the recovery of damages rather than by the needs created by his or her medical condition. It is also, ironically (given that *Hunt v Severs* is conventionally viewed as a victory for insurers), disadvantageous from the point of view of the defendant's insurers, who will have to pay the cost of care at commercial rates, rather than the normally lower rates awarded for care that is supplied to the plaintiff free of charge.<sup>120</sup>

<sup>117</sup> A Reed, "A Commentary on *Hunt v Severs*" (1995) OJLS 133, 137-138

<sup>118</sup> *Ibid*, 138.

<sup>119</sup> We understand that it is now a widespread practice among lawyers acting for personal injury plaintiffs to advise this course of action, since it avoids any of the uncertainty attaching to contracts with the defendant or other friends or relatives as to whether the contract is enforceable.

<sup>120</sup> See paras 2.33-2.36 above; R Doggett, "*Hunt v Severs* - A Pyrrhic Victory for Insurers?" *Quantum*, 6 May 1994.

- 3.64 (iv) Another potential anomaly has been identified where there are two defendants responsible for the injury to the plaintiff. If defendant D1, who is only ten per cent to blame for the injury and entitled to recover a contribution of ninety per cent of the total damages from defendant D2, provides care to the plaintiff free of charge in the same way as the defendant in *Hunt v Severs*, it should be asked whether D1 can recover from D2 a contribution to the cost of the care provided by D1. It would appear that D1 will not be entitled to claim such a contribution because, after *Hunt v Severs*, D1 is not liable to P in respect of the care which he has provided, and so despite his relatively small share in the blame for the damage, he bears the entire cost of providing the care. If, on the other hand, P had engaged the services of a professional nurse or carer, then D1 would be able to recover ninety per cent of the relevant expenses from D2 in the usual way.<sup>121</sup>
- 3.65 (v) It was argued before the House of Lords in *Hunt v Severs* that it was relevant that the defendant was insured against third-party liability. This argument was strongly rejected by the House.<sup>122</sup> Therefore, in that particular case (and, we would assume, the typical scenario) the plaintiff and defendant were collectively unable to call upon the proceeds of the defendant's indemnity insurance to cover the cost of caring for the plaintiff. This aspect of the decision has also been criticised.<sup>123</sup> However, we disagree with that criticism. Although the existence of insurance was a vital part of the factual picture, and indeed the litigation would scarcely have made sense if the defendant had not been insured against such liability, we do not consider that the existence of insurance should be permitted to affect liability. We believe that the question of the defendant's liability must necessarily precede the one of the defendant's insurer's liability.
- 3.66 (vi) It can also be objected that in cases such as this the plaintiff and the defendant-carer generally form one household and therefore a single economic unit, so that it is meaningless to talk about money being held by one family member for another. However, one is *ex hypothesi* treating family members separately if one is speaking about litigation between them. Indeed, if the litigation is treated as being, in substance, between the economic unit comprising the plaintiff and the defendant-carer on the one hand, and the defendant's third-party insurers on the other, the consequence would be to turn the defendant's third-party insurance into first-party insurance.
- 3.67 But while we reject the last two criticisms of *Hunt v Severs*, the first four arguments do represent persuasive reasons for regarding the decision as unsatisfactory. On the other hand, as we have already indicated, we believe that their Lordships' reasoning was correct in treating the loss as the carer's and not

<sup>121</sup> D Kemp, "Voluntary Services Provided by Tortfeasor to his Victim" (1994) 110 LQR 524, 526. See also R Doggett, "*Hunt v Severs* - A Pyrrhic Victory for Insurers?" *Quantum*, 6 May 1994. In a decision on a proof before answer the Outer House of the Court of Session in Scotland left open the question of the respective rights of the parties in this situation: *Kozikowska v Kozikowski* 1996 SLT 386 (Note).

<sup>122</sup> [1994] 2 AC 350, 363, *per* Lord Bridge of Harwich.

<sup>123</sup> See, eg, L C H Hoyano, "The Dutiful Tortfeasor in the House of Lords" [1995] Tort L Rev 63, 70-72; A Reed, "A Commentary on *Hunt v Severs*" 1995 OJLS 133, 140.

the plaintiff's. The question we face therefore is whether one can reach the desired solution in the defendant-carer situation without abandoning the principle that the loss is the carer's not the plaintiff's.

- 3.68 We believe that the solution to this dilemma lies in the obvious but crucial point that legislation can override the logic of the common law. While as a matter of common law principle, it is indeed hard to see that one can regard the defendant as being "liable" to pay damages which the plaintiff is then legally bound to pay over to the defendant, there seems to be no objection to there being a legislative provision that, in the interests of policy, cuts across that logic. **It is therefore our provisional view that there should be a legislative provision reversing *Hunt v Severs* and laying down that the defendant carer's liability to pay damages for the plaintiff's nursing (or other) care should be unaffected by any liability of the plaintiff, on receipt of those damages, to pay those damages back to the defendant as the person who has gratuitously provided that care. In our view, such a provision would remove the objections of policy to the decision that we have set out above. We ask consultees whether they agree with this provisional view.**

***(c) The quantum of damages***

- 3.69 We have said that we are provisionally in favour of damages being awarded for gratuitously provided care, in order to compensate the provider of that care. One must then consider how those damages are assessed, but the prior question arises of whether the damages should be designed to compensate in full, or whether limits should be applied. In Australia the cost of gratuitously provided care is an established head of damages.<sup>124</sup> But the perceived need to limit costs to defendants and their insurers has led to statutory restrictions on the amount of damages for gratuitously provided care (as well as on other heads of damages, for example for pain, suffering and loss of amenity)<sup>125</sup> in relation to particular types of accident.<sup>126</sup> These have taken the form of ceilings<sup>127</sup> and thresholds.<sup>128</sup> We are not, however, attracted by artificial and unprincipled limits on this form of pecuniary loss.<sup>129</sup> We believe that the carer should receive full compensation for his or her

<sup>124</sup> Albeit based on the view that the loss which must be compensated is that of the carer rather than of the plaintiff. See *Griffiths v Kerkemeyer* (1977) 139 CLR 161; paras A.36-A.37 below.

<sup>125</sup> See Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140, paras 3.29-3.32, 4.23.

<sup>126</sup> Some jurisdictions, notably Tasmania, have abolished them, either altogether or in relation to particular types of accident: see para A.39 n 112 below.

<sup>127</sup> Eg in New South Wales and South Australia in relation to motor accidents (Motor Vehicles (Third Party Insurance) Act (NSW), s 35C; Wrongs Act 1936 (SA), s 35a(1)(g), s 35a(1)(h) and s 35a(2)) and in New South Wales in relation to work accidents (Workers Compensation Act 1987 (NSW) s 151K).

<sup>128</sup> In relation to motor and work accidents in New South Wales: Motor Accidents Act 1988 (NSW), s 72(2) and (4); Workers Compensation Act 1987 (NSW), s 151K. The services must be provided for a minimum of 6 months and a minimum of 6 hours per week. The first 6 months and the first 6 hours per week are not compensable.

<sup>129</sup> See, analogously, our reason for provisionally rejecting thresholds for the recovery of non-pecuniary loss set out in paras 4.23-4.26 of our consultation paper Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140.

loss. **We are therefore provisionally opposed to the introduction of limits, on damages awarded under this head, of the type introduced in some Australian jurisdictions. We ask consultees whether they agree.**

- 3.70 The notion that damages for services rendered by others should be assessed on the basis of reasonableness is, on the face of it, an uncontroversial one.<sup>130</sup> The question of how this principle translates into practice is rather more contentious. The approach employed by the courts, at least prior to *Hunt v Severs*,<sup>131</sup> has been to try to find a path between the two “extreme solutions”<sup>132</sup> of awarding damages on the basis of the cost of obtaining care commercially, and awarding a nil figure on the basis that the plaintiff has received the care free of charge.<sup>133</sup> It remains to be seen what, if any, change in assessing damages will follow the decision in *Hunt v Severs*<sup>134</sup> (which views the loss to be compensated as the carer’s rather than the plaintiff’s).<sup>135</sup>
- 3.71 Where loss of earnings exceeds the cost of commercial care some may regard it as questionable whether the defendant should be required to meet the excess cost. On the other hand, the Pearson Commission argued that to base the award on the approximate market value of the services would be harsh on those who give up a highly paid job to nurse an injured relative.<sup>136</sup> There may indeed be exceptional cases where expert medical evidence suggests that the presence of a near relative is invaluable to the plaintiff’s rehabilitation. At least in those cases it seems reasonable (and not contrary to the duty to mitigate) for the relative to give up highly paid employment and the plaintiff to be given a sum representing the actual loss suffered by the relative in nursing the plaintiff.
- 3.72 The test of reasonableness, as it has been applied in *Housecroft v Burnett*<sup>137</sup> and the cases following it, is inescapably imprecise, even if it is subject to the ceiling represented by the commercial rate. It is open to question whether such a vague provision gives greater scope for fairness in all cases or encourages disparity in the courts’ decisions in cases of this sort. It is significant, however, that neither the Pearson Commission<sup>138</sup> nor the Law Commission<sup>139</sup> has, in the past, recommended a hard and fast rule. We take the view that it should continue to be left to the courts to decide how to assess damages in respect of care

<sup>130</sup> See also Pearson Report (1978) Cmnd 7054, vol 1, para 350, and Law Com No 56, p 42, where a similar view was expressed.

<sup>131</sup> [1994] 2 AC 350.

<sup>132</sup> *Housecroft v Burnett* [1986] 1 All ER 332, 342, per O’Connor LJ.

<sup>133</sup> See para 2.33 above.

<sup>134</sup> [1994] 2 AC 350.

<sup>135</sup> See para 2.36 above.

<sup>136</sup> Pearson Report, (1978) Cmnd 7054, vol 1, para 350. But see also *Van Gervan v Fenton* (1992) 175 CLR 327, in which the High Court of Australia rejected the amount of foregone wages as a measure of the cost of care, in favour of the market value of providing those services, being their “fair and reasonable value”.

<sup>137</sup> [1986] 1 All ER 332

<sup>138</sup> (1978) Cmnd 7054, vol 1, paras 343 - 351.

<sup>139</sup> (1973) Law Com No 56, pp 42-43.

gratuitously provided by another. Our views on this are reinforced by the fact that the impact of *Hunt v Severs* on the quantum of damages has not yet been considered by the higher courts and any recommendation for statutory rules of assessment would therefore seem particularly inappropriate. **We therefore provisionally consider that the law in relation to the quantum of damages awarded to plaintiffs in respect of care gratuitously provided by another individual is not in need of statutory reform. We ask consultees whether they agree and, if not, to say what reforms they would favour.**

#### **(4) Loss of the plaintiff's ability to do work in the home**

- 3.73 As laid down by the Court of Appeal in *Daly v General Steam Navigation Co Ltd*,<sup>140</sup> a plaintiff will be entitled to recover damages for loss of the ability to do work in the home. As far as the *future* is concerned, those damages will be recoverable as a pecuniary loss, regardless of whether the plaintiff will retain the services of another person to carry out the work as opposed to doing the best that he or she can in the circumstances. As regards the past, they will only be recoverable as a pecuniary loss to the extent that the plaintiff has engaged paid help, or has received unpaid help from a person who has had to forgo employment to enable him or her to give that help, but the loss can be reflected in the damages for pain, suffering and loss of amenity.<sup>141</sup>
- 3.74 At first instance in *Daly v General Steam Navigation Co Ltd*, Brandon J had applied a consistent approach to both past and future loss. But his reasoning was based on an analogy between paid work done outside the home and unpaid work done within the home. This analogy was then extended to justify similar treatment between, on the one hand, loss of income from paid employment and, on the other hand, loss of the capacity to carry out work in the home.<sup>142</sup> We respectfully find it difficult to agree with the logic of the analogy. Where loss of earning capacity is being compensated, the plaintiff is receiving compensation for a stream of income which the plaintiff would have expected to have received during the course of his or her life. Invaluable though unpaid work carried out in the home is, the loss of the capacity to perform it does not result in a loss of an actual income stream, and so the analogy breaks down.
- 3.75 We also regard the Court of Appeal's approach in *Daly* as unsatisfactory. It criticises the artificiality of regarding past housekeeping incapacity as always being a pecuniary loss, while applying that artificiality to the future.<sup>143</sup> We see no good reason why the courts should apply an approach that is inconsistent as between past and future loss, particularly when this inconsistency is not found in respect of other heads of loss.
- 3.76 However, it seems to us that the range of cases to which *Daly* has direct relevance may be largely limited to those in which the plaintiff will carry on doing

<sup>140</sup> [1981] 1 WLR 120. See also *Hoffmann v Sofaer* [1982] 1 WLR 1350, where the work was not housekeeping but of a "do-it yourself" nature.

<sup>141</sup> See generally para 2.37 above.

<sup>142</sup> [1979] 1 Lloyd's Rep 257, 265 (*sub nom The Dragon*).

<sup>143</sup> See A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 196.

the relevant tasks himself or herself. In particular, where the plaintiff receives domestic assistance free of charge from other individuals, it appears that the courts outflank *Daly* by applying the same principles as apply to other forms of gratuitous care. So, for example, it was argued in *Roberts v Johnstone*<sup>144</sup> that, where the plaintiff had in the past received domestic assistance free of charge from his adoptive mother, application of the principle laid down in *Daly* dictated that no damages for pecuniary loss (that is, special damages) were recoverable and this would, in turn, affect the calculation of interest. But this argument was rejected by the Court of Appeal, which distinguished *Daly* and held that special damages were recoverable in respect of the carer's domestic assistance.<sup>145</sup>

3.77 We should add that to the extent that the Court of Appeal in *Daly* followed *Donnelly v Joyce*<sup>146</sup> in treating the loss of earnings of the plaintiff's husband (who had given up part-time work to carry out the housekeeping) as the plaintiff's loss, it cannot stand with the overruling of *Donnelly* in *Hunt v Severs*.<sup>147</sup> Such a loss would now be treated as the husband's and awarded to the wife to hold on trust for him.

3.78 **It is our provisional view that the reasoning in the *Daly* case should be abandoned and that past and future loss of the ability to do work in the home should be treated consistently. In our view, therefore:-**

- (1) Loss or reduction of ability to carry out work in the home should be compensated as a past pecuniary loss where the plaintiff has paid for someone to carry out that work and as a future pecuniary loss where the plaintiff satisfies the court that he or she will pay for someone to carry out that work.**
- (2) Consistently with our proposed approach to gratuitously rendered nursing services, a plaintiff should be able to recover the loss incurred by a third party (including where the third party is the defendant) who has gratuitously rendered, or will gratuitously render, housekeeping services or other work in the home, and should either hold the damages so recovered on trust for that third party or alternatively should be under a personal obligation to account to the third party for the damages.**
- (3) A plaintiff may also recover as an aspect of damages for non-pecuniary loss (pain, suffering and loss of amenity) a sum for the loss or reduction of ability to carry out work in the home. This will be particularly important when the plaintiff can recover no damages under (1) or (2) above because he or she has struggled on with the work despite the injury.**

<sup>144</sup> [1989] QB 878.

<sup>145</sup> [1989] QB 878, 895.

<sup>146</sup> [1974] QB 454.

<sup>147</sup> [1994] 2 AC 350: see paras 2.24-2.26 above.

**We ask consultees (a) whether they agree with our provisional view that the position, as set out in (1), (2) and (3) above, ought to be the law; and (b) whether they consider that it would be helpful, for the purposes of clarifying the law, for the above statement of the law to be set out in legislation. We would particularly welcome the views of practitioners with expertise in the field as to whether the decision in *Daly* causes significant problems in practice.**

#### **(5) Hospital visits**

- 3.79 The plaintiff is entitled to recover the reasonable costs incurred in visiting the plaintiff in hospital, with the moneys so recovered being held on trust for the person incurring those expenses.<sup>148</sup> We regard this as an extension of the basis on which damages are recovered for care provided to the plaintiff free of charge, and an analogous approach to that provisionally favoured above should therefore apply.<sup>149</sup> **We therefore provisionally recommend that, as with damages for gratuitously provided nursing care, the injured plaintiff should be able to recover damages for the cost of hospital visits and should either hold the damages on trust for his or her visitors (as under the present law), or alternatively be placed under a personal obligation to account to them for the damages. We ask consultees whether they agree and, if so, which of the two approaches they prefer.**
- 3.80 **It is also our provisional view that, for the same reasons (and by the same sort of legislative provision) as have been discussed above in respect of gratuitous care, *Hunt v Severs* should be legislatively reversed in respect of its denial of a claim *on behalf of the defendant* for the costs of hospital visits. Do consultees agree?**

## **2. THE PLAINTIFF'S ACCOMMODATION**

### **(1) Purchase of suitable accommodation**

#### ***(a) The basic approach***

- 3.81 It has been seen that the law will compensate a plaintiff in respect of additional expenditure where it is reasonable for the plaintiff to move to different, more expensive accommodation.<sup>150</sup> As laid down in *Roberts v Johnstone*,<sup>151</sup> the measure of damages under this head will generally be calculated by multiplying the additional capital expenditure, over and above any proceeds from the sale of any existing property, by a conventional rate of interest of two per cent to give an annual figure, and then converting the sum into a capital one by applying a multiplier.

<sup>148</sup> See para 2.38 above.

<sup>149</sup> See para 3.55 above.

<sup>150</sup> See paras 2.39-2.41 above.

<sup>151</sup> [1989] QB 878.



- 3.82 The first question that must be asked is whether this basic approach, referred to in *Kemp & Kemp* as “satisfactory and elegant”,<sup>152</sup> is sound. The general purpose behind calculating the notional interest figure and then capitalising it, rather than simply using the capital outlay, is to avoid the windfall profit to the plaintiff’s estate which would result when the plaintiff died, leaving a house which had been wholly, or at least to a great extent, paid for out of the damages.<sup>153</sup> The reasoning behind the method of calculation used in *Roberts v Johnstone*<sup>154</sup> is that the plaintiff has suffered not a one-off capital loss, but a continuing annual loss which results from having to borrow the capital expended or from having funds tied up in owning the house rather than being available for investment.
- 3.83 One could, alternatively, use a discounted cash flow method.<sup>155</sup> For example, the plaintiff might sell his or her existing house for £45,000 and buy a new one for £110,000, a net outlay of £65,000. Suppose that the plaintiff’s remaining life expectancy is 35 years and that the value of the property will still be £110,000 at the end of that time. We have seen, in relation to the method of calculation used in *Roberts v Johnstone*, that the plaintiff would be overcompensated if he or she were simply awarded £65,000 under this head, because the plaintiff’s estate would be expected to get back the sale proceeds of the new property, including the £65,000, in 35 years’ time. The discounted cash flow method measures the amount of this overcompensation by taking the amount of the net<sup>156</sup> capital expenditure which will flow back to the plaintiff’s estate on the sale of the property, and discounting it from then back to the present date to reflect the delay in receipt by the plaintiff’s estate. In the example, the present value<sup>157</sup> of £65,000 in 35 years’ time is £13,926, and so the plaintiff, by the discounted cash flow method, should recover £65,000 less £13,926, ie £51,074.<sup>158</sup> Discounted cash flow, which can be adapted to suit more complex circumstances, differs from the *Roberts v Johnstone* approach more than may appear at first glance, because it regards the plaintiff’s loss as a capital loss rather than an income one. However, it appears to us that the approach is problematic because of its need to make predictions about the likely sale proceeds of a property, in some cases a very long time into the future. Without such a figure, the method cannot be operated, and yet it appears impossible to predict it with any great accuracy. In the example cited, the property could realise several times its original price, in which case the plaintiff would be left with a large windfall profit. Another problem with the discounted cash flow method is that it depends heavily on an accurate discount rate. This has also been seen as problematic in the context, for example, of calculating multipliers.<sup>159</sup>

<sup>152</sup> Vol 1 para 5-046.

<sup>153</sup> See para 2.40 above.

<sup>154</sup> And before it, in *George v Pimock* [1973] 1 WLR 118 (CA).

<sup>155</sup> See C Cooper and C Illidge, “Is *Roberts v Johnstone* still fair to plaintiffs and defendants?” (1993) 137 SJ 767.

<sup>156</sup> Ie having deducted any proceeds from the sale of an existing property.

<sup>157</sup> Assuming a discount rate of 4.5%.

<sup>158</sup> Cooper and Illidge, *op cit*.

<sup>159</sup> See paras 2.68-2.73 above.

- 3.84 Comparing the two alternatives **we take the provisional view that the method of calculating accommodation costs used in *Roberts v Johnstone* is the better one, provided that it is used with an appropriate rate of interest. We ask consultees whether they agree, and if not what alternative method of calculation they would advocate.**

***(b) The appropriate rate***

- 3.85 If one accepts the basic logic of *Roberts v Johnstone*, one must then ask whether the rate of two per cent applied in the calculations is the best rate to use. Two per cent was regarded as the appropriate rate because it was seen, for example in the context of interest on non-pecuniary loss, as the real rate of return on a risk-free investment. Stocker LJ said:-

Lord Diplock was [in *Wright v British Railways Board*<sup>160</sup>] concerned with the appropriate interest rates for non-economic loss, and the reasoning may therefore be said to be inappropriate to economic loss such as the notional cost of mortgage interest on acquired property. It seems to us, however, that where the capital asset in respect of which the cost is incurred consists of house property, inflation and risk element are secured by the rising value of such property particularly in desirable residential areas, and thus the rate of 2 per cent would appear to be more appropriate than that of 7 per cent or 9.1 per cent, which represents the actual cost of a mortgage loan for such a property.<sup>161</sup>

- 3.86 The House of Lords, in *Wright v British Railways Board*,<sup>162</sup> had approved the conventional rate of two per cent set by the Court of Appeal in *Birkett v Hayes*<sup>163</sup> for interest on pre-trial non-pecuniary loss. We examined this in detail in our last consultation paper.<sup>164</sup> Giving the sole speech, Lord Diplock said that there were two ways in which an appropriate rate of interest, that is, a rate designed to compensate the recipient solely for not being able to use his or her money during the period of investment, as opposed to compensating for inflation or other risks, could be ascertained. One was to examine the rate of return on index-linked government securities (ILGS).<sup>165</sup> The other was to subtract the nominal from the actual rate of return on a low-risk security which was not index-linked.<sup>166</sup> There was no evidence before the House of Lords which justified, on this basis, a deviation from the two per cent applied in *Birkett v Hayes*, and so that rate was applied. In doing so, it was held that that the two per cent guideline, for the sake

<sup>160</sup> [1983] 2 AC 773.

<sup>161</sup> [1989] QB 878, 892. See para 2.41 above.

<sup>162</sup> [1983] 2 AC 773.

<sup>163</sup> [1982] 1 WLR 816.

<sup>164</sup> See Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140, paras 2.45-2.47 and 4.119-4.125.

<sup>165</sup> [1983] 2 AC 773, 782-783. ILGS were, at the time the House of Lords heard *Wright*, a new phenomenon.

<sup>166</sup> *Ibid*, 783.

of certainty, should continue to be followed “until the long trend of future inflation has become predictable with much more confidence.”<sup>167</sup>

- 3.87 In *Thomas v Brighton Health Authority*<sup>168</sup> the Court of Appeal revisited the question of the proper rate. At first instance, Collins J had calculated the damages for accommodation costs by using the current rate of return on ILGS, namely a rate of three per cent.<sup>169</sup> This was emphatically rejected by the Court of Appeal which, having reviewed *Birkett v Hayes* and *Wright v British Railways Board* as well as *Roberts v Johnstone*, reaffirmed the conventional rate of two per cent. This was essentially on the basis that ILGS are not risk-free and that one cannot say that their rate of return has settled at three per cent: in short, the firm change of circumstances envisaged by Lord Diplock as justifying a revision of the rate had not occurred.
- 3.88 Nevertheless, there are arguments that suggest that a change of the rate from a fixed two per cent is appropriate. If the analysis underpinning *Roberts v Johnstone* is that the plaintiff has lost the opportunity to use the capital sum for an equivalent low-risk investment,<sup>170</sup> it would seem that the most accurate index of the rate of return on a low-risk investment is the rate of return on ILGS; being index-linked, it is a real rather than a nominal rate of return<sup>171</sup> and, fluctuating in line with the market, it would seem to give a more accurate reflection of market perceptions of the present and expectations of the future than a fixed rate. Indeed, if, as we understand to be the case, plaintiffs often finance the purchase of accommodation by using damages awarded under other heads, this would support the view that what the plaintiff has lost is the opportunity to invest in, at least, a low risk investment a sum equivalent to that being spent on accommodation, in this case the other damages. The rejection by the Court of Appeal of ILGS rates as a basis for the interest rate to be used in accommodation cost calculations could be argued to sit uncomfortably with Lord Diplock’s discussion of the relevance of the same rates, in the context of interest on

<sup>167</sup> *Ibid.*

<sup>168</sup> *The Times* 24 October 1996.

<sup>169</sup> [1996] PIQR Q44, Q55-Q56.

<sup>170</sup> In *Thomas* the Court of Appeal did not question whether the investment assumed to be forgone in purchasing the accommodation should be a risk-free or at least a low risk one, although elsewhere in the judgment it is held that, for the purposes of setting the discount rate for future pecuniary loss, a plaintiff should not be regarded as less risk-averse than any other investor. If, on this basis, the plaintiff were to be regarded as forgoing an investment in equities, then logic would seem to indicate that the rate of interest applied in the *Roberts v Johnstone* calculation should include a risk premium. Note that the parties had agreed that the *Roberts v Johnstone* test is different from that identifying the discount rate for future loss.

<sup>171</sup> See Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, paras 2.24-2.41, in which we recommended the adoption of ILGS rates as the discount rate in calculating damages for future pecuniary loss; see also Structured Settlements and Interim and Provisional Damages (1992) Consultation Paper No 125, paras 2.23-2.24. In our consultation paper Damages for Personal Injury: Non-Pecuniary Loss (1996) Consultation Paper No 140, paras 4.119-4.125 we asked whether ILGS rates might replace the current fixed 2% in use in relation to interest on non-pecuniary loss.

damages for non-pecuniary loss, in *Wright v British Railways Board*.<sup>172</sup> It may be an oversimplification to refer to ILGS as totally risk-free, but ILGS should still be regarded as an investment of very low risk, at least sufficiently low to serve as a useful index for these purposes. The intention of the House of Lords in *Wright*, in setting a conventional interest rate of two per cent on damages for non-pecuniary loss, was clearly to promote certainty, in order to assist settlements and to avoid the need for expert evidence.<sup>173</sup> It is true that if the rate in *Roberts v Johnstone* calculations were to be the rate of return from time to time on ILGS, and allowed to fluctuate accordingly, certainty would be lost. But this argument could be met by fixing the rate by statutory instrument, perhaps on an annual basis. In that way, certainty would be achieved.

- 3.89 **We ask consultees whether they consider that the rate of interest in calculating accommodation expenses should continue to be two per cent. If not, what rate, or method of fixing the rate, would they favour; and, in particular, would they favour the rate being set by reference to the return on index-linked government securities?**

***(c) Accommodation purchased by persons other than the plaintiff***

- 3.90 The discussion in the preceding paragraphs presupposes that the property will be purchased by the plaintiff. Where, however, the plaintiff is a minor, the property may well be purchased by, and the purchase funded by, for example, the plaintiff's parents,<sup>174</sup> either out of their available capital or, more likely, by way of a mortgage.<sup>175</sup> This poses a conceptual problem, in so far as the courts would appear to be awarding damages for the parents' loss, rather than the plaintiff's, unless one adopts an analysis parallel to the one adopted in *Hunt v Severs*<sup>176</sup> in relation to gratuitously supplied care, so that the plaintiff is holding the relevant part of the damages on trust for the parents. This difficulty seems to have had very little express recognition by the courts, although in *Thomas v Brighton Health Authority*,<sup>177</sup> at first instance, Collins J rejected the argument that, since the property had been purchased by the plaintiff's parents and not the plaintiff, there was no loss to be compensated.<sup>178</sup> **Our provisional view is that, analogously to damages for gratuitously provided care, the plaintiff should either hold the damages awarded in respect of accommodation costs on trust for the gratuitous providers of any finance given for the purchase and/or adaptation of that accommodation, or alternatively be placed under a personal obligation to account to the providers of the gratuitous finance**

<sup>172</sup> [1983] 2 AC 773, 782-784. See also *Birkett v Hayes* [1982] 1 WLR 816, 824-825, *per* Eveleigh LJ.

<sup>173</sup> See, eg, [1983] 2 AC 773, 785, *per* Lord Diplock.

<sup>174</sup> For the sake of brevity, we will refer throughout the discussion of this topic to the plaintiff's parents, although, of course, its relevance extends beyond parents.

<sup>175</sup> As it was in *Roberts v Johnstone* [1989] QB 878.

<sup>176</sup> [1994] 2 AC 350. We are in general agreement with the approach taken in *Hunt*: see paras 2.26 and 3.46 above.

<sup>177</sup> [1996] PIQR Q44.

<sup>178</sup> *Ibid*, Q55. This was not adverted to in the Court of Appeal.

**for those damages. We ask consultees whether they agree and, if so, which of the two approaches they prefer.**

- 3.91 There is very little discussion in the case law of the question of the respective interests in the property, where a property is not being purchased by the plaintiff.<sup>179</sup> There may be a case for addressing these issues at the time when the damages are awarded, where the purchase, and any necessary alterations, are to be funded partly by the parents and partly out of the damages. For example, the plaintiff may, on reaching adulthood, be able to lead an independent life, and wish to purchase his or her own separate accommodation. Questions may then arise as to whether the plaintiff's contribution to the cost of the purchase and (if it constitutes an improvement) alteration of the home gives him or her a beneficial interest in it, and therefore whether he or she has the right to compel its sale.<sup>180</sup> Enabling the court, at the same time as awarding damages, to declare the beneficial ownership of the property as at that date, might be a way to reduce the scope for dispute in these situations. But, on the other hand, there must be doubt as to whether it is appropriate for these matters to intrude upon the personal injury litigation, not only because this would add to the time and cost of the litigation, but also because, in dealing with interests in the property bought partly with the damages, the court would be going beyond its normal remit of assessing damages and would be dealing with the consequences of those damages being spent in a particular way. **We ask consultees whether they consider that the courts should be empowered to decide on the beneficial interests in the property at the time when damages are awarded in respect of the purchase or alteration of accommodation for the plaintiff. We would be especially interested to hear whether practitioners have experienced any problems in relation to this issue.**

## **(2) The cost of alterations**

- 3.92 In many cases, whether or not the plaintiff needs to move to alternative accommodation, it will be necessary to carry out alterations to adapt the plaintiff's home to his or her needs. The basic principle is that the plaintiff is entitled to the reasonable cost of carrying out alterations which are reasonable. The way in which the cost is assessed differs, however, according to the circumstances. The main division is between alterations which, in absolute terms,<sup>181</sup> enhance the value of the property, and those which have a nil or negative effect on value.

<sup>179</sup> An exception is *Lay v South West Surrey Health Authority* (unreported, 26 June 1989), in which Phillips J at least referred to the question whether the property would be beneficially owned by the plaintiff or by his parents, although he held that on the facts of the case it would not make any difference to the damages awarded. See *Kemp & Kemp*, vol 1 para 5-050.

<sup>180</sup> Under the Trusts of Land and Appointment of Trustees Act 1996, s 14.

<sup>181</sup> Ie regardless of the actual cost of carrying out the alterations.

**(a) Alterations enhancing value**

- 3.93 In *Roberts v Johnstone*<sup>182</sup> the Court of Appeal had to consider the appropriate basis on which to assess the damages in relation to the cost of alterations carried out by the plaintiff. Those alterations had brought about an increase in the value of the property, but the amount of the increase was less than the total cost of the works. The court awarded the cost of carrying out the alterations, less the increase in the value of the property.<sup>183</sup> A different approach was taken in *Willett v North Bedfordshire Health Authority*,<sup>184</sup> where a sum was awarded based on an annual figure of two per cent of the cost, calculated as if the alteration costs represented the cost of acquiring a property. Hobhouse J in *Willett* took the view that, given the fact that the treatment of the expenditure on alterations was not argued in *Roberts v Johnstone*, he was free to take a different approach.<sup>185</sup> There is an important difference between *Willett* and *Roberts* in that the enhancement to the value of the house resulting from the alterations in *Willett* was agreed by the parties to be “equivalent” to the cost, whereas the alterations in *Roberts* resulted in an enhancement to the value of the new house of little over a quarter of their total cost.
- 3.94 We see no reason, at least where the alterations substantially “pay for themselves”, why the *Willett* approach should not be taken. There is, after all, little difference, for these purposes, between purchasing a three-bedroom house for £100,000 and immediately adding a fourth bedroom at a cost of £50,000, resulting in a four-bedroomed house worth £150,000, and simply buying a four-bedroomed house for £150,000. The method used in *Willett* produces a result which is consistent between the two examples. If, however, one were to apply the method used in *Roberts*, the plaintiff would be able to recover the annual two per cent on the acquisition cost of £100,000 in the first example, but nothing at all in respect of the alterations, whereas in the second example he or she would recover the annual two per cent on the whole of the £150,000 outlay. This comparison highlights an inconsistency in *Roberts* between the treatment of the cost of alterations, where that cost contributes to an increase in the value of the property, and that of the cost of acquiring the property itself. Both types of expenditure involve the commitment of the plaintiff’s capital to, effectively, an enforced investment in housing rather than more rewarding forms of investment, yet only the first is deemed to be worthy of compensation.
- 3.95 It must be recognised that it will only be in a minority of cases, mainly involving adding extra accommodation without “customising” the property, that outlay will result in a commensurate increase in value. However, we believe that our criticism of *Roberts* is also valid in those far more numerous instances where, as in *Roberts* itself, the alterations increase the value of the property, but by less than the total amount of expenditure. We believe that the approach which we have advocated in the previous paragraph should be applied, *mutatis mutandis*, to these circumstances, and that any “wasted” expenditure which does not contribute to

<sup>182</sup> [1989] QB 878.

<sup>183</sup> See para 2.42 above.

<sup>184</sup> [1993] PIQR Q166.

<sup>185</sup> See para 2.42 above.

an increase in value should be recoverable in full.<sup>186</sup> Suppose, for example, a plaintiff remains in his or her existing house, but adapts it at a total cost of £15,000. The value of the house before the alterations is £80,000; the value after the alterations is £90,000, an increase of £10,000. So, of the cost of the alterations, £10,000 has produced an increase in value and the other £5,000 can be treated as “wasted”. We would propose that the £10,000 be treated in the same way as an acquisition cost would be. Assuming a rate of two per cent per annum,<sup>187</sup> the plaintiff will receive a sum based on £200 per annum which, if the multiplier is, say, 16, will be £3,200. To this figure must be added the “wasted” costs of £5,000, making a total of £8,200.

3.96 **We therefore provisionally recommend that, in relation to any alterations which increase the value of the altered property, the law should be as follows:-**

- (1) **the plaintiff should recover damages calculated by applying the appropriate annual rate of return<sup>188</sup> to the increase in value or (if smaller) the total cost of the alterations, and then applying a multiplier to this sum;**
- (2) **in addition, if any balance of the cost of the alterations remains after deducting the increase in value, that balance (that is, the ‘wasted costs’) should be recoverable.**

**We ask consultees:- (a) whether they agree with our provisional view that the position, as set out in (1) and (2) above, should be the law; and (b) whether they consider that it would be helpful for the purpose of clarifying the law for the above statement of the law to be set out in legislation.**

***(b) Alterations not enhancing value***

3.97 Where alterations to the property do not increase or decrease the capital value of the property, the simple cost of the alterations is recoverable.<sup>189</sup> The position is slightly more complicated where the alterations result in a *reduction* in the value of the property in absolute terms. This will happen where, for example, very extensive alterations are made to the property to adapt it to the specific needs of a severely disabled plaintiff. It may be the case that, in addition to the cost of the alterations, such a reduction should be reflected in the damages payable, but there does not appear to be any authority on the question, or any certainty as to how the reduction should be taken into account.<sup>190</sup> **We ask consultees whether they believe that the law on this question should be clarified and, if so:**

<sup>186</sup> See, eg, *Almond v Leeds Western HA* [1990] 1 Med LR 370 (Fennell J).

<sup>187</sup> But see paras 3.85-3.89 above.

<sup>188</sup> Set at 2% by *Roberts v Johnstone*, and confirmed at that rate by *Thomas v Brighton HA*.

<sup>189</sup> See para 2.43 above.

<sup>190</sup> *Ibid.*

- (1) **whether, in addition to the cost of the works, the damages awarded should take account of the reduction in value of the property; and, if so,**
- (2) **how the reduction in value should be taken into account.**<sup>191</sup>

### **3. THE MANAGEMENT OF THE PLAINTIFF'S AFFAIRS**

#### **(1) Court of Protection**

3.98 Where the plaintiff is under the jurisdiction of the Court of Protection, the general rule is that its fees, and the fees of, and reasonable solicitors' costs incurred by, a receiver, are recoverable from the defendant.<sup>192</sup> Although the law here is in general straightforward and clear, there are two areas in which the law might benefit from clarification. These are the effect, in the future, of diminishing capital upon Court of Protection fees;<sup>193</sup> and whether the existence of contributory negligence should be reflected in the award for Court of Protection fees.<sup>194</sup>

3.99 On the first of those two questions, we consider that, since the award of damages is designed to compensate the plaintiff's actual losses and expenses, so far as they can be predicted, the amount awarded for Court of Protection fees should be adjusted to take account of the actual reductions in capital, and consequently annual income expected in the future, and therefore the reductions in the Court of Protection fees levied on the annual income. That represents the current law, following the decision of Alliot J at first instance in *Roberts v Johnstone*.<sup>195</sup> In that case the plaintiff argued for fees of £33,600 to be awarded; the defendant argued that the future reduction in capital should be taken into account, and this sum halved. Alliot J did not make a detailed calculation of the likely size of the capital over future years, but awarded £25,000 after taking into account the possibility of future legal costs (separate from the annual fee) in relation to the management of the damages. He himself referred to this as a "broad brush" approach. One might argue that the courts here should adopt a more precise approach. We are, however, doubtful whether it would be practicable to amend the law so as to achieve a significant increase in the precision with which damages, in respect of Court of Protection fees, are calculated. It is also our view that any more precise method is best left for the courts to develop rather than being imposed by legislation. **We accordingly provisionally recommend that no reform on this issue is required. We ask consultees whether they agree.**

<sup>191</sup> For example, whether the amount representing the reduction in value should be discounted: cf para 3.93 above.

<sup>192</sup> See paras 2.48-2.51 above.

<sup>193</sup> See para 2.49 above.

<sup>194</sup> See para 2.50 above.

<sup>195</sup> Unreported, 22 October 1986; quoted in *Kemp & Kemp*, vol 1 para 5-055. See para 2.49 above.



3.100 As to contributory negligence reducing the total amount of the plaintiff's damages, we are unable to agree with the argument in *Ellis v Denton*,<sup>196</sup> that the fees of the Court of Protection should be exempt from the reduction in damages, and we do not consider any failure to treat the Court of Protection's fees in this way to result in a double deduction. It may be that, following *Cassel v Riverside Health Authority*,<sup>197</sup> *Ellis v Denton* can no longer stand as good law, and that contributory negligence *does* reduce damages recoverable for Court of Protection fees. But *Cassel v Riverside Health Authority* did not involve contributory negligence and *Ellis v Denton* was not mentioned. We consider that the law on this issue should be clarified. **We therefore provisionally recommend that where the amount of damages awarded to a plaintiff is reduced through contributory negligence, such reduction should be applied to the award in respect of Court of Protection fees in the same way as it is applied to the other damages. We ask consultees (a) whether they agree with our provisional view as to what the law ought to be; and (b) whether they would consider it helpful, for the purposes of clarifying the law, for the above statement of the law to be set out in legislation.**

## (2) Financial advisers' fees

3.101 A plaintiff recovering damages for personal injury will normally want to invest the damages that are awarded for future pecuniary losses such as lost earnings and expenses. Indeed, damages for future pecuniary loss are calculated on the assumption that they will be invested, and that the investment will produce a particular rate of return.<sup>198</sup> We take the view that, where it is reasonable for a plaintiff to obtain professional advice in order to obtain the rate of return which has been assumed in calculating the damages, he or she should be able to recover the reasonable cost of that advice.<sup>199</sup> To do otherwise imposes a cost on the plaintiff which would effectively deprive him or her of the return assumed in the assessment of damages, resulting in undercompensation. It can be argued that since the law does not concern itself with the way in which a plaintiff spends the damages awarded it should not concern itself with, or compensate, costs incurred by the plaintiff in making the decision how to invest the damages.<sup>200</sup> We disagree with that argument, and with the related argument that the cost of financial advice should be treated as being too remote.<sup>201</sup> In calculating damages for the plaintiff's future pecuniary loss, which will usually form the bulk of the total damages, the court must make assumptions about how, for this purpose, the

<sup>196</sup> Unreported, 30 June 1989; noted in *Kemp & Kemp*, C2-002. See para 2.50 above.

<sup>197</sup> [1992] PIQR Q168. See para 2.50 above.

<sup>198</sup> Paras 2.64-2.74 above. See also our Report on Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, paras 2.1-2.4 and 2.24-2.31.

<sup>199</sup> Such an approach is also taken in Canada, where plaintiffs regularly recover the cost of the investment advice necessary to achieve the intended level of return. See para A.66 below.

<sup>200</sup> See, eg, *Francis v Bostock*, *The Times* 8 November 1985 (Russell J). Cf *Anderson v Davis* [1993] PIQR Q87, in which R Bell QC disagreed. The view in *Anderson v Davis* seems to be supported in a dictum of the Court of Appeal in *Wells v Wells*, *The Times* 24 October 1996.

<sup>201</sup> *Ibid.*

plaintiff might invest the damages, and the rate of return on those investments.<sup>202</sup> The assessment of the damages and the investment of those damages are inextricably linked. We would, however, make a distinction here between, on the one hand, advice necessary to obtain the rate of return assumed in setting the quantum of damages for future pecuniary loss and, on the other hand, any further advice which the plaintiff might engage with a view to obtaining a higher rate of return. We would treat the latter kind of advice as not having the same close connection with the assessment process as the former, and therefore being beyond the scope of expenses that a plaintiff should be permitted to recover.

3.102 The rate of discount traditionally applied by the courts, and therefore the assumed rate of return, is 4.5 per cent. This was reaffirmed by the Court of Appeal in *Wells v Wells*, *Thomas v Brighton HA* and *Page v Sheerness Steel plc*.<sup>203</sup> It would almost certainly be necessary for a plaintiff to obtain professional advice to have the best chance of obtaining this rate of return whilst minimising risk. In contrast, if a lower rate of assumed return and discount (for example, index-linked government securities rates) were to be adopted by the courts (including where prescribed by the Lord Chancellor under the Damages Act 1996)<sup>204</sup> one would correspondingly not expect the plaintiff to have to incur significant expense in obtaining the advice necessary to obtain that rate of return.<sup>205</sup> Of course, the plaintiff could well seek detailed financial advice in order to try to obtain a return higher than the prescribed rate, but, for the reason we have given, the defendant should not be expected to pay for that advice.

3.103 It is probable, though not certain, that the law currently allows the recovery of reasonable costs of financial advice.<sup>206</sup> If this is not the present state of the law, reform is clearly needed to achieve the position which we have advocated. Moreover, even if the law *does*, in principle, already permit the recovery of those costs then we believe that the law should still be clarified. **We therefore provisionally recommend that a plaintiff in a personal injury case should be entitled to damages for the cost of such financial advice as may be reasonable in order to obtain the rate of return applied in the calculation of his or her damages for future pecuniary loss. We ask consultees whether they agree.**

#### 4. LOSSES ARISING OUT OF THE PLAINTIFF'S DIVORCE

3.104 Following *Pritchard v F H Cobden Ltd*,<sup>207</sup> where a plaintiff has suffered personal injuries and those injuries result in his or her becoming divorced, any loss recoverable as a result of the divorce, (for example because of financial relief granted by the court to the other spouse) will not be recoverable from the defendant, no matter how foreseeable the divorce and the attendant loss may be.

<sup>202</sup> In order to discount the damages to their present value.

<sup>203</sup> *The Times* 24 October 1996. See paras 2.70-2.72 above.

<sup>204</sup> Damages Act 1996, s 1. See para 2.69 above.

<sup>205</sup> For support for this view see *Kemp & Kemp* para 5-070.

<sup>206</sup> See para 2.52 above.

<sup>207</sup> [1988] Fam 22. Cf *Jones v Jones* [1985] QB 704.

The decision in *Pritchard* has been much criticised.<sup>208</sup> In reaching it the Court of Appeal, as we have seen,<sup>209</sup> relied on three main arguments, although general policy considerations no doubt underlay the arguments which were deployed.<sup>210</sup>

- 3.105 One argument was that to allow divorce losses would produce “infinite regress” in deciding the orders to be made after divorce.<sup>211</sup> But an apparent solution to this problem would be for the actual or likely lump sum (or any other form of ancillary relief) ordered or agreed in relation to the divorce to be calculated without regard to any damages which the plaintiff might recover for the cost of divorce whilst taking into account damages under all other relevant heads. The court would then be able to assess and award the damages for the cost of the divorce.
- 3.106 The second argument was that the financial relief represents only a redistribution of the matrimonial assets rather than a loss to the plaintiff. But for the purpose of assessing damages for the plaintiff’s personal injuries, it seems necessary to look at the financial position from the perspective of the plaintiff alone, and the fact the he or she is left with fewer assets than before the making of the order must mean that, for this purpose, the plaintiff has made a loss.<sup>212</sup>
- 3.107 The third argument revolved around the procedural difficulties involved in a situation where a court might, in hearing an action for personal injuries, have to predict what arrangements for financial provision would be made in matrimonial proceedings.<sup>213</sup> But this argument is not applicable where ancillary relief in the divorce has been awarded or agreed *before* the personal injury action is heard. In other cases, courts might indeed have to predict the likely financial outcome of matrimonial proceedings, but prediction of future events is an inevitable part of any award of damages for serious personal injuries. In any event, there are cases in which it would be possible to say with a high degree of probability that, given the plaintiff’s disability and future needs,<sup>214</sup> any court making financial provision on the plaintiff’s divorce would exercise its powers so as to ensure that the plaintiff retained the benefit of the whole, or substantially the whole, of the damages awarded for the injuries. It is noteworthy that in both *Jones v Jones*<sup>215</sup>

<sup>208</sup> See, eg, *McGregor on Damages* (15th ed 1988) para 1498; A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 196; *Clerk & Lindsell on Torts* (17th ed 1995) para 27-10; S Juss, “An ‘Unusual Claim’ in the Court of Appeal” [1987] CLJ 210.

<sup>209</sup> See paras 2.60-2.62 above.

<sup>210</sup> See para 2.63 above.

<sup>211</sup> See para 2.61 above.

<sup>212</sup> See *McGregor on Damages* (15th ed 1988) para 1498. See also S Juss, “An ‘Unusual Claim’ in the Court of Appeal” [1987] CLJ 210, 212, in which it is argued that the court’s argument is inconsistent with the (then new) statutory approach to financial provision on divorce embodied in s 3 of the Matrimonial and Family Proceedings Act 1984, whereby a spouse need not be put back into the same position as before the marriage broke down.

<sup>213</sup> See para 2.62 above.

<sup>214</sup> Both are matters to which the court must have regard, under the Matrimonial Causes Act 1973, s 25(2)(b) and (e).

<sup>215</sup> [1985] QB 704.

and *Pritchard v F H Cobden Ltd*,<sup>216</sup> the court heard both sets of proceedings together, which, in those cases, resolved any procedural difficulties, although with the new emphasis given by the Family Law Act 1996 to mediation and negotiated settlements, one would be less likely to encounter cases in which this solution would be appropriate.

- 3.108 The underlying and perhaps dominant consideration in *Pritchard* was that public policy should preclude the recovery of damages for loss resulting from divorce, and that the law should draw the boundaries of recoverability accordingly, even if that loss is reasonably foreseeable. We recognise that there are policy considerations that militate against recognising the consequences of divorce in this way; for example, the undesirability of giving unnecessary encouragement to divorce earlier than would otherwise be the case, or indeed at all. It is necessary, however, to balance those considerations against the hardship that may be caused to plaintiffs in cases where it can be proved to a court that the plaintiff's injuries have foreseeably led to divorce.
- 3.109 If one were to recognise divorce-related loss as a head of damages for personal injuries, the question as to whether the tortiously inflicted injuries did in fact cause the divorce would often be a difficult one. It could lead to evidence, for example expert psychiatric evidence, being marshalled at great cost by both plaintiff and defendant to establish or rebut causation. It could involve an investigation into the circumstances of the marital breakdown, and the consequent invasion of the privacy of both the plaintiff and the plaintiff's former spouse. One could, for example, conceive of a situation where a defendant adduced evidence of the plaintiff's behaviour including, perhaps, adultery, in order to demonstrate that even if the accident which caused the plaintiff's injuries had not occurred, the marriage would have broken down anyway. These difficulties would inevitably become worse the greater the time which had elapsed between the breakdown of the marriage and the hearing of the claim for damages. Nevertheless there will be some cases in which this causation issue is clear cut. In *Jones v Jones*<sup>217</sup> it was conceded by the defendant that the breakdown of the plaintiff's marriage was caused by his injuries, and even in *Pritchard v F H Cobden Ltd*<sup>218</sup> the defendant conceded that the divorce was at least partly caused by the injuries.
- 3.110 Apart from the possibly serious evidential difficulties involved in establishing causation, there is the further objection that, following the reform of the law resulting from the passing of the Family Law Act 1996,<sup>219</sup> any inquiry into the circumstances of a marital breakdown would appear to conflict with the new policy underlying the law of divorce. Under the old regime, it had been (at least formally) the duty of the court to make such an inquiry, so far as it reasonably

<sup>216</sup> [1988] Fam 22.

<sup>217</sup> [1985] QB 704.

<sup>218</sup> [1988] Fam 22.

<sup>219</sup> The Act is not yet in force. It will implement, with some amendments, reforms recommended in our Reports Family Law - The Ground for Divorce (1990) Law Com No 192 and Family Law - Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

could.<sup>220</sup> That duty will no longer exist. A divorce order under the 1996 Act follows the making of a statement by one or both spouses, fulfilling certain requirements, that the maker or makers of the statement believe that the marriage has broken down<sup>221</sup> and, after the statutory period of reflection and consideration<sup>222</sup> and the satisfying of the other statutory requirements,<sup>223</sup> a declaration by the party applying for the divorce that he or she believes that the marriage cannot be saved.<sup>224</sup> There is no provision for the statement to contain any explanation of the facts, beyond the primary fact of the breakdown of the marriage, or for any investigation to be held into the circumstances behind it.<sup>225</sup> The policy of the Act is to exclude any judicial inquest into the breakdown of the marriage: the creation of just such an inquest in the alternative forum of a claim for personal injuries would detract from that policy. In other words, it can be argued that it would frustrate the intention of excluding the details of the relationship between former spouses from judicial consideration in the divorce proceedings, if those details were brought into court in other proceedings.

- 3.111 **We ask consultees for their views as to whether the law should be reformed so as to allow a plaintiff to recover damages for pecuniary loss arising from financial arrangements made on a divorce that has been foreseeably caused by an actionable personal injury. We ask consultees particularly to bear in mind the new approach to divorce embodied in the Family Law Act 1996. If consultees do favour such a reform, we would further ask them to consider whether any changes, and, if so, what changes, should be made to procedure in the listing or hearing of personal injury and/or divorce cases in order to facilitate the resolution of claims for loss arising from the plaintiff's divorce.**

## **5. INTEREST ON DAMAGES FOR PECUNIARY LOSS**

- 3.112 The basic principle underlying the award of interest on pecuniary loss, that the plaintiff should be entitled to interest on past but not future loss,<sup>226</sup> is plainly a sound one. The plaintiff should be compensated for the delay between the incurring of pecuniary loss and his or her receipt of damages in respect of that loss. Moreover, given that, unlike damages for non-pecuniary loss, damages for pecuniary loss are awarded according to the value of money at the time when the loss was incurred, not at the time of trial, **we provisionally consider that the rate used to calculate interest on pecuniary loss should continue to**

<sup>220</sup> Matrimonial Causes Act 1973, s 1(3) (repealed by Family Law Act 1996, s 66(3) and Schedule 10.) In most cases it appears that this did not happen in practice (see, eg, Law Com No 192, para 2.2 and Appendix C) although the duty was by no means a dead letter for practical purposes (see, eg, *ibid*, Appendix C, paras 37 and 45).

<sup>221</sup> Family Law Act ss 5(1)(a) and (b) and 6.

<sup>222</sup> *Ibid*, ss 5(1)(c) and 7.

<sup>223</sup> *Ibid*, s 8 (information meetings) and 9 (arrangements for the future).

<sup>224</sup> *Ibid*, s 5(1)(d).

<sup>225</sup> In our Report Family Law - The Ground for Divorce (1990) Law Com No 192, paras 3.10-3.11 we rejected the option of an inquest into the breakdown.

<sup>226</sup> See paras 2.75-2.76 above.

**contain an element to reflect inflation.<sup>227</sup> We ask whether consultees agree. We also ask consultees whether they agree with our provisional view that the rate on the special account should continue to be the basis of the rate used to calculate interest on pecuniary loss and, if not, what rate should replace it.**

- 3.113 We have found more difficult the question of the extent to which the “half-rate” approach of *Jefford v Gee*<sup>228</sup> should apply; and how one should deal with the inconsistent approach to this question taken by the Court of Appeal in *Dexter v Courtaulds Limited*<sup>229</sup> and *Prokop v Department of Health and Social Security*.<sup>230</sup>
- 3.114 The perfect way to calculate interest on pecuniary loss would be to do so on each individual item of loss, for the full applicable rate and for the full period of the loss. Therefore, in the case of lost monthly earnings, interest would be computed separately on each month’s loss, and the figures aggregated. So, for example, where the accident takes place on 1 January 1991 and the trial three years later on 31 December 1993, and the plaintiff has lost earnings of £12,000 for the whole period between the accident and the trial, the interest on salary due to have been paid on 31 January 1991 would be calculated by multiplying the monthly rate by that month’s loss (£1,000), then by the period for which the loss is suffered (35 months, from 31 January 1991 to 31 December 1993). Interest on the salary due on 28 February 1991 would be calculated in the same way, except over a period of 34 months, and so on, down to the salary which the plaintiff would have received on 30 November 1993.
- 3.115 The rule in *Jefford v Gee*, whereby interest is calculated by applying the rate of interest to the total loss over the total period of that loss, and halving the resulting figure, was intended as a short cut to an approximation of this “perfect” result. Where the loss consists of a continuous loss, lasting up to the date of the trial, such as the loss of earnings in the example given in the previous paragraph, a fair approximation is indeed reached. The accuracy of the result, however, depends on the assumption that the loss is accruing at a constant rate all the time up to the trial. Once this assumption ceases to hold true - where, for example, the loss ceases before the trial because the plaintiff returns to work, or where the amount of the loss changes over time, perhaps because it is found that the plaintiff would have experienced changes in monthly salary if the accident had not happened - distortions occur and the relative accuracy of the approximation is lost. The distortion is particularly marked in cases where the loss ceases significantly before the trial, and the longer the time lapse is, the greater the distortion. The courts have sought to deal with this problem by not applying the *Jefford v Gee* method in the cases where to do so would be anomalous,<sup>231</sup> but the exceptional circumstances in which such a departure is regarded as justified has led to a difference of view between the Court of Appeal in *Prokop v DHSS* and the Court

<sup>227</sup> See para 2.77 above.

<sup>228</sup> [1970] 2 QB 130.

<sup>229</sup> [1984] 1 WLR 372.

<sup>230</sup> Unreported, 5 July 1983.

<sup>231</sup> See para 2.78 above.

of Appeal in *Dexter v Courtaulds Ltd*. The former, unlike the latter, regarded the exceptional circumstances as wide-ranging.<sup>232</sup>

- 3.116 We believe that the application of the *Jefford v Gee* approach to discrete items of past expenditure poses even more problems. For example, if a plaintiff incurs expenditure of £1,000 soon after an accident in May 1994, and the case comes relatively speedily to trial in May 1996, the interest which ought to be awarded in principle on that expenditure will cover the whole of the two-year period from accident to trial, and at the current rate of eight per cent,<sup>233</sup> this will be £160. Yet, if the *Jefford v Gee* calculation is applied, the interest payable on the same loss will be only half of that figure. The courts may be prepared not to apply *Jefford v Gee* to expenditure such as this, and may be readier to do so than with loss of earnings, but the position is uncertain.<sup>234</sup>
- 3.117 Our provisional view is that *Prokop* is to be preferred to *Dexter* and that, accordingly, the application of *Jefford v Gee* should be largely restricted to where the loss consists of a continuous loss lasting up to the date of trial; that, in other words, a wide range of exceptions to *Jefford v Gee* should be recognised. **We therefore ask consultees whether they agree with our provisional view that the decision of the Court of Appeal in *Prokop* is to be preferred to that of the Court of Appeal in *Dexter* (that is, that the exceptions to the “half-rate” approach of *Jefford v Gee* should be regarded as wide-ranging so that, for example, *Jefford v Gee* should not apply where the loss has been wholly incurred many years before trial). If consultees agree with that provisional view we also ask them whether they consider that reform would be best achieved by legislation, or by a practice direction, or by being left to the courts.**

## 6. OTHER QUESTIONS

- 3.118 **In addition to the questions which have been raised for consultation in this Part, consultees are invited to comment, with reasons, on any other aspects of the law covered by this Paper which they regard as being in need of reform.**

<sup>232</sup> See paras 2.78-2.82 above.

<sup>233</sup> See para 2.77 n 220.

<sup>234</sup> See paras 2.80-2.82 above.

## **PART IV**

# **SUMMARY OF RECOMMENDATIONS AND CONSULTATION ISSUES**

- 4.1 We set out below a summary of our questions and provisional recommendations on which we invite the views of consultees.

### **MEDICAL AND NURSING EXPENSES AND OTHER COSTS OF CARE**

#### **Section 2(4) of the Law Reform (Personal Injuries) Act 1948**

- 4.2 Our provisional view is that section 2(4) should not be repealed or reformed. We invite consultees to say whether they agree with that provisional view. If consultees do not agree we invite them to say, with their reasons, whether they would prefer a simple reasonableness test, as the Scottish Law Commission recommended, or a test of reasonableness on medical grounds, as the Pearson Commission recommended. (paragraphs 3.2-3.18)

#### **Recoupment of costs by the National Health Service**

- 4.3 We ask consultees for their views on the following questions:
- (1) Do consultees agree with our provisional view that, as a matter of legal principle, the NHS should have a claim to recover from tortfeasors (or other legal wrongdoers) the costs of NHS care resulting from a tort (or other legal wrong)?
  - (2) Do consultees consider that there are policy or practical reasons, and if so what are these reasons, that mean that no such right of recoupment should be introduced (and please note that we would very much welcome the views of those with detailed knowledge of the workings of the NHS on the issues raised in paragraph 3.33)?
  - (3) Do consultees agree with our provisional view that if a recoupment scheme were to be introduced, it should take the form of the NHS having a direct claim against the tortfeasor (or other legal wrongdoer) which is parasitic on the victim having recovered damages?
  - (4) Do consultees agree with our provisional view that, if a recoupment scheme were introduced, it would be sensible to adopt similar administrative arrangements to those used for the recoupment of social security benefits? (paragraphs 3.19-3.42)

#### **Care provided free of charge to the plaintiff by relations or other private individuals**

##### ***The general position***

- 4.4 We provisionally recommend: (a) that the availability of damages in respect of care provided gratuitously to the plaintiff is justified in order to permit the carer



to be remunerated for his or her services, and should continue; and (b) that accordingly either (i) the plaintiff should hold those damages on trust for the providers of past and future care or (ii) a personal obligation should be imposed on the plaintiff to account to the providers of past and future care for those damages. We invite consultees to say whether they agree with this provisional view and, if so, which of the two approaches (if either) they support. We would be particularly interested to hear whether any problems have been experienced in practice with the “trust” approach. (paragraphs 3.43-3.55)

- 4.5 We ask consultees whether, instead of or in addition to the injured victim’s claim, they would support reform which would enable the carer to make a direct claim against the tortfeasor (or other legal wrongdoer). (paragraphs 3.56-3.58)

***Care provided by the defendant***

- 4.6 It is our provisional view that there should be a legislative provision reversing *Hunt v Severs* and laying down that the defendant carer’s liability to pay damages for the plaintiff’s nursing (or other) care should be unaffected by any liability of the plaintiff, on receipt of those damages, to pay those damages back to the defendant as the person who has gratuitously provided that care. We ask consultees whether they agree with this provisional view. (paragraphs 3.59-3.68)

***The quantum of damages***

- 4.7 We are provisionally opposed to the introduction of limits, on damages awarded in respect of care provided gratuitously to the plaintiff, of the type introduced in some Australian jurisdictions. We ask consultees whether they agree. (paragraph 3.69)
- 4.8 We provisionally consider that the law in relation to the quantum of damages awarded to plaintiffs in respect of care gratuitously provided by another individual is not in need of statutory reform. We ask consultees whether they agree and, if not, to say what reforms they would favour. (paragraphs 3.70-3.72)

**Loss of the plaintiff’s ability to do work in the home**

- 4.9 It is our provisional view that the reasoning in *Daly v General Steam Navigation Co Ltd*<sup>1</sup> should be abandoned and that past and future loss of the ability to do work in the home should be treated consistently. In our view, therefore:
- (1) Loss or reduction of ability to carry out work in the home should be compensated as a past pecuniary loss where the plaintiff has paid for someone to carry out that work and as a future pecuniary loss where the plaintiff satisfies the court that he or she will pay for someone to carry out that work.
  - (2) Consistently with our proposed approach to gratuitously rendered nursing services, a plaintiff should be able to recover the loss incurred by a third party (including where the third party is the defendant) who has gratuitously rendered, or will gratuitously render, housekeeping services or

<sup>1</sup> [1981] 1 WLR 120.

other work in the home, and should either hold the damages so recovered on trust for that third party or alternatively should be under a personal obligation to account to the third party for the damages.

- (3) A plaintiff may also recover as an aspect of damages for non-pecuniary loss (pain, suffering and loss of amenity) a sum for the loss or reduction of ability to carry out work in the home. This will be particularly important when the plaintiff can recover no damages under (1) or (2) above because he or she has struggled on with the work despite the injury.

We ask consultees (a) whether they agree with our provisional view that the position, as set out in (1), (2) and (3) above, ought to be the law; and (b) whether they consider that it would be helpful, for the purposes of clarifying the law, for the above statement of the law to be set out in legislation. We would particularly welcome the views of practitioners with expertise in the field as to whether the decision in *Daly* causes significant problems in practice. (paragraphs 3.73-3.78)

### **Hospital visits**

- 4.10 We provisionally recommend that, as with damages for gratuitously provided nursing care, the injured plaintiff should be able to recover damages for the cost of hospital visits and should either hold the damages on trust for his or her visitors (as under the present law), or alternatively be placed under a personal obligation to account to them for the damages. We ask consultees whether they agree and, if so, which of the two approaches they prefer. (paragraph 3.79)
- 4.11 It is our provisional view that, for the same reasons (and by the same sort of legislative provision) as have been discussed above in respect of gratuitous care, *Hunt v Severs*<sup>2</sup> should be legislatively reversed in respect of its denial of a claim on behalf of the defendant for the costs of hospital visits. We ask consultees whether they agree. (paragraph 3.80)

## **THE PLAINTIFF'S ACCOMMODATION**

### **Purchase of suitable accommodation**

#### ***The basic approach***

- 4.12 We take the provisional view that the method of calculating accommodation costs used in *Roberts v Johnstone*<sup>3</sup> is better than the discounted cash flow method, provided that it is used with an appropriate rate of interest. We ask consultees whether they agree, and if not what alternative method of calculation they would advocate. (paragraphs 3.81-3.84)

#### ***The appropriate rate***

- 4.13 We ask consultees whether they consider that the rate of interest in calculating accommodation expenses should continue to be two per cent. If not, we ask

<sup>2</sup> [1994] 2 AC 350.

<sup>3</sup> [1989] QB 878.

consultees what rate, or method of fixing the rate, they would favour; and, in particular, whether consultees would favour the rate being set by reference to the return on index-linked government securities. (paragraphs 3.85-3.89)

***Accommodation purchased by persons other than the plaintiff***

- 4.14 Our provisional view is that, analogously to damages for gratuitously provided care, the plaintiff should either hold the damages awarded in respect of accommodation costs on trust for the gratuitous providers of any finance given for the purchase and/or adaptation of that accommodation, or alternatively be placed under a personal obligation to account to the providers of the gratuitous finance for those damages. We ask consultees whether they agree and, if so, which of the two approaches they prefer. (paragraph 3.90)
- 4.15 We ask consultees whether they consider that the courts should be empowered to decide on the beneficial interests in the property at the time when damages are awarded in respect of the purchase or alteration of accommodation for the plaintiff. We would be especially interested to hear whether practitioners have experienced any problems in relation to this issue of the beneficial interests in the property. (paragraph 3.91)

**The cost of alterations**

***Alterations enhancing value***

- 4.16 We provisionally recommend that, in relation to any alterations which increase the value of the altered property, the law should be as follows:
- (1) the plaintiff should recover damages calculated by applying the appropriate annual rate of return to the increase in value or (if smaller) the total cost of the alterations, and then applying a multiplier to this sum;
  - (2) in addition, if any balance of the cost of the alterations remains after deducting the increase in value, that balance (that is, the ‘wasted costs’) should be recoverable.

We ask consultees (a) whether they agree with our provisional view that the position, as set out in (1) and (2) above, should be the law; and (b) whether they consider that it would be helpful for the purpose of clarifying the law for the above statement of the law to be set out in legislation. (paragraphs 3.92-3.96)

***Alterations not enhancing value***

- 4.17 We ask consultees whether they believe that the law relating to the award of damages for the cost of alterations to accommodation resulting in a reduction in the value of the property should be clarified and, if so:
- (1) whether, in addition to the cost of the works, the damages awarded should take account of the reduction in value of the property; and, if so,
  - (2) how the reduction in value should be taken into account. (paragraph 3.97)

## **THE MANAGEMENT OF THE PLAINTIFF'S AFFAIRS**

### **Court of Protection**

- 4.18 Our provisional view is that the courts already properly take account of diminishing capital in calculating damages for Court of Protection fees and that, therefore, no reform on this issue is required. We ask consultees whether they agree. (paragraphs 3.98-3.99)
- 4.19 We provisionally recommend that where the amount of damages awarded to a plaintiff is reduced through contributory negligence, such reduction should be applied to the award in respect of Court of Protection fees in the same way as it is applied to the other damages. We ask consultees (a) whether they agree with our provisional view as to what the law ought to be; and (b) whether they would consider it helpful, for the purposes of clarifying the law, for the above statement of the law to be set out in legislation. (paragraph 3.100)

### **Financial advisers' fees**

- 4.20 We provisionally recommend that a plaintiff in a personal injury case should be entitled to damages for the cost of such financial advice as may be reasonable in order to obtain the rate of return applied in the calculation of his or her damages for future pecuniary loss. We ask consultees whether they agree. (paragraphs 3.101-3.103)

## **LOSSES ARISING OUT OF THE PLAINTIFF'S DIVORCE**

- 4.21 We ask consultees for their views as to whether the law should be reformed so as to allow a plaintiff to recover damages for pecuniary loss arising from financial arrangements made on a divorce that has been foreseeably caused by an actionable personal injury. We ask consultees particularly to bear in mind the new approach to divorce embodied in the Family Law Act 1996. If consultees do favour such a reform, we would further ask them to consider whether any changes, and, if so, what changes, should be made to procedure in the listing or hearing of personal injury and/or divorce cases in order to facilitate the resolution of claims for loss arising from the plaintiff's divorce. (paragraphs 3.104-3.111)

## **INTEREST ON DAMAGES FOR PECUNIARY LOSS**

- 4.22 We provisionally consider that the rate used to calculate interest on pecuniary loss should continue to contain an element to reflect inflation. We ask whether consultees agree. We also ask consultees whether they agree with our provisional view that the rate on the special account should continue to be the basis of the rate used to calculate interest on pecuniary loss and, if not, what rate should replace it. (paragraph 3.112)
- 4.23 We ask consultees whether they agree with our provisional view that the decision of the Court of Appeal in *Prokop v Department of Health and Social Security*<sup>4</sup> is to be preferred to that of the Court of Appeal in *Dexter v Courtaulds Limited*<sup>5</sup> (that is,

<sup>4</sup> Unreported, 5 July 1983.

<sup>5</sup> [1984] 1 WLR 372.

that the exceptions to the “half-rate” approach of *Jefford v Gee*<sup>6</sup> should be regarded as wide-ranging so that, for example, *Jefford v Gee* should not apply where the loss has been wholly incurred many years before trial). If consultees agree with that provisional view we also ask them whether they consider that reform would be best achieved by legislation, or by a practice direction, or by being left to the courts. (paragraphs 3.113-3.117)

#### **THE MULTIPLIER**

- 4.24 We would ask consultees to draw to our attention any problems with multipliers that relate solely to the calculation of future expenses (as opposed to other future pecuniary losses). (paragraphs 2.64-2.74)

#### **OTHER QUESTIONS**

- 4.25 In addition to the questions which have been raised for consultation consultees are invited to comment, with reasons, on any other aspects of the law covered by this Paper which they regard as being in need of reform. (paragraph 3.118)

<sup>6</sup> [1970] 2 QB 130.

# APPENDIX

## OTHER JURISDICTIONS

### SCOTLAND

#### Principles governing award and assessment: general

- A.1 Scottish law permits a pursuer to recover in a personal injury action the cost of the provision of care and other services, the value of any aids and equipment required, and any expenses incurred or to be incurred, so long as these are a consequence of the injury and satisfy a general test of 'reasonableness,' although cases refer to the reasonable cost of 'necessary' services or expenses.<sup>1</sup> What is regarded as reasonably necessary will depend on the particular circumstances of the individual pursuer and the nature of his or her injury. Scottish courts, like those in England, generally allow the pursuer to claim the expenditure involved in arranging his or her care and living arrangements in such a way that he or she is able to achieve a measure of independence, and to receive care and attendance in his or her preferred environment.<sup>2</sup>
- A.2 Reasonable expenses actually incurred before trial simply need to be ascertained and computed,<sup>3</sup> and if incurred in good faith on competent advice, they may be recovered even if it later becomes clear that they were unnecessary or disadvantageous.<sup>4</sup> For future expenditure, the traditional multiplier method will be used in order to quantify the pursuer's loss. In determining the multiplier, English actuarial tables have been used by Scottish courts, though only as a check on a value selected in the traditional manner and not as a starting point for assessment.<sup>5</sup> Scottish courts have also stressed that different factors go into the calculation of the multipliers for loss of future earnings and cost of future care.<sup>6</sup>

<sup>1</sup> See generally *Watson, Laidlaw & Co v Pott, Cassels & Williamson* 1914 SC 18; *Clyde Navigation Trs v Bowring SS Co* 1929 SC 715; *Pomphrey v Cuthbertson* 1951 SC 147; *Cruickshank v Shiels* 1951 SC 741, 753. Cf *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25. Scots law, which does not recognise punitive damages, appears to have been particularly insistent in emphasising that the fundamental principle governing awards is compensation, not punishment, and that the pursuer is only entitled to recover damages for an actual loss sustained (or to be sustained) by him or her.

<sup>2</sup> Cf *McMillan v McDowall* 1993 SLT 311; *Stevenson v Sweeney* 1995 SLT 29. There is no authority as to whether a pursuer can recover the cost of home care even where this is more expensive than being cared for in a private institution. Cf paras 2.3 above and A.58 below.

<sup>3</sup> The assessment of the value of services provided gratuitously by a relative or third party is obviously more problematic. See paras A.6-A.10 below.

<sup>4</sup> *Rubens v Walker* 1946 SC 215, 216. See also *Geddes v Lothian Health Board* 1992 SLT 986, 988.

<sup>5</sup> *O'Brien's CB v British Steel plc* 1991 SLT 477, 484. Lord President Hope did not think that it could be assumed that the mortality rates for persons living in Scotland were exactly the same as those for England and Wales.

<sup>6</sup> *Ibid.*, at p 486; applied in *Stevenson v Sweeney* 1995 SLT 29. See para 2.66 above.

### **Medical and hospital treatment**

- A.3 Section 2(4) of the Law Reform (Personal Injuries) Act 1948 applies in Scotland, in respect of NHS facilities available under the National Health Service (Scotland) Act 1978, as it does in England and Wales.<sup>7</sup> Thus in determining whether medical expenses are reasonable, the possibility of avoiding or reducing them by taking advantage of facilities available under the NHS is to be disregarded.
- A.4 In 1978, the Scottish Law Commission criticised this provision and recommended that it be repealed and replaced by the ordinary test of reasonableness.<sup>8</sup> The Commission was concerned that section 2(4) might lead to over-compensation in cases where it was patent that at some point the injured person would use NHS facilities. But this result has been avoided in England and Wales<sup>9</sup> and it seems that Scottish courts adopt the same approach.<sup>10</sup> If private medical expenses have not in fact been incurred because NHS facilities have been used instead, or it is very probable that such facilities will be used in the future, the pursuer will not be permitted to recover them.
- A.5 Section 11 of the Administration of Justice Act 1982 provides that in Scotland, as in England and Wales,<sup>11</sup> any saving attributable to the pursuer's maintenance at public expense in an institution should be set off against any award for lost income.

### **Gratuitous care: section 8 of the Administration of Justice Act 1982**

- A.6 Prior to 1983, Scottish courts took the view that where services are provided gratuitously by a third party, the loss in question is not sustained by the injured person but rather by the third party rendering the services. Since the fundamental principle of the Scots law of reparation is that damages are awarded only in respect of loss sustained by the pursuer, it was held that the value of such services could not form part of the injured person's own claim.<sup>12</sup> It was doubtful whether a direct claim by the third party rendering the services could be sustained either.<sup>13</sup>

<sup>7</sup> See paras 2.5-2.14 above.

<sup>8</sup> Damages for Personal Injuries - Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions (1978) Scot Law Com No 51, paras 81-3.

<sup>9</sup> See paras 2.10-2.14 above.

<sup>10</sup> In *Stevenson v Sweeney* 1995 SLT 29, the pursuer's claim for the cost of a nurse was rejected because the evidence was that the district nurse could provide this service and would do so without charge.

<sup>11</sup> Administration of Justice Act 1982, s 5: see para 2.2 above.

<sup>12</sup> *Edgar v Lord Advocate* 1965 SC 67 (care and services rendered by third party not recoverable without contract to pay for them); *Jack v M'Dougall & Co (Engineers)* 1973 SC 13 (out of pocket expenses incurred by third party not recoverable). Cf the need-based approach of the English courts in *Donnelly v Joyce* [1974] QB 454: see para 2.24 above.

<sup>13</sup> *Robertson v Glasgow Corp'n* 1965 SLT 143; *Higgins v Burton* 1967 SLT (Notes) 61; *Jack v M'Dougall & Co (Engineers)* 1973 SC 13. Scots law has never entertained direct claims by a husband or parent for loss of consortium or services.

A.7 Section 8 of the Administration of Justice Act 1982 in substance implemented the recommendations of the Scottish Law Commission<sup>14</sup> in giving injured persons a statutory right to claim damages in respect of ‘necessary services’ rendered to them by a relative. It provides:<sup>15</sup>

- (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 in the knowledge that an action for damages has been raised or is in contemplation 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.
- (2) The injured person shall be under an obligation to account to the relative for any damages recovered from the responsible person under subsection (1) above.
- (3) Where, at the date of an award of damages in favour of the injured person, it is likely that necessary services will, after that date, be rendered to him by a relative in consequence of the injuries in question, then, unless the relative has expressly agreed that no payment shall 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 -
  - (a) reasonable remuneration for those services; and
  - (b) reasonable expenses which are likely to be incurred in connection therewith.
- (4) The relative shall have no direct right of action in delict against the responsible person in respect of any services or expenses referred to in this section.

A.8 ‘Relative’ is defined in section 13(1) and covers the same class of persons who are entitled to claim for loss of support in a fatal accident action in Scotland.<sup>16</sup> In the case of services rendered by persons outside this group, such as friends or distant relatives, a claim by the injured person falls to be determined by the common law and thus will only succeed where a contract to pay for the services has been entered into. Under subsections (1) and (3), an express agreement by the relative

<sup>14</sup> Damages for Personal Injuries - Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions (1978) Scot Law Com No 51, Part II.

<sup>15</sup> As amended by s 69 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

<sup>16</sup> The class includes spouses, divorced spouses, cohabitants living together as husband and wife, children, stepchildren, parents, siblings, uncles, aunts, nephews, nieces, cousins, ascendants and descendants, as well as in-laws. The Scottish Law Commission’s recommendation excluded further third parties, considering that the need for recovery only existed within the family group. See Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions (1978) Scot Law Com No 51, paras 20-23, 29-31.



not to accept payment can prevent a section 8 claim.<sup>17</sup> Evidence that the relative performed past services without thought of repayment will not in itself be sufficient, since the agreement under subsection (1) must be made ‘in the knowledge that an action for damages has been raised or is in contemplation.’

A.9 The term ‘necessary services’ is left undefined by the Act. It has been interpreted fairly widely by the Scottish courts and covers a wide range of domestic as well as nursing or caring services.<sup>18</sup> The Scottish courts adopt a ‘broad approach,’ to valuation of these services, sometimes simply awarding a global sum and at other times looking either at the earnings foregone by the relative in providing the necessary services or at the commercial cost of providing them.<sup>19</sup> The courts have indicated a preference for the commercial rate, but have, in the absence of evidence of that rate, applied a valuation based on loss of earnings.<sup>20</sup> Where the commercial rate is used, it will be discounted for factors such as tax and national insurance, and must take account of the quality of the service provided and the qualifications of, and demands made on, the relative providing it. Commercial rates are usually used as a check on the value the court thinks appropriate.<sup>21</sup>

A.10 Section 8(2) of the 1982 Act places the pursuer under a duty to account to a relative who has provided necessary services.<sup>22</sup> The duty applies only in respect of damages recovered for past services,<sup>23</sup> not those for future services.<sup>24</sup> The question whether a claim by the injured person can be sustained under section 8 in respect of services provided by a relative who is also the defender has not yet been addressed by Scottish courts.<sup>25</sup> In *Hunt v Severs*<sup>26</sup> Lord Bridge said *obiter*

<sup>17</sup> See *Campbell v City of Glasgow District Council* 1991 SLT 616 (claim refused where carer insisted under cross-examination that she would not accept payment even if recovered from the defender). Cf *Myles v City of Glasgow District Council* 1994 SCLR 1112 (claim successful where carer willing to accept payment only if it had been awarded as damages).

<sup>18</sup> For examples, see *Myles v City of Glasgow District Council* 1994 SCLR 1112.

<sup>19</sup> See J Blaikie, “Personal Injuries Claims: The Valuation of ‘Services’” (1994) 17 SLT (News) 167.

<sup>20</sup> *Forsyth’s CB v Govan Shipbuilders Ltd* 1988 SLT 321, 326-7. The quantum of the section 8 claim was not questioned on appeal (1989 SLT 91). Where there is no commercial equivalent to the services in question, the court may use loss of earnings as an alternative: *Farrelly v Yarrow Shipbuilders Ltd* 1994 SLT 1349 (evidence of the pursuer’s wife’s lost earnings used to assess the value of her emotional and psychological support).

<sup>21</sup> *McMillan v McDowall* 1993 SLT 311, 315-6.

<sup>22</sup> The Scottish Law Commission regarded the loss as being the relative’s, but decided, largely on pragmatic grounds, not to recommend a direct action for the relative. Cf *Hunt v Severs* [1994] 2 AC 350, where the House of Lords adopted a trust analysis: see para 2.26 above.

<sup>23</sup> Under s 8(1).

<sup>24</sup> Under s 8(3).

<sup>25</sup> The wording of s 8 seems to contemplate that the ‘relative’ and ‘the responsible person’ will be different people (eg subsection(4)), as will usually be the case. It could be argued that s 10(iv), which provides that pre-trial payments by the defendant are deductible, and s 13(2), which provides that ‘payments’ include benefits in kind, combine to prevent recovery in respect of pre-trial care provided by the defendant. We are not aware, however, of any case in which this has been suggested, and in any event it would only apply to pre-trial and not post-trial care.

that if the case had been brought in Scotland it would have been ‘immediately obvious’ that the claim was unsustainable,<sup>27</sup> because the injured person would have been placed under a duty to account to the relative, and he could see no ground for requiring the defender to pay to the pursuer a sum of money which the pursuer had then to repay. But this reasoning cannot apply in respect of future services likely to be rendered by a relative-defender, where no duty to account is imposed by statute.

### **Inability to render personal services to a relative**

A.11 Section 9 of the Administration of Justice Act 1982 gives effect in Scotland to the recommendation of the Scottish Law Commission that an injured person should receive compensation in respect of personal services which he or she is no longer able to provide to other family members. It provides:

- (1) The responsible person shall be liable to pay to the injured person a reasonable sum by way of damages in respect of the inability of the injured person to render the personal services referred to in subsection (3) below.
- (2) ...
- (3) The personal services referred to in subsections (1) and (2) above are personal services -
  - (a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability,
  - (b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and
  - (c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative.
- (4) ... the relative shall have no direct right of action in delict against the responsible person in respect of the personal services mentioned in subsection (3) above.

A.12 Section 9 allows the injured person to claim damages in respect of an inability to render services both before and after the trial.<sup>28</sup> ‘Personal services’ is not defined but, as is the case with ‘necessary services’ under section 8, the Scottish courts have tended to interpret the term liberally.<sup>29</sup>

<sup>26</sup> [1994] 2 AC 350.

<sup>27</sup> At p 363.

<sup>28</sup> Eg *Johnstone v Hardie* 1990 SLT 744. Cf *Daly v General Steam Navigation Co Ltd* [1981] 1 WLR 120, para 2.37 above.

<sup>29</sup> See eg *Brown v Ferguson* 1990 SLT 274 (general housework, child care); *Ingham v John G Russell (Transport) Ltd* 1991 SLT 739 (gardening and DIY); *Fox v NCR (Nederland) BV* 1987 SLT 401 (board and lodging).

- A.13 In assessing a ‘reasonable sum by way of damages’ for the purposes of section 9, Scottish courts generally base awards on the commercial rate for the services in question.<sup>30</sup> A discount may be applied in order to reflect the fact that the injured person would have been partly incapable of rendering the services in the future in any event.<sup>31</sup> Despite the wording of section 9(3)(a), the courts seem to assess those services which the pursuer was actually providing, rather than those which he or she might have been expected to provide.

#### **Accommodation costs**

- A.14 Scottish law allows a pursuer to recover the reasonable cost of purchasing and moving to alternative accommodation, where this is reasonably necessary as a result of the injuries.<sup>32</sup> In *Geddes v Lothian Health Board*,<sup>33</sup> Lord Milligan accepted in principle the annualised cost approach adopted by the English Court of Appeal in *Roberts v Johnstone*<sup>34</sup> for calculating the cost of acquiring a new home. This approach was also accepted in *McMillan v McDowall*,<sup>35</sup> where a paraplegic claimed the cost of a specially built bungalow adapted to his needs.

#### **Cost of investment and management advice**

- A.15 Where the injured person is rendered incapable of managing his or her own financial affairs, and a curatory or trust is required, these costs will be recoverable.<sup>36</sup> The question whether fees incurred for advice on the investment and management of an award may also be recovered in cases which do not involve a curatory or trust does not appear to have arisen for determination.<sup>37</sup>

#### **Financial costs of divorce**

- A.16 There appears to be no clear Scottish authority regarding the recoverability of the financial costs of divorce or marriage breakdown resulting from the pursuer’s injuries.<sup>38</sup>

<sup>30</sup> Eg *Lenaghan v Ayrshire and Arran Health Board* 1993 SLT 544. See also J Blaikie, “Personal Injuries Claims: The Valuation of ‘Services’” (1994) 17 SLT (News) 167.

<sup>31</sup> Eg *G’s CB v Grampian Health Board* 1995 SLT 652 (pursuer’s history of depressive illness would probably have prevented her at times from acting as a wife and mother).

<sup>32</sup> See *McEwan & Paton on Damages in Scotland* (March 1993) para 11-07. Cf the English position, paras 2.39-2.47 above.

<sup>33</sup> 1992 SLT 986.

<sup>34</sup> [1989] QB 878.

<sup>35</sup> 1993 SLT 311, 317-8.

<sup>36</sup> Eg *Forsyth’s CB v Govan Shipbuilders Ltd* 1989 SLT 91; *G’s CB v Grampian Health Board* 1995 SLT 652. See *McEwan & Paton on Damages in Scotland* (August 1994) para 11-10. Cf paras 2.48-2.51 above.

<sup>37</sup> Cf para 2.52 above.

<sup>38</sup> In *Lang v Fife Health Board* 1990 SLT 626, the court was not satisfied that the pursuer’s injury had contributed significantly to the breakdown of his marriage, and no damages were awarded for his losses arising out of divorce. Cf paras 2.59-2.63 above.

## IRELAND

### Principles governing award and assessment: general

- A.17 Past and prospective expenses rendered necessary by tortiously-inflicted personal injury constitute a recognised head of pecuniary loss under Irish law, and the recoverability of any particular item of expense is determined by a test of reasonableness.<sup>39</sup> Items of expense which could be recovered include the costs of:<sup>40</sup> medical and hospital treatment;<sup>41</sup> continuing care, either at home or in an institution;<sup>42</sup> aids and appliances; the cost of moving to special accommodation or adapting an existing house;<sup>43</sup> and other expenses such as increased travelling or living costs.
- A.18 As in England, a multiplier method of assessment is used for calculating future expenses, but there are some important differences to be noted as regards the calculation of future pecuniary loss in general.<sup>44</sup> Irish courts have stated that “where there is a substantial element of future loss of earnings involved in any claim, the evidence of an actuary is not merely desirable but necessary”,<sup>45</sup> and make direct allowance, when calculating future pecuniary loss, for the impact of future inflation.<sup>46</sup> The result appears to be that Irish courts are more generous in the selection of the appropriate multiplier, including that for assessing future care costs.<sup>47</sup> As is the case elsewhere, the multiplier for future care will usually be higher than that chosen for calculating future loss of earnings.<sup>48</sup>

<sup>39</sup> J White, *Irish Law of Damages For Personal Injuries and Death* (1989) paras 5.1.01-5.2.01.

<sup>40</sup> See generally White, *op cit*, paras 5.3.01-5.3.08; *Conley v Strain*, 5 August 1988 (Unreported, HC), set out in White, *op cit*, paras 17.1.02-17.1.07.

<sup>41</sup> See paras A.19-A.21 below.

<sup>42</sup> See also paras A.22-A.26 below for care which is provided gratuitously by private individuals.

<sup>43</sup> See further para A.28 below.

<sup>44</sup> See J White, *Irish Law of Damages For Personal Injuries and Death* (1989) para 5.5.02; D McIntosh & M Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994) pp 7-8. For a brief description of the English approach, see Structured Settlements and Interim and Provisional Damages (1992) Consultation Paper No 125, paras 2.9-2.15.

<sup>45</sup> *O’Leary v O’Connell* [1968] IR 148, 156, *per* Walsh J. See also J White, *Irish Law of Damages For Personal Injuries and Death* (1989) para 4.3.13; B M E McMahan & W Binchy, *Irish Law of Torts* (2nd ed 1990) pp 790-792.

<sup>46</sup> This is done by adjusting the discount rate, and is in turn reflected in the actuarial multiplier adopted. See J White, *Irish Law of Damages For Personal Injuries and Death* (1989) para 5.5.02. White states that if there is evidence that medical and hospital expenses increase in cost at a rate greater than that of other consumer goods and services, the allowance made for inflation when assessing future expenses ought to be based on the rate of increase in the cost of such services, rather than that of consumer prices in general.

<sup>47</sup> B M E McMahan & W Binchy, *Irish Law of Torts* (2nd ed 1990) p 35.

<sup>48</sup> J White, *Irish Law of Damages For Personal Injuries and Death* (1989) para 5.5.02.

## Medical and hospital treatment

- A.19 In Ireland, injured persons are usually eligible to receive free medical and hospital services under the Health Act 1970.<sup>49</sup> Ireland has no statutory equivalent to section 2(4) of the Law Reform (Personal Injuries) Act 1948,<sup>50</sup> but in practice the Irish courts appear to reach the same result. The test of reasonableness, as applied by Irish courts, does not necessarily require plaintiffs who seek to recover the cost of private care to make use of any available free services.<sup>51</sup> But as in England,<sup>52</sup> Irish judges will not allow a plaintiff to recover the cost of treatment where the medical and hospital services in question are *in fact* provided free of charge under the Health Act 1970.<sup>53</sup>
- A.20 Section 2 of the Health (Amendment) Act 1986 shifts the cost of medical treatment in road traffic accident cases from the state to negligent defendants.<sup>54</sup> Section 2(1) requires a Health Board to charge negligently injured road traffic accident victims having a personal injury compensation claim<sup>55</sup> for services which they would otherwise be eligible to receive free of charge under the Health Act 1970. Although the Health Board is also given the power to waive or to reduce the charge, having regard to the amount of compensation actually received by the injured person and to any reduction for contributory negligence,<sup>56</sup> this power is to be ignored by a court when it assesses the injured person's damages.<sup>57</sup> Hence in road traffic accident cases, a defendant will have to pay as part of any damages for personal injury the amount of any charges made or likely to be made by a Health Board for treatment normally provided free.
- A.21 Where an injured person is maintained in a hospital or other institution at public expense under the Health Act 1970, the question arises whether his or her damages for loss of earnings should be reduced by the 'domestic element' thereby saved. There is no statutory provision in Ireland directing Irish judges to make such a reduction,<sup>58</sup> nor one which prohibits them from so doing.<sup>59</sup> The question

<sup>49</sup> Road accident victims may in some cases be charged for such services: see para A.20 below.

<sup>50</sup> See paras 2.5-2.14 above.

<sup>51</sup> See JWhite, *Irish Law of Damages for Personal Injuries and Death* (1989) para 5.2.01: "a proper application of the test of reasonableness... achieves, without the necessity for similar legislation, the same result at Irish law."

<sup>52</sup> See para 2.2 above.

<sup>53</sup> In *Cooke v Walsh* [1984] IRLM 208, it seems to have been assumed that damages could not be recovered for the cost of hospital treatment for which the plaintiff would not be charged. See further JWhite, *Irish Law of Damages for Personal Injuries and Death* (1989) para 5.6.06 n 36. The majority in *Cooke v Walsh* did however suggest (at p 219) that "some damages might properly be awarded" in respect of future therapy and transport, even if these services would be provided without charge.

<sup>54</sup> See White, *op cit*, paras 5.6.07-5.6.08. Cf paras 2.15 and 3.19-3.42 above.

<sup>55</sup> This will include money received by way of settlement, as well as damages awarded in court. See White, *op cit*, para 5.6.08.

<sup>56</sup> Health (Amendment) Act 1986, s 2(2)(a).

<sup>57</sup> *Ibid*, s 2(2)(b).

<sup>58</sup> Cf Administration of Justice Act 1982, s 5.

therefore falls to be determined by the common law, and does not appear to have arisen directly for decision,<sup>60</sup> but where the plaintiff is maintained in a private institution and is awarded damages for the cost of his care, it seems that the Irish courts may be prepared to make a deduction for the ‘domestic element’ of that award.<sup>61</sup>

### **Gratuitous care and expenses incurred by third parties**

A.22 In Ireland it is still possible for the husband or parents of an injured person to recover damages for loss of services and consortium in their own action against the wrongdoer.<sup>62</sup> Such damages may include any past or future medical, nursing or travel expenses incurred by the relative in meeting the injured person’s needs.<sup>63</sup> The question whether a wife may bring an action for loss of consortium in respect of injury to her husband has not been decided by the Irish courts, but it has been argued that, given the changed legal position of married women and the constitutional prohibition on sexual discrimination, the better view is that a wife does have a right of action.<sup>64</sup> In 1981 the Irish Law Reform Commission recommended<sup>65</sup> that the right of action should extend to all members of the family unit residing together, and that “all expenses reasonably incurred and financial losses suffered by any member of the family (other than the injured person)”<sup>66</sup> should be recoverable. These proposals were not implemented.

A.23 Expenses incurred by a relative or other third party are more often claimed by the injured person in his or her own action for damages.<sup>67</sup> But the court will not allow damages to be recovered twice in respect of the same expense, by both the victim in a personal injury action, and a relative in an action for loss of

<sup>59</sup> Section 2 of the Civil Liability (Amendment) Act 1964 enacts a general rule *against* the deductibility of money benefits, but the prohibition does not extend to benefits in kind.

<sup>60</sup> Given the Irish tradition against the deductibility of benefits, it has been argued that any savings on living expenses ought not to reduce damages for loss of earnings: see J White, *Irish Law of Damages for Personal Injuries and Death* (1989) para 4.10.24. This was the English view before 1982: *Daish v Wauton* [1972] 2 QB 262 (CA).

<sup>61</sup> *Griffiths v Van Raaj* [1985] ILRM 582, 587-8; cf *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174, 191.

<sup>62</sup> See B M E McMahon & W Binchy, *Irish Law of Torts* (2nd ed 1990) ch 33; J White, *Irish Law of Damages for Personal Injuries and Death* (1989) paras 4.4.27-4.4.29, 5.6.12 and ch 31.

<sup>63</sup> *Spaight v Dundon* [1961] IR 201, 215. See also para A.27 below.

<sup>64</sup> B M E McMahon & W Binchy, *Irish Law of Torts* (2nd ed 1990) p 599. See also the Irish Law Reform Commission’s proposals, discussed immediately below.

<sup>65</sup> First Report on Family Law: Criminal Conversation, Enticement and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC1-1981) pp 9-11, 17, and Parts IV and V of the draft Bill. See also the Law Reform Commission’s Working Paper No 7, *The Law Relating to Loss of Consortium and Loss of Services of a Child* (1979).

<sup>66</sup> See also *The Law Relating to Loss of Consortium and Loss of Services of a Child* (1979) Working Paper No 7, p 39, giving “expenses ... involved in visiting hospital” as an example.

<sup>67</sup> See eg *Conley v Strain*, 5 August 1988 (Unreported, HC), although the items in question were not challenged.

consortium. The prevailing view of academic commentators seems to be that the injured person's own claim should take precedence over a consortium action by the husband or parent.<sup>68</sup>

- A.24 Irish courts also allow an injured person to claim damages in his or her own personal injury action for the cost of past or future services gratuitously provided by a relative or other third party, in keeping with the general rule in Ireland against the deductibility of compensating benefits.<sup>69</sup> In *Doherty v Bowaters Irish Wallboard Mills Ltd*,<sup>70</sup> it was clear that nursing care would have to be provided for the plaintiff in the future, whether by paid professionals, the plaintiff's parents, or his spouse. The Supreme Court first assumed that in principle the plaintiff was entitled to recover damages for the cost of providing necessary care, assessed at the appropriate commercial rate for the provision of similar services. The court then held that the possibility that care might be provided gratuitously by the plaintiff's parents was an irrelevant circumstance, and should not reduce the damages payable. In addition, although the plaintiff might have chosen to reimburse his parents for their services, this was not made a precondition of recovery.<sup>71</sup> Essentially, this implies a needs-based approach similar to that subsequently adopted by the English Court of Appeal in *Donnelly v Joyce*.<sup>72</sup>
- A.25 More recent cases confirm that damages for gratuitous services provided by relatives or other third parties are indeed recoverable by injured persons in personal injury actions.<sup>73</sup> It is difficult to ascertain whether the Irish courts adopt a uniform approach towards the valuation of such gratuitous care, but their acceptance of a needs-based approach suggests an assessment based on commercial rates.<sup>74</sup>
- A.26 There appears to be no limit in Irish law upon the class of persons providing the gratuitous care in respect of which damages may be recovered, although in the cases of which we are aware the care had been provided by members of the injured person's family. Nor have Irish courts yet had to decide the question whether damages may be recovered for gratuitous care provided by the wrongdoer. It is possible that the Irish courts might allow such recovery, given their preference for a needs-based approach, the absence in Irish law of a duty to reimburse the care-provider, and the general rule against the deductibility of compensating advantages.

<sup>68</sup> See eg J White, *Irish Law of Damages for Personal Injuries and Death* (1989) paras 5.6.12 and 31.1.02. The trend in Ireland is towards recovery of all expenses by the injured person.

<sup>69</sup> See White, *op cit*, paras 5.3.05 and 5.6.02-5.6.05.

<sup>70</sup> [1968] IR 277.

<sup>71</sup> At p 286.

<sup>72</sup> [1974] QB 454. See para 2.24 above.

<sup>73</sup> Eg *Cooke v Walsh* [1984] IRLM 208; *Conley v Strain*, 5 August 1988 (Unreported, HC), set out in J White, *Irish Law of Damages for Personal Injuries and Death* (1989) paras 17.1.02-17.1.07 (damages for full domestic help and paramedic attendance provided by the plaintiff's family up to the date of trial).

<sup>74</sup> See eg *Doherty v Bowaters Irish Wallboard Mills Ltd* [1968] IR 277; White, *op cit*, para 5.6.05. Cf *Housecroft v Burnett* [1986] 1 All ER 332, 343; paras 2.33-2.36 above.

### **Inability to do work in the home**

- A.27 We noted above that in Ireland the husband or parent of an injured person may bring an action for damages for loss of services and consortium. It is well established that a husband may recover, as part of this action, the expense of employing extra domestic assistance due to the loss of his wife's services.<sup>75</sup> Although an injured wife can recover for loss of earning capacity outside the home, Irish courts have not yet followed those in England in allowing her recovery for loss of housekeeping capacity,<sup>76</sup> and recovery for lost domestic services appears confined to consortium and services actions. It has been argued that this is unsatisfactory, especially since these older actions are in decline and proposals to extend them remain unimplemented.<sup>77</sup>

### **Accommodation costs**

- A.28 A plaintiff is entitled to recover the cost of adapting an existing home or of purchasing a new one.<sup>78</sup> In the latter instance Irish courts make allowance for the fact that the plaintiff thereby obtains a capital asset in the property, and will not permit the plaintiff to recover the full cost of acquiring the new accommodation.<sup>79</sup> But it appears that, rather than adopting an 'annualised cost' approach, they take a 'rough and ready' approach to assessing the damages to which the plaintiff is entitled.<sup>80</sup>

### **Financial costs of marriage breakdown or divorce**

- A.29 Although there are no cases directly in point, it has been suggested that Irish courts might follow the Court of Appeal in *Jones v Jones*<sup>81</sup> and recognise the costs associated with the breakdown of marriage as a recoverable head of damages.<sup>82</sup> It must be borne in mind that divorce has only recently become available in Ireland.

## **AUSTRALIA**

### **Principles governing award and assessment: general**

- A.30 Australian law allows a plaintiff in a personal injury action to recover the reasonable value of goods and services required as a result of the injury. The

<sup>75</sup> *Spaight v Dundon* [1961] IR 201, 215. See also *Chapman v McDonald* [1969] IR 188 (recovery by parent on proof of contractual obligation to pay child for services).

<sup>76</sup> Cf *Daly v General Steam Navigation Co Ltd* [1981] 1 WLR 120: see para 2.37 above.

<sup>77</sup> See eg J White, *Irish Law of Damages for Personal Injuries and Death* (1989) para 4.4.27-4.4.29.

<sup>78</sup> White, *op cit*, para 5.3.07.

<sup>79</sup> See *Doherty v Bowaters Irish Wallboard Mills Ltd* [1968] IR 277, 286-7.

<sup>80</sup> Cf *Roberts v Johnstone* [1989] QB 878: see paras 2.40-2.41 above.

<sup>81</sup> [1985] QB 704.

<sup>82</sup> J White, *Irish Law of Damages for Personal Injury and Death* (1989) paras 4.1.12-4.1.13. This would be in keeping with the awards of general damages for strain placed on marriage in *Roche v Peilow*, 8 July 1986 (Unreported, HC) and *Flannery v Houlihan*, 16 December 1987 (Unreported, HC), both set out in White, *op cit*, paras 30.1.14-30.1.26. White does not mention the contrary decision of the Court of Appeal in *Pritchard v F H Cobden Ltd* [1988] Fam 22, discussed at paras 2.60-2.63 above.



criterion of recovery for any particular item of expense is, as elsewhere, ‘reasonableness.’<sup>83</sup> If goods or services can be shown to be reasonably required to alleviate the plaintiff’s condition, their reasonable value may be recovered. The question is not what would be ideal, but what is reasonable, which involves a weighing of cost against health benefits to the plaintiff.<sup>84</sup> Successful claims have included the value of such items as medical and nursing services, increased travelling and modified accommodation, and extra aids and appliances.<sup>85</sup>

- A.31 Free or subsidised hospital and medical treatment may be available to an injured person who has a claim for damages, but although Australia has no equivalent to section 2(4) of the Law Reform (Personal Injuries) Act 1948,<sup>86</sup> the requirement of reasonableness is not taken so far as to compel plaintiffs always to make use of available free medical treatment. The question in any particular case is whether any health benefit to the plaintiff in being treated privately outweighed the extra cost.<sup>87</sup> It has been argued that the reasonableness test should be interpreted liberally, excluding the recovery of exorbitant charges but giving the plaintiff a fairly free choice.<sup>88</sup>
- A.32 Damages in respect of future care costs are calculated using a multiplier approach.<sup>89</sup> Australian courts recognise that the deduction made for contingencies will not necessarily be the same for future expenditure as that made for future loss of earning capacity, because the contingencies relevant to the former head of loss are fewer and ‘of a different order.’<sup>90</sup> Future inflation is

<sup>83</sup> See generally H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) ch 4; J G Fleming, *The Law of Torts* (8th ed 1992) p 230; F Trindade & P Cane, *The Law of Torts in Australia* (2nd ed 1993) p 492.

<sup>84</sup> See *Sharman v Evans* (1977) 138 CLR 563, 573 (Barwick CJ, Gibbs and Stephen JJ, Jacobs and Murphy JJ dissenting).

<sup>85</sup> There appears to be no Australian authority on the recoverability of losses arising from divorce or marriage breakdown occasioned by the plaintiff’s injuries. State courts have held that where divorce was in any case probable the plaintiff may not recover: *Examiner Newspapers Pty Ltd v Geeves*, 1975 (Unreported, Tas SC); and that some recovery may be possible for the reduction in enjoyment of life which results from the breakdown of a marriage: *Hird v Gibson* [1974] Qd R 14; *Turnbull v Vickery*, 13 December 1976 (Unreported, NSW SC).

<sup>86</sup> See paras 2.5-2.14 above.

<sup>87</sup> See eg *Taccone v Electric Power Transmission Pty Ltd* [1962] Qd R 545 (expense of being treated in Italy rather than Australia not recoverable). Cf *Wyld v Bertram* [1970] SASR 1.

<sup>88</sup> H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.2.3. Luntz argues that the principle outlined in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 (see para A.36 below) should extend to this situation.

<sup>89</sup> See further F Trindade & P Cane, *The Law of Torts in Australia* (2nd ed 1993) pp 487-9; H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) ch 6. The multiplier method used in Australia is slightly different from that used in England.

<sup>90</sup> *Bresatz v Przibilla* (1962) 108 CLR 541. See Luntz, *op cit*, para 6.4.4.

allowed for only indirectly, through the adoption of a uniform discount rate for future care claims, set by the High Court at 3%.<sup>91</sup>

### **Medical and hospital treatment**

- A.33 Such arrangements as exist for the provision of public hospital services at little or no charge usually exclude persons with a claim for damages. Normally, therefore, a plaintiff will be entitled to damages for the cost of medical and hospital care and treatment, in line with his or her liability to pay for those services.<sup>92</sup> But if the plaintiff *has* received free treatment at public expense, it appears that the reasonable cost of the treatment will not be recoverable,<sup>93</sup> and in the case of future treatment courts have occasionally assumed that no charge will be made, and refused to award damages.<sup>94</sup>
- A.34 Following the introduction of the Health and Other Services (Compensation) Act 1995, Commonwealth health insurance benefits in respect of private care will be payable even to people who also have a right to receive personal injury damages.<sup>95</sup> The Commonwealth is given a right to recover from the plaintiff any benefits which have been paid prior to judgment or settlement,<sup>96</sup> and the plaintiff will be able to recover the value of any such benefits from the defendant. The court will, however, give the defendant credit for any benefits that will be received in the future.
- A.35 There is no requirement in Australia that savings on maintenance should be set off against damages for loss of earnings where the plaintiff is cared for by the State at public expense.<sup>97</sup> But where the plaintiff's care will be provided at a

<sup>91</sup> *Todorovic v Waller* (1981) 150 CLR 402. The discount rate has been raised by statute in all Australian jurisdictions, either generally or in relation to personal injury caused by motor accidents.

<sup>92</sup> Eg *Tyrell v Tyrell* (1980) 25 SASR 73; *Lyons v Lyons* [1981] VR 497; *Handley v Datson* [1980] VR 66; cf *Blundell v Musgrave* (1956) 96 CLR 73. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990), paras 4.3.3, 4.4.1-4.4.7.

<sup>93</sup> Cf Luntz, *op cit*, para 4.4.3, arguing that following *Griffiths v Kerkemeyer* (1977) 139 CLR 161, the plaintiff should be entitled to recover the reasonable cost of any necessary treatment, and the question is instead whether the defendant should be given credit because the cost has been met from public funds.

<sup>94</sup> Eg *Hunt v Johnson* [1962] WAR 55; *Taccone v Electric Power Transmission Pty Ltd* [1962] Qd R 545. Cf *Lindsley v Hawkins* [1973] 2 NSWLR 581, where the court took the view that the possibility that the law might be changed to provide free hospitalisation was to be ignored. See also H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.4.7, arguing that it is generally unrealistic, even in the absence of evidence, to assume that no charge will be made in the future.

<sup>95</sup> Health and Other Services (Compensation) Act 1995, ss 7, 9. This reverses the previous position under the National Health Act 1953 (as amended) and the Health Insurance Act 1973, which provided that claimants who had established a right to receive personal injury damages would not receive health insurance benefits. These provisions apply unless an insurer is directly liable to pay the expenses as they are incurred, under a reimbursement arrangement. See further D I Cassidy, "Health and Other Services (Compensation) Act 1995" (1996) 70 ALJ 473.

<sup>96</sup> Health and Other Services (Compensation) Act 1995, ss 8, 10.

<sup>97</sup> Australia has no equivalent to s 5 of the Administration of Justice Act 1982, and no deduction is made at common law: *Jensen v Burnham* [1966] QWN 51. Cf para 2.2 above.

charge and he or she is therefore entitled to receive a sum of damages for the cost of care, the High Court has held that a deduction for savings on maintenance is appropriate,<sup>98</sup> and that the deduction should be made from the damages for care rather than from those for lost earning capacity.<sup>99</sup>

### **Gratuitous care and expenses incurred by third parties**

A.36 In the leading case of *Griffiths v Kerkemeyer*,<sup>100</sup> the High Court of Australia followed the approach in *Donnelly v Joyce*<sup>101</sup> in holding that where the injury gives rise to a need for goods and services (such as attendance and care), the need itself is the relevant loss, and the reasonable cost of satisfying that need only a means of quantifying the damages to be awarded. Even where services are provided gratuitously by a relative or friend, therefore, their reasonable cost may be recovered. The court further held that the plaintiff should be regarded as holding such damages beneficially, without the imposition of a trust for the benefit of the provider or otherwise exacting an undertaking from the plaintiff to reimburse the provider.<sup>102</sup> Claims under *Griffiths v Kerkemeyer* now form a well-established sub-head of damages for medical, nursing and related services in personal injury actions in Australia.<sup>103</sup>

A.37 In *Van Gervan v Fenton*,<sup>104</sup> the High Court held that the wages foregone by the care provider were not an appropriate criterion for assessing the damages for gratuitous care and that, as a general rule, they should be assessed by reference to the market cost or value of the services provided.<sup>105</sup> Any requirement that the

<sup>98</sup> *Skelton v Collins* (1966) 115 CLR 94. H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 1.5.12, comments that the deduction has usually been small. This is similar to the deduction of the 'domestic element' from private care costs in *Shearman v Folland* [1950] 2 KB 43: see para 2.2 above.

<sup>99</sup> *Sharman v Evans* (1977) 138 CLR 563.

<sup>100</sup> (1977) 139 CLR 161.

<sup>101</sup> [1974] QB 454. See para 2.24 above. Some State courts had already chosen to follow this approach: see eg *Beck v Farrelly* (1975) 13 SASR 17, but cf eg *Gaydon v Public Transport Commission of NSW* [1976] 2 NSWLR 44. For earlier cases taking a different approach, see eg *Blundell v Musgrave* (1956) 96 CLR 73; *McGregor v Rowley* [1928] SASR 67; *Graham v Baker* (1961) 106 CLR 340.

<sup>102</sup> (1977) 139 CLR 161, *per* Stephen and Mason JJ. The Queensland Law Reform Commission has recommended that the court should be required by statute to consider whether damages for past care awarded in this way should be paid directly to the care provider. See *The Assessment of Damages in Personal Injury and Wrongful Death Litigation*, Report No 45 (October 1993) pp 51-2, 107. Cf also *Re D J R and the Mental Health Act 1958* [1983] 1 NSWLR 557 (damages under control of court because of plaintiff's incapacity paid out to persons providing services).

<sup>103</sup> In *Beck v Farrelly* (1975) 13 SASR 17, the court went so far as to allow recovery for voluntary assistance in the plaintiff's business while he was in hospital. See also *O'Keefe v Schluter* [1979] Qd R 224; *Cockshell v Australian National Railway Commission* (1986) Aust Torts Reps 80-024; H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.10.

<sup>104</sup> (1992) 175 CLR 327, on appeal from the Supreme Court of Tasmania. The plaintiff's wife had given up employment as a nurse's aide to care for him at home. Contrast this result with the position in England, paras 2.33-2.36 above.

<sup>105</sup> (1992) 175 CLR 327, 333, *per* Mason, Toohey, McHugh and Gaudron JJ. Brennan, Deane and Dawson JJ seemed to accept that *prima facie* the market rate is the appropriate rate,

satisfaction of the need be ‘productive of financial loss’, a term used by Gibbs J in *Griffiths v Kerkemeyer*,<sup>106</sup> was rejected.<sup>107</sup> It was conceded that the full market rate might not necessarily be appropriate in every case, and might have to be adjusted up or down, but the income foregone by the care provider would rarely be an appropriate guide.<sup>108</sup> Moreover, the damages were not to be reduced on the ground that some of the services now needed would have been provided in any event.<sup>109</sup>

A.38 There is conflicting authority at State level as to whether an injured plaintiff can recover damages where gratuitous services are provided by a friend or relative who is also the defendant. Most courts have refused damages because they would force the defendant to pay twice.<sup>110</sup> The question has not arisen for decision in the High Court.

A.39 In some Australian jurisdictions there are statutory limits upon what and how much may be recovered as damages for personal injury in certain types of claim. Such provisions exist primarily to reduce the cost to defendants or their insurers of compensating injured plaintiffs, and thereby to reduce insurance premiums.<sup>111</sup> So it is that *Griffiths v Kerkemeyer* claims have been abolished or limited by statute in some jurisdictions, principally in relation to motor or work accidents.<sup>112</sup> In

except where the injured plaintiff and the provider are living together as husband and wife or are in some other personal and permanent relationship. In practice, this is the most common situation.

<sup>106</sup> (1977) 139 CLR 161, 168. Cf *Graham v Baker* (1961) 106 CLR 340, 347.

<sup>107</sup> *Van Gervan v Fenton* (1992) 175 CLR 327, 333 (per Mason CJ, Toohey and McHugh JJ), 347 (per Gaudron J).

<sup>108</sup> *Ibid* at pp 333-8, 347-8. It was agreed, however, that the provider’s lost earnings might be ‘a starting point’ where there was no relevant market or the market rate was objectively too high, or where the nature and duration of the provider’s previous work is comparable to the services which he or she now provides.

<sup>109</sup> *Ibid* at p 350 per Gaudron J (Brennan, Deane and Dawson JJ dissented on this point).

<sup>110</sup> *Doble v Brunton* (1976) 72 LSJS 151; *Gowling v Mercantile Mutual Insurance Co Ltd* (1980) 24 SASR 321; *Jones v Jones* [1982] Tas SR 282. In *Gutkin v Gutkin* [1983] 1 Qd R 764 and *Maan v Westbrook* [1993] 2 Qd R 267, the Queensland Supreme Court took the view that damages should be refused because the plaintiff sustains no loss where his or her need for services is met by the defendant, although this approach would exclude *Griffiths* claims altogether. In *Lynch v Lynch* (1991) NSWLR 411, the New South Wales Court of Appeal allowed recovery where liability insurance was compulsory for the defendant. Other cases have ignored the presence or otherwise of insurance. See further J G Fleming, “Damages Against the Helpful Tortfeasor” (1992) 66 ALJ 388. Lord Bridge relied on several of the Australian cases in *Hunt v Severs* [1994] 2 AC 350: see para 2.32 above.

<sup>111</sup> See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.9; Queensland Law Reform Commission, *The Assessment of Damages in Personal Injury and Wrongful Death Litigation*, Report No 45 (October 1993) pp 1-2.

<sup>112</sup> Eg Common Law (Miscellaneous Actions) Act 1986 (Tas), s 5 (no claim for accidents after 1986); Transport Accident Act 1986 (Vic), ss 93(10)(c), 174 (ceiling on motor accident claims before 1987, no claim thereafter); Motor Accidents Act 1988 (NSW) s 72 (limitation and deductible thresholds for motor and work accident claims from mid-1987); Wrongs Act 1936 (SA), s 35a (limitation on claims for all accidents from 1987 onwards). See also R Graycar, “Before the High Court - Women’s Work: Who Cares?” (1992) 14 Syd L R 86; H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990), paras 4.6.3, 4.6.9.

contrast, the Australian Capital Territory has extended the *Griffiths* principle to allow damages to be recovered where the injured plaintiff formerly provided domestic services to others but is now unable to do so.<sup>113</sup>

- A.40 In *Wilson v McLeay*,<sup>114</sup> the High Court allowed an injured plaintiff to recover in her own personal injury action a reasonable sum in respect of expenses incurred by her parents in visiting her while she was in hospital, on the ground that the visits were reasonably necessary in order to alleviate her condition. Expenses incurred by relatives or friends in visiting the injured plaintiff may now be recovered by the injured plaintiff under the principle in *Griffiths v Kerkemeyer*, as long as they are reasonably necessary to alleviate the plaintiff's condition.<sup>115</sup>

#### **Actions for loss of consortium**

- A.41 The common law action by a husband or parent for loss of consortium remains available in South Australia, and has been extended in Queensland to allow a wife the same right.<sup>116</sup> Where the action is available, any medical, hospital and nursing expenses incurred by the husband, wife or parent in the treatment of the injured person can be recovered directly.<sup>117</sup> Damages for loss of consortium can also cover the loss of the injured person's domestic services, at least where paid replacement help is employed, and perhaps also where the services are replaced gratuitously.<sup>118</sup> Since an injured person is also able, in his or her own action, to recover such expenses and the value of services provided gratuitously, courts must avoid any duplication between the two claims.<sup>119</sup>

#### **Inability to do work in the home**

- A.42 Where a person formerly provided domestic or household services gratuitously but is now, due to injury, unable to do so, Australian courts have found the conceptualisation of the loss involved problematic, and their approach to compensation has not been uniform.<sup>120</sup> Before the abolition in most jurisdictions of the action for loss of consortium, the predominant approach was to regard the loss involved as a loss to the former recipients of the services, recoverable by

<sup>113</sup> Law Reform (Miscellaneous Provisions) Act 1955 (ACT), s 33 (as amended by the Law Reform (Miscellaneous Provisions) Act 1991).

<sup>114</sup> (1961) 106 CLR 523.

<sup>115</sup> See eg *Richardson v Schultz* (1980) 25 SASR 1; cf *Gow v MVIT* [1967] WAR 55. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.7.3.

<sup>116</sup> Law Reform (Husband and Wife) Act 1968 (Qd) (as amended) (from 18 September 1989). See generally Luntz, *op cit*, ch 10.

<sup>117</sup> *Smee v Tibbetts* (1953) 53 SR (NSW) 391; *Bresatz v Przibilla* (1962) 108 CLR 541.

<sup>118</sup> See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 10.1.5.

<sup>119</sup> See eg *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *McInerney v Bertram* (1980) 86 LSJS 402; *Cockshell v Australian National Railway Commission* (1986) Aust Torts Reps 80-024. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) chs 4,10; F Trindade & P Cane, *The Law of Torts in Australia* (2nd ed 1993) pp 506-8.

<sup>120</sup> See R Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 Syd L R 528; "Before the High Court - Women's Work: Who Cares?" (1992) 14 Syd L R 86.

them in a consortium action. Many courts therefore refused to allow an injured woman to claim damages herself in respect of her inability to perform those household services which she had previously undertaken gratuitously.<sup>121</sup> But more recently, some Australian courts have been prepared to view the loss as the injured person's own, and have allowed recovery primarily under the principle in *Griffiths v Kerkemeyer*.<sup>122</sup>

### **Accommodation costs**

- A.43 Australian courts have differed in their approaches to the recovery of the expense involved in the modification of the plaintiff's accommodation to meet his or her new needs. In most cases, the plaintiff has been allowed to recover only the difference between the cost of the conversion and the increase in the capital value of the house.<sup>123</sup> The full capital cost of purchasing a home will not be recoverable, and in some cases, the purchase of a new house has been regarded as unreasonable.<sup>124</sup> Where it is accepted that such a purchase is necessary, it seems likely that the Australian courts will follow the decision in *Roberts v Johnstone*<sup>125</sup> in calculating the amount to be awarded.<sup>126</sup>

### **Costs of investment and management advice**

- A.44 The cost of professional investment advice was taken into account in *Todorovic v Waller*<sup>127</sup> in fixing the uniform discount rate for multipliers for future care damages at 3%. Those plaintiffs who are under a disability such that they will also incur the management costs of their fund have been allowed to recover those additional expenses.<sup>128</sup>

<sup>121</sup> Eg *Burnicle v Cutelli* [1982] 2 NSWLR 26; *Mairward v Doyle* [1983] WAR 210.

<sup>122</sup> Eg *Hodges v Frost* (1984) 53 ALR 373 (recovery for necessary domestic services previously provided by plaintiff but now provided to her by other family members). Because of the abolition of the action for loss of consortium in most jurisdictions, the majority of claims are now brought under *Griffiths v Kerkemeyer*.

<sup>123</sup> *Carlton v Allison* [1964] NSW 946. Cf *Frankcom v Woods*, 1 October 1980 (Unreported, NSW CA), where nothing was deducted for the increased value of the house because the increase would only be realised on the plaintiff's death and would be minimal at that time.

<sup>124</sup> *Cannulli v Di Matteo*, 21 August 1979 (Unreported, NSW CA). The plaintiff, who was living with her parents, had claimed the cost of purchasing a new home, but this was rejected by the court, which said that if she could no longer live with her parents, the only reasonable option was to go into a nursing home or hostel.

<sup>125</sup> [1989] QB 878; see paras 2.40-2.41 above.

<sup>126</sup> See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.1.6.

<sup>127</sup> (1981) 150 CLR 402.

<sup>128</sup> Eg *Campbell v Nangle* (1985) 40 SASR 161; *Wegert v Dittman* [1988] 2 Qd R 228; *Treonne Wholesale Meats Pty Ltd v Shaheen* (1988) 12 NSWLR 522. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.1.10.

## NEW ZEALAND

### The Accident Compensation Scheme

- A.45 A comprehensive, no-fault accident compensation scheme exists in New Zealand under which those who suffer personal injury by accident are compensated.<sup>129</sup> The scheme was first introduced in 1974,<sup>130</sup> consolidated in 1982,<sup>131</sup> and radically altered in 1992.<sup>132</sup> The common law right to sue for damages is barred where the scheme itself provides cover,<sup>133</sup> and most victims of personal injury caused by negligence are confined to seeking only that compensation which may be obtained under the scheme.<sup>134</sup>
- A.46 The original scheme provided<sup>135</sup> for a ‘reasonable’ sum to be paid in respect of a wide range of expenses without the prior approval of the Accident Compensation Corporation.<sup>136</sup> Sums claimed had to be ‘reasonable by New Zealand standards’, but in addition to specific expenses incurred,<sup>137</sup> general provision was also made to compensate claimants for other ‘pecuniary loss not related to earnings.’<sup>138</sup> Provision was also made for lump sum compensation to be paid, up to a maximum amount, in respect of non-pecuniary loss.<sup>139</sup>

<sup>129</sup> For fuller accounts of the scheme and its background, see S Todd (ed), *Law of Torts in New Zealand* (1991) ch 2; K Oliphant, “Distant Tremors: What’s Happening To Accident Compensation in New Zealand?”, paper prepared for the Torts Section, SPTL conference, 14 September 1995; R Mahoney, “Trouble in Paradise: New Zealand’s Accident Compensation Scheme” in S A M McLean (ed), *Law Reform and Medical Injury Litigation* (1995) p 31; R S Miller, “An Analysis and Critique of the 1992 Changes to New Zealand’s Accident Compensation Scheme” (1992) 5 *Cant L R* 1; Honourable Bill Birch, *Accident Compensation - A Fairer Scheme* (1991) pp 10-15.

<sup>130</sup> By the Accident Compensation Act 1972 (as amended by the Accident Compensation Amendment Act 1973). There were further amendments in subsequent years.

<sup>131</sup> By the Accident Compensation Act 1982 (‘ACA 1982’).

<sup>132</sup> By the Accident Rehabilitation and Compensation Insurance Act 1992 (‘ARCIA 1992’). This Act introduced important changes in the level of compensation for medical and related expenses arising from accidental injury.

<sup>133</sup> ARCIA 1992, s 14(1); cf ACA 1982, s 27(1).

<sup>134</sup> It has been suggested that the limitation in the scope of the scheme introduced by ARCIA 1992, in terms of what injuries are covered, will lead to an increase in tort actions. See further para A.56 below.

<sup>135</sup> ACA 1982, Part VI.

<sup>136</sup> The governmental body operating the scheme, now renamed the Accident Rehabilitation and Compensation Insurance Corporation (‘the Corporation’).

<sup>137</sup> ACA 1982, ss 72-4 (travelling expenses), 76 (dental costs), 77 (replacement of clothing etc worn at time of accident), 75 (hospital treatment, the cost of drugs, and most medical treatment).

<sup>138</sup> ACA 1982, s 80. This section allowed the injured person to claim out of pocket expenses, any member of their family to claim for provision of household services, any third party to claim for reasonable expenses incurred in helping the injured person, and a sum to be claimed for the necessary care of an unconscious person requiring constant attention.

<sup>139</sup> ACA 1982, s 78-9 (up to \$17,000 for permanent loss or impairment of any bodily function; up to \$10,000 for loss of amenities, including disfigurement and pain and suffering).

- A.47 Concerned at the rising cost of the scheme, however, the Corporation in 1987 adopted a policy of specifying the maximum amounts that it would pay for various types of medical treatment and expense.<sup>140</sup> Although these guidelines were held to be unlawful by the New Zealand Court of Appeal,<sup>141</sup> the Government introduced regulations in 1989 which stipulated maximum amounts payable, and Regulations made under ARCIA 1992 have continued this policy.<sup>142</sup>
- A.48 The scheme introduced by ARCIA 1992 does not make explicit provision for compensation for ‘pecuniary loss not related to earnings’, and also abolished the provision for recovery for personal property damaged at the time of the accident. Part III makes provision for compensation for the costs of personal injury under the general heading of rehabilitation,<sup>143</sup> and compensation is now generally paid only after costs have actually been incurred. Regulations made under the Act govern entitlement to compensation and lay down the amounts payable, and for many types of expense, payment will only be made on the condition that the expense was ‘cost-effective.’ Where an individual’s programme of rehabilitation involves any costs to be incurred more than thirteen weeks after the injury, it must be submitted to the Corporation for approval, and payment will only be made to the extent that such approval has been given.<sup>144</sup>
- A.49 The costs of necessary and cost-effective *vocational* rehabilitation, aimed at enabling an injured person to return to work, will be met by the Corporation, but generally only for one year and in no event for more than two years.<sup>145</sup>
- A.50 Most central to this paper is compensation for *social* rehabilitation, which is concerned to meet the costs of restoring the independence of the injured person. This will include, for example, weekly payments for attendant care<sup>146</sup> and

<sup>140</sup> See R Mahoney, “Trouble in Paradise: New Zealand’s Accident Compensation Scheme” in S A M McLean (ed), *Law Reform and Medical Injury Litigation* (1995) pp 61-62; K Oliphant, “Distant Tremors: What’s Happening to Accident Compensation in New Zealand?”, paper prepared for the Torts Section, SPTL Conference in Cardiff, 14 September 1995, p 21; Honourable Bill Birch, *Accident Compensation - A Fairer Scheme* (1991) p 13.

<sup>141</sup> *New Zealand Society of Physiotherapists v ACC* [1988] 2 NZLR 641; *New Zealand Private Hospitals Association v ACC* [1988] 2 NZLR 648. The court held that the limits, imposed by the Corporation without legislative authority, could not defeat the statutory requirement that the Corporation must pay for medical expenses to a reasonable New Zealand standard; and that the Corporation had been wrong, in determining what was a reasonable sum, to take into account what it could afford to pay.

<sup>142</sup> See paras A.50-A.52 below.

<sup>143</sup> ARCIA 1992, ss 22-5 (vocational rehabilitation), 26 (social rehabilitation), 27 (physical rehabilitation).

<sup>144</sup> ARCIA 1992, ss 19-20.

<sup>145</sup> ARCIA 1992, ss 22-3.

<sup>146</sup> See generally ARCIA 1992, s 26, and Accident Rehabilitation and Compensation Insurance (Social Rehabilitation - Attendant Care) Regulations 1992 (SI 1992 No 259). ‘Attendant care’ is defined as “the provision... of physical assistance to enable the claimant to move around, to take care of basic personal needs such as dressing, feeding and toileting, and to protect the claimant from further injury in the ordinary environment; but does not include preparing meals, general housekeeping, home maintenance, or child care.”



household help<sup>147</sup> which may be claimed by the injured person only; the Corporation has no liability to the person providing the service. The payments are calculated according to a set formula and are subject to a threshold level of need and a ceiling on payment. Payments will not be made for household help where it is provided by a person who lives in the claimant's home, or who did so immediately prior to the injury.<sup>148</sup> Compensation for child care<sup>149</sup> is payable to an injured person who before the accident primarily undertook the care of the child concerned. It applies only in respect of children under the age of 12 and is calculated by reference to the number of children, up to a fixed weekly maximum. Again, there is no entitlement to compensation where the child care is provided by a person who lives in the claimant's home.

- A.51 Social rehabilitation compensation may also be claimed for adaptation or purchase of vehicles<sup>150</sup> and accommodation,<sup>151</sup> subject to detailed restrictions. Any expense claimed must be necessary and cost-effective, and certain types of alteration will not be paid for.<sup>152</sup> Nothing is payable for the maintenance or repair of vehicles, maximum amounts are imposed on all claims, and payments will not be made at less than five yearly intervals unless they are necessary and expected to be cost-effective. The costs of relocation to a new home will only be met where this is a cost-effective alternative to modification of the injured person's existing home.
- A.52 The cost of aids and appliances<sup>153</sup> necessary to achieve independence in daily living may still be met by the Corporation as social rehabilitation costs, but certain specified items, such as beds and prosthetic devices, will in no circumstances be paid for, and others only where they are a cost-effective alternative to payments for attendant care, home help or child care. Maximum amounts are set and a \$100 threshold applies.
- A.53 In addition to vocational and social rehabilitation costs, an accident victim can claim compensation in respect of 'treatment and physical rehabilitation.'<sup>154</sup> This

<sup>147</sup> See generally Accident Rehabilitation and Compensation (Social Rehabilitation - Home Help) Regulations 1992 (SI 1992 No 261). 'Household help' is defined as the provision of "services related to meal preparation, laundry and cleaning." Payments will only be made where the injured person was before the accident predominantly responsible for the task in question.

<sup>148</sup> Thus payments in respect of help provided by non-household members, such as friends or relatives who are not living with the injured person, seem to be permitted. There are no similar restrictions on payments for attendant care.

<sup>149</sup> See generally Accident Rehabilitation and Compensation Insurance (Social Rehabilitation - Child Care) Regulations 1992 (SI 1992 No 260).

<sup>150</sup> See generally Accident Rehabilitation and Compensation Insurance (Social Rehabilitation - Purchase and Modification of Vehicles) Regulations 1992 (SI 1992 No 270).

<sup>151</sup> See generally Accident Rehabilitation and Compensation Insurance (Social Rehabilitation - Modifications to Residential Premises) Regulations 1992 (SI 1992 No 269).

<sup>152</sup> Such as, for vehicles, air-conditioning or cassette players, and for buildings, heating systems or electrical appliances.

<sup>153</sup> See generally Accident Rehabilitation and Compensation Insurance (Social Rehabilitation - Aids and Appliances) Regulations 1992 (SI 1992 No 282).

<sup>154</sup> ARCIA 1992 s 27.

provision covers health care services and medical treatment, such as the cost of hospitalisation or treatment by a specialist, which need not form part of an individual's rehabilitation programme in order to entitle the recipient to payment.<sup>155</sup> A major change in this context is the introduction of the concept of 'user part charges' for public health care, requiring accident victims to pay charges for certain categories of public health care services.<sup>156</sup> The amount which must be borne by the claimant has also effectively been increased.<sup>157</sup> The overall result is that, although the scheme continues to pay out compensation for the cost of medical treatment, the level of compensation has been cut and the scheme does not provide the 'full' compensation which was previously obtainable by an accident victim at common law.

- A.54 Another significant change made in the 1992 reforms was the abolition of lump sum compensation for non-pecuniary loss, and the introduction of a weekly independence allowance,<sup>158</sup> scaled according to degree of incapacity, and subject to a threshold of disability.<sup>159</sup> It was envisaged that the independence allowance should be used by accident victims to make up the balance of costs which would not be met under the social rehabilitation provisions.<sup>160</sup>
- A.55 The Accident Compensation Scheme has been subject to considerable criticism in recent years. Academics have repeatedly highlighted the inadequacy of the Scheme in its current form when compared with the common law rights in tort which it replaced,<sup>161</sup> and concern voiced by official bodies including the New Zealand Law Commission has led to review of the Scheme through a government consultation procedure. The consultation document, however, provisionally

<sup>155</sup> ARCIA 1992, s 20(4). But cf s 27, which provides that treatments must be "necessary and appropriate and not excessive in number or duration."

<sup>156</sup> See Honourable Bill Birch, *Accident Compensation - A Fairer Scheme* (1991) pp 55-6.

<sup>157</sup> Honourable Bill Birch, *op cit*, p 56: "An effective move towards user part charges for [other categories of health care services] can be introduced... by reducing the maximum that the ACC can pay under regulations." Note the independence allowance and the role envisaged for it, discussed at para A.54 below.

<sup>158</sup> ARCIA 1992, s 54. See also Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 3.33-3.37.

<sup>159</sup> The allowance has repeatedly been criticised for setting too high a threshold and awarding too low a sum even at the top of the scale. See eg K Oliphant, "Distant Tremors: What's Happening To Accident Compensation in New Zealand?", paper prepared for the Torts Section, SPTL conference, 14 September 1995, p 26.

<sup>160</sup> Honourable Bill Birch, *Accident Compensation - A Fairer Scheme* (1991) pp 47-50, 58-9: the aim is "to enable those injured to meet the additional costs of disability during the remainder of their life."

<sup>161</sup> See eg R Mahoney, "Trouble in Paradise: New Zealand's Accident Compensation Scheme" in S A M McLean (ed), *Law Reform and Medical Injury Litigation* (1995) p 31; R S Miller, "An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme" (1992) 5 *Cant L R* 1. Mahoney describes (at p 33) the absence of a right to sue in tort as "a severe penalty as the dictated benefits fall well short of the damages available in a traditional lawsuit", and suggests (at p 77) that "meaningful compensation [is] missing under the Act."

rejects a return to traditional tort claims, and suggests that lump sum payments will not be generally reintroduced.<sup>162</sup>

### **Personal injury falling outside the accident compensation scheme**

- A.56 Although the Accident Compensation Scheme removed actions in tort for any injury in respect of which compensation was available under the Scheme, a limited number of residual personal injury actions still reach the courts. These actions relate to injuries inflicted intentionally, or those which occur in circumstances which do not satisfy the definition of ‘accident’ for the purposes of the Scheme.<sup>163</sup> It has been suggested, however, that limitation of the scope of the Scheme will increase the number of common law actions being brought.<sup>164</sup>

## **CANADA**

### **Principles governing award and assessment: general**

- A.57 Canadian courts apply a test of reasonableness in order to determine the damages which may be awarded to an injured person in respect of care and rehabilitation.<sup>165</sup> In the late 1970s the Supreme Court of Canada established that an item of expense should be regarded as reasonable wherever it can be used to sustain or improve the mental or physical health of the injured person, and that an item justified by the medical evidence in this way will not be disallowed just because it is very costly.<sup>166</sup> The Supreme Court also indicated that the primary concern of the courts when awarding damages for personal injuries should be to ensure that the plaintiff is adequately provided for in terms of future care.<sup>167</sup> Although claims had always to be reasonable, the Supreme Court said that concerns about the social burden of the expense were of secondary importance in

<sup>162</sup> See generally Honourable Bruce Cliffe, *Accident Compensation* (1995), and especially pp 9-11, 13, 33.

<sup>163</sup> ARCIA 1992, ss 3-4.

<sup>164</sup> See eg R S Miller, “An Analysis and Critique of the 1992 Changes to New Zealand’s Accident Compensation Scheme” (1992) 5 *Cant L R* 1, 13.

<sup>165</sup> See generally S M Waddams, *The Law of Damages* (2nd ed 1991) paras 3.410-3.490 and 3.1110-3.1240; K Cooper- Stephenson & I Saunders, *Personal Injury Damages in Canada* (1981) pp 132-147, ch 6; (1994) 11 *CEJ* (West 3rd) paras 251-3 and 301-317.

<sup>166</sup> The issues were raised in a series of contemporaneous cases, usually referred to as ‘the trilogy’, concerning plaintiffs facing a lifetime of dependency and care because of their catastrophic injuries: *Andrews v Grand & Toy Alberta Ltd* (1978) 83 *DLR* (3d) 452; *Thornton v Board of School Trustees of School District No 57 (Prince George)* (1978) 83 *DLR* (3d) 480; *Arnold v Teno* 83 *DLR* (3d) 609.

<sup>167</sup> *Andrews v Grand & Toy Alberta Ltd* (1978) 83 *DLR* (3d) 452, 476; *Arnold v Teno* (1978) 83 *DLR* (3d) 609, 630, 632, 639. Acceptance of the principle that pecuniary loss should be fully compensated formed part of the Court’s justification for the imposition of a ceiling on damages for non-pecuniary loss (which it set at \$100,000). It was thought permissible to take account of the social impact of very large awards for non-pecuniary loss once a plaintiff’s care needs had been properly provided for. See *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 3.38-3.48.

relation to damages for the cost of care, as opposed to damages for non-pecuniary loss, where they carried ‘considerable weight’.<sup>168</sup>

- A.58 On the basis of the medical evidence before it, the Supreme Court awarded the cost of home care, instead of much less costly institutional care, to the plaintiffs in the ‘trilogy’. Home care has since become the norm for seriously injured plaintiffs,<sup>169</sup> and Canadian courts will usually favour the plaintiff when judging the reasonableness of a claim in respect of care.<sup>170</sup>
- A.59 Canadian courts employ actuarial evidence in the calculation of damages for future pecuniary loss, including damages for future care, and tend to regard the discount rate to be applied as a question of fact to be determined in each case.<sup>171</sup> They also make specific allowance for the impact of taxation on the income generated by investment of any sum awarded for future care.<sup>172</sup> As in England, a deduction is made for any overlap in provision of living expenses between awards for loss of earnings and the cost of care.<sup>173</sup>

### **Medical and hospital treatment**

- A.60 Canada operates a universal health insurance scheme, and the bulk of an injured person’s medical and hospital expenses will usually be met by the relevant provincial health scheme.<sup>174</sup> Although the statutory provisions of the health insurance schemes vary, they normally provide for the provincial health care provider concerned to be subrogated to the plaintiff’s rights.<sup>175</sup> Damages for

<sup>168</sup> *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 467. The court said that, as regards the cost of care, the aim of minimising the social burden of expense should never compel the choice of the unacceptable, although it might influence a choice between acceptable alternatives.

<sup>169</sup> Ontario Law Reform Commission, Report on Compensation for Personal Injuries and Death (1987) p 118.

<sup>170</sup> S M Waddams, *The Law of Damages* (2nd ed 1991) para 3.1160. In 1987, the Ontario Law Reform Commission examined concerns regarding cost and inconsistency in relation to the courts’ interpretation of ‘reasonableness’. But it took the view that a general reasonableness test was the appropriate one to apply, that the courts were applying it responsibly, and that it ensured the desired degree of flexibility. See Report on Compensation for Personal Injuries and Death (1987) pp 125-7 and recommendation 26.

<sup>171</sup> S M Waddams, *The Law of Damages* (2nd ed 1991) para 3.1010; Ontario Law Reform Commission, Report on Compensation for Personal Injuries and Death (1987) pp 218-225.

<sup>172</sup> *Watkins v Olafson* [1989] 2 SCR 750; *Scarff v Wilson* [1989] 2 SCR 776. Canadian courts do not make allowance for taxation when calculating damages for future loss of earning capacity.

<sup>173</sup> *Watkins v Olafson* [1989] 2 SCR 750, 773; *Semenoff v Kokan* (1991) 59 BCLR (2d) 195, 202-3. Cf the English approach, para 2.2 above.

<sup>174</sup> See S M Waddams, *The Law of Damages* (2nd ed 1991) paras 3.1150 and 3.1740-3.1760; K D Cooper-Stephenson & I B Saunders, *Personal Injury Damages in Canada* (1981) pp 133, 299-302, 520-527. Most schemes are now publicly funded and require no payment from individuals.

<sup>175</sup> Waddams, *op cit*, paras 3.1150 and 3.1740; Cooper-Stephenson & Saunders, *op cit*, p 521; J A Rendall, “Subrogation in medical and hospital insurance schemes: judicial philosophy versus legislative pragmatism” (1974) 6 Ottawa L Rev 291. Only the province of Alberta operates on a principle of deduction rather than subrogation, and expressly excludes any

medical expenses will therefore be important to the plaintiff only in the minority of cases where health insurance does not cover his or her loss.<sup>176</sup> If the defendant has insufficient assets to meet both the subrogated claim of the health plan and the plaintiff's claim for other damages, it has been held by the Supreme Court of Canada that the plaintiff's claim should take priority.<sup>177</sup>

- A.61 A personal injury victim in Canada may also receive free or subsidised care under publicly funded health programmes.<sup>178</sup> In keeping with the interpretation of reasonableness used by the Canadian courts, the mere availability of free or subsidised care will not in itself be sufficient to preclude the plaintiff from recovering damages for private care where the medical evidence suggests that the latter is more appropriate.<sup>179</sup> Where pre-trial care has in fact been provided to the plaintiff for free, he or she will not be entitled to recover damages for that care in the absence of a legal obligation to pay or to seek recovery on behalf of the health care provider.<sup>180</sup> The Supreme Court has held that the mere possibility that the plaintiff might be awarded damages on the basis of private care but then take advantage of free facilities, or that the State might in the future provide adequate care at no cost to the plaintiff, ought not to affect assessment where there is no evidence to support the conjecture.<sup>181</sup>

### **Gratuitous care and expenses incurred by third parties**

- A.62 Canadian law in this area has developed in a similar way to the law in England. Originally, claims for damages in respect of gratuitous services were denied on

action against a tortfeasor in respect of losses covered by the scheme. The Ontario Law Reform Commission considered abrogating the subrogation rule currently applicable in Ontario and adopting one in favour of deduction instead, but decided against it in the absence of detailed empirical analysis of whether the potential administrative savings would outweigh the loss of deterrence: Report on Compensation for Personal Injuries and Death (1987) pp 192-3.

<sup>176</sup> K D Cooper-Stephenson & I B Sanders, *Personal Injury Damages in Canada* (1981) p 300.

<sup>177</sup> *Ledingham v Ontario Hospital Services Commission* [1975] 1 SCR 332.

<sup>178</sup> See S M Waddams, *The Law of Damages* (2nd ed 1991) paras 3.1670-3.1710; K D Cooper-Stephenson & I B Saunders, *Personal Injury Damages in Canada* (1981) pp 296-8, 300-302, 319; (1994) 11 CED para 332.

<sup>179</sup> Eg *Watkins v Olafson* [1989] 2 SCR 750, where the Supreme Court refused to limit damages to the cost of living in a government-subsidised apartment where the evidence was that it did not provide the care required by the plaintiff. But if, on the evidence, cheaper care is sufficient for meeting the plaintiff's needs, an award of damages may be limited to the value of that level of care.

<sup>180</sup> *Semenoff v Kokan* (1991) 59 BCLR (2d) 195, 201-2.

<sup>181</sup> *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452: "There is no evidence that the Government of Alberta at present has any plans to provide special care... [a]ny such possibility is speculation ... It is not for the court to conjecture upon how a plaintiff will spend the amount awarded to him... [t]here is nothing to show that [these dangers] have any basis in fact." at p 465-6 *per* Dickson J. See also *Thornton v School District No 57 (Prince George)* (1978) 83 DLR (3d) 480, 487. But cf *Wipfli v Britten* (1984) 13 DLR (4th) 169 (no recovery where highly improbable that plaintiff would ever be charged for his care). See further K D Cooper-Stephenson & I B Saunders, *Personal Injury Damages in Canada* (1981) p 297; S M Waddams, *The Law of Damages* (2nd ed 1991) para 3.1700.

the grounds that the plaintiff was under no obligation to pay for them.<sup>182</sup> But Canada now generally allows the plaintiff to recover damages in respect of gratuitous care provided by any third parties,<sup>183</sup> although in most cases a trust will be imposed in favour of the care-provider, or the plaintiff will be required to undertake to pay the damages over.<sup>184</sup> Some courts, however, have refused or limited damages where household services have been provided by another member of the same household, holding that these services are of a kind which family members can be expected to perform for each other without payment.<sup>185</sup> There is no uniform approach to the valuation of the services, which have sometimes been assessed according to the provider's lost earnings, and sometimes by the market rate for the type of services in question, with the lesser of the two usually setting the ceiling on quantum.<sup>186</sup>

A.63 The common law action for loss of consortium and services has been abolished in some jurisdictions, but is still available in others.<sup>187</sup> The courts and commentators now tend to favour compensating all losses through the injured person's own action,<sup>188</sup> but in those jurisdictions which still permit consortium and services actions, a husband<sup>189</sup> will be able to recover any expenses paid on behalf of his injured wife, as well as damages for the loss of her household services.<sup>190</sup> In Alberta the action for loss of consortium and services has been replaced with a cause of action available to either spouse for the deprivation of

<sup>182</sup> Eg *Carroll v Baer* [1924] 2 DLR 452; *Greenaway v CPR* [1925] 1 DLR 992. The rule was sometimes circumvented by a contract between plaintiff and carer: *Einarson v Keith* (1961) 36 WWR 215. In a few cases, recovery of losses incurred by third parties was allowed: see eg *Sunston v Russell* (1921) 21 OWRN 160.

<sup>183</sup> The principle will also cover expenses incurred by third parties in eg visiting the plaintiff, if they have assisted the plaintiff's recovery. No clear authority exists for the case where care is rendered by the defendant.

<sup>184</sup> See eg *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452; *Thornton v Board of School Trustees of School District No 57 (Prince George)* (1978) 83 DLR (3d) 480; *Arnold v Teno* 83 DLR (3d) 609; (1994) 11 CED para 342. Statutory provisions in some states allow the third party provider to assert an independent claim in respect of services provided; see para A.63 below.

<sup>185</sup> See eg *Kroeker v Jansen* (1995) 123 DLR (4th) 652 (damages for household services by spouse allowed, but quantum severely reduced); (1994) 11 CED para 341. But cf eg *Benstead v Murphy* (1994) 22 CCLT (2d) 271; *Bain v Calgary Board of Education* [1994] 2 WWR 468, 499.

<sup>186</sup> Eg *Crane v Worwood* (1992) 65 BCLR (2d) 16.

<sup>187</sup> British Columbia, Manitoba, Saskatchewan, and New Brunswick no longer permit actions for consortium and services. Alberta and Ontario have introduced statutory replacements. The common law action remains possible in the other provinces, and in Newfoundland it has been held that it is available to both spouses: see *Power v Moss* (1986) 38 CCLT 31.

<sup>188</sup> See comments in *Fobel v Dean* (1991) 9 CCLT (2d) 87; *Benstead v Murphy* (1994) 22 CCLT (2d) 271. See also S M Waddams, *The Law of Damages* (2nd ed 1991) paras 2.140-2.180.

<sup>189</sup> At common law, the action for loss of consortium and services was not available to a wife, but see *Drewry v Towns* (1951) 2 WWR 217, where a wife's action was entertained, although it was unsuccessful.

<sup>190</sup> Damages for loss of household services will be quantified according to the market rate of substitute services of the kind lost, as was the case at common law in England: *Cutts v Chumley* [1967] 1 WLR 742.

the 'society and comfort' of the other.<sup>191</sup> In Ontario, relatives have a statutory right to recover reasonable travel and other expenses, and a reasonable allowance for services rendered, where these expenses result from injury to any person with a claim for damages for personal injury.<sup>192</sup> The relationship of this right with that of the injured person is unclear. The wording of the Ontario Act appears to cover pre-trial expenses only, and it has been argued that it should only allow recovery of those expenses not recovered in the victim's own action.<sup>193</sup>

### **Inability to do work in the home**

- A.64 Compensation of the loss involved where an injured person is no longer able to perform household services was traditionally achieved through the common law action for loss of consortium and services, available only to the husband. This is still possible in some jurisdictions, either at common law or through statutory replacements of the common law action.<sup>194</sup> The general trend, however, is towards recovery by the injured person in his or her own action, although there is no uniformity as to how the loss is conceptualised. Loss of capacity has sometimes been compensated as a non-pecuniary loss, relating to the pain and suffering involved in struggling to continue with household services, or the loss of amenity in being unable to do so.<sup>195</sup> Alternatively, plaintiffs have recovered damages for loss of housekeeping capacity as a separate head of pecuniary loss, stressing the economic value of domestic labour.<sup>196</sup>

<sup>191</sup> See Domestic Relations Act 1980, s 43(1).

<sup>192</sup> Family Law Act 1990, s 61, re-enacting provisions of the Family Law Act 1986. A similar action for any third party was recommended by the Law Reform Commission of British Columbia, although the action would have to be pursued through the injured person: see Report on Pecuniary Loss and the Family Compensation Act (1994), LRC 139.

<sup>193</sup> See eg S M Waddams, *The Law of Damages* (2nd ed 1991) paras 3.1570-3.1580. But in *Dziver v Smith* (1983) 146 DLR (3d) 314, the Ontario Court of Appeal held that the exercise of the statutory right did not preclude recovery by the injured person. It was this uncertainty which led the Ontario Law Reform Commission to recommend the repeal of the statutory right, but the recommendation was not implemented. See Report on Compensation for Personal Injuries and Death (1987).

<sup>194</sup> The Ontario Family Law Act 1990 allows relatives to recover an allowance for services provided to the injured person. See para A.63 above.

<sup>195</sup> See eg *Lefebvre v Kitteringham* (1985) 39 Sask R 308; *Fobel v Dean* (1991) 9 CCLT (2d) 87; *Finch v Herzberger* [1993] 4 WWR 179. This approach is favoured where no substitute has actually been employed and there is no actual pecuniary loss. But because there is a ceiling on awards for non-pecuniary loss, this sum may disappear. See *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 477.

<sup>196</sup> See eg *Fobel v Dean* (1991) 9 CCLT (2d) 87. This approach is favoured in respect of future losses, but damages awarded have been moderate. The Ontario Law Reform Commission recommended that plaintiffs should be able to recover a sum related to the average weekly earnings in the province for loss of working capacity, which would include loss of the capacity to provide household services. See Report on Compensation for Personal Injuries and Death (1987).

### **Accommodation costs**

- A.65 Canadian courts have looked favourably on claims for home care as opposed to institutional care,<sup>197</sup> and have as a result allowed plaintiffs to recover the cost of purchasing special accommodation or adapting their existing homes.<sup>198</sup>

### **Costs of investment and management advice**

- A.66 Canadian courts regularly make a specific allowance for the costs involved in obtaining investment advice which the plaintiff will need to achieve the level of damages intended, if it can be shown that some assistance will be required.<sup>199</sup> But where the size of the award is not substantial, claims for such fees have been disallowed,<sup>200</sup> especially where the plaintiff is not mentally incapacitated and can make his or her own investment decisions.<sup>201</sup> An award for investment advice will obviously be inappropriate in cases where the bulk of the award is not at the plaintiff's disposal because a provincial health plan is subrogated to his or her rights.

## **THE UNITED STATES<sup>202</sup>**

### **Principles governing award and assessment: general**

- A.67 Plaintiffs in the United States are entitled to recover the reasonable value of medical treatment and expenses which are reasonably necessary in order to minimise or alleviate the effects of personal injury.<sup>203</sup> In general, the test of reasonableness is applied in the same way as in England. Considerable flexibility is afforded to the requirement of reasonableness, although because damages are

<sup>197</sup> See further para A.58 above.

<sup>198</sup> See eg *Hurd v Hodgson* (1988) 61 Alta LR (2d) 36; *Joubert v Rosetown (Town)* (1987) 60 Sask R 200; *Bissky v Trotter* (1984) 54 BCLR 288. But see further the analysis of the 'trilogy' cases by the Ontario Law Reform Commission in its Report on Compensation for Personal Injuries and Death (1987) p 123. In *McLeod v Palardy* (1981) 124 DLR (3d) 506, an award for the modification of accommodation was made, even though the overall reduction of damages because of the plaintiff's contributory negligence made it unlikely that the modifications would actually be undertaken.

<sup>199</sup> *Mandzuk v Vieira* [1988] 2 SCR 650; *Watkins v Olafson* [1989] 2 SCR 750, 774; *Macdonald (Guardian ad litem of) v Neufeld* (1993) 17 CCLT (2d) 201.

<sup>200</sup> *McLeod v Palardy* (1981) 124 DLR (3d) 506; *MacDonald v Alderson* (1982) 15 Man R (2d) 35.

<sup>201</sup> *Law v Wu* (1980) 14 CCLT 282; *Read v MacIvor* [1988] BCWLD 774; but see *Mandzuk v Vieira* [1988] 2 SCR 650, where a management fee was awarded even though the plaintiff's mental ability was unaffected.

<sup>202</sup> Given the large number of differing State jurisdictions, we intend only to provide a general statement of the approaches common to all, or a majority of States, rather than to consider each jurisdiction individually. Where possible, relevant differences in the laws of a significant minority of States have been noted.

<sup>203</sup> See eg *Steinauer v Sarpy County* 353 NW 2d 715 (1984); 22 Am Jur 2d, Damages §§ 197 & ff; D B Dobbs, *Law of Remedies (Abridged)* (2nd ed 1993) pp 650-1; American Law Institute, *Restatement of the Law of Torts* (2d) (1979) §§ 919, 924(c).



assessed by jury, the exact amounts awarded for expenses can be difficult to determine.<sup>204</sup>

### **Medical and hospital treatment**

- A.68 Most Americans have private health insurance, usually paid for through employment, or will receive cover through public health insurance plans.<sup>205</sup> In the majority of cases, therefore, the medical costs of personal injury victims are met by insurance payments. In addition, a limited amount of free treatment is available to those people without health insurance cover. Only in a minority of cases will much of the cost of medical and hospital treatment fall to be met by the victim.<sup>206</sup>
- A.69 The general rule is that the reasonable value of medical and nursing services required as a result of the injury may be recovered from the tortfeasor, regardless of expenditure actually incurred.<sup>207</sup> Thus the fact that the plaintiff has received, or will in the future receive, medical care for which he or she has not had to pay will not be taken into account when assessing damages. This is normally seen as an application of the ‘collateral source’ rule, whereby defendants will not be entitled to a reduction of damages on account of any benefits received by the plaintiff from other sources.<sup>208</sup>
- A.70 In many instances, statutes provide for either subrogation or reimbursement of third party providers, or that to be eligible for healthcare benefits, the recipient must assign any cause of action for personal injury to the public provider.<sup>209</sup> In these cases, there will be no windfall benefit to the plaintiff and no loss to the

<sup>204</sup> A novel type of cost which has recently been recognised by some American courts is the expense of continuing medical monitoring or surveillance to detect the onset of latent injuries. See further para A.77 below.

<sup>205</sup> Medicare covers the elderly, and Medicaid the poor. See further American Law Institute, *Enterprise Responsibility for Personal Injury Volume I: The Institutional Framework* (1991) ch 4.

<sup>206</sup> The American Law Institute, *ibid*, quotes conservative late-1980s estimates of over 30 million Americans uninsured, and between 10 and 20 million significantly underinsured. Although stating (at p 137) that “lack of health insurance continues to be a troubling problem for our country”, it suggests that tort damages can play a significant role in providing a form of health care insurance for some of the injuries suffered by this population.

<sup>207</sup> *District of Columbia v Woodbury* 136 US 450 (1890). Cf *Dequeant v Dobbins* 334 So 2d 555 (1976) (plaintiff charged an unreasonably high fee for medical treatment but permitted to recover full expense). See also 22 Am Jur 2d, Damages §§ 198, 200.

<sup>208</sup> The rule is said to have originated in *The Propellor Monticello v Mollison* 58 US 152 (1854), but the first use of the term ‘collateral source’ was in *Harding v Townshend* 43 Vt 536 (1871). See also *Burke v Byrd* 188 F Supp 384 (1960); *Restatement Torts 2d* § 920A and comment c; 22 Am Jur 2d, Damages § 570; D EYtreberg, “Collateral source rule: receipt of public relief or gratuity as affecting recovery in personal injury action” 77 ALR 3d 366 (1977); P E Artzer, “Damages: the collateral source rule in retrospect” 7 Washburn LJ 321. All States operate the rule in some form, although it has occasionally been disapplied where no expense has been or is likely to be incurred: see D EYtreberg, *op cit*, pp 377-8.

<sup>209</sup> Such provisions have almost universally been upheld when challenged (mainly under the due process or equal protection clauses of the Constitution) in the courts: see D Tussey, “Personal injury recovery as affecting eligibility for, or duty to reimburse, public welfare assistance” 80 ALR 3d 772 (1977), especially §§ 6-9.

third party. But the costs involved in subrogation schemes often mean that reimbursement is not effected in practice, especially where small amounts are involved. Additionally, several States prohibit some collateral sources, either by statute or at common law, from operating subrogation or reimbursement schemes. In a significant number of cases, then, the plaintiff may recover the cost of his treatment despite incurring no out of pocket expense.

- A.71 Where a plaintiff recovers damages for hospital care, some American courts have made a deduction for the 'domestic element' saved by his or her maintenance in hospital.<sup>210</sup> Such deductions, where made, have been made from the award for provision of care, rather than the award for loss of earnings.

### **Gratuitous care and expenses incurred by third parties**

- A.72 Plaintiffs can generally recover the reasonable value of care which has been or will be provided gratuitously by relatives or friends. Recoverability of damages in respect of such care was recognised by American courts well before their English and Commonwealth counterparts, and is usually said to follow from the collateral source rule.<sup>211</sup> American courts have stated that the existence of a moral obligation to reimburse the carer is sufficient to allow the plaintiff to recover,<sup>212</sup> and have not usually imposed any further obligation on the plaintiff to pay the damages over to the carer. The courts usually appear to regard as the recoverable loss the plaintiff's need for the services in question.<sup>213</sup> It is unclear whether the plaintiff can recover from the defendant carer, although the collateral source rule does not usually apply to benefits conferred by the defendant.

- A.73 The measure of damages for such recovery is usually the commercial rate for the provision of the services in question and not the carer's loss of earnings,<sup>214</sup> in keeping with the needs-based analysis used by the courts. This will be so even where the carer has given up employment to care for the plaintiff.<sup>215</sup>

<sup>210</sup> *Vedder v Delaney* 98 NW 373 (1904); cf *Tomey v Dyson* 172 P 2d 739 (1946). See 22 Am Jur 2d, Damages § 211.

<sup>211</sup> See eg *Chavez v US* 192 F Supp 263 (1961); *Thoresen v Milwaukee & Suburban Transport Co* 201 NW 2d 745 (1972); 22 Am Jur 2d, Damages § 571; J A Connelly, "Damages for personal injury or death as including value of care and nursing gratuitously rendered" 90 ALR 2d 1323 (1963).

<sup>212</sup> See eg *Tucson v Holliday* 411 P 2d 183 (1966). This approach has not, however, found favour in all jurisdictions. As examples, Illinois, Pennsylvania, New York and Delaware usually require the plaintiff actually to have incurred expense, or to have a legal obligation to pay for his or her treatment.

<sup>213</sup> In *Thoresen v Milwaukee Suburban Transport Co* 201 NW 2d 745 (1972) it was said (at p 752 *per* Hallows CJ) that the plaintiff was entitled to recover "the reasonable value of his medical costs reasonably required by the injury. In most cases this is the actual expense, but in some cases it is not. But the test is the reasonable value, and therefore there need be no actual charge." Cf paras 2.24 and A.36 above.

<sup>214</sup> *Roth v Chatlos* 116 A 332 (1922); *Walker v Philadelphia* 45 A 657 (1900).

<sup>215</sup> *Jackson v US* 526 F Supp 1149 (1981); cf *Mays v American Indemnity Co* 365 So 2d 279 (1978). See also 22 Am Jur 2d, Damages § 209.

- A.74 In those States where the action for loss of consortium is still available, a relative who incurs reasonable expenses in the care of the victim may recover those expenses directly from the tortfeasor. Such actions are not generally restricted to husbands, and may often be brought by wives, parents and sometimes even children.<sup>216</sup> In these cases, recovery will be limited to the expenses actually incurred, rather than the reasonable value of the care or treatment. In order to avoid any danger of double recovery, the action will usually have to be heard jointly with the injured person's own action.<sup>217</sup>

#### **Inability to do work in the home**

- A.75 A person who is injured and cannot carry out domestic services may be granted substantial recovery for the value of the decrease in his or her earning capacity resulting from the injury.<sup>218</sup> This claim may be based on the value of the work the plaintiff could have performed in the home but for the injury, or on the value of the work he or she could have done outside the home if that is higher.<sup>219</sup> The justification for this approach is that the plaintiff is being compensated for loss of earning capacity, rather than actual pecuniary loss, and it is therefore irrelevant that the injured person was not working outside the home at the time of the accident, and had no intention of doing so. Alternatively, the plaintiff may claim any expenses incurred in obtaining replacement services.

- A.76 In those States where actions may be brought for loss of consortium, the relative may include in his or her claim an element to represent the loss of the housekeeping services of the victim.<sup>220</sup> To avoid double recovery, this action will usually be heard with any action brought by the victim, and the claims may not overlap.

#### **Medical monitoring and surveillance expenses**

- A.77 American courts have begun to recognise a new concept of cost recovery for 'medical monitoring', to detect or prevent future injury in cases where a tort has been committed but the expected damage has not yet been suffered.<sup>221</sup> Such actions have emerged primarily in the context of, and as a means of dealing with, toxic tort cases, where plaintiffs have been tortiously exposed to carcinogens or other chemicals which it is alleged may cause serious future harm. The award

<sup>216</sup> See generally 41 Am Jur 2d, Husband & Wife §§ 444, 448; 59 Am Jur 2d, Parent & Child § 105.

<sup>217</sup> See *Restatement Torts 2d* § 693.

<sup>218</sup> *Grant v Hoffman* 151 So 2d 287 (1963). See also *Florida Greyhound Lines Inc v Jones* 60 So 2d 396 (1952), where recovery was allowed even though no evidence had been presented as to the value of the household services previously provided.

<sup>219</sup> See D B Dobbs, *Law of Remedies (Abridged)* (2nd ed 1993) p 650.

<sup>220</sup> *Restatement Torts 2d* § 693; see also para A.74 above.

<sup>221</sup> See A L Schwartz, "Recovery of damages for expense of medical monitoring to detect or prevent future disease or condition" 17 ALR 5th 327 (1994); A T Slagel, "Medical surveillance damages: a solution to the inadequate compensation of toxic tort victims" 63 Indiana L J 849 (1988). Some courts have, however, denied medical monitoring claims on the grounds that to allow them would be to create a new cause of action that should be recognised only by the Supreme Court or state legislatures.

seeks to cover the costs of periodic future medical examinations to detect the onset of physical harm.<sup>222</sup>

## OTHER EUROPEAN JURISDICTIONS<sup>223</sup>

### Principles governing award and assessment: general

A.78 In principle, all European jurisdictions allow the recovery in tort of medical expenses and costs necessitated by personal injury, on the basis that pecuniary losses are to be compensated in full.<sup>224</sup> Again, and in common with all the legal systems we have considered above, it appears that the recoverability of any particular item of expense is universally subject to a test of reasonableness.<sup>225</sup> The range of items for which claims have been recognised is similar to that in England. In France, a plaintiff will not generally be permitted to recover the cost of luxury services in hospital,<sup>226</sup> but in Austria and Germany, for example, plaintiffs are entitled to the cost of treatment to the standard they enjoyed by reason of their economic position and standing before the accident, even where this means first class care.<sup>227</sup>

<sup>222</sup> It has also been held that a court-administered fund for these costs is preferable to a lump sum payment: Schwartz, *op cit.* Some courts have even suggested that the defendant might be required to set up a special fund to finance such medical check-ups as they arise: see D B Dobbs, *Law of Remedies (Abridged)* (2nd ed 1993) p 652.

<sup>223</sup> This section does not purport to be an exhaustive description of the relevant laws in other European jurisdictions; rather than examining each jurisdiction in detail we have attempted to make general comments and illuminate matters of particular interest. For further reference, see W Pfennigstorf (ed), *Personal Injury Compensation* (1993); D McIntosh & M Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994); and P Szöllösy, "Recent trends in the standard of compensation for personal injury in a European context" (1991) 3 *Scandinavian Insurance Quarterly* 191.

<sup>224</sup> Eg Arts 249 and 843 BGB (Germany); Art 1223 CC (Italy); Art 46 OR (Switzerland); Art 1325 CC (Austria). Courts in countries whose codes do not specify the heads of damage recoverable in a personal injury action have nonetheless tended to arrive at the same conclusion: see H McGregor, "Personal Injury and Death" (1969) *Int Enc Comp L Vol XI/2 Torts* ch 9 s 140. See also W Pfennigstorf, *Personal Injury Compensation* (1993) pp 17, 127, 197; B S Markesinis, *The German Law of Torts* (3rd ed 1994) pp 908, 914; P Szöllösy, "Recent trends in the standard of compensation for personal injury in a European context" (1991) 3 *Scandinavian Insurance Quarterly* 191, 201.

<sup>225</sup> See eg B S Markesinis, *The German Law of Torts* (3rd ed 1994) p 914.

<sup>226</sup> W Pfennigstorf, *Personal Injury Compensation* (1993) p 39; H McGregor, "Personal Injury and Death" (1969) *Int Enc Comp L Vol XI/2 Torts* ch 9 s 141. But the French courts are prepared to award a seriously injured plaintiff the (relatively expensive) cost of home care, on the grounds that he or she is entitled to care in his or her usual surroundings: P Szöllösy, "Recent Trends in the Standard of Compensation for Personal Injury in a European Context" (1991) 3 *Scandinavian Insurance Quarterly* 191, 195.

<sup>227</sup> D McIntosh & M Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994) p 339; W Pfennigstorf (ed), *Personal Injury Compensation* (1993) p 70. But in Denmark, for example, no sum is awarded for medical expenses where the plaintiff is treated free in a state hospital, and the courts would be reluctant to award medical expenses if an injured person had chosen a private hospital rather than a state one; see McIntosh & Holmes, *op cit.*, p 129.

A.79 Some European jurisdictions permit payment in the form of an annuity or periodical payment.<sup>228</sup> In some cases, the level of such awards may be adjusted at a later date, to take account of changes in the facts on which they are based. Therefore, when a plaintiff has claimed for future expenses, the amount he or she receives can be altered to reflect the changing state of his or her condition and needs.<sup>229</sup>

### **Medical and hospital treatment**

A.80 Although in theory medical costs are a legitimate element of damages for personal injury, in practice the widespread incidence in Europe of either social security systems or private medical insurance means that the bulk, if not all, of an injured person's medical and related costs will be met in the first instance from a collateral source, without the recipient ever being billed personally for goods and services.<sup>230</sup> Tort claims for medical and related expenses are usually brought by individuals only as a means of recovering the costs which have not been met by the collateral source.<sup>231</sup> Such 'extra' items as the cost of home adaptations due to disability or injury may also be recoverable, subject of course to the overriding requirement that the expenses claimed must be reasonable.

A.81 European countries differ in their approach to recovery by the collateral source of the cost of goods and services provided to the plaintiff. Most European jurisdictions allow the social security provider, or private health insurer, to recoup the benefits provided by means of subrogation. The great majority specifically provide for State recoupment,<sup>232</sup> although in a few jurisdictions there are no provisions for State recoupment through subrogation or otherwise.<sup>233</sup> Rights of

<sup>228</sup> Eg France, Belgium, Switzerland, Sweden and the Netherlands. In Germany, Art 843 BGB stipulates a *presumption* in favour of payment by annuity. In France, structured settlements are common in cases involving large awards, but in all the other jurisdictions mentioned it seems that both plaintiffs and defendants favour a lump sum over periodic payments.

<sup>229</sup> Such variations are common in Germany, where the damages may be adjusted down as well as up. In France, periodic payments can be index-linked to avoid the effects of inflation, and even lump sum awards can be reopened in exceptional cases of deterioration. See further R Redmond-Cooper, "Aspects of the French law of damages" in F J Holding and P Kaye (eds) *Damages for Personal Injuries* (1993) p 51.

<sup>230</sup> But in France, for example, patients are billed directly by the health care provider in the first instance, and then receive reimbursement of a percentage of the fees from the state sickness insurance funds. The percentage reimbursed varies according to locality and the subject-matter of the claim, but is generally between 70 and 90%.

<sup>231</sup> See generally B S Markesinis, *The German Law of Torts* (3rd ed 1994) p 909; W Pfennigstorf (ed), *Personal Injury Compensation* (1993) p 66. In a number of European countries, such as France and Germany, social security benefits only cover a percentage of the cost of medical expenses, and the remainder will be charged to the injured party, who will then have to recover it from the tortfeasor. Where the tortfeasor does not have enough resources to meet both the claim of the victim and the subrogated claim, the victim's claim will generally take priority.

<sup>232</sup> Most will achieve this through statutory subrogation rights, but some, like the Netherlands and Luxembourg, give the collateral source a direct right against the tortfeasor.

<sup>233</sup> This applies mostly to Scandinavian countries, where private medical care is rare and the standard of State care is very high, usually meeting all medical expenses. In Sweden, tort claims for personal injuries are rare, but the benefits awarded under State insurance

subrogation for private insurers are generally left to the individual contracts of insurance.

- A.82 Pursuing individual actions for recoupment involves additional costs which may discourage the social security carrier from bringing subrogated claims, especially where the amounts involved are not substantial. In some countries which provide for recoupment through subrogation, standard loss-sharing agreements exist between social security organisations and liability insurers for reimbursement of a fixed percentage of the expenses paid.<sup>234</sup> Some countries also operate systems which attempt to internalise the social costs of higher-risk but necessary activities, such as motoring, either in addition to<sup>235</sup> or as a replacement for<sup>236</sup> rights of subrogation.
- A.83 Where the injured person is hospitalised, some of the expenses which he or she would normally incur are met as part of the care rendered. In some European countries, as in England, a deduction, of an amount representing those living expenses, is made from any damages awarded for hospital care including, where appropriate, from damages for anticipated future hospitalisation.<sup>237</sup>

#### **Gratuitous care and expenses incurred by third parties**

- A.84 Where gratuitous care has been or will be rendered to the plaintiff by relatives or friends, he or she will nonetheless usually be able to recover damages for the cost of care.<sup>238</sup> Such gratuitous care is regarded as a non-deductible collateral benefit. The plaintiff usually has no duty to account to the third party for the damages, so

schemes are assessed in accordance with tort rules. The policy against subrogation apparently stems from a desire to avoid the transaction costs involved in shifting loss between two large and substantially identical groups. See W Pfennigstorf (ed), *Personal Injury Compensation* (1993) p 202.

<sup>234</sup> Eg Germany, where a typical agreement might provide for the liability insurer to reimburse 55% of all claims, without further investigation of the issue of fault. But usually the agreement will only apply to claims for amounts below a certain level, typically DM30,000. See further W Pfennigstorf (ed), *Personal Injury Compensation* (1993) p 72. A similar system exists in Switzerland, and is also proposed in Belgium.

<sup>235</sup> In some cases, liability cannot be satisfactorily allocated and subrogation is therefore ineffective to recover all the costs of the activity. In Belgium, for example, where subrogated claims are common, a substantial tax is also levied on motor insurance premiums to represent 'social costs.' See further W Pfennigstorf (ed), *Personal Injury Compensation* (1993) pp 15, 203.

<sup>236</sup> In Italy, which operates a limited system of subrogation, the *regioni* (local units of the national health service) waive their right to reimbursement of medical costs in road accident cases, and instead the insurance companies pass on to the State a percentage (4.45% in 1991) of their income from motor insurance premiums. See further P Szöllösy, "Recent Trends in the Standard of Compensation for Personal Injury in a European Context" (1991) 3 *Scandinavian Insurance Quarterly* 208.

<sup>237</sup> In France and Germany, for example, any damages awarded for time spent in hospital are reduced by a daily amount (FF50 / DM20 in 1993) representing the patient's savings on meals. Similar provisions exist in Sweden, Austria, Belgium and Switzerland.

<sup>238</sup> This approach is taken in most European countries which allow recovery in tort for the cost of care, including Germany, the Netherlands and Belgium; France requires the plaintiff to show a legal obligation to reimburse the third party. Where no damages for the cost of care would be available, as in Sweden for example, the position is less clear.

that reimbursement of the third party is left to the plaintiff's discretion. In some countries, the plaintiff will also be able to recover any visiting expenses incurred by relatives or friends.<sup>239</sup>

### **Inability to do work in the home**

- A.85 Most European countries compensate plaintiffs for their loss with respect to domestic services, either for their loss of time, or as part of a loss of amenities claim for loss of their capacity to perform housework. The method of quantification differs from country to country, but most will allow recovery even if the plaintiff does not engage paid help, and the services are performed, if at all, by family or friends.<sup>240</sup> In some countries, a claim for loss of a wife's domestic services can alternatively form part of a direct claim by the husband, but such actions, where they still exist, are becoming less popular.<sup>241</sup>

<sup>239</sup> In France and Belgium visiting expenses are recoverable either in the victim's action or directly by the third party. The general trend in Europe, however, is to place less emphasis on the direct action for the relative, and to include all losses and expenses in the damages recoverable by the plaintiff; in Switzerland, for example, such losses can only be recovered through the victim's own action.

<sup>240</sup> In Germany, recovery is for the loss of capacity rather than the actual expense incurred in replacement services. In France and Italy, the plaintiff can recover the actual or hypothetical cost of household help, calculated with reference to the average wages of a housekeeper. Swedish courts tend to require proof of extra costs actually incurred by the family, but the State is obliged to provide home help if this is necessary because of the plaintiff's inability to perform housework.

<sup>241</sup> In Germany, such an action was possible under Art 845 BGB only for the husband in respect of his wife's services, but in 1968 this was held to be in contravention of the equality provisions of the *Gleichbehandlungsgesetz*. The solution adopted was to limit the claim to the injured party in all cases.