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L A W C O M M I S S I O N

First Programme - Item XV

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THE ACTIONS FOR LOSS OF SERVICES, LOSS OF CONSORTIUM, SEDUCTION AND ENTICEMENT

14th June 1968

THE ACTIONS FOR LOSS OF SERVICES, LOSS OF CONSORTIUM, SEDUCTION AND ENTICEMENT

1. Earlier consultations have revealed the need for further thought on these topics. The difficulties are such that we think it necessary to have further and wider consultations before reaching final conclusions. Accordingly we set out in this Working Paper the questions to which we are anxious to obtain answers and the provisional conclusions so far as we feel ourselves in a position to reach any. The reasoning that lies behind these questions and conclusions is to be found in the paragraphs of the Appendix cited below.

The Employer's Action for Loss of Services

2. Questions:-

(1) If the employer's right to damages for loss of services is to be abolished should anything take its place? (paras.9-22)

(2) Would it in fact be likely to lead to a greater readiness to continue payment of wages during injury or to more generous sick-pay arrangements if employers were given a right to recover such payments from the tortfeasor? (paras.15-21)

(3) If some new right should be provided, should this take the form of a right by the employer to recover by action from the tortfeasor payments which he has made that have reduced the damages which would otherwise have been recoverable by the employee? (paras.24-29)

(4) Alternatively, should the victim be entitled to recover damages from the tortfeasor without deduction of payments made to him by the employer?(paras.30-40)

(5) Alternatively, should the victim be entitled to recover, without deduction of payments made to him by his employer, save to the extent of one-half the value of such payments received or receivable within five years of the accident? (para.41)

(6) If the answer to (4) or (5) is in the affirmative, should the victim be obliged to restore such payments to his employer? (paras.30-40)

(7) If the answer to question (3) or (6) is in the affirmative, what ought the law to be when the damages recovered by the employee are reduced because of his contributory negligence? (paras.25, 35 and 36)

(8) Should whatever solution is adopted regarding employers apply equally to benefactors, other than the State, who have mitigated the victim's damage? (para.41)

3. Provisional Conclusions

Subject to reconsideration in the light of answers to these questions, our provisional conclusions (see paragraphs 42-44 of the Appendix) are:-

(a) The employer's right to damages for loss of services should be abolished. But an employee who has been unable to work because of a tortious injury should be entitled to recover damages in respect of earnings for the period of absence prior to the trial whether or not he has received remuneration, pension or sick pay from his employer or anyone else.

(b) An employee should be entitled to recover damages in respect of payments made for medical attention prior to the trial whether the payments were made by him or by his employer or anyone else.

(c) However, in assessing his damages for loss of future earnings, account should be taken of any payments arising out of his employment which he will or may receive (except as provided in the Law Reform (Personal Injuries) Act 1948) but not of payments unrelated to his employment, such as proceeds of an insurance policy which he has taken out or voluntary contributions by friends or relations.

(d) Similarly, in assessing damages for future medical attention account should be taken of any right arising out of his employment to have those paid but, again, not of any right unrelated to the employment.

(e) Where payments under (a) or (b) have been made to or on behalf of the victim by his employer or other third party, the law should not provide any definite right to recoupment from the victim. This should be left to be worked out between the victim and the benefactor, either prospectively (for example under conditions of employment) or retrospectively after the victim has recovered from the tortfeasor.

Family Losses

4. Questions:-

(1) If a husband's right to damages for loss of his wife's society and services or loss of a child's services is to be abolished, is it accepted that a new right should take its place? (paras.46-48)

If so:-

(2) Is it accepted that, in so far as relatives have made payments or conferred benefits which mitigate the damage of the victim, such payments or benefits should continue to be disregarded in assessing his damages and that the victim should not be under any legal obligation to restore to the relatives unless the court otherwise directs? (para.50)

(3) As regards other losses incurred by members of the family, is it accepted that pecuniary losses should be recoverable from the

tortfeasor whether they arise from:-

(a) visits to the victim's sick bed;

(b) the need to look after the victim or to secure the performance of the domestic role previously performed by him;

(c) financial dependency on the victim? (paras.49 and 52-61)

(4) As regards these pecuniary losses, is it accepted that claimants (in either fatal or non-fatal cases) should not be restricted to a definitely prescribed class? (paras.53, 54, 57, 60 and 61)

(5) What should be the position regarding non-pecuniary losses flowing

(a) from deprivation of domestic services, companionship and parental care, and

(b) from grief?

Should there be

(i) no recovery at all in either fatal or non-fatal cases (para.68),

(ii) recovery only of a fixed sum by the estate of a deceased victim (para.69),

(iii) recovery up to a prescribed maximum sum in respect of both (a) and (b) (para.70),

(iv) recovery without any prescribed maximum (para.71), or

(v) recovery in respect of (a) but not (b) (para.72)?

(see paras.73-75)

(6) Is it accepted that if non-pecuniary family losses were recoverable in fatal cases the deceased's own claim for non-pecuniary loss should not survive for the benefit of his estate? (paras.70-72)

(7) Is it accepted that, if non-pecuniary family losses were recoverable, they should not survive for the benefit of the claimant's estate? (para.76)

(8) As regards procedure, is it accepted that of the four possible methods (recovery by the victim, individual claims by each member of the family, a system analogous to that under the Fatal Accidents Act, and a representative action) a generalised procedure similar to that under the Fatal Accidents Act would be the best solution? If so, should the other members of the family be entitled to apply to be joined as plaintiffs in an action by the victim, and after what period of delay by the victim should they be entitled to bring proceedings independently of him? (paras.77-84)

(9) Should the amounts recoverable by the family be reduced proportionately to any contributory negligence of the victim? (para.85)

5. Provisional Conclusions

Subject to reconsideration in the light of answers to these questions our provisional conclusions (see paras.86-87) are:-

(a) The husband's right to damages for loss of the wife's society and services or of a child's service should be abolished.

(b) In the victim's claim for damages against the tortfeasor, payments or other benefits received by him from relatives or other benefactors should be ignored; but the court should have power in appropriate cases to give directions or to obtain undertakings regarding restoration to the benefactor (paras.41 and 50).

(c) Other pecuniary losses suffered by members of the family as a result of the injury to the victim should be recoverable whether or not the injuries are fatal (paras.52-61).

(d) Recovery should extend to the reasonable cost of such visits to the victim's hospital or sick-bed as were naturally to be expected in the circumstances (paras.52-54).

(e) Claimants should not be restricted to a prescribed class of relatives and dependants; anyone who has suffered pecuniary loss which flowed from or was a reasonable consequence of the wrongful injury or death should be entitled to recover (paras.53, 54, 57 and 60).

(f) We have, as yet, formed no concluded view on whether non-pecuniary losses should be recoverable and, if so, to what extent and on what basis (paras.69 75).

(g) If non-pecuniary loss is to be recoverable it will be necessary to prescribe the class of relatives and dependants entitled to claim, unless either

(i) non-pecuniary losses are restricted to fatal cases and are compensated by a payment of a fixed sum to the deceased's estate, or

(ii) claims are limited to those who have also suffered pecuniary loss.

If a class is prescribed it should probably exclude infant children (para.74).

(h) If non-pecuniary losses of relatives and dependants are to be recoverable on any basis, the victim's claim for non-pecuniary loss in fatal cases should not survive for the benefit of his estate (paras. 70-72). Nor should the claim of the relative or dependant for non-pecuniary loss survive for the benefit of his estate (para.76).

(j) The best solution to the problem of reducing multiplicity of claims (paras.77-84) might be to apply to non-fatal cases a similar procedure to that under the Fatal Accidents Act whereby only one action can be brought on behalf of all those entitled to claim. This should normally be brought by the victim but where he delayed unreasonably any or all claimants should be entitled to institute one action on behalf of all those entitled (paras.80-82).

(k) The victim's contributory negligence should reduce the amount recoverable. (para.85)

Seduction

6. Our conclusion is that the father's (or other master's) right to damages for the seduction of his unmarried infant daughter (or other female servant) should be abolished and not replaced by any other cause of action vested in him (para.88).

Enticement or Harbouring

7. The existing right to damages should also be finally abolished (paras.89-92).

Comments

8. We shall be most grateful if those to whom this is circulated will let us have their views by 31st December. It is appreciated that many recipients will be interested in parts only of the Paper, but we shall particularly welcome their views on the parts which directly concern them and upon which they have practical experience. In particular we hope that bodies representative of employers and employees will be able to help us by answering the questions raised in paragraph 2 above.

9. Comments should please be addressed to:

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14 June 1968

A P P E N D I X

THE ACTIONS FOR LOSS OF SERVICES, LOSS OF CONSORTIUM SEDUCTION AND ENTICEMENT

Contents

A P P E N D I X

INTRODUCTION

1. Item XV of the Law Commission's First Programme reads as follows:

MISCELLANEOUS MATTERS INVOLVING ANOMALIES, OBSOLESCENT PRINCIPLES OR ARCHAIC PROCEDURES

> Much of English law is heavily overlaid with history. This does not mean that the principles involved may not still be applicable in modern conditions, subject to necessary adjustments from time to time. There are, however, certain parts of the law which seem to rest on social assumptions which are no longer valid or to involve archaic procedures. The topics mentioned below constitute only a first list of such matters which would appear to call for attention.
>
> (a) Actions for loss of services, loss of consortium, seduction, enticement and harbouring, and the extent to which employers, spouses or parents should be entitled to recover wages or payments made to or on behalf of an employee, spouse, or child, as the case may be, who is the victim of a tort. These matters have been the subject of a detailed survey, with proposals for reform, in the Eleventh Report of the Law Reform Committee (1963 Cmnd.2017).
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> Recommended: that an examination be made of these .... topics.
>
> Examining Agency: the Commission.

2. It was hoped that each of the topics referred to in Item XV might be disposed of rapidly. Accordingly after a limited amount of outside consultation, notably with the Confederation of British Industry, provisional proposals were prepared concerning Item (a), with which alone this paper is concerned, and sent in March 1966 to the Bar Council, the Law Society, and the Society of Public Teachers of Law for their comments. These provisional proposals can be summarised as follows:

(a) The abolition of the action for loss of services whether by an employer, a spouse or a parent.

(b) The abolition of the action for loss of consortium.

(c) The abolition of the action for seduction.

(d) The abolition of the actions for enticement and harbouring.

(e) Provision enabling an injured person to recover the reasonable expenses incurred by a spouse, parent or member of the household to which he belongs.

This last proposal was based on the concept of a family pool to be replenished by action taken on behalf of the "pool" by the injured person.

3. As a result of the comments received in response to these proposals the Law Commission has concluded that it is not possible to dispose of the questions involved as rapidly or as summarily as had originally been hoped, and that further and wider consultation is essential before any firm proposals can be formulated. As we said in our Second Annual Report[1], there are in particular two difficult questions which require further study:

> "(i) whether an employer should have a remedy against the tortfeasor in respect of wages paid to the victim of the tort, his employee, during the period of incapacity, and the scope of any such remedy;
>
> (ii) what provision the law should make to give a remedy against the tortfeasor to members of the victim's family or others who incur expense or suffer loss in aiding or comforting him while incapacitated."

As we added:

> "Our provisional opinion is that the ancient common law remedies, though they are inadequate and in some respects clearly do reflect social assumptions which are no longer acceptable, cannot safely be swept away until these two questions are satisfactorily answered."

4. The present paper is accordingly an expanded version of that originally prepared and with somewhat different provisional proposals. It is being circulated far more widely and in particular to bodies representative of employers and employees (in view of their especial interest in the first of the two questions referred to above), and of insurance interests.

5. The matters dealt with in this paper have previously been considered by the Law Reform Committee and, in part, by the Law Reform Committee for Scotland. The former was invited in 1961:

> "To consider the desirability of:
>
> 1. abolishing the right of action by a master for the loss of his servant's services; and
>
> 2. enabling an employer to recover damages for loss suffered by him in consequence of a wrong done to his employee by a third person."

The second question only was also referred to the Law Reform Committee for Scotland. Both Committees reported in 1963[2]. The Law Reform Committee unanimously recommended the abolition of the right of action in all its aspects, subject to a right to either spouse to recover expenses incurred as a result of tortious injury to the other or to a dependent child, but, by a majority, took the view that an employer should be given a limited right of recovery[3]. On the

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1. Law Com. No.12, para.93.
2. Cmnd.2017 (England) and Cmnd.1997 (Scotland).
3. Cmnd.2017, paras.5-16.

other hand, the Law Reform Committee for Scotland, agreeing with the English minority, recommended that legislation should not be introduced to enable an employer to recover.

6. The various actions with which this paper is concerned are in the main based upon one common principle, namely that a master is entitled to sue anyone who causes him to suffer loss by wrongfully depriving him of the services of his servant. This includes the loss of the real or notional services of persons who would not in modern conditions be regarded as a man's servants, such as his wife and children. On the other hand, outside the range of these family relationships the scope of the action is very narrow, for in recent years it has been confined to injury done to those who used to be described as menial servants and who can be regarded as forming part of the master's household(4). This restriction has not yet been adopted by the High Court of Australia(5) or the Supreme Court of Canada(6) and has provoked adverse comment in England(7). As the Law Reform Committee pointed out(8):

> "no doubt it is open to the House of Lords to extend the action to any case in which the ordinary relationship of master and servant exists, though it is perhaps unlikely that this will now be done".

But they added:

> "In any event it is clear that the action is not available in cases where the ordinary relationship of master and servant does not exist, for example, where the injured man is a police constable (9), or a civil servant (10)."

That, however, is a less serious limitation which would still leave the action sufficiently viable to play a role in the economic life of the 20th Century. But if restricted, as it seems to be, to menial servants, it can under modern conditions have little or no application outside the domestic sphere. A further anomalous limitation is that there is no right to damages if the servant is killed instead of merely injured(11). In the event of death, however, there may be a cause of action on behalf of certain close relatives, who suffer loss thereby, under the Fatal Accidents Acts 1846-1959.

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4. Inland Revenue Commissioners v. Hambrook [1956] 2 Q.B. 641.
5. Commissioner for Railways (N.S.W.) v. Scott (1959) 102 C.L.R. 392 (Engine driver).
6. Attorney General v. Nykorak [1962] Sup.Ct.331; 33 D.L.R. 2d. 373 (soldier).
7. Goodhart (1955) 71 L.Q.R. 308; Sawer (1955) 18 M.L.R. 488.
8. Cmnd.2017, para.2.
9. Attorney General for New South Wales v. Perpetual Trustee Co. [1955] A.C. 457 P.C.
10. Inland Revenue Commissioners v. Hambrook (supra).
11. Admiralty Commissioners v. S.S. Amerika [1917] A.C. 38 H.L.

7. At present, therefore, a remedy is available in the following circumstances:

(1) Where a menial servant has been injured by the wrongful act of the third person and the master has thereby been deprived of his services, the master may sue for the financial loss he has suffered.
This is the action for loss of services in the narrow sense.

(2) A husband who is deprived of his wife's services because she is wrongfully injured by a third person can similarly recover for loss of her services. This type of action is in theory identical with (1), but in practice is brought in conjunction with (3); for a recent example, see Cutts v. Chumley[12]. Similarly a parent may recover for the loss of services of a child who is actually rendering services or to whose services the law regards him as entitled (i.e. a minor living at home and not in other full-time employment).

(3) Where a wife has been wrongfully injured by a third person her husband can sue the third person for the loss which he has incurred by being deprived of his wife's society (consortium). On the other hand, a wife has no remedy in respect of the loss of consortium of her husband if it is he that is injured[13].
This is normally known as the action for loss of consortium.

In the above three situations the wrongdoer must have committed a legal wrong to the "servant". In the following three situations that is not necessarily so.

(4) A man[14] is entitled to recover damages for loss of services of any female servant of his or any unmarried daughter under 21 ordinarily living at home who is seduced (or raped) by a third person with the result that he is deprived of her services (normally because she becomes pregnant). This is commonly known as the action for seduction and the only practical importance of it today is where an unmarried daughter is seduced. It differs from an action under head (2) since there will normally be no actionable wrong so far as the girl herself is concerned; so long as she has consented and is old enough to do so the seduction will not be an actionable assault.

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12. [1967] 1 W.L.R. 742 where the husband recovered £5,000 for loss of services and £200 for loss of consortium.

13. Best v. Samuel Fox & Co.Ltd. [1952] A.C. 716, H.L.

14. Or a woman if she is the "master". But where a daughter is living with both parents her domestic services are deemed to be owed to the father, not the mother, and the mother has no cause of action: see Bectham v. James [1937] 1 K.B. 527.

(5) It is actionable to induce a servant to leave his master's employment wrongfully or, if illegal means are used, to leave his employment even rightfully. Similarly, it is actionable to harbour another's servant who has left his master's employment wrongfully. This type of action for enticement or harbouring is for all practical purposes extinct.

(6) It is also actionable to entice away or harbour a spouse or infant child. The action still has some life as respects enticement of a wife. It is somewhat similar in function to an action for damages for adultery[15] but enticement does not require proof of adultery and a wife can sue for enticement[16] whereas only the husband can sue for damages for adultery. To the extent that the wife can sue her husband's enticer, the action seems no longer to be based solely on the concept of loss of the services to which a master is entitled.

8. That these various remedies in their present form are anachronisms which ought to be abolished we have no doubt[17]. This was the unanimous opinion of the Law Reform Committee and was the view taken (with some qualifications) by the Bar Council, the Council of the Law Society and the Society of Public Teachers of Law when we previously consulted them. All the remedies (with the partial exception of enticement) are based upon the archaic notion that a man has some sort of proprietary interest in his servant, wife or infant daughter. The problem, however, is whether one can abolish the various actions based on the concept of loss of services without substituting some other remedies in their place. We accordingly turn to a consideration of the six different situations referred to in the previous paragraph.

(1) EMPLOYERS' LOSS OF SERVICES

9. We think it would be generally accepted that there can at the present day be little justification for entitling an employer to a remedy merely because someone's wrongful act has deprived the employer, temporarily or permanently, of the services of his employee. It is an accepted risk of the employment relationship that various events may occur which will render the employee incapable of working. Now that we are all liable to be injured at any time by

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15. M.C.A. 1965, s.41.

16. Gray v. Gee (1923) 39 T.L.R. 429; Newton v. Hardy (1933) 149 L.T. 165; Elliott v. Albert [1934] 1 K.B. 650, C.A.; Best v. Samuel Fox. Ltd. [1952] A.C. 716 at 729 per Lord Goddard, C.J.

17. It has been suggested that a doctor who performed a sterilisation operation on a wife or terminated her pregnancy, without the husband's consent, might be liable to the husband and that this liability may be based on the action for loss of services. We are of the opinion (a) that there is no such liability (and probably should not be) and (b) that were there any such liability it could not possibly be grounded on the action for loss of services.

hazards such as the motorcar, the risk that an employee may be injured wrongfully (for example by someone's negligent driving) is regarded as one of the normal risks which an employer accepts. If the employee's services are uniquely valuable to the employer, the latter can and should insure against the risk of his death or injury. Hence we see no justification for retaining the action for loss of services merely in order to compensate an employer for loss of an employee's services.

10. On the other hand, it seems wrong that a good employer who continues to pay his employee during the period when the latter is away injured (or to pay for medical attention), may thereby reduce the damages payable by the person who has wrongfully injured the employee. At present the position in England is that, if an employee is entitled to receive wages or a pension during his absence because of injury, the amount received reduces his claim against the wrongdoer for damages for loss of earnings[18].

> "The general rule is that the injured party should give credit for all sums which he receives in diminution of his loss, save that there are exceptional cases (such as insurance benefits) for which he need not give credit". (19)

Thus he must give credit for wages and pensions which he is entitled to receive (whether the pension be contributory or non-contributory[20],) and unemployment benefit[21], but not apparently for insurance benefits under a policy of assurance[22], wholly voluntary benefits[23] or supplementary benefits received from the Supplementary Benefits Commission[24]. As regards other payments received under national insurance, one half only of these has to be taken into account[25]. What the position is as regards payments received under optional as opposed to compulsory pension schemes is unsettled[26]. The principle behind

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18. Browning v. War Office [1963] 1 Q.B. 750, C.A.; Parry v. Cleaver [1968] 1 Q.B. 195, C.A.

19. Per Denning M.R. [1968] 1 Q.B. at p.206.

20. But not, apparently, if it is reducible at pleasure: Carroll v. Hooper [1964] 1 W.L.R. 345; Elstob v. Robinson, ibid. 726. But cf. Jenner v. Allen West [1959] 1 W.L.R. 554, C.A., where it was held that a voluntary pension was deductible in a claim by dependants under the Fatal Accidents Acts. However, since 1959 no "insurance money, benefit, pension or gratuity" is to be deducted from a claim under the Fatal Accidents Acts or the Carriage by Air Act: see Fatal Accidents Act 1959, s.2.

21. Parsons v. B.N.M. Laboratories, Ltd., [1964] 1 Q.B. 95, C.A.

22. Bradburn v. Great Western Railway Co., (1874) L.R. 10 Ex. 1.

23. Liffen v. Watson [1940] 1 K.B. 556, C.A.

24. Foxley v. Olton [1965] 2 Q.B. 306.

25. Law Reform (Personal Injuries) Act 1948, s.2(1).

26. See per Salmon L.J. [1968] 1 Q.B. at 209, 210.

the general rule is clear enough; it is based upon a strict adherence to the compensatory theory of damages emphasized in British Transport Commission v. Gourley[27]. It is not however easy to detect any consistent principle behind the various exceptions. Parry v. Cleaver[28], the latest case on this subject, is on appeal in the House of Lords and it may be that this will produce a change, or at least a clarification, of the position. The general principle has been strongly criticised by Professor Street[29], who also argues that it would still be open to the English courts to allow recovery on the basis of loss of earning capacity, rather than for loss of the wages themselves as special damages. A different principle has been adopted in the U.S.A. where it is generally accepted that all collateral benefits including wages and pensions are to be disregarded[30]. In Australia, the High Court has held that wages have to be taken into account[31] but not pensions[32]. In Canada, a Saskatchewan case holds that credit has to be given for such part of a pension as represents the employer's contribution but not for the portion representing the employee's[33].

11. The one valuable result which the action for loss of services might achieve if extended beyond the realm of menial servants would be to enable the employer to recover from the tortfeasor the wages and other benefits that he has paid, thereby counterbalancing the reduction of the amount of damages payable to the victim of the tort by the tortfeasor. It might be thought that in an action for loss of services, the damages should be measured by the cost of replacing the services rather than by the wages paid to the injured servant[34].

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27. [1956] A.C. 185, H.L.

28. Supra.

29. Law of Damages, 77-82.

30. Fleming in (1966) 54 Cal.L.R. 1478; see especially on this point pp.1495-1498 (we must acknowledge our indebtedness to Professor Fleming's most valuable article with its survey of the comparative material). This view seems to have been shared by Lord Sumner: see Admiralty Commissioners v. S.S. Amerika [1917] A.C. at p.61. It was the view taken as regards pensions by the C.A. in Payne v. Railway Executive [1952] 1 K.B. 26, C.A. and by Donovan L.J. in Browning v. War Office, supra, where the other members of the court held that Payne's Case could not stand in view of British Transport Commission v. Gourley, supra.

31. Treloar v. Wickham (1961) 105 C.L.R. 102; Graham v. Baker (1961) 106 C.L.R. 340

32. Graham v. Baker, supra; Jones v. Gleeson (1965) 39 A.L.J.R. 258.

33. Smith v. C.P.R. (1963) 41 D.L.R. (2d) 249.

34. "[T]he damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment .... a master cannot count as part of his damage .... sums which he has to pay because his contract binds him to pay wages ...." per Lord Sumner in Admiralty Commissioners v. S.S. Amerika [1917] A.C. at 61; followed in Australia by Fullager J. in Commissioner for Railways v. Scott (1959) 102 C.L.R. 392 at 408-9. But Fleming, op.cit. p.1493 brands this argument as "more appealing to the literal-minded than to those with a teleological concern with purposes and means to achieve desirable ends".

However that may be, the courts have in fact allowed recovery of the wages paid by the master so long as the master was legally liable to pay[35]. Accordingly had the action for loss of services remained generally available it would have provided an adequate means of "shifting the loss so that while the injured party is not enriched, the tortfeasor is neither relieved of any of his burden nor yet exposed to any additional burden"[36]. This, broadly, is still achieved in Australia. England, on the other hand, avoids exposing the tortfeasor to any additional burden (as occurs in those American states which allow the injured party to recover without giving credit for wages actually received and also allows the employer to recover in an action for loss of services) but relieves the tortfeasor of part of his burden. This it does by insisting that the injured party shall give credit for wages received and that (except in the case of menial servants) there shall be no action for loss of services by the employer. Nor can the employer recover from the tortfeasor on the basis of unjust enrichment[37].

12. Various expedients can be adopted whereby the employer can pay wages without thereby reducing the damages payable by the tortfeasor. If the employer makes payments to the employee which are purely voluntary and in the nature of gifts, it seems that these can be disregarded in the employee's claim for damages against the tortfeasor. In practice, however, this is not a satisfactory solution from the employer's point of view. The better alternative is for the wages to be paid in the form of a loan which is to be repaid in due course. Such loans, if repayable in any event, will definitely not reduce the damages recoverable from the tortfeasor by the employee; accordingly he will be able to repay the loan from the damages recovered. But this is not a very satisfactory solution either. A good employer will not wish to appear in the somewhat ungenerous light of a lender with a right of recovery from the employee in all circumstances. What he will probably want to be able to say is "I am continuing to pay your wages but if and when you recover from the third person who injured you I shall expect you to repay". If such an arrangement can be construed as imposing a definite legal obligation to refund provided that the employee recovers from the tortfeasor, it seems to be assumed in England that the sums so advanced are not to be taken into account in reduction of the

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35. It seems that if wages are paid voluntarily they are not recoverable as such but may be some evidence of the value of the lost services: I.R.C. v. Hambrook [1956] 2 Q.B. at 667 and 672. In some circumstances the loss to the master may be greater than either the cost of replacement service or of wages paid to the injured servant and, if so, it seems that this additional loss can also be recovered: Mankin v. Scala Theodrome Co. [1947] K.B. 257.

36. Fleming: op.cit. pp.1495, 1496.

37. Receiver for Metropolitan Police District v. Croydon Corporation [1957] 2 Q.B. 154, C.A.

damages recoverable by the victim from the tortfeasor[38]. The minority on the Law Reform Committee suggested that a term to this effect should be inserted in contracts of service[39] and it is known that there are some schemes which do so provide[40]. Nevertheless difficulties will arise in the event of the damages recovered by the employee from the tortfeasor being reduced because of the employee's contributory negligence. If the employee recovers, say, only half his damages, he will nevertheless be under a legal liability to repay the full amount of the wages advanced to his employer.

13. The legal position becomes still more difficult if the arrangement between employer and employee is construed as entitling the employee to his wages despite his absence, with no more than a moral obligation to refund if his recovery from the tortfeasor enables him to do so. In some cases the courts have allowed the employee to recover from the tortfeasor on giving an undertaking that he would repay the advances to his employer[41]. The power to require such an undertaking has however been denied in Australia[42]. Moreover in the light of the English decision in Gage v. King[43], it seems doubtful whether recovery from the tortfeasor is truly permissible in such circumstances.

14. Those who believe, as most now do, that the sole object of damages is to compensate the injured party and not to punish the wrongdoer, can argue plausibly that there is no objection to a system which lets the tortfeasor off more lightly because someone else happens to have mitigated the victim's loss[44]. If an employer has done so because of generosity or because he has bound himself by contract to do so, it can besaid that there is no reason why he "should receive a solatium by being given a new kind of right of action"[45]. The fact that the

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38. But this is not the view held by the Australian High Court: Blundell v. Musgrave (1956) 96 C.L.R. 73. According to that decision there must be a definite legal obligation to refund whether or not there is recovery from the tortfeasor, but if there is such an obligation it does not matter that the employer will probably not enforce it unless the employee succeeds in his claim against the tortfeasor. It may be that a distinction should be drawn between an obligation to refund if any damages are recovered from the tortfeasor and an obligation to refund only if damages in respect of lost wages are recovered.

39. Cmnd.2017, p.12. See also Lord Goddard C.J. [1956] 2 Q.B. at 656-7.

40. For example, the Scheme of Conditions of Service of the National Joint Council for Local Authorities' Administrative, Professional, Technical and Clerical Services.

41. Dennis v. L.P.T.B. [1948] 1 All E.R. 779.

42. Blundell v. Musgrave (1956) 96 C.L.R. 73 at 94 (Fullager J.).

43. [1961] 1 Q.B. 188.

44. See McGregor: Compensation Versus Punishment in Damages Awards, (1965) 28 M.L.R. 629.

45. Cmnd.2017, at p.12.

tortfeasor gains thereby is no more anomalous than the fact that it is normally cheaper to kill someone than to injure him. The tortfeasor, it is said, is not unjustly benefited but merely lucky that his wrong has not caused the victim greater damage. The fact is, however, that the present rule does offend many people's sense of justice and that in itself is an objection to it. Nor are those people unreasonable. The tortious act of the wrongdoer has led to actual foreseeable financial loss greater than the wrongdoer is called upon to bear. It smacks of legal pedantry to argue that the loss borne by the employer flows, not from tort, but from the employer's own generosity or contract and that the tort is not the causa causans but merely the causa sine qua non of the loss. However one looks at it, the loss has been suffered and would not have been suffered but for the tort. What can perhaps be said is that the employer should not be able to recover a loss which he has voluntarily assumed (cf. para.9 above).

15. It seems self-evident that the public interest as well as the sectional interests of employers and employees would best be served if:

(a) an employee continued to receive his wages notwithstanding absence from work because of injury;

(b) the amount of such wages was ultimately recovered from the tortfeasor; and

(c) any amount so recovered was then restored to the employer.

From the point of view of the employee it is more satisfactory that the wages should continue to be paid by the employer rather than that the employee should have to try to recover them from the tortfeasor. The employee needs his wages as they accrue and normally cannot afford to wait for them until his action is decided or settled years later.

16. It is clear that the present legal position is not conducive to the above aims. The law does not encourage employers to continue to pay wages. If they do so, they will not be able to recover them from the tortfeasor except on the very rare occasions when an action for loss of services is available. In other circumstances, if they pay wages the result is often to prevent any recovery in that respect from the tortfeasor. Even if wages are paid by way of a loan to be refunded when the employee recovers from the tortfeasor, difficulties arise when the employee's recovery is only partial because of his own contributory negligence. In that event the employee or his trade union may resist any refund to the employer.

17. The abolition of the action for loss of services would not make the position worse, except marginally: it would have an effect only in the rare cases where the relationship between employer and employee is such that an action for loss of services is at present available to the employer and in these cases would remove the present incentive to continue to pay wages.

18. On the other hand, the abolition of the action, while it would rarely make the position worse, would certainly never make the position better. If the law is to assist in accomplishing the aims set out in para.15, some new or improved remedy must be provided. The first question for determination therefore is whether what actually occurs at present does substantially achieve those aims despite the inadequacies of the law. It is on this point that we would particularly welcome advice and information from bodies representative of employers and employees (for example, the C.B.I. and the T.U.C.).

19. The evidence given six or seven years ago to the Law Reform Committee and the Law Reform Committee of Scotland appears to have suggested that, whatever the defects in the law, the actual position was reasonably satisfactory. Certain it is that at that time the British Employers Confederation (one of the bodies now merged into the C.B.I.) were opposed to any change in the law beyond a simple abolition of the action for loss of services and did not want employers to be given a right of action to replace it. However, our discussions with the C.B.I. in February 1966 made it clear that that view had not been unanimous then and that the balance of opinion may well have changed since. It seems to be quite clear that events have not realised the hope of the minority of the Law Reform Committee that it would become common form for terms of employment to include a provision that wages would continue during an injured employee's incapacity and be repayable only if the victim recovered damages from a third party. Such evidence as we have suggests that, on the contrary, the practice of continuing to pay wages is becoming less common and that provisions to that effect are rarely among those of which written particulars are furnished to employees in accordance with the Contracts of Employment Act 1963. In so far as express provisions are made for payments during absence through injury it seems that they are normally limited to sick pay not exceeding an amount which, when added to the national insurance benefit, will approximate to the basic wage. Moreover, employees and their unions are in a less strong position to bargain for better terms now that there is a larger body of unemployed than there was a few years ago. In actual practice there appears to be a marked difference between the experience of manual and non-manual workers. Mrs. Dorothy Wedderburn of Imperial College in a recent survey(46) found that 82% of non-manual workers received some money from their employers during sickness and 36% received their full wages. But only 54% of manual workers received anything and only 9% got full wages(47). Nor does the position seem to be wholly

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46. Published in New Society for 12th Oct.1967 at p.512.

47. See ibid. p.514 and Table 18c at p.512. These figures relate to absence for sickness generally - not exclusively to incapacity due to an accident where, conceivably, the figures may be higher.

satisfactory from the employer's point of view. Unless express provision is made to cover the situation when a worker is absent, then, unless he is on piece-work, the normal position will be that he will be entitled to be paid his wages until his employment is terminated. The last step that the employer will normally wish to take is definitely to dismiss an injured workman merely because he is injured. This frequently leads to doubts and disputes on whether or not the employment has in fact been terminated, and if so when, and accordingly to what wages the employee is legally entitled.

20. Apart from these consequences there is also the question of justice as between the employer and employee on the one hand, and the tortfeasor on the other. In the eyes of many it must appear arbitrary and unjust that the extent of the tortfeasor's liability is dependent upon (a) whether the man he has injured happens to be a menial servant, (b) whether the latter is, under the terms of his employment, legally entitled to his wages during absence through injury and (c) what arrangements are in fact made between employer and employee. If the injured man is a menial servant and is legally entitled to wages during absence the injured man cannot recover loss of wages from the tortfeasor, but the master can and no reduction will be made for the servant's contributory negligence[48]. In other circumstances the employer can never recover directly from the tortfeasor. The employee may or may not be able to recover from the tortfeasor according to whether wages are in fact paid, and, if paid, on what basis. If wages are recoverable by the employee at all, his contributory negligence will reduce the amount recoverable by him.

21. There is therefore some reason to suppose that the present position is unsatisfactory and would be no less satisfactory if the action for loss of services were abolished, as we have no doubt that it should be. But the case for further reforming the law is, to some extent, dependent on whether any change in the legal position would be likely to lead in practice to greater readiness on the part of employers to continue to pay wages to their injured workers. If, as may well be the case, their apparent reluctance has nothing to do with the fact that they know that thereby they may merely be benefiting the tortfeasor and if, as may also be the case, they are indifferent as to the possibility of ever recovering what they pay, the case for any legal change is much weakened. This is another question on which we should particularly welcome the views of the C.B.I. and other employers' associations, and of the T.U.C. and employees' Unions.

22. One other factor which any reform should seek to preserve is that so far as possible all liabilities arising out of one event should be disposed of.

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48. Mallett v. Dunn [1949] 2 K.B. 180.

in one action. This is desirable not only because multiplicity of actions is inherently undesirable but because the injured party will find it difficult to negotiate a settlement with the tortfeasor (or his insurers) unless that settlement disposes of the whole claim. This is a powerful objection to any proposal which would give an employer an independent right of action against the party who had wrongfully injured his employee. It is also a further objection to the present action for loss of services - although not a very potent one because of the minimal number of cases in which such an action is possible.

23. Assuming that there should be a new remedy on the abolition of the employer's present action for loss of services, there are, as we see it, three possibilities.

Possibility I - Independent right of action by employer

24. The first possibility is to confer on the employer an entirely independent right of action against the tortfeasor. In effect this would be to retain the present action for loss of services but to free it from the limitations which the English courts have imposed. This might be supported upon the theory that when a tortfeasor injures someone he ought to foresee that the employer of the injured party is among those likely to suffer loss and that accordingly the employer should be regarded as within the range of those to whom a duty of care is owed. It is not thought that this proposal is one which deserves serious consideration. It has, as we see it, all the disadvantages of the other possible solutions canvassed below and none of their advantages. It would lead to the possibility of multiple actions and to excessive recovery from the tortfeasor - since presumably the contributory negligence of the injured employee would be irrelevant in an action by the employer. If a right of recovery is to be vested in the employer there seems every advantage in basing this on the subrogation principle considered under the next head.

Possibility II - Subrogation

25. A solution based on the subrogation principle is, in effect, that recommended, by a majority, by the Law Reform Committee[49]. Under their proposals an employer[50] who made payments or conferred other benefits on his injured employee would have been entitled to recover from the tortfeasor to the extent that the tortfeasor's liability to the employee had been reduced in consequence of the action of the employer. Accordingly the liability of the tortfeasor would not have been increased but the amount for which he was liable

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49. Cmnd.2017, paras.5-16.

50. "Employer" was to be defined widely so as to avoid difficulties regarding, for example, the police.

would have been equitably adjusted between the employer and employee. The Committee further recommended that the amount recoverable by the employer from the tortfeasor should be reduced in proportion to any contributory negligence on the part of the employee. Professor Fleming points out that this further limitation was not necessary in order to avoid excessive recovery against the tortfeasor[51]. If the employee's total damage is £10,000 of which £1,000 represents wages that would have been lost but for the fact that the employer continued to pay wages, and if, because of 50% contributory negligence the employee is entitled to recover only £5,000, it makes no difference to the tortfeasor whether the employer recovers in full (£1,000) and the employee recovers £4,000 or whether the employer recovers £500 and the employee £4,500. For the protection of the tortfeasor the only rule needed is that the employer's claim shall not exceed the total liability to the employee[52]. In principle the employer ought to recover in full; the rule recommended by the Committee means that the employee is benefited (he recovers £5,500 in all), and the employer damnified because of the employee's negligence. It may be that the Committee thought that there would be objection by the trade unions if the employer recovered in full while the employee did not, and on purely pragmatic grounds this may justify their recommendation. Moreover, they may have been conscious of the fact that the opposite rule would produce what might seem to be an anomalous distinction between the two major types of personal injury cases - road accidents and factory accidents. In the former the employee's claim is against a third party; in the latter normally against his employer. In the latter, the employee's claim in respect of loss of wages is reduced by the amount of wages which the employer-defendant has continued to pay. If in such a case the employee's total claim would, again, have been for £10,000, including £1,000 for loss of wages had they not been paid, the employee's claim is reduced to £9,000 if wages are paid, and if he is 50% to blame he recovers £4,500 which, with the £1,000 wages already paid, gives him £5,500 in all. Accordingly the rule suggested by the Committee produces the same result whether the claim is against a third party or the employer. It does not, however, eradicate the anomaly that in both cases if the employee has been contributorily negligent an employer who continues to pay wages ends up worse off than if he had not paid.

26. The effect of contributory negligence can be left for later consideration. The question which first needs decision is whether the subrogation principle is the best solution. The case against it is strongly argued by the

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51. Op.cit., p.1525.

52. It is arguable that, where it does, the employer should be entitled to recover from the employee. The Israeli Law, considered below, so provides.

dissenting minority on the Law Reform Committee[53]. Most of their arguments, however, are against providing any remedy rather than against this particular solution. The main arguments against any solution which would vest a right of action in the employer are that it would encourage multiplicity of actions and make it more difficult to settle out of court. The former objection is met to some considerable extent by the majority recommendations of the Committee that separate action should be discouraged by costs sanctions and by other procedural provisions[54]. The objection that it would make it difficult to settle is not met, and is, in our view, a serious one. Defendants (and their insurers) want to be able to settle the whole of the claim at one time. They will be reluctant to settle with the employee unless, at the same time, they can settle with the employer. Might it not make for disharmony in labour relations if neither employer nor employee were able to effect a settlement without the concurrence of the other? On this question we shall again welcome the views of associations representing the two sides of industry. In most cases we imagine that there would be little difficulty and that employers would be willing to subordinate their interests to those of their injured workers. But would employers welcome the need to pursue their separate claim against the tortfeasor? Would they not prefer to leave everything in the hands of the employee? Which solution would afford the greater encouragement to continue to pay wages?

27. Although the recommendations of the Law Reform Committee have not been implemented in England and were rejected by the Law Reform Committee for Scotland[55], they were the inspiration of Israeli legislation - the Law of Torts (Repair of Bodily Harm) Act 1964[56]. This Act goes further than the Law Reform Committee's proposals in that it extends to anyone who through his services mitigates the injured person's harm and is not limited to benefits conferred by an employer. It is, accordingly, of relevance not only in the present context but also in relation to the problem of family expenditure considered in paras.46 et.seq. It affords a remedy to all persons who offer reasonable aid to those suffering from "bodily harm" (which includes illness, bodily or mental defect or death) and is therefore in line with the so-called "Good Samaritan" Acts in the U.S.A.[57].

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53. Cmnd.2017, pp.12-14.

54. Cmnd.2017, para.15. But see the Minority Report, para.6 at p.13.

55. Cmnd.1997.

56. For a description of its provisions, see M. Shalgi: A Benefactor's Right of Action against a Tortfeasor: A New Approach in Israel, (1966) 29 M.L.R. 42. We must acknowledge our indebtedness to this article on which the present account is based.

57. On these, see Fleming, op.cit. p.1512 and sources there cited.

It allows recovery in respect of "expenditure incurred or services rendered in order to repair bodily harm, preserve the victim from aggravation of the harm or from further harm or relieve his suffering, and includes such assistance given to the victim towards his maintenance or the maintenance of his family as he needs as a result of the harm and, where the victim has died, assistance as aforesaid given to a person entitled to compensation from the tortfeasor in respect of the victim's death". The only exception is where an insurance company repairs the harm under an insurance policy with the victim.

The person who repairs the harm is given a direct action against the wrongdoer when the latter's tortious liability to the victim is established. But only such expenditure as is reasonable can be recovered. It is expressly provided that salary or wages paid by an employer are to be regarded as reasonable provided that they do not exceed the salary or wages which the employee would have received if he had been at work(58). Again, it expressly stated that this includes the reasonable upkeep of a soldier during the period in which he is unfit for service. However, the maximum liability of the tortfeasor is not to exceed the amount which he would have had to pay the victim if the harm had not been repaired. Where the injured party has been contributorily negligent the benefactor may recover from the victim in proportion to the latter's blameworthiness(59). If the victim has repaid the benefactor he, the victim, may then recover from the tortfeasor.

Finally(60), there is an interesting provision designed to minimise the difficulties caused by allowing separate actions by the victim and benefactor. The court which tries the benefactor's claim may, on his application, admit as evidence findings in the action by the victim against the tortfeasor regarding the tortfeasor's liability and any contributory negligence. But the reverse does not apply since it is thought that generally the main issue is between the victim and the wrongdoer and that the court which tries this must be untrammelled by any finding in the subsidiary action by the benefactor. Normally, no doubt, the two actions, if fought at all, will be heard together.

28. It seems to us that, if a remedy based on the subrogation principle is to be adopted, the Israeli Act is a precedent which deserves close study.

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58. As Shalgi (op.cit. p.46) points out, the employer is not restricted to the recovery of wages at the rate preceding the injury; this is of importance in Israel where most collective agreements provide for periodical increases.

59. If the victim alone is negligent the benefactor may recover from him.

60. There is also an interesting and useful provision whereby the benefactor is given a direct right against the tortfeasor's insurer, if any.

At the time of writing the article on which the above account is based[61] it was too early to judge how it is working. By now, however, some experience should have been gained[62] and we hope that those in Israel to whom this Paper is sent will be able to give us an assessment of the results so far. One of the Israeli Law's attractions, as already mentioned, is that it subsumes the claim of an employer within a wider principle which would partially solve the problem of claims by members of the victim's family.

29. If it were decided that the right course would be to transfer part of the victim's claim to the employer for enforcement by the latter there are, of course, other ways of achieving this apart from those based on subrogation. One could, for example, provide for an express assignment of the appropriate proportion of the victim's claim to the employer. German law in fact interprets employment contracts as imposing an obligation on the employee to assign his tort claim to the employer in respect of any wages paid during disability[63]. This, however, seems to have no advantage over a solution based on subrogation. Apart altogether from doctrinal objections to the assignment of rights of action for torts, "the common law technique of subrogation , being automatic in operation, seems preferable since it avoids the necessity of resorting to legal process in order to compel a recalcitrant employee to assign"[64].

Possibility III - Recovery from tortfeasor by the employee

30. The third possible solution - one which has been suggested to us by the Bar Association for Commerce, Finance and Industry - is to allow the employee to recover from the tortfeasor without giving credit for any sums paid by the employer, leaving subsequent adjustment to take place between the employer and employee. This solution, if it could be elaborated so as to work satisfactorily in practice, has considerable advantages over those previously canvassed - advantages from the viewpoints of employer, employee, and tortfeasor alike. The employer would not be saddled with the burden of bringing a separate action against the tortfeasor and the employee and the tortfeasor would be free to settle the whole claim. It would also have the great advantage of automatically eradicating most of the present uncertainty about, and anomalous distinctions between, those benefits received from an employer which the employee must deduct from the damages recoverable from the tortfeasor and those which he need not[65].

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61. See n.56, supra.
62. It came into force on 2nd April, 1964.
63. See on this Fleming, op.cit. pp.1512, 1513, 1520-1523.
64. Fleming: op.cit. p.1513.
65. See para.10, supra.

The employee would be able to recover in respect of "lost" wages and of medical expenses whether or not these had been paid by the employer and whether or not the employer had paid them voluntarily or because he was bound to do so. It would avoid the need in the employee's action to ensure that full account was taken of what he had received from the employer. Furthermore, if the employee were placed under a legal obligation to restore to the employer whatever he recovered from the tortfeasor in respect of liabilities in fact borne by the employer, double recompense to the employee would always be avoided - as it seems not to be at present where the payments are made gratuitously by the employer.

31. However, as will be pointed out later(66), if the employee were placed under a legal obligation to account to the employer it would undoubtedly add to the complications. It is for consideration, therefore, whether it would be necessary or desirable to impose any such obligation. The matter could instead be left to be worked out between employer and employee. If employers were not prepared to rely on employees' sense of moral obligation they could insert express provisions in their terms of employment. It is true that if employees were under no legal obligation to account they might sometimes enjoy a double recovery. It can be argued however that this is less objectionable than that the tortfeasor should benefit because of the generosity of the employer or because the employee has foregone a higher regular wage in consideration of the employer undertaking to provide him with wages or sick pay or to pay for his medical attention. As we have seen(67), as a result of the Fatal Accidents Act 1959 such benefits are not to be deducted in a dependant's claim under the Fatal Accidents Act or in a claim under the Carriage by Air Act. If that can be regarded as showing a legislative policy(68) that dependants shall be entitled to such benefits in addition to any compensation from the tortfeasor, it seems strange that the same policy should not apply to protect a living victim and his dependants.

32. The main arguments against not imposing a legal obligation to account to the employer, apart from the objection that it might lead to double recovery, are, as we see it, the following:-

(a) Unless employers have a right to recover they will be less likely to continue to pay wages.

(b) Although in some circumstances the employee himself might consider that he was under a moral obligation to refund to the employer, even though there was no contractual agreement to that effect, if he were to die before doing so it would be difficult for his personal representatives

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66. See paras.34-41, infra.

67. See fn.20, supra.

68. As pointed out below (para.40) this is doubtful.

to honour this moral obligation. Even if they did so by agreement with the beneficiaries, the amount repaid would presumably not be deductible as a debt to reduce the amount of the estate for death duty purposes.

33. It is questionable whether either of these objections has much validity. As regards the first, whether an employer continues to pay wages depends mainly, we suspect, on whether he wants to retain the employee. Whether sick-pay is forthcoming depends mainly, we have no doubt, on whether it is payable under the conditions of service; it may or may not be the case that it would more commonly be provided for if there was a chance of ultimately recovering it. Occasionally one or other may be paid out of a humane desire to help the workman and his family, and doubtless this is commonly the motive when medical expenses are defrayed by the employer. Very rarely, we think, will the employer's decision in any particular case depend on the likelihood of being repaid. All that can be said is that payments are more likely to be made out of a desire to help the workman than out of a desire to help the tortfeasor. That being so, this third solution, even without a legal right to recoupment, may be as likely as the second to encourage such payments to be made. As regards the second objection we cannot imagine that many employers are likely to be upset by the fact that an expected voluntary repayment does not materialise because the employee dies. Moreover, it is only in the rarest of cases that liability to estate duty will be a serious consideration precluding a voluntary repayment if those interested in the estate wish to make it. Any employer who is concerned to secure a legal right to repayment can provide for that in his terms of employment, thereby avoiding any such difficulties.

34. If, despite the above arguments, it is thought essential or desirable to provide the employer with a legal right of recovery against his employee we see no overwhelming difficulties in so providing so long as the right of recoupment is limited to sums paid prior to the judgment in the employee's action against the tortfeasor and therefore included in the special damages recovered by him. To extend the right of recoupment to future payments would be obviously impracticable. No employee is going to hand over to his employer a capital sum representing compensation for loss of future earnings, hoping that his future wages will ultimately recoup him. Nor is he going to work for the employer for nothing until he has rendered services equivalent in value to the capital sum. Apart from this, equitable adjustment of the income tax position would be impossibly difficult. But so long as the employer's right of recoupment is limited to sums already paid we can see no particular difficulty.

35. If the employer were to be given a legal right of recovery a decision would have to be reached on what was to happen if the damages recovered were

reduced because of the employee's contributory negligence. This matter has already been adverted to above[69], and it was pointed out that this is solely a question as between employer and employee and does not affect the liability of the tortfeasor. The liability of the latter will be reduced if the employee has been contributorily negligent. The question is whether the employee's liability to recoup the employer should similarly be reduced. It seems to us that in a situation such as we are at present discussing the rule would have to be that the employee, on recovering from the tortfeasor, should restore to the employer the whole of the sums advanced by him - at any rate so long as they did not exceed the total amount recovered. It cannot be right, as we see it, that the amount to be restored by the employer should be reduced because the employee is himself at fault. Possible trade union objections to such a rule, readily understandable though they may be, must be weighed against the argument that employers cannot be expected to go on paying wages if they know that the amount that they will get back is dependent on the extent of the employee's contributory negligence. As we see it, the present situation is totally different from that considered later[70] where members of the family seek to recover something additional to the tortfeasor's liability to the immediate victim. There it seems quite right that the tortfeasor's additional liability should be reduced proportionately to the victim's contributory negligence. In the present context, however, the question is simply how the amount for which the tortfeasor is liable to the victim should be divided between the victim and the employer who has advanced wages to him.

36. Where, however, the total amount recovered by the employee is less than the total wages already paid by the employer it seems clear that, in the absence of express agreement to the contrary, the employee should not be required to restore to the employer more than he, the employee, has recovered from the tortfeasor. This, however, is not a very common situation since normally past wages will constitute only a small fraction of the total damages claim. Unless the employee's proportionate responsibility for the accident is very high or his claim for past wages constitutes an unusually large fraction of his total loss, the total damages which he may be expected to recover should be sufficient to enable him to recoup the employer. What, however, will more commonly occur is that his recovery in respect of past and future earnings will, because of his contributory negligence, be less than the wages already paid by the employer. When this occurs should the amount recoverable from the employee by the employer be reduced likewise? In our opinion it should not, if only because this would be impracticable so long as judges do not always expressly divide the total sum awarded by way of damages under various heads of damages. Even if judges

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69. See para.25.

70. Infra. para.85.

changed their practice in this regard it would still make for difficulty when claims were settled out of court; then both parties want to be able to settle for a lump sum without complicated assessments under various heads.

37. The Law Reform Committee preferred the second solution to this, the third, on the following grounds:(71)

> "The employee would have little incentive to claim damages from which he would derive no advantage, more particularly if, as in the case of medical expenses incurred on his behalf by his employer, he would have to go to some trouble to ascertain the particulars. Moreover, as the employer's right of recovery would be dependent upon the award of damages to the employee, the employer would have no remedy if the employee did not choose to bring proceedings and it might be difficult for the employer to recover if the employee settled his claim out of court. Finally, we have no reason to believe that employers would welcome a remedy which would in the last resort depend on their bringing proceedings against an employee who had been the victim of an accident."

All these arguments obviously have some force but all are based on the assumption that the employee is to be placed under a legal obligation to reimburse the employer. If he is not, but if, as we have suggested above, the question of recoupment is left to be worked out between the employer and employee, the objections largely disappear.

38. Even if the employee were placed under a legal obligation we are not convinced that the objections of the Law Reform Committee are very weighty. If the employee's only damages were loss of past wages no doubt he would not bother to sue if the employer had continued to pay him. But normally this would not be the only or the major part of his loss. And in the vast majority of cases the employer has a remedy in his own hands. If the employee shows no sign of pursuing his action against the tortfeasor, the employer can force his hand by ceasing to pay wages and returning his cards. Settlements out of court would admittedly be slightly more complicated since the employee, to be sure of his ultimate position, would need to consult the employer before accepting the settlement and to agree with the employer how much should be repaid him. But it would still avoid some of the difficulties of effecting a settlement which would inevitably arise were the second solution to be adopted when, as we have seen, the tortfeasor could never be sure of achieving a full and final settlement by making an offer to the employee alone. Finally, while we agree that employers would not wish to have to bring actions against their employees, actual litigation would be very much a last resort which would hardly ever be used. An amicable settlement between employer and employee should normally be easier to reach than a settlement between the employer and the tortfeasor.

39. The Law Reform Committee for Scotland suggested that if an employer

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71. Cmnd.2017, para.14.

were given a right of recovery this could lead to difficulties regarding income tax[72]. So long as the right of recovery were limited, as suggested above, to payments made prior to the trial of the employee's action we do not think that any serious trouble would arise. The ultimate result, however, might differ according to whether the employer were given a right against the tortfeasor (i.e. solution II), or left to recover from the employee (solution III). Since British Transport Commission v. Gourley[73] the amount recoverable by the employee from the tortfeasor is the equivalent of the lost wages after tax. Where the employer has continued to pay wages he will, presumably, have deducted tax under PAYE and accounted to the Revenue therefor. If he were given a direct action against the tortfeasor it would, presumably, be for the total amount which he had paid to the employee and to the Revenue. On that basis, both the employer and the employee would be fully compensated, but the tortfeasor would have paid the amount of the tax which he would have escaped paying if no wages had been advanced - in the latter event the loser would be the Revenue which would not receive tax on the wages. If, on the other hand, the employee were allowed to recover from the tortfeasor, his recovery, unless the rule in Gourley is altered, would presumably be the equivalent of the wages less tax, and this is all that he can fairly be asked to restore to the employer. Accordingly the tortfeasor would be in the same position as if wages had not been paid, but the employer would be undercompensated by the amount of the tax[74]. The different result may be anomalous but we cannot regard it as of great importance.

40. We have already stated that in our view it would be quite impracticable to require the employee to refund to the employer payments exceeding the amount of wages paid **prior** to the judgment in the employer's action. The question arises whether, if the third solution were adopted, it should be these prior payments alone which should be disregarded in assessing the damages recoverable by the employee from the tortfeasor or whether all such benefits past or future should be disregarded. As already pointed out, in assessing damages in claims under the Fatal Accidents Act or Carriage by Air Act no account is to be taken of "any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death"[75]. Adoption of the same rule would lead

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72. Cmnd.1997, para.14.

73. [1956] A.C. 185, H.L.

74. Unless he could recover from the Revenue - and we do not see how he could.

75. Fatal Accidents Act 1959, s.2(1). Moneys payable under a contract of insurance had already been excluded by the Fatal Accidents (Damages) Act 1908.

to a provision that benefits "which have been or will or may be paid as a result of the injury" should be disregarded[76]. While this would include insurance moneys, pensions, and payments for medical attention, it would presumably not include wages (for wages are paid not as a result of the injury but despite the injury). However, it probably goes too far to argue that the provision in the Fatal Accidents Act shows a general legislative policy to exclude benefits, since a different policy as regards National Insurance has been adopted in the Law Reform (Personal Injuries) Act 1948. Under s.2(1) of that Act in an action for personal injuries account has to be taken of "one half of the value of any rights which have accrued or probably will accrue .... therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued". This provision represents a compromise between the views of the Monckton Committee[77], which had favoured taking the whole of these benefits into account in reduction of the damages recoverable, and those who thought they should be totally disregarded. It seems to us that this probably is a field in which it would be appropriate to adopt a pragmatic compromise rather than to attempt a rigid adherence to a strict principle either that there should never be over-compensation or that the tortfeasor should never benefit from the mitigation of damages by a third party.

41. Whatever solution is adopted as regards payments by employers should, we think, apply equally to payments by other benefactors which mitigate loss to the party primarily injured. As we have seen[78] such payments do not seem, under the present law, to reduce the damages recoverable against the tortfeasor. If the employer were given a direct action against the tortfeasor (i.e. if solution II were adopted) it would presumably be desirable to provide other benefactors with a direct action as does the Israeli legislation referred to above[79]. In that event it would be necessary to provide that payments by such benefactors should operate to reduce the damages recoverable by the immediate victim from the tortfeasor. If, however, the third solution to the problem of employers' payments were adopted, as we are inclined to favour, the result would be to equate the position of employers with other benefactors under the present law. In that event the question would arise whether other benefactors should be given a definite legal right to recover from the victim once he had recovered

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76. This is the position in the Republic of Ireland by virtue of s.2 of the Civil Liability (Amendment) Act 1964 (no.17 of 1964).

77. Report of the Committee on Alternative Remedies, Cmd.6860, of 1946.

78. Para.10, supra.

79. Para.27, supra.

from the tortfeasor. Our provisional view is that the case for so doing is far weaker than in the case of employers. The benefactors will normally be relations or friends and, as was said long ago in a different but analogous context:

> "perhaps it is better for the public that these voluntary acts of benevolence from one man to another which are charities and moral duties, but not legal duties, should depend altogether for their reward on the moral duty of gratitude" (80)

In saying that we are thinking only of the situation where the benefactor's expenditure has been recovered from the wrongdoer by the victim, who is thereby placed in a position to show his gratitude by making restoration. The situation may well be different where the third party has suffered loss which is not recoverable from the wrongdoer by the victim. To that we advert later(81). Nor are we thinking of payments received from the State under National Insurance. We do not suggest that anything should be done to upset the delicate balance of interests represented by s.2(1) of the Law Reform (Personal Injuries) Act 1948(82) though it is not easy to justify the continuance of a different rule under the Fatal Accidents Acts(82). Indeed, it can be argued that the best solution would be to generalise the compromise adopted in the 1948 Act. If that were done the rule would be that one half of the value of all benefits received or likely to be received by the victim within the first five years would be taken into account and everything else ignored. Such a solution would have the advantage of introducing a measure of consistency into the present somewhat chaotic position.

Provisional Conclusions

42. Accordingly, our suggested solution would be as follows:

(a) The employer's action for loss of services should be abolished but where an employee has been off work because of the tortious injury he should be entitled to recover damages in respect of wages for the period of absence prior to the trial irrespective of whether he has been paid wages, pension or sick pay by his employer(83) or anyone else.

(b) Similarly he should be entitled to recover damages in respect of payments for medical attention irrespective of whether these payments

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80. Per Lord Eyre in Nicholson v. Chapman (1793) 2 Hy. Bl. at p.259.

81. See paras.52 et.seq. infra.

82. Para.40, supra.

83. This of course, would not apply where the employer was himself the tortfeasor.

have been borne by him his employer or anyone else[84].

(c) However, in assessing his damages for loss of future earnings, account should be taken of any payments arising out of his employment which he will or may receive (except as provided in the Law Reform (Personal Injuries) Act 1948) but not of payments unrelated to his employment such as proceeds of an insurance policy which he has taken out or voluntary contributions by friends or relations.

(d) Similarly, in assessing damages for future medical attention account should be taken of any right arising out of his employment to have these paid but, again, not of any right unrelated to the employment.

(e) Where payments under (a) or (b) have been made to the victim by his employer or other third party the law should not provide any definite right to recoupment from the victim. This should be left to be worked out between the victim and the benefactor, either prospectively (e.g. under conditions of employment) or retrospectively after the victim has recovered from the tortfeasor.

43. The contrast between the rule embodied in (a) and (b) and that in (c) and (d) may seem illogical but is, in our view, justified on the grounds of fairness, convenience and the ends sought to be achieved. Damages recovered under (a) and (b) are special damages representing a definite ascertainable sum. A rule that payments received from others do not have to be deducted would simplify the administration of justice and should encourage the making of payments by employers and others to the injured party at the time when he most needs them, i.e. in the months or years preceding the recovery of damages from the tortfeasor. Damages recovered under (c) and (d) are estimates of future general damages and, from a practical point of view, in a totally different position. Benefits likely to be received in future as an incident of the victim's employment should, we think, be taken into account, but not entirely extraneous benefits for which the victim has contracted with an insurance company or which he hopes to receive from benefactors. Whether an employment pension is payable obligatorily or voluntarily should be irrelevant, except, of course, that the

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84. It is already provided that the fact that an injured person might have taken advantage of the free National Health Scheme is to be disregarded: Law Reform (Personal Injuries) Act 1948, s.2(4). Where a firm as its own medical or hospital service for its workers it is not suggested that a worker who has taken advantage of this should be able to recover by way of damages what he would otherwise have had to spend (any more than someone who has taken advantage of the free National Health Service could do so). Even if the employer were given an independent right of action against the tortfeasor it is difficult to see how, in practice, he could recover in these circumstances since there would be virtually insuperable difficulties in separating the cost incurred in respect of the particular employee from the general cost of the service. All that could be done is to prescribe charges in respect of particular medical services, which could be recovered for the benefit of the health service, whether National or private.

value to be placed on the latter will be far less. This seems to be the result to which the courts are tending[85]. We think that it would be generally regarded as fair that in assessing general damages for loss of earning capacity or for future medical attention, regard should be had to the extent to which the victim's conditions of employment will or may lead to a mitigation of his loss. Though strict logic may demand that the same should apply to mitigation under an insurance policy taken out by the victim we think it would generally be regarded as unfair[86] to deprive the victim of the benefit of his own initiative in paying for a policy which is not normally intended as a pure indemnity policy but as one giving him definite amounts in the event of certain injuries.

44. In suggesting in rule (c) that there should not be any legal right of recovery by the employer (or other benefactor), we would not wish to rule out the possibility that, in appropriate cases, the court when awarding damages might give directions or extract an undertaking that appropriate restoration of part of them should be made to the employer. As we have seen, the courts have, occasionally, made such directions when they consider that the victim is under a moral obligation to refund[87]. In connection with family losses to which we advert later[88], we think that such directions or undertakings might be more widely used. But, in relation to an employer we think that it would only be rarely that they would be appropriate. One of the main objects of our provisional proposal is to avoid the need to bring before the court any details of the state of account between the employer and employee or of the arrangements which they have made between themselves. Without these details the court will not be in a position to make any definite direction or to extract a binding undertaking.

45. These views are, however, only provisional. Before coming to any final conclusions we would be greatly helped by views on the various questions raised in the foregoing paragraphs which can be summarised as follows:

(1) On the assumption that the employer's action for loss of services is abolished, should anything take its place? (paras.9-22)

(2) Would it in fact be likely to lead to a greater readiness to continue payment of wages during injury or to more generous sick-pay

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85. Subject, of course, to what the House of Lords may decide when Parry v. Cleaver reaches them: see para.10, supra.

86. Unless perhaps the insurance company were subrogated to the victim's rights and enabled to recover from the tortfeasor, thereby - hopefully - leading to a general reduction in insurance premiums.

87. See Dennis v. L.P.T.B. [1948] 1 All E.R. 779, supra, para.13.

88. See para.50, infra.

arrangements if employers were given a right to recover such payments from the tortfeasor? (paras.15-21).

(3) If some new remedy should be provided should this take the form of an action by the employer to recover from the tortfeasor payments made by the employer that have reduced the damages which would otherwise have been recoverable by the employee? (paras.24-29).

(4) Alternatively, should the victim be permitted to recover special damages from the tortfeasor without deduction of payments made by the employer? (paras.30-40)

(5) Alternatively, should the victim be permitted to recover without deduction of such payments except to the extent of one half the value of such payments receivable within five years of the cause of action? (para.41)

(6) If the answer to (4) or (5) is in the affirmative should the victim be placed under a legal obligation to restore such payments to the employer (or other benefactor)? (paras.30-40)

(7) If the answer to question (3) or (6) is in the affirmative, what should be the position when the damages recovered by the employee are reduced because of his contributory negligence? (paras.25, 35 and 36).

(8) Should whatever solution is adopted regarding employers apply equally to benefactors, other than the State, who have mitigated the victim's damages? (para.41).

(2) HUSBAND'S ACTION FOR LOSS OF WIFE'S SOCIETY AND SERVICES OR (3) OF CHILD'S SERVICES

Introduction

46. It seems convenient to deal with situations (2) and (3) together since they raise precisely the same issues. The utterly anachronistic basis of the action needs no stressing and no one, we think, would advocate its retention in its present form which sometimes affords a remedy to the husband but never to the wife[89]. On the other hand, the action, though anachronistic, is far from obsolete and it often enables a husband to recover in circumstances which justice clearly demands that he should and where, in the present state of the law, it would be difficult for him to recover on any other basis. In the recent case of Cutts v. Chumley[90], a wife and mother of three little boys had been so seriously injured that she would have to spend the rest of her life in an institution. As a result the husband had been virtually deprived of her society and wholly deprived of her services in running the home and looking

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89. Except very occasionally for loss of a child's services: see para.7, n.14, supra.

90. [1967] 1 W.L.R. 742.

after the children. He recovered a conventional figure of £200 in respect of impairment of consortium[91] and £5,000 for loss of services. We think it would be generally agreed that it would have been outrageous if he had not been compensated in respect of the latter item at least and that the award was not over-generous. What is clearly needed is some alternative remedy where husband, wife, and, perhaps other members of the household may recover for the economic loss that they suffer and the expenses they reasonably incur as a result of the tortious injury of the immediate victim. This was the unanimous opinion of the Law Reform Committee[92]. At present there is a remedy for loss of dependency under the Fatal Accidents Acts if the breadwinner is killed, and it would be anomalous to deny such a remedy when his support is lost by a non-fatal injury.

47. It would be an exaggeration to suggest that it is clear that damages are never recoverable except through an action for loss of services. There is some authority for saying that anyone who is under a legal obligation to maintain the immediate victim may recover from the tortfeasor the cost of doing so[93]. On this alternative basis a husband might be able to recover medical expenses or the cost of hiring assistance to look after an injured wife or infant child, and a wife, perhaps, might sometimes recover in respect of expenses incurred for an infant child[94] - but not presumably for her husband. But it is not easy to understand what is the exact legal basis for such action if it is not an action for loss of services. If discharge of a legal obligation affords an alternative basis, an employer who, under the terms of his contract with an employee, is liable to provide medical attention, sick pay or wages ought to be able to recover[95], but this, as we have seen, is not so under the present law. Neither this alternative basis, if it exists, nor the action for loss of

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91. Following Lawrence v. Biddle [1966] 2 Q.B. 504,. In Best v. Samuel Fox & C the C.A. would apparently have allowed a claim for loss of consortium only when the loss was total ([1951] 2 K.B. 639) and, in the H.L., Lords Porter and Goddard would apparently have gone still further and denied any claim for loss of consortium as opposed to services: [1952] A.C. at 728 and 734.

92. Cmnd.2017, paras.19-20. The minority did not dissent on this point.

93. Per Lord Goddard in Best v. Samuel Fox & Co. [1952] A.C. at 731 and 734, a Diplock J. in Kirkham v. Boughey [1958] Q.B. 338 and 342.

94. Cf. Diplock J. in Kirkham v. Boughey, supra.

95. Unless a voluntarily incurred obligation is to be distinguished from one imposed by the general law.

services necessarily entitles a husband to recover all the loss which he reasonably incurs[96]. Nor, as we have seen, does either assist a wife when she has incurred expense as a result of her husband's injury. It may be that if she too has suffered injury she can recover from the tortfeasor expenditure reasonably incurred by other members of the family to the extent that that **reduces** the damages to which she would otherwise be entitled[97]. But in Gage v. King[98], Diplock J. held that unless the plaintiff was under a legal liability to incur the expenses she could not recover them by way of damages. Accordingly in that case the plaintiff wife was held not entitled to recover expenses incurred for her own medical attention since her husband was legally liable to provide her with medical attention and if she contracted for it she was presumed to have done so as her husband's agent[99]. If this is correct it presumably means that a wife can never recover, even in respect of her own medical expenses, unless she has actually paid them out of her own pocket or unless, when she contracted for them, she specifically pledged her own credit.

48. Hence although defendants often concede that the plaintiff can recover awards which reflect the impact of financial loss on other members of the family, they do not always do so and frequently there is no legal basis for the recovery. The Bar Council, in their evidence in 1961 to the Law Reform Committee, drew attention to the unhappiness among practitioners in the field of personal injuries litigation caused by the present uncertainty and by the "Dickensian form which their pleadings assume" in an attempt to provide a legal basis for a recovery. The abolition of the action for loss of services would remove one basis (and perhaps the only legal one) on which such recovery is sometimes possible. It seems clear that a new and more satisfactory legal basis must be found.

Types of Family Losses

49. Before proceeding further it may be helpful to attempt to distinguish between the various types of loss which members of a family may sustain if one member is injured. The borderline between the various types may not always be crystal clear but, as we see it, there are in effect six reasonably distinct types, viz.

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96. See, for example, Kirkham v. Boughey, supra. where it was held that the husband was not entitled to recover loss of earnings incurred because he reasonably stayed in England to look after his injured wife instead of returning to his job in Africa. And cp. McDonnell v. Stevens, The Times 8th April 1967. But contrast McNeill v. Johnston [1958] 1 W.L.R. 888.

97. See Schneider v. Eisovitch [1960] 2 Q.B. 430 where the plaintiff wife undertook to repay her brother-in-law's expenditure in bringing her and her husband's body back from France where the accident occurred.

98. [1961] 1 Q.B. 188.

99. This seems to conflict with Rees v. Hughes [1946] K.B. 517, C.A.

(i) Payments in mitigation. First there are payments which other members of the family make to their injured colleague to mitigate the damage which he would otherwise incur. Obvious examples are payments made by a man to maintain his son during the time when the latter is not receiving wages, or for medical attention in respect of his injured wife or children. Unlike losses considered under the following heads, these losses are not additional to those suffered by the immediate victim; they are merely borne initially by another instead of being incurred by the injured party.

(ii) Hospital visits. Secondly there are the costs of visits to the injured man's sickbed. These costs may include both out-of-pocket expenses in fares and, sometimes, loss of earnings resulting from time off work to make hospital visits.

(iii) Other pecuniary losses not based on dependency. Thirdly there are types of pecuniary loss which flow not from the fact that other members of the family are dependent on the injured party (on which see (iv) below) but from the need to look after the injured party or to secure the performance of the domestic role hitherto performed by him. For example, loss of earnings may be suffered by a wife who has to nurse her injured husband, or by an elder daughter who has to look after the younger children while the mother is incapacitated, or expenditure may be incurred by a husband who has to engage a housekeeper to replace his injured wife.

(iv) Economic losses based on dependency. Fourthly there is the situation where one member of the family is wholly or partially dependent on another and suffers because the injuries to that other diminish his available resources. A man who has paid his teenage child an allowance of £2 a week and his wife a dress allowance of £10 a month may find himself unable to do so while out of work as a result of the injury. Losses under this head will not necessarily be of definite sums but may instead result in a reduction in the future economic prospects of the dependant. If it be the case that an education at Eton gives a young man the best prospects, he will suffer future economic loss if his father loses his job as a result of an injury and in consequence has to remove his boy from Eton and send him to the local comprehensive school. Similarly if the expectation of life of the breadwinner is diminished as a result of the injury, though his dependants may not suffer immediately they are likely to lose their source of financial support earlier than they otherwise would.

(v) Loss of services, companionship and parental care. In contrast with the foregoing types, where the loss was essentially of an economic character, we now come to situations in which the loss, though real, is not of a

financial character. If a wife and mother is injured it may be that a servant or housekeeper will be engaged to take her place. In that event the husband has suffered an economic loss falling under head (iii). More probably, however, the other members of the family will rally round and undertake more of the family chores. In that event, a burden, but no definite financial loss, is borne by them. Similarly infant children who are deprived of the care of one or other of their parents normally do not suffer economically thereby but nevertheless suffer what most people would regard as a grievous loss.

(vi) Solatium for grief. Finally there is the grief and worry which members of the family will suffer when another is injured. This again is entirely non-economic but is, as we see it, distinguishable from the type of loss referred to in (v). In some cases, however, it may be difficult to decide whether there is a loss under head (v) as well as under head (vi). Where a parent is injured infant children clearly suffer loss under both heads and, where the parent is the breadwinner, under head (iv) also. Where, however, a dependent child is injured there is a loss under head (vi) but no loss under head (iv) - but rather a gain - and probably no loss under head (v) either, unless the child rendered domestic services.

The questions which first have to be determined are whether any, and if so which, of these types of losses should be recoverable, and by whom.

(i) Payments in Mitigation

50. We have already dealt with payments in mitigation of the immediate victim's damage when considering the position of the employer. In our view, whichever solution is adopted regarding payments by an employer should apply equally to payments by any benefactor, whether or not a member of the family. Hence if the subrogation solution(1) were adopted it should, as in the Israeli legislation(2), be made to extend to payments made or benefits conferred by members of the family and others in so far as these diminished the damages which would otherwise be recoverable by the immediate victim from the tortfeasor. The same principle should apply if, instead, the solution which we favoured were adopted of disregarding such payments and benefits in assessing the damages recoverable by the victim from the tortfeasor(3). As we have seen, payments and benefits conferred by benefactors, as opposed to employers, seem to be disregarded under the present law(4), and in our view that practice should continue.

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1. See paras.25-29, supra.
2. See paras.27-28, supra.
3. See paras.30-45.
4. See paras.10 and 47.

Similarly we would favour, even more strongly, the view that no legal right of recoupment should be given to the members of the family who made the payments; essentially the damages recovered from the tortfeasor should be regarded as replenishing the "family pool" out of which the payments were made. However, to avoid the risk of future family discord we think that here it may often be appropriate for the court when awarding damages to give directions or to obtain an undertaking regarding recoupment of other members of the family[5].

51. An equally straightforward solution, however, is not possible as regards the remaining types of loss, for these are additional to the loss suffered by the immediate victim and, if they are to be recoverable at all, will have to be claimed separately, though not necessarily in a separate action[6], and will add to the total damages payable by the tortfeasor. Hence one has to consider carefully (a) whether they should be recoverable at all, and (b) if so, by or on behalf of which members of the family.

(ii) Hospital visits

52. It seems to be generally accepted that the cost of visits to the victim's sick-bed is essentially the type of loss which should be recoverable; this was certainly the view of the Law Reform Committee[7]. As already pointed out[8], the cost is not necessarily limited to fares to and from the hospital; if a husband has to lose a day's work and earnings, the cost to him ought also to be recoverable. Nor should recovery be dependent on whether the visit of the relative has hastened the victim's restoration to health. Any attempt to subsume recovery under mitigation of damage is obviously impracticable. On the other hand some limit must be placed on the extent to which the tortfeasor ought to pay; the victim's cousin in Australia can hardly expect a subsidised trip to London. The Law Reform Committee spoke of "reasonable visits to hospital" and reasonableness ought obviously to be an essential criterion. But, as it seems to us, the question is not solely whether it was reasonable for the relative to make the visits but also whether it is reasonable to expect the tortfeasor to pay for them. Casual visits by a distant relative are very different from regular, time-consuming, and therefore potentially costly, visits by a husband, wife, son or daughter. It might, therefore, be desirable to limit recovery to the reasonable cost (both in out-of-pocket expenses and loss of earnings) of such visits as were to be expected in the natural course of events having regard to the extent of the victim's injuries and his family circumstances.

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5. Cf. as regards employers, para.44, supra.
6. See paras.80-84, infra, for suggestions regarding linkage of claims.
7. Cmnd.2017, paras.19 and 20.
8. Para.49, supra.

Alternatively one might leave it to judicial discretion by providing for recovery of such costs as the court considered it reasonable for the tortfeasor to bear.

53. A second and related question is whether claims under this head should be restricted to prescribed members of the family. If this were done it might eliminate or reduce the need to define the type of visits; any visits by the prescribed members might be regarded as reasonable - so long as the cost was not excessive (e.g. a son's trip from Australia to visit his father with a broken ankle). The difficulty, however, is to find a meaningful prescription. One would suppose that visits by a member of the same household ought to be included even though the visitor is not a legal relation but, for example, the "common-law wife". But members of the household would seem to be too narrow (a man who lives on his own should not be deprived of visitors to his sickbed) - unless it can be argued that costs should be recoverable only if they have depleted the household pool. But even on the latter basis it would be harsh to exclude visits from a fiancée or fiancé; most engaged couples are in the process of building up a common pool for use after marriage. And since these visits are, perhaps, the most eagerly awaited of all, it would, we think, be lamentable if they were excluded.

54. The fact is, we believe, that circumstances differ so greatly that it would be virtually impossible to define any classes in a way which would not produce anomalies. In some cases the only likely visitors would be parents, children and spouses. In others, particularly with the aged, the only visits might be from old friends who were not relations at all. On balance, therefore, we should favour some such formula as that suggested in para.52, with no restriction on the class of friends and relations. An injured man should be entitled to receive visits and, if the visitors care to claim, the reasonable costs involved should be recoverable from the person who has injured him. In the case of occasional visits by friends or distant relations it is unlikely that the cost would be other than trivial or that the visitor would wish to claim. We should, however, welcome views on this.

(iii) Other pecuniary losses not based on dependency

55. In separating this head from head (iv) we are seeking to distinguish types of economic loss which flow, not from the fact that other members of the family are dependants of the injured party (head iv), but from the fact that the incapacity of the injured party causes another member of the family either to give up remunerative employment or to engage someone else to perform the role hitherto carried out by the injured party. We are not saying definitely that dependency claims should be treated differently from the latter claims but merely that it is arguable that they should. We have not thought it necessary

to distinguish between giving up employment and engaging another; it appears to us that they clearly ought to be treated in the same way. Under the present law they are treated differently; a wife who gives up her job to look after her injured husband cannot recover from the tortfeasor (though the husband may be able to if he pays her as a nurse or, conceivably, on the basis that the services have mitigated his damage by obviating the need to pay for a nurse[9]) but a husband who is deprived of the domestic services of his wife or daughter can recover the cost of replacing them by an action for loss of services. The whole object of abolishing the action for loss of services and replacing it by something better is to remove anomalous distinctions of this sort.

56. Under this head also, it seems clear that losses should not be recoverable from the tortfeasor except to the extent that they were incurred as a reasonable means of meeting the situation arising from the injury to the immediate victim. If a wife threw up a £10,000 per annum job in order to nurse her husband instead of employing someone else to do so at a tenth of the cost, the court would obviously not regard her whole loss of income as flowing reasonably from the tort. And it would take the same view if a husband engaged the chef at the Savoy to cook his meals in place of his injured wife. But, once again, if the course taken was reasonable in the circumstances the extent of the recovery should not be measured by the extent to which it mitigated the damage of the immediate victim.

57. So long as this "reasonableness" test is laid down there is, we suggest, no need in this case to limit recovery within any prescribed class of relatives. If it is a reasonable response to the emergency for someone to give up his or her job in order to look after the immediate victim or to discharge the domestic duties hitherto undertaken by him it cannot matter, as it seems to us, what relationship, if any, the person who steps into the breach bears to the victim. It would appear to be wholly unreasonable to say that a wife can be compensated but not an adult sister. And if there is no relation prepared to step into the breach, we can see no reason why a friend should be precluded from doing so except at her own expense. Similarly if a nurse or a housekeeper is engaged it cannot make any difference who engages the nurse or housekeeper and makes himself responsible for paying her. When we come to deal, under heads (v) and (vi), with non-pecuniary losses, a legal relationship between the claimant and the victim of the tort may well be essential, but we cannot see its relevance in the present context.

(iv) Economic losses based on dependency

58. We now come to the type of losses with which claims under the Fatal Accidents Acts are primarily concerned, namely losses flowing from dependency.

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9. See para.47.

Once again we are concerned with strictly economic losses but, as already pointed out[10], they need not necessarily be immediately quantified but may depend on an estimate of the loss of future prospects. Under the present law, if the breadwinner is killed, action may be brought on behalf of his dependants to recover the economic loss which they suffer thereby. When the Fatal Accidents Acts were originally introduced[11] all causes of action vested in the victim of a tort abated with his death - actio personalis moritur cum persona - thus rendering the plight of dependants grave indeed. But the right of action afforded the dependants by the Acts in cases of wrongful death has survived the abolition of the actio personalis rule[12] so that today the victim's personal representatives can recover both the loss he suffered and, on behalf of the dependants of a wide but prescribed class, any additional economic loss that they have suffered. Since any benefits received by the dependants as a result of the death have to be set-off against their claims, these will be diminished to the extent that the dependants succeed to those damages as beneficiaries under the deceased's will or intestacy. But this has certainly not rendered Fatal Accidents Act claims otiose, for in many cases the loss to the dependants will be additional to, and greater than, the loss to the deceased. Dependants may equally suffer additional loss when the victim is incapacitated instead of being killed outright, but their claims then are not at present recognised by the law except when an action for loss of services is possible, i.e. in practice only when a wife or daughter is injured. In most cases this can be justified on the basis that, if the immediate victim recovers damages for loss of future earnings, this will enable him to continue to maintain his dependants who, accordingly, neither need nor should be given an independent claim since this would lead to double recovery. This, however, is not always so. If the breadwinner's expectation of life has been reduced, neither the nominal sum awarded for that nor the damages for loss of earnings during his expected life can lead to adequate compensation for his dependants. Nor will a son who had to be taken away from Eton as a result of the father's injury be adequately compensated by an award of damages to the father five years later. While steps would have to be taken, as they are under the Fatal Accidents Acts, to avoid double recovery, if dependants are to be adequately compensated they need a remedy whether the injury of the breadwinner be fatal or not.

59. Hence to provide a remedy to dependants which would operate in the same way whenever there was a wrongful injury whether or not it caused death would, it seems to us, be an eminently desirable rationalisation of the law. For the present we assume that the remedy should be restricted, as claims under

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10. See para.49, supra.
11. Lord Campbell's Act 1846.
12. By the Law Reform (Miscellaneous Provisions) Act 1934.

the Fatal Accidents Acts are treated as restricted[13], to strictly economic losses as opposed to those considered under heads (v) and (vi).

60. Under the Fatal Accidents Acts, claims can be brought only on behalf of a prescribed class of relatives. This, however, has now become so wide[14] that it is difficult to see why any prescription is needed and why recovery should not be based simply on the fact of dependency rather than on dependency plus a legal relationship embracing almost every likely type of dependant. The main classes of likely dependants who are excluded are "common law" husbands or wives (who clearly have a present dependency), divorced wives being paid maintenance (which will normally cease on the ex-husband's death), and fiancées (who are likely to have a future dependency). It seems to us that these classes ought to be included. Moreover if the victim was in fact maintaining in whole or in part someone who does not happen to be a blood relation or legally adopted (for example someone over whom the victim has accepted the obligations of guardianship) we do not see why that dependant should be denied a claim. Specifying a relationship has, perhaps, fulfilled one desirable purpose in that it has enabled the courts to hold that one cannot under the Fatal Accidents Acts claim for a loss flowing solely from a commercial association[15]. It would, however, be possible to exclude that type of dependency without having to specify prescribed classes of relations.

61. Hence, if claims, whether for fatal or non-fatal cases, were to be restricted to definite economic losses, we are inclined to think that there should not be a fixed list of relatives but that the right of recovery should depend on the fact of dependence in each case. This, however, is another point on which we would welcome views. If there is to be a fixed list we feel strongly that it should be the same whether the injury inflicted by the tort-feasor leads to death or merely to injury. It could therefore hardly be narrower than the present list under the Fatal Accidents Acts and a strong case can be made for widening it so as to avoid the present exclusion of the common law spouse[16].

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13. See para.63, infra.

14. It includes spouses, children and grandchildren (lawful, illegitimate, step or adopted), parents (including step-parents), grandparents, and brothers, sisters, aunts, uncles and their issue: Fatal Accidents Acts 1846 and 1959.

15. Burgess v. Florence Nightingale Hospital [1955] 1 Q.B. 349, where it was held that a husband could not claim for the loss of his wife as a professional dancing partner. Contrast Mankin v. Scala Theodrome Co. [1947] K.B. 257 where damages in comparable circumstances were recovered in an action for loss of services.

16. At present the children of an illicit union can recover but not the other partner in that union.

(v) Loss of services, companionship and parental care

62. We now come to various types of loss which are not of a definite financial character. They include, on the one hand, losses which may at present be recoverable under the action for loss of services and, on the other hand, losses which under the present law are probably not recoverable at all. The principal illustration of the first type of loss is where a wife is injured. In these circumstances, as we have seen, the husband can at present recover from the tortfeasor damages designed to compensate him for the loss of the wife's services and companionship (consortium). If he engages a housekeeper to perform her domestic duties while she is incapacitated he will have suffered a definite financial loss which will be recoverable. More probably, however, the other members of the family will rally round and undertake the domestic duties formerly performed by the wife. In that event the husband, in an action for loss of services and consortium, will recover only an arbitrary conventional sum in the neighbourhood of £200[17]. Illustrations of the second situation, in which at present nothing is recoverable, are where the wife is killed[18], where a husband is injured, or is killed and the wife suffers no direct pecuniary loss thereby[19], where young children (not rendering services to their parents) are killed or injured[20], or where parents are killed or injured and the children suffer no pecuniary loss but are deprived, temporarily or permanently, of parental care.

63. As we see it, in all these cases the husband, wife, parents or children suffer a loss which is something more tangible than grief alone. Where a wife and mother is killed or injured it may be that she will be replaced by a paid housekeeper[21]; but if there is a daughter old enough the probability is that she will perform that role and that no direct pecuniary loss will be suffered by the family. Few will deny that there is a loss. Yet except in cases in which there is an action for loss of services it seems that nothing is at present recoverable in respect of it. In one case, it is true, the court expressed a willingness to award damages in respect of such a loss. That case,

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17. Cf. Cutts v. Chumley, supra. para.46.

18. An action for loss of services cannot be brought if the immediate victim is killed: Admiralty Commissioners v. S.S. Amerika [1917] A.C. 38, H.L.

19. The wife cannot sue for loss of the husband's consortium (Best v. Samuel Fox & Co. [1952] A.C. 716, H.L.) and claims under the Fatal Accidents Act are limited to pecuniary loss: Pevec v. Brown (1964) 108 Sol.J. 219.

20. In these circumstances their parents normally suffer no pecuniary loss and may (e.g. if the child is killed) gain financially since they no longer have to maintain the child.

21. As in Cutts v. Chumley, supra. para.46.

Preston v. Hunting Air Transport[22] arose out of an air accident and turned on the interpretation of the word "damage" in the Warsaw Convention which is incorporated into our domestic law by (now) the Carriage by Air Act 1961. A widowed mother of two children aged 3 and 4 years was killed in an air crash. Ormrod J. said[23] that the question was whether the damage to them:

> "should be calculated purely on what may be estimated as the financial loss which these infants had sustained, or whether it should be calculated on the broader basis of the loss which they inevitably must have sustained beyond the actual financial loss by the fact that they lost their mother as young children aged some three or four years, who were at the time of her death already deprived of a father".

He concluded that:

> "I must take into account, in calculating any sum which should be awarded to them, something more than the purely financial loss and award some sum - a sum extremely difficult to arrive at - for the loss they have sustained by reason of the fact that they have lost the care of their mother at an age when probably they needed it most".

In the light of these remarks, it comes as something of a shock to observe that all that the two of them were awarded in respect of the non-financial element in their loss was £400. In a subsequent case[24] under the Fatal Accidents Act the court has refused to follow Ormrod J's decision and has ruled that only strict financial loss is recoverable.

64. Should such damages be legally recoverable? One thing seems to be clear, whatever the rule, it should be the same for fatal and for non-fatal injuries. The present situation, in which non-pecuniary losses are never[25] recoverable in cases of fatal injuries, but may be recoverable in other cases if, but only if, the relationship with the immediate victim is such that an action for loss of services is available, seems indefensible.

65. As we see it, the case for allowing non-pecuniary loss to be recovered is:-

(i) The loss, though difficult to quantify, is a real and serious one.

(ii) At present damages are recoverable in some cases and it would be difficult to justify a reform of the law which would result in their never being recoverable.

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22. [1956] 1 Q.B. 454.

23. At p.461.

24. Pevec v. Brown (1964) 108 Sol.J. 219.

25. Preston v. Hunting Air Transport, supra para.63, a decision to the contrary must be regarded as of dubious authority. It is not really possible to argue that the words of the Warsaw Convention and the Fatal Accidents Act are sufficiently different to justify an award of non-pecuniary loss under the former but not under the latter.

The case against recovery is:-

(a) The law should not take account of losses which are impossible to calculate.

(b) Damages, if allowed, could only be assessed as arbitrary conventional sums - as indeed they are at present in the few cases where they are recoverable[26] and conventional sums are inconsistent with a compensatory theory of damages.

(c) If non-pecuniary loss suffered by infant children were recoverable, insuperable practical difficulties would arise. The tortfeasor (or his insurers) would never be safe in settling with a victim who had infant children. The latter might, and indeed generally would, have suffered some non-pecuniary loss and without the approval of the court their claims could not be disposed of.

Before further exploring these pros and cons it seems desirable to mention the final type of loss (grief) which raises similar problems.

(v) Solatium for grief

66. Obviously people are likely to suffer grief when their nearest and dearest are killed or injured. This, however, is not a type of loss which English law has ever openly recognised as recoverable. The position is different in the Civil Law countries, including Scotland. In Scotland a distinction is drawn, in cases of delicts causing death, between patrimonial loss and a solatium for grief and distress, and husbands and wives and ascendants and descendants can claim for both[27]. South Australia has by statute adopted the Scottish concept and coupled it with a legislative prescription of the sum to be awarded. By ss.23A, B and C of the Wrongs Act 1936, introduced in 1940, in the case of the death of a child the court may award the parents a sum not exceeding £500 and in the case of the death of a spouse may award the other a sum not exceeding £700 by way of solatium for the suffering caused by the death. Nearer home this has recently been taken up by the Republic of Ireland. By s.47[28], of the Civil Liability Act 1961 (no.41) the court is entitled to award dependants entitled to claim for pecuniary loss in fatal accident cases reasonable compensation for mental distress not exceeding £1,000 in all. This was originally introduced on an experimental basis for three years[29], but since it was thought to work satisfactorily, the time-limit has now been

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26. Approximately £200 per head: cf. Cutts v. Chumley and Preston v. Hunting Air Transport, supra.

27. See D.M. Walker: The Law of Delict in Scotland, pp.722-733.

28. See subs.(1)(a)(ii) and (b).

29. See ibid. subs.1(d).

removed[30].

67. There is, however, an indirect way whereby in England members of a family may obtain a solatium for mental distress in cases of fatal accidents. Since 1934[31] the personal representatives of the person killed as a result of negligence can sue on behalf of the estate for the non-pecuniary loss suffered by the deceased (pain and suffering and loss of expectation of life). The effect of this is to give members of the family something over and above the pecuniary loss which they suffer. As, however, it is a benefit which has to be set-off against their claims for pecuniary loss it rarely has much effect. To allow non-pecuniary loss to be recovered for the benefit of the estate rather than the victim himself has been much-criticised and is difficult to support.

Possible Solutions to the Problems raised by (v) and (vi)

68. Solution I One possibility would be to restrict recovery, in both fatal and non-fatal cases, to pecuniary loss, i.e. to say that in no circumstances are any damages recoverable under head (v) or (vi). This would preserve the present position in fatal accidents but alter it in those non-fatal cases where an action for loss of services and consortium lies under the present law. This solution is, in effect, that favoured by Lords Porter and Goddard in Best v. Samuel Fox & Co.[32]. It would, however, produce what some would regard as an anomaly that a husband could recover damages for loss of the wife's services where he could prove that he had suffered actual pecuniary loss in replacing them but could not recover anything if the other members of the family had undertaken her duties. It would also mean that no regard at all would be paid to loss of comfort and society (consortium). This too would be regarded by some as anomalous. In Best v. Samuel Fox & Co. Lord Reid[33], in an opinion concurred in by Lord Oaksey[34], said:

> "In the old cases a number of words are used to describe the husband's loss or damage. He has, by the act of the wrongdoer, lost his wife's services, assistance, comfort, society, etc. Sometimes the word consortium is used in conjunction with one or more of these words; sometimes it appears to be intended to include them .... . But it would seem that there was only one cause of action in respect of all these matters. There was not one action for loss of consortium and another for loss of servitium,

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30. By the Civil Liability (Amendment) Act 1964, s.6 and Sch. See on these sections, Knight: Some Aspects of Damages under the Civil Liability Acts 1961 and 1964; (1966) 1 Irish Jurist (N.S.) 35 at 50-58.

31. I.e. since the Law Reform (Miscellaneous Provisions) Act 1934 abolished the rule that personal actions do not survive.

32. [1952] A.C. 716, H.L. at 728 and 730.

33. Ibid. at 735-6.

34. Ibid. at 734.

and in the same cause of action loss or damage under any of these heads could properly be taken into account, though often the main emphasis might be on the value of the services or assistance which the husband had lost. .... I can see no sign of any difference in quality between his right to her assistance and his right to her society, and indeed it would be difficult to say where in fact assistance ends and society begins, either today or in the Middle Ages.. No doubt her services and assistance had an additional value because her comfort and society went with them. I do not think that consortium was an abstraction: it seems to me rather to be a name for what the husband enjoys by virtue of a bundle of rights, some hardly capable of precise definition".

Many would think that this view of the law displays sound common sense and that far from abolishing the husband's right of recovery a similar right should be conferred on the wife when she is wrongfully deprived of her husband's assistance and society. As husbands who bring home the pay packet and help with the washing-up we should be the last to deny that this enhances our value; but we should not like to think that this represents our only value. On the other hand adoption of this solution would certainly have the merits of simplicity, avoiding as it would the inevitable complications which would arise if any of Solutions 3-5 were adopted.

69. Solution 2 The second possibility would again be to restrict recovery in both fatal and non-fatal cases to pecuniary loss but to substitute for the personal representatives' present right in fatal cases to recover damages for non-pecuniary loss, a rule that the tortfeasor should pay a fixed sum into the estate of the deceased. This solution is based on the suggestion of Lord Devlin in the recent case of Naylor v. Yorkshire Electricity Board[35]. There, speaking of the difficulties of assessing damages for loss of expectation of life, he said[36]:-

"To arrive at a figure .... is a matter for compromise and not for judicial determination .... . It would, I think, be a great improvement if the head of damage were abolished and replaced by a short Act of Parliament fixing a suitable sum which a wrongdoer whose act has caused death should pay into the estate of the deceased."

The effect of this would be that those who succeeded to the deceased's estate would be openly compensated for the non-pecuniary loss which they suffered under heads (v) and (vi). By providing that payment should be made to the estate instead of to individual members of the family (as under solutions 3, 4 and 5) the practical difficulties of settling actions, especially where infants were involved, would be avoided. On the other hand the fixed sum might not in fact enure for the benefit of those members of the family who had suffered the non-pecuniary loss; the deceased might have left a will which cut out his wife and children or, on intestacy, all might go to the wife and nothing to the children. Unless those disinherited resorted to proceedings under the Inheritance (Family

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35. [1967] 2 W.L.R. 1114, H.L.

36. At p.1128. Still more recently this was supported by Donaldson J. in Barker v. Willoughby [1968] 2 W.L.R. 1138.

Provision) Act 1938, the result might seem unfair.

70. Solution 3 The third possibility, a variation of the second, would be to follow South Australia and Ireland[37] and to provide for a maximum sum that would be awarded to members of a prescribed class of relatives in respect of non-pecuniary loss whether under head (v) or (vi). If this were done it would have to be decided whether, as in South Australia and Ireland it should apply only to fatal cases or whether to both fatal and non-fatal, and whether it should be coupled with the abolition, as suggested in solution 2, of any right of personal representatives to recover on behalf of the estate damages for pain and suffering and loss of expectation of life. In principle we should favour a common solution for both fatal and non-fatal cases. But one could hardly abolish the victim's right to damages for non-pecuniary loss in non-fatal cases. If therefore payment of a solatium for non-pecuniary loss were to be awarded to relatives in such cases this would have to be additional to the damages for non-pecuniary loss recovered by the immediate victim. In fatal cases the right of the personal representatives to recover such damages could well be abolished. Difficulties might arise, however, in cases where the injured victim lingered on and it was not known for some time what the outcome was going to be[38]. A further difficulty, and this applies both to solutions 2 and 3, is that any fixed or maximum tariff tends to become unrealistic with falls in the purchasing power of the currency[39]. Damages assessed by judicial decisions, even if conventional sums are awarded, are in theory more easily adjusted[40].

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37. See para.66, supra.

38. Cf. Andrews v. Freeborough [1967] 1 Q.B. 1. If, in such a case the injured victim lingered on and was conscious the relatives might wish to spend freely on extra comforts but would not know how far these would be recoverable until the ultimate outcome of the accident.

39. This has caused particular difficulty in the U.S.A. in the case of those States which, in their Wrongful Death statutes (equivalent to our Fatal Accidents Acts), limit the amounts recoverable for pecuniary loss. This could be avoided if the statute prescribed a sum but directed that it was to be automatically adjusted upwards or downwards according to fluctuations in the purchasing power of the £.

40. Thus the conventional figure of £200 fixed in 1941 for loss of expectation of life (Benham v. Gambling [1941] A.C. 157, H.L.) has now been adjusted to £500, equivalent to the fall in the purchasing power of the £ by 2½ times: Naylor v. Yorkshire Electricity Board [1967] 2 W.L.R. 1114 H.L. But, as Lord Upjohn pointed out, the adjustment has taken place "by fits and starts rather than by any estimation of the purchasing power of the pound": at p.1130. Note also Bishop v. Cunard White Star Line [1950] P.240 in which it was held that damages crystallised at the date of the tort (1941) and that no adjustment could be made for depreciation between then and the date of the trial (1950).

71. Solution 4 The fourth possibility would be to adapt solution 3 so that there would be no fixed statutory maximum to the sum that could be awarded to relatives. In other words a member of the family who could prove that he had suffered non-pecuniary loss, whether under head (v) or (vi), because of temporary or permanent loss of the company and comfort of the wife, husband, child or parent, or because of grief, would be entitled to recover whatever damages the court thought reasonable. This could be coupled with abolition of the personal representatives' right to sue for non-pecuniary loss suffered by the deceased.

72. Solution 5 The final solution would be to adopt solution 4 but to disallow, as at present, any solatium for grief. In other words, damages under head (v) would be recoverable but not those under head (vi).

73. At present we find ourselves unable to express any firm or unanimous preference for one or other of these solutions. As we see it, the case for allowing non-pecuniary loss to be recoverable would be a strong one were it not for objection (c) in para.65, where there are infant children. On the other hand, those countries which allow claims for solatium do not appear to have found that infant claimants cause insuperable difficulties. Nor do they in England where they have pecuniary claims under the Fatal Accidents Act, and if, as suggested below(41), a similar procedure were adopted in non-fatal cases it is arguable that the difficulties would not be unsurmountable. We do not think that in fact there would be much difficulty if non-pecuniary loss could be taken into consideration only when there is also a claim for pecuniary loss. What we regard as a grave difficulty is the possibility of a claim for non-pecuniary loss alone. In every case where a parent is killed or injured infant children must suffer to some extent. The wrongdoer could never settle the claim unless the court approved the settlement on behalf of the children.

74. There are, as we see it, three possible answers to this particular problem. One is to adopt solution 2 as a result of which there would be no individual claims but merely a payment to the estate in the event of death. It has already been pointed out that this could produce somewhat unfair results. Moreover it would mean that non-pecuniary loss would be recoverable in fatal cases but never in non-fatal cases, and this seems an undesirable result. The second answer would be to provide that non-pecuniary loss should be recoverable only by those who had also suffered pecuniary loss. This, as pointed out in the preceding paragraph, would solve most of the difficulties. Like the first answer it would also have the advantage that if, as we have suggested(42), there

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41. Paras.80-84.

42. See paras.54, 57, 60 and 61.

is no need to prescribe the class of relatives who can claim for pecuniary loss, a prescription of a class could be totally avoided. But it would give rise to anomalous results. The family could suffer substantial non-pecuniary loss without any pecuniary loss at all; why should the former loss not be recoverable? In some cases the question whether pecuniary or non-pecuniary loss is suffered may depend solely on whether someone is employed to stand in for the immediate victim or whether the family rally round. The third possible answer is to prescribe a narrow class of relatives entitled to claim for non-pecuniary loss and to exclude children. If that were done claimants might either be limited to parents and spouses or extended to grandparents or even collaterals or other adult members of the same household. If non-pecuniary losses are to be recoverable on their own the prescription of a class of relatives entitled to claim cannot easily be avoided.

75. Having regard to the above considerations we shall welcome views on which of these solutions should be adopted and, of course, any alternative suggestion.

76. We are all agreed that if recovery of non-pecuniary loss is permitted in any form the claim should be personal to the member of the family concerned and should not be enforceable by his personal representatives on his death. The opposite result would be even more objectionable than the present survival of the victim's own claim for non-pecuniary loss and could result in unjustifiable double recovery(43).

Form of Action

77. There are four possible methods whereby recovery by the family could be obtained:

(i) By allowing the immediate victim, or his personal representatives, to recover with no right of recoupment from him by the members of the family concerned.

(ii) By individual claims by each member of the family concerned.

(iii) By a system analogous to that under the Fatal Accidents Acts.

(iv) By a representative action by one member of the family on behalf of himself and all others having claims.

78. In our view method (i) is, as already stated(44), appropriate to recovery of losses arising from benefactions to the victim, though even here we

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43. A. is killed and his wife and infant child suffer non-pecuniary loss as a result. Before their claims are settled the child dies. If the wife is allowed to pursue his claim as his personal representative and successor to his estate she will receive an undeserved double solatium in respect of her husband's death.

44. Para.50.

should favour use by the court of a power to give directions or to obtain undertakings. But, in our view, this would not be appropriate in other cases. There are obvious objections to allowing other people's claims, which might be substantial, to depend entirely on the initiative of the immediate victim, or to leaving restoration of sums recovered entirely to his sense of moral obligation. Moreover, in the absence of a definite legal obligation to hand over damages recovered, personal representatives might be in an embarrassing position, and there would be a liability to estate duty on the whole of the net damages recovered if the immediate victim died before handing over the shares of others.

79. The obvious objection to method (ii) is that the tortfeasor would have to deal separately with each member of the family with an actual or potential claim and could not be sure that he had achieved a full and final settlement unless he negotiated with every possible claimant. If actions were brought it would no doubt be possible to provide by rules for the actions by the various claimants to be consolidated but it would be difficult to preclude each party from being separately represented with increased costs.

80. We are therefore inclined to favour a system of claim-linkage. One way of achieving this would be method (iii) based on the present practice under the Fatal Accidents Act. Under this only one action can be brought, normally in the name of the deceased's personal representatives, giving full particulars of the persons for whose benefit the action is brought[45] (in practice this is coupled with an action by the personal representatives to recover damages to which the deceased was personally entitled). If, however, there is no personal representative or if he does not commence an action within six months, all or any of the relatives entitled to the benefit of the Act may sue on behalf of all claimants[46]. If analogous provisions applied in the case of non-fatal injury, only one action would be allowed on behalf of all the relatives and normally this would be brought by the immediate victim and be coupled with his personal action. If, however, he did not bring an action on their behalf within a reasonable time any relative would be entitled to do so on behalf of himself and the others. We suggest, however, that six months is too short and that twelve months might be better. We shall welcome views on this.

81. We do not think that to follow the pattern of the Fatal Accidents Acts would make settlements of claims unduly difficult. Initially the tortfeasor would deal only with the immediate victim and could make him an offer of a lump sum to include the personal claim of the victim and the claims of the relatives.

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45. Fatal Accidents Act 1846, s.2.

46. Ibid, s.3 as amended by Fatal Accidents Act 1864, s.1 and Law Reform (Limitation of Actions, etc.) Act 1954, s.3.

It would then be up to the victim to consult with the relatives to decide whether the lump sum should be accepted and, if so, how it was to be apportioned among the various claimants. If infants were involved it would be necessary to secure the court's approval[47] but this seems unavoidable if the interests of infants are to be properly protected. And where infants were concerned the court would keep control over the amount recovered until the infants attained full age[48]. But since the procedure in this regard was simplified and cheapened as a result of s.19 of the Administration of Justice Act 1965 we do not think that it can be regarded any longer as unduly cumbersome. If the immediate victim delayed in taking proceedings and these were instituted by another relative, the tortfeasor would then have to deal with the latter so far as concerns the relatives' claims, but this is unlikely to occur often.

82. The principal objection to this solution is that a system which works when one already has fiduciaries (the personal representatives), might not work in non-fatal cases where the immediate victim, not previously in a fiduciary position, would find himself conducting negotiations and actions on behalf of others as well as himself. This might not be acceptable to him or to those others. The fact that the immediate victim might object presents no insuperable difficulty, for as we have suggested, he should be under no compulsion to pursue the other's claims and if he did not another relative should be entitled to do so. It may be objected that there might then be disagreement on the choice of relative[49]. However no choice seems to be requisite. Under the Fatal Accidents Act 1864 on default by the personal representatives the action can be brought "by or in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been brought" if brought by the personal representative. Hence all claimants could be joint plaintiffs if they wished, and, as we understand it, if one started proceedings the others could apply to be joined. A similar rule could apply whenever the immediate victim did not bring the action, and, perhaps, should apply even if he did.

83. Finally, method (iv) would be to treat the relatives' claims as suitable for a representative action under R.S.C. O.15, r.12. This does not appear to have any obvious advantages over method (iii) and to suffer from the

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47. R.S.C. O.80, rr.11 & 12. See Dietz v. Lennig Chemical Ltd., [1967] 3 W.L.R. 165, H.L.

48. Ibid, r.13.

49. This does not seem to have caused any difficulty in cases under the Fatal Accidents Act, but there suit otherwise than by the personal representatives is a rare occurrence since the personal representatives are clearly under a duty to pursue the claim on behalf of the estate and, in practice, equally regard themselves as under an obligation to pursue the claims under the Fatal Accidents Act.

disadvantage that two separate proceedings would always be needed, one on behalf of the immediate victim and the other on behalf of the family. No doubt the two actions would be heard together but this would not wholly obviate the disadvantages regarding costs and settling claims. If, as suggested in the preceding paragraph, the other relatives were entitled to apply to be joined even when the immediate victim was suing (thus not equating him with a personal representative in a fatal claim), method (iii) seems simpler and more advantageous than a representative action.

84. Accordingly, our inclination is to favour method (iii) but we shall welcome views on this.

Effect of contributory negligence

85. As in claims under the Fatal Accidents Act[50], if the immediate victim was guilty of contributory negligence the claims of the relations should be reduced proportionately. As already pointed out[51], the Law Reform Committee considered that this should apply throughout. Although we have suggested that a different view should be adopted where the sole question is how the damages recoverable by the immediate victim should be divided between him and a benefactor[52], this does not apply in the present context since the damages recoverable by the relatives increase the total damages recoverable from the tortfeasor. Clearly the same rule should apply whether or not the injury to the immediate victim is fatal and it seems clear to us that the rule laid down in the Fatal Accidents Act is right; part of the loss flows not from the tort but from the victim's own negligence and the tortfeasor should not be required to pay for this.

Provisional Conclusions

86. Accordingly our provisional proposals under these heads are as follows:

(a) The husband's action for loss of the wife's society and services or of a child's service should be abolished.

(b) In the immediate victim's claim for damages against the tortfeasor, payments or other benefits received by him from relatives or other benefactors should be ignored[53], but the court should have power in appropriate cases to give directions or obtain undertakings regarding restoration to the benefactor (paras.41 and 50).

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50. Law Reform (Contributory Negligence) Act 1945, s.1(4).

51. Para.25, supra.

52. See para. 35, supra.

53. This is probably the position under the present law: see para.10 and, as regards claims under the Fatal Accidents Acts, Rawlinson v. Babcock & Wilcox [1967] 1 W.L.R. 481.

(c) Other pecuniary losses suffered by members of the family as a result of the injury to the victim should be recoverable whether or not the injuries are fatal (paras.52-61).

(d) Recovery should extend to the reasonable cost of such visits to the victim's hospital or sick-bed as were naturally to be expected in the circumstances (paras.52-54).

(e) Claimants should not be restricted to a prescribed class of relatives and dependants; anyone who has suffered pecuniary loss which flowed from or was a reasonable consequence of the wrongful injury or death should be entitled to recover (paras.53, 54, 57 and 60).

(f) We have, as yet, formed no concluded view on whether non-pecuniary losses should be recoverable and, if so, to what extent and on what basis (paras.69-75).

(g) If non-pecuniary loss is to be recoverable it will be necessary to prescribe the class of relatives and dependants entitled to claim, unless either (a) non-pecuniary losses are restricted to fatal cases and are compensated by a payment of a fixed sum to the deceased's estate or (b) claims are limited to those who have also suffered pecuniary loss. If a class is prescribed it should probably exclude infant children (para.74).

(h) If non-pecuniary losses of relatives and dependants are to be recoverable on any basis, the immediate victim's claim for non-pecuniary loss in fatal cases should not survive for the benefit of his estate (paras. 70-72). Nor should the claim of the relative or dependant for non-pecuniary loss survive for the benefit of his estate (para.76).

(j) The best solution to the problem of reducing multiplicity of claims (paras.77-84) might be to apply to non-fatal cases a similar procedure to that under the Fatal Accidents Act whereby only one action can be brought on behalf of all those entitled to claim. This should normally be brought by the immediate victim but where he delayed unreasonably any or all claimants should be entitled to institute one action on behalf of all those entitled (paras.80-82).

(k) The immediate victim's contributory negligence should reduce the amount recoverable. (para.85)

87. As will be seen, these proposals retain the basic concepts of "replenishment of the family pool" and "claim linkage" which we put forward in our earlier and limited round of consultation. But they attempt to meet the objections which were made to these proposals, and in particular the objections that the range of relatives to be protected was too narrowly defined and that it was unsatisfactory to deny them any legal entitlement. We also think that

Our new suggestions would have the desirable consequence of removing most of the present arbitrary distinctions between fatal and non-fatal injuries. We would emphasize, however, that our views are merely provisional and, in some cases unformed, and that before coming to a final conclusion we invite views on the questions raised in the foregoing paragraphs which can be summarised as follows:

(1) If a husband's right to damages for loss of his wife's society and services or loss of a child's service is to be abolished, is it accepted that a new remedy must take its place? (paras.46-48). If so:-

(2) Is it accepted that in so far as relatives have made payments or conferred benefits which mitigate the damage of the immediate victim, such payments or benefits should continue to be disregarded in assessing his damages and that the victim should not be under any legal obligation to restore to the relatives unless the court otherwise directs? (para.50).

(3) As regards other losses incurred by members of the family is it accepted that pecuniary losses of the classes referred to in para.49(ii)-(iv) should be recoverable? (paras.52-61).

(4) As regards these pecuniary losses is it accepted that claimants (in either fatal or non-fatal cases) should not be restricted to a definitely prescribed class? (paras.53, 54, 57, 60 and 61).

(5) As regards non-pecuniary losses which of the possible solutions set out in paras.68-72 is the best? (paras.73-75).

(6) Is it accepted that if non-pecuniary family losses were recoverable in fatal cases, the deceased's own claim for non-pecuniary loss should not survive for the benefit of his estate? (paras.70-72).

(7) Is it accepted that, if non-pecuniary family losses were recoverable, they should not survive for the benefit of the claimant's estate? (para.76).

(8) As regards procedure, is it accepted that, of the four possible methods set out in para.77, method (iii), a generalised procedure analogous to that at present operating under the Fatal Accidents Act is the best? (paras.79-84). If so, should the other members of the family be entitled to apply to be joined as plaintiffs in an action by the immediate victim (para.82) and after what period of delay by the immediate victim should they be entitled to bring proceedings independently of him? (para.80).

(9) Should the amounts recoverable by the family be reduced proportionately to any contributory negligence of the immediate victim? (para.85).

(4) SEDUCTION

88. We have no doubt that the father's (or other master's) right to damages for the seduction of his unmarried infant daughter (or other female servant) should be abolished[54] and not replaced by any other cause of action vested in him. This does not mean that we are satisfied with the present affiliation law and procedure enabling the unmarried mother to recover maintenance from the putative father. On the contrary, we are convinced, as we have already indicated[55], that a thoroughgoing review of this branch of the law is needed and some steps in that direction are already being taken. But the retention of any right of action by the father or mother of the girl appears to us to be indefensible[56].

(5) ENTICEMENT OR HARBOURING OF SERVANTS

89. As already pointed out[57] this type of action is, for all practical purposes, extinct. In modern times its place has been taken by the actions for inducing a breach of contract[58] or for conspiracy or intimidation[59] and these adequately provide such remedy as is needed[60]. No one has suggested that there is any valid reason why this aspect of the action for loss of services should not receive its quietus and we so recommend.

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54. Already legal aid is denied in this type of action: Legal Aid and Advice Act 1949, 1st. Sch. Part II, 1(c).

55. See our Published Working Paper No.12 on Proof of Paternity and our Second Annual Report (Law Com. No.12) para.80.

56. We are unable to share the opinion expressed by the Council of the Law Society that these views "cut at the very root of family stability and that it is necessary to retain some right of action in respect of seduction in order to express the public disapprobation of such conduct. To remove all such rights is to open the door to any man who might otherwise be deterred from immoral conduct by the knowledge of the risk he might be running if such a right existed". The Council do not dispute that an action vested in the father in the event of his daughter's pregnancy has proved an ineffective sanction against pre-marital intercourse.

57. Supra, para.7(5).

58. I.e. the rule in Lumley v. Gye (1853) 2 E & B, 216.

59. Rookes v. Barnard [1964] A.C. 1129, H.L.; Stratford v. Lindley [1965] A.C. 269, H.L. and see Trade Disputes Act 1965.

60. They would not necessarily cover the harbouring of a servant known to have broken his contract, but such an action will fail if the employee would not in any event have returned to his employer: Jones Bros. (Hunstanton) Ltd. v. Stevens [1955] 1 Q.B. 275. Hence this residual aspect of the action is valueless, for "it is hard to see how a plaintiff could ever rebut this, especially in a state of full employment". Salmond: Torts (14th Ed.) p.501n.

(6) ENTICEMENT OF SPOUSE OR INFANT DAUGHTER

90. Enticement of an infant daughter should obviously stand or fall within the analogous action for seduction and we have no hesitation in recommending that it should fall. It hardly seems to have any independent life. However, enticement of a spouse has; though actions are infrequent they do occur. As already pointed out[61] they are closely related to claims for damages for adultery - the old action for criminal conversation now superseded by a statutory remedy[62]. We dealt with this, and incidentally with the action for enticement, in our Working Paper on Financial Relief in Matrimonial Causes[63] where we expressed a preference for abolishing both actions[64].

91. Comments so far received on our provisional proposals in that Working Paper suggest that public opinion would favour the abolition of the action for enticement and of any claim for damages for adultery not coupled with a petition for divorce or judicial separation, but that there would be objection to a total abolition of claims for damages for adultery. Public opinion, it is said, will demand that damages be recoverable in divorce proceedings from the wealthy seducer of a poor man's wife.

92. Our preference is still for total abolition of both actions, but we are awaiting further views on the proposed abolition of damages for adultery. In the meantime we have no hesitation in proposing the total abolition of the action for enticement.

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61. Supra, para.7(6).
62. Now Matrimonial Causes Act 1965, s.41.
63. Published Working Paper No.9, paras.128-142.
64. At para.142.