All England Official Transcripts (1997-2008)

Pirelli General Plc and others v Gaca

Damages and compensation - Personal injury - Assessment of damages - Deduction - Payments from group insurance policy taken out by tortfeasor - Payments deductible from damages.

[2004] EWCA Civ 373, (Transcript: Smith Bernal)

COURT OF APPEAL (CIVIL DIVISION)

BROOKE, MUMMERY, DYSON LJJ

26 MARCH 2004

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R Browne QC and B Cotter for the Appellant

J Foy QC and N Hillier for the Respondent

Messrs Capital Law; Messrs Lamport Bassitt

DYSON LJ:

THE FACTS

[1] On 7 August 1998, the claimant was seriously injured in an accident at work. The defendants were his employers. As a result of the accident, he was unable to return to work. His employment was eventually terminated on 19 March 2000 on the grounds of ill health. Whilst he was off work, but before his employment was terminated, he received sick pay from the defendants. He also received payments (total £34,167.18) pursuant to a Group Personal Accident insurance policy for "Temporary Total Disablement" from Europ Assistance for the period from the accident until the termination of his employment. Following the termination of his employment, he received (i) an ill health gratuity payment of £10,000 from the defendants themselves; and (ii) £88,620 from Europ Assistance under the terms of the insurance policy for "Permanent Total Disability."

[2] The claimant issued proceedings in June 2001. The defendants admitted liability and judgment was entered in favour of the claimant with damages to be assessed. The defendants contended that the proceeds of the insurance (£122,787.18) should be deducted from the damages awarded to the claimant. The claimant contended that they should not be deducted. A preliminary issue was ordered to be tried. In a careful judgment given on 29 August 2003, Mr Recorder Gibbons QC held that the insurance payments were not deductible. The defendants appeal against that decision with the permission of Sedley LJ. An important issue that arises on this appeal is whether the decision of this court in *McCamley v Cammell Laird Shipbuilders Limited* [1990] 1 All ER 854, [1990] 1 WLR 963 can be properly distinguished, or whether it should no longer be followed in the light of decisions of the House of Lords.

[3] By the terms of the insurance policy, the defendants were "participating companies" and the claimant an "insured person". The "operative times of cover" in relation to the claimant was "whilst in pursuit of normal occupational duties on behalf of the Insured or whilst travelling directly between residence (normal or temporary) and place of work". The Schedule identified the "benefit descriptions". These included: "personal accident"; "sickness"; "medical expenses"; "baggage and personal effects"; "money"; and "personal liability". In relation to "personal accident", the schedule described six "items" of benefit, including "permanent total disablement" (item 4) and "temporary total disablement" (item 5). The "sums insured" for a person in Category B (such as the claimant) were 400% of annual salary for permanent total disablement, and 100% of annual salary for temporary total disablement. "Salary" was defined to mean "the total gross amount of remuneration paid to an Insured Person exclusive of overtime, commission and bonus payments."

[4] The claimant's contract of employment was contained in a handbook issued by the defendants. The introduction to the handbook included:

> "Welcome to Pirelli Cables Limited. The purpose of this handbook is to provide you with information about your employment with Pirelli. Section 3 sets out the main terms and conditions which, together with those in your offer letter, form your Contract of Employment with the Company. Other sections outline the benefits which are available to you as well as explaining the working arrangements which exist in the interests of fairness, safety, security and good relationships."

[5] Section 2 of the handbook was entitled "Benefits and Facilities". Between pages 6 and 10 of the handbook there were mentioned the various benefits and facilities which were available to employees. These included under the heading "Personal Accident/Travel Insurance" :

> "The Company operates a Personal Accident and Travel Insurance Scheme, which covers personal injury, loss and/or damage to personal property whilst on Company business."

[6] Section 3 of the handbook was entitled "Terms and Conditions of Employment". It stated:

> "The following "Terms and Conditions of Employment" (pages 10 to 18) together with the terms and conditions in your offer letter constitute your Contract of Employment."

There was no reference in s 3 to the Personal Accident/Travel Insurance Scheme referred to in s 2. There was, however, a reference to a separate scheme for sick pay operated by the defendants themselves.

[7] The judge held that:

> "The provision of the permanent health insurance for the benefit of the defendants' employees was not a contractual entitlement under their contracts of employment, nor did the claimant and his fellow employees make any direct contribution to the premiums. The defendants' only contractual liability to a sick or injured employee was under the wholly separate scheme for sickness pay where the payments came from the defendants themselves."

[8] There is no challenge by the defendants to the judge's finding that the provision of permanent health insurance was not a contractual entitlement.

[9] Although the judge made no finding on the question whether the claimant was aware of the insurance policy, it is not disputed on behalf of the claimant that he must be taken to have been aware of its existence and terms. The terms of the policy were reviewed by the defendants from time to time, and documents that

we have been shown indicate that their employees and representatives of the trade unions were informed about the terms of the policy whenever it was reviewed. It is not clear to what extent, if any, the terms of the policy were taken into account in negotiations between the defendants and the unions.

INTRODUCTION TO THE ISSUES

[10] It has been stated repeatedly that the fundamental principle is that a claimant is entitled to recover the full extent of his net loss, and no more. As Lord Reid pointed out in *Parry v Cleaver* [1970] AC 1, [1969] 1 All ER 555, 13:

> "Two questions can arise. First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages."

[11] It has never been in doubt that, if the injured claimant continues to receive his wages, whether under the name of sick pay or otherwise, these sums fall to be deducted from the damages for loss of earnings: see per Lord Bridge of Harwich in *Hussain v New Taplow Paper Mills* [1988] AC 514, [1988] 1 All ER 541, 530D. It has also been stated on a number of occasions that there are two classes of payment to a claimant as a result of an accident which are not required to be brought into account in the assessment of damages. These are often referred to as the two exceptions against the rule against double recovery of damages. They are (i) payments made gratuitously to the claimant by others as a mark of sympathy ("the benevolence exception"); and (ii) insurance monies ("the insurance exception").

[12] In the court below, it was submitted on behalf of the claimant that the proceeds of the insurance policy that were received by him in the present case should not be deducted from his damages on the grounds that they came within the ambit of the benevolence exception. The judge accepted that submission. On this appeal, the claimant has served a respondent's notice and contends that the judgment should also be upheld on the grounds that the proceeds of the policy fell within the insurance exception.

THE BENEVOLENCE EXCEPTION

REVIEW OF THE AUTHORITIES

[13] In *Parry v Cleaver,* Lord Reid said that he knew of no better statement of the reason for the benevolence exception than that of Andrews CJ in *Redpath v Belfast and County Down Railway* [1947] N.I. 167, 170. In that case, the defendant company sought to bring into account sums received by the plaintiff from a distress fund to which members of the public had contributed. Andrews CJ said that the plaintiff's counsel had submitted:

> "that it would be startling to the subscribers to that fund if they were to be told that their contributions were really made in ease and for the benefit of the negligent railway company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely if not entirely dried up."

[14] A number of the subsequent cases in which the scope of, and reasons for, the exception have been discussed were not benevolence exception cases. Nevertheless, they contain dicta of the highest authority. In *Parry*, the issue was whether a disablement pension fell to be taken into account in the assessment of the plaintiff's financial loss. At p 13H, Lord Reid said of the benevolence and insurance exceptions that "the

common law has treated this matter as one depending on justice, reasonableness and public policy". After referring to the judgment of Andrews CJ, Lord Reid said (p 14C) that "it would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large."

[15] In *Hussain*, the plaintiff was injured in an accident in the course of his employment with the defendants and was unable to continue his pre-accident work. For the first 13 weeks after the accident, he received full "sick pay" from the defendants in accordance with the terms of his contract of employment. Thereafter, he received payments (as he was contractually entitled to do) equal to half his pre-accident earnings under the defendants' permanent health insurance scheme. It was held that his claim for damages in respect of loss of earnings fell to be reduced by the amounts of these payments. It was not argued on behalf of the claimant that the payments received under the insurance scheme came within the benevolence exception. Rather, it was submitted that they were in the nature of insurance payments, and fell within the insurance exception. It was held that the payments were indistinguishable in character from the uninsured sick pay in lieu of wages, and that as such they fell to be deducted.

[16] Having set out the facts, Lord Bridge (p 527B) referred to the passage in Lord Reid's speech in *Parry* to which I have referred at para 10 above, and said that the dichotomy (raised by Lord Reid's two questions) "must not be allowed to obscure the rule that prima facie the only recoverable loss is the net loss". Financial gains accruing to the plaintiff which he would not otherwise have received but for the event which gives rise to the cause of action are prima facie to be taken into account. But to this prima facie rule there are two well-established exceptions. Having referred to the insurance exception, he described the benevolence exception in these terms:

> "Secondly, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, the amount received is again to be disregarded."

[17] Lord Bridge continued:

> "If the award of damages adequately compensates the plaintiff, as it should, the additional amounts received from the insurer or from the third party benevolence may be regarded as a net gain to the plaintiff resulting from his injury. But in both cases the common sense of the exceptions stares one in the face. It may be summed up in the rhetorical question: "Why should the tortfeasor derive any benefit, in the one case, from the premiums which the plaintiff has paid to insure himself against some contingency, however caused, in the other case, from the money provided by the third party with the sole intention of benefiting the injured plaintiff?"
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> There are, however, a variety of borderline situations where a plaintiff may receive money which, but for the wrong done to him by the defendant, he would not have received and where there may be no obvious answer to the question whether the rule against double recovery or some principle derived by analogy from one of the two classic exceptions to that rule should prevail. Some of these problems have been resolved by legislation, sometimes in the form of a compromise solution providing that a proportion only of certain statutory benefits is to be taken into account when assessing damages. But where there is no statute applicable the common law must solve the problem unaided and the possibility of a compromise solution is not available. Many eminent common law judges, I think it is fair to say, have been baffled by the problem of how to articulate a single guiding rule to distinguish receipts by a plaintiff which are to be taken into account in mitigation of damage from those which are not. Lord Reid aptly summed the matter up in *Parry v Cleaver* when he said [1970] AC 1, 13H: "The common law has treated this matter as one depending on justice, reasonableness and public policy."

[18] In that case, the defendant was the employer. Lord Bridge did not say anything more about the benevolence exception in particular, but there is one passage where he touched on the question whether it was material that the payments were made by or on behalf of the tortfeasor. Towards the end of his speech, he referred to the decision of the British Columbia Court of Appeal in *Chan v Butcher* [1984] 4 WWR 363. In that case, it was held that a plaintiff could recover her full loss of earnings as damages from her employer

notwithstanding that at the same time she received her full salary pursuant to a so-called "short-term disability program" established and funded by the employer. Lord Bridge held that he would have decided the case the other way, since it did not fall within the insurance exception. He said:

> "It positively offends my sense of justice that the plaintiff, who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity to work from two different sources, his employer and the tortfeasor. It would seem to me still more unjust and anomalous where, as here, the employer and the tortfeasor are one and the same."

[19] In the Court of Appeal ([1987] 1 WLR 336, p 350), Lloyd LJ discussed the position of the tortfeasor who pays in these terms:

> "But there is one consideration of public policy which is worth mentioning. If an employee is injured in the course of his employment, and his employers make him an immediate ex gratia payment, as any good employer might, I see no reason why such a payment should not be taken into account in reduction of any damages for which the employer may ultimately be held liable. Employers should be encouraged to make ex gratia payments in such circumstances. If so, then public policy would seem to require that such payments be brought into account.
>
> It could, of course, be said that an ex gratia payment is like a sum coming to the plaintiff by way of benevolence, and should therefore be disregarded. This is so, where it is a third party who is ultimately held liable: see *Cunningham v Harrison* [1973] QB 942. But there must surely be an exception to that general rule where the ex gratia payment comes from the tortfeasor himself. So, if it is right that an ex gratia payment by the employer should be brought into account where the employer is the tortfeasor, why should it make any difference that the payment is one which he has contracted to make in advance? So if Mr Harvey is wrong in his main argument, that payments under the scheme are in the nature of wages, and should be brought into account on that score, there would be much to be said for his alternative argument that such payments should in any event be brought into account on the grounds of "justice, reasonableness and public policy." But it is unnecessary to decide the case on that ground, since, on the facts of the present case, Mr Harvey is entitled to succeed on his first ground."

[20] The next relevant authority is *Hodgson v Trapp* [1989] AC 807, [1988] 3 All ER 870. In this case, the question was whether attendance and mobility allowances payable to the plaintiff pursuant to statute should be deducted from her damages. It was held that they should. Lord Bridge reiterated the principle that damages for negligence are intended to be "purely compensatory" (p 819 D). The basic rule is that the court must measure the net consequential loss and expense. To the basic rule there are well-established exceptions, although they are not always "precisely defined and delineated". It is the rule that is "fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such" (p 819H). He described the benevolence exception as applying where:

> "moneys [are] received by the plaintiff from the bounty or benevolence of third parties motivated by sympathy for his misfortune."

[21] The question in *Hodgson* was how far it was appropriate to treat statutory benefits as analogous to the proceeds of voluntary benevolence "intended to alleviate the plight of the victims of misfortune" (p 820 D). The analogy was rejected. Lord Bridge referred to what he had said in *Westwood v Secretary of State for Employment* [1985] AC 20, [1984] 1 All ER 874, 43:

> "I do not see any analogy at all between the generosity of private subscribers to a fund for the victims of some disaster, who also have claims for damages against a tortfeasor, and the state providing subventions for the needy out of funds which, in one way or another, have been subscribed compulsorily by various classes of citizens. The concept of public benevolence by the state is one I find difficult to comprehend."

[22] I must now turn to *McCamley.* The plaintiff suffered personal injuries during the course of his employment and claimed damages from his employers. He received a lump sum payment under an insurance policy taken out on behalf of the defendants by their parent company for the benefit of employees

who were injured at work. The question was whether the lump sum payment fell to be deducted from the damages. This court held that the payment did not come within the insurance exception, since the plaintiff had not paid or contributed towards the payment of the premiums.

[23] The next question was whether it came within the benevolence exception. Caulfield J had found that the existence of the policy was unknown to both the plaintiff and his trade union. He held that the payment was not deductible. It seems that, founding himself on Lord Reid's speech in *Parry*, he considered that the question whether the payment fell within the insurance exception depended on "justice, reasonableness and public policy". As was said in the judgment of this court, the judge treated this as a simple jury point, and decided that for the defendants to claim credit for the money offended his idea of justice. The court then said at p 971 D:

> "The reason why the judge came to the correct decision on this matter is that the payment to the plaintiff was a payment by way of benevolence, even though the mechanics required the use of an insurance policy. The payment was not an ex gratia act where the accident had already happened, but the whole idea of the policy, covering all the many employees of British Shipbuilders and its subsidiary companies, was clearly to make the benefit payable as an act of benevolence whenever a qualifying injury took place. It was a lump sum payable regardless of fault or whether the employers or anyone else were liable, and it was not a method of advancing sick pay covered by a contractual scheme such as existed in *Hussain's* case [1988] AC 514. It was paid in circumstances quite different from those covered by Lloyd LJ's comment on public policy: [1987] 1 WLR 336, 350. That the arrangement was made before the accident is immaterial. The act of benevolence was to happen contingently on an event and was prepared for in advance. To refer to Lord Bridge's speech in *Hussain's* case [1988] AC 514, 528, this payment was one analogous to "one of the two classic exceptions" to the rule that there should be no double recovery. The point was well made on behalf of the plaintiff that this sum was not to be payable in respect of any particular head of damage suffered by him and was not an advance in respect of anything at all. To say that does not mean that in an appropriate case there may not be a general payment or an advance to cover a number of different heads of damage. The importance in the present case is that the sum was quantified before there had been an accident at all and when it could not have been foreseen what damages might be sustained when one did take place. We would dismiss the defendants' appeal on the point of the insurance payment."

[24] The significance of this decision for the present case is obvious. There are strong factual similarities; indeed, the judge in the present case did not feel able to distinguish it. Of particular significance is the fact that in both cases it was the tortfeasor who made the payment. Before I consider *McCamley* further, however, I need to complete this survey of the principal relevant authorities.

[25] In *Hunt v Severs* [1994] 2 AC 350, [1994] 2 All ER 385, the plaintiff was injured by the negligence of the defendant. The defendant provided gratuitous nursing care and other assistance to the plaintiff. They married each other. The question was whether the defendant was required to pay the plaintiff a sum representing the value of the services which he had rendered to the plaintiff. In the Court of Appeal, Sir Thomas Bingham MR, giving the judgment of the court, said:

> "Where services are voluntarily rendered by a tortfeasor in caring for the plaintiff from motives of affection or duty they should in our opinion be regarded as in the same category as services rendered voluntarily by a third party, or charitable gifts, or insurance payments. They are adventitious benefits, which for policy reasons are not to be regarded as diminishing the plaintiff's loss. On the facts of the present case the judge's decision was not in our view contrary to principle or authority and it was fortified by what we regard as compelling considerations of public policy. We consider that he reached the right conclusion and would accordingly dismiss the defendant's appeal."

[26] In the House of Lords, the leading speech was given by Lord Bridge. Having cited this passage from the judgment of the Court of Appeal, he referred to the two exceptions to the rule against double recovery, describing the benevolence exception as occurring where payments are made by "the benevolence of third parties motivated by sympathy for the plaintiff's misfortune". The policy considerations which underlie the exceptions were, he said, "well understood". He continued:

> "But I find it difficult to see what considerations of public policy can justify a requirement that the tortfeasor himself should compensate the plaintiff twice over for the self-same loss. If the loss in question is a direct pecuniary loss (eg

> loss of wages), *Hussain's* case is clear authority that the defendant employer, as the tortfeasor who makes good the loss either voluntarily or contractually, thereby mitigates his liability in damages pro tanto."

[27] Finally, *Williams v BOC Gases Ltd* [2000] ICR 1181. In that case, the plaintiff claimed damages from his employer in respect of injuries suffered during the course of his employment. The defendant paid the claimant a sum to which he had no contractual entitlement, saying that it was to be treated as an advance against any damages that he might be awarded against the defendant. The money came from the defendant's own fund. Brooke LJ (with whom Thorpe LJ agreed) reviewed the authorities to which I have referred. He said at para 26:

> "In my judgment, the judge was over-influenced by the decision of this court in *McCamley* which should be treated, until it receives the consideration of the House of Lords, as a case turning on its own particular facts: in other words, for what members of that court, deciding the issue as a jury question, thought was just, reasonable and in accordance with public policy on the facts of that case."

[28] Brooke LJ considered the factors relied on as showing that the case fell within the benevolence exception, and concluded:

> "32. In my judgment, these arguments are not strong enough to resist the force of the principles reiterated by Lord Bridge in his three speeches in the House of Lords to which I have referred. The "benevolence" exception is limited in terms to gifts arising from the benevolence of third parties, and does not cover benevolent gifts made by the wrongdoer himself, for which allowance ought prima facie to be made against any compensation he might have to pay. Neither of the justifications for the benevolence exception apply to the tortfeasor. Deductibility will encourage him to make benevolent payments in future to injured employees, rather than the reverse. And it certainly cannot be said that in making the gift, his intention was to benefit the plaintiff rather than to relieve himself of liability *pro tanto*: he would have been happy to achieve both purposes at once. *A fortiori* in a case in which he said in terms, at the time he made the gift, that it was to be treated as an advance against any damages he might have to pay.
>
> 33. I can see nothing unjust in the fact that on this approach Mr Williams will not be able to recover more money from his employers because he can prove that some of the ailments from which he was suffering when he retired on medical grounds were caused by his employers' negligence. As a matter of public policy employers ought to be encouraged to make payments of this kind to their employees who retire on medical grounds, and there is no principle of public policy known to me which should tend to encourage employees to sue their employers if they have already received sums attirbutable to their injuries which exceed what their employers might otherwise be liable to pay.
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> 34. The editor of *J Fleming, The Law of Torts* (8th edition) said at p 249:
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> The case for crediting the tortfeasor for benefits with which he has himself furnished the plaintiff is perhaps strongest: here there is no room for the argument that it would subsidise the tortfeasor at someone else's expense; moreover, it encourages voluntary aid by those who are often in the best position to offer it to their victims when it is most needed.
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> 35. I agree."

Discussion of the benevolence exception without reference to *McCamley*

[29] If *McCamley* is put to one side, it is clear from these authorities that the essence of the benevolence exception is that it applies where payments have been made to the claimant by third parties from motives of sympathy. Although Lord Reid in *Parry* used the word "benevolence" rather than charity, he did so only because "rightly or wrongly, many people object to it" (p 14A), and not because it is inaccurate to describe the payments which come within the exception as "charitable". The OED definition of "Benevolence" includes "kindness, generosity, charitable feeling". It is of note that in the Law Commission paper, *Damages for Personal Injury, Medical, Nursing and Other expenses; Collateral Benefits* (1999) Law Com No 262, the benevolence exception is discussed under the sub-heading "Charity" (paras 10.10-10.14).

[30] In considering the scope of the benevolence exception, and in particular whether it extends to payments made by the tortfeasor, it is important to keep in mind the rationale for the exception. It is that "it would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy" (per Lord Reid) or "startling" (per Andrews CJ) that the victim should have his damages reduced so that he would gain nothing from the benevolence of third parties. Where ex gratia payments are made by the tortfeasor to the victim, the position is very different. Nobody could reasonably suggest that it would be revolting to the ordinary man's sense of justice or startling that the victim's damages should be reduced to take account of an ex gratia payment made by the tortfeasor. On the contrary, as was said by Lloyd LJ in *Hussain* and by Lord Bridge in *Hunt v Severs*, there is no good public policy reason for requiring a tortfeasor to compensate the victim of his negligence twice over. In fact, it offends one's sense of justice that a claimant should be compensated twice by the tortfeasor. Moreover, there is a further important policy consideration which militates against treating ex gratia payments by tortfeasors as coming within the benevolence exception. As Lloyd LJ said, employers should be encouraged to make ex gratia payments where their employees are injured during the course of their employment. They are likely to be discouraged if such payments are not deducted from awards of damages. Brooke LJ made the same point in *Williams*. Although payments by third parties made out of sympathy for the plight of victims of accidents are to be applauded, there is not the same public policy interest in encouraging such payments as there is in encouraging employees to make ex gratia payments to their employees when they are injured in the course of their employment.

[31] As a matter of principle, therefore, and on the basis of the authorities (apart from *McCamley)* I would hold that ex gratia payments made to victims by tortfeasors do not normally fall within the benevolence exception, even if it can be shown that they are made from motives of benevolence. I say "normally" because it would be possible, in theory at least, and so long as there is nothing in his insurance policy to put his cover at risk if he takes such a course, for the tortfeasor to make an ex gratia payment, and to spell out explicitly that the payment is a gift made on the basis that it should not be deducted from any damages that may be awarded to the employee if litigation ensues. In that exceptional situation, the position may be different.

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[32] I must now consider *McCamley*. This decision has been described as "a difficult case" (*McGregor on Damages* 17th edition para 35-134) and a case that is "a difficult one to interpret" (*Law Com No 262* para 10.14). Mr Moxon-Browne QC submits that in that case the Court of Appeal approved the approach of Caulfield J to treat the issue of deductibility as a simple jury question to be answered by the application of the principles of justice, reasonableness and public policy. It is not clear to me whether this court did indeed approve that approach. But in my view, the issue of deductibility should not be determined on the application of a broad brush principle of justice, reasonableness and public policy. Such an approach would introduce unnecessary and unacceptable uncertainty into this area of the law. Moreover, it flies in the face of the basic principle that a claimant is only entitled to his net loss subject to the two classic exceptions. The exceptions are not precisely defined, and there may be justification for extending the scope of an exception to include payments which are analogous to those which fall within an exception as it has been defined hitherto. But the case for such treatment must be clearly made out.

[33] It is, therefore, necessary to examine the reasons given by the Court of Appeal in *McCamley* for holding that the payment "was a payment by way of benevolence". Two main reasons were given for concluding that the judge reached the right conclusion. The first was that the payment was pursuant to an insurance policy and was quantified before there had been any accident at all. I do not see how this sheds any light on the character of, or the motive for, the payment. As Lloyd LJ asked rhetorically in the passage from *Hussain* cited by the Court of Appeal in *McCamley*, why should it make any difference that the payment is one which the employer has contracted to make in advance? The second reason is that the money paid was simply a lump sum paid regardless of fault and not in respect of any particular head of loss. But the sum (a wages benefit) was one which the plaintiff would not have received from his employer but for the accident, and, on the basis of the authorities to which I have referred, prima facie it fell to be deducted from his claim for loss of

earnings. I do not see how the fact that the lump sum was paid regardless of fault sheds any light on whether its payment was an act of benevolence.

[34] For these two reasons, the court felt able to decide that the payment in that case was analogous to one falling within the benevolence exception. As I have said, I do not consider that either of these reasons supports this conclusion.

[35] In my judgment, *McCamley* was wrongly decided for two principal reasons. First, the payment in that case manifestly was not analogous to a payment within the classic benevolence exception. There is a fundamental difference between (i) payments made by an employer to his employees to compensate them for the consequences of injuries suffered in an accident (whether or not caused by the employer's fault, and whether or not the payments are made directly or indirectly by means of an insurance policy as in *McCamley* and the present case), and (ii) payments made to victims of accidents by third parties out of sympathy for their plight. As I have said earlier, different public policy considerations apply in the two cases. Moreover, it is unreal to treat the payment of benefits under an insurance policy as equivalent, or even analogous, to payments made by third parties out of sympathy. Such benefits are made available by employers to their employees not (or, at least, not principally) out of sympathy or charity, but in order to promote good relations with their employees and the trade unions to their mutual advantage. In other words, they are essentially management arrangements. The judgment in *McCamley* does not explain why, despite the obvious differences, it is right to classify ex gratia payments by an employer in the same way as ex gratia payments by third parties.

[36] The second principal reason why I consider *McCamley* to have been wrongly decided is that, for the reasons I have given earlier, ex gratia payments made to employees by their employer tortfeasors do not normally fall within the benevolence exception, even if it can be shown that they are made from motives of benevolence. It is worthy of note that in *McCamley* the court cited, with apparent approval, the passage from the judgment of Lloyd LJ in *Hussain,* in which he said that (i) public policy considerations required ex gratia payments by tortfeasors to fall outside the benevolence exception, and (ii) the fact that the payment by the tortfeasor was one which he had contracted to pay in advance should make no difference. And yet the court did not explain why the payments fell within the benevolence exception although they had been made by the tortfeasor, or why it made a difference that the defendant had contracted to make the payments in advance.

[37] In *Williams*, Brooke LJ said that *McCamley* should be treated as a case turning on its own facts, ie for what the court, deciding the issue as a jury question, thought was just, reasonable and in accordance with public policy on the facts of that case. I prefer to hold that *McCamley* was wrongly decided and should not be followed. As I have explained, the question whether a payment falls within one of the two classic exceptions is not a jury question to be determined in some vaguely Solomonic way according to the judge's sense of what is just and reasonable and what is therefore required by public policy. A payment should only be treated as analogous to a benevolent payment by a third party if the case for doing so is clearly made out, having regard to the rationale for the existence of the benevolence exception. As the Law Commission has said, when referring to *McCamley*, (Law Com No 262 para 10.14), the law in relation to charity by tortfeasors is unclear. For the reasons that I have given, there is no case for generally extending the scope of the benevolence exception to include payments made by tortfeasors to their victims.

[38] It may be said that it is not open to this court to say that *McCamley* should no longer be followed. But the decision is plainly inconsistent with what Lloyd LJ said explicitly on the issue of payments by tortfeasors in *Hussain* in the passage apparently approved in *McCamley*. It is also inconsistent with what Lord Bridge said in *Hussain* when discussing *Chan* (admittedly an insurance exception case), and what he said in *Hunt* in the passage that I have cited at para 26 above. In short, the facts in *McCamley* did not satisfy the criteria for the benevolence exception as it has been expounded (and its rationale explained) in statements of the highest authority.

THE BENEVOLENCE EXCEPTION IN THE PRESENT CASE

[39] The judge applied *McCamley*. He felt unable to distinguish the facts of the two cases. Since for the reasons that I have given, *McCamley* should no longer be followed, this court is not inhibited in the way that the judge was. I would hold that this case does not come within the benevolence exception because (a) the payments were made by the tortfeasor, and (b) the payment of benefits under the insurance policy was not equivalent, or analogous, to payments made by third parties out of sympathy.

[40] If it were necessary, I would in any event hold that *McCamley* can and should be distinguished. The judge held that the claimant had no contractual entitlement to benefits under the policy, since there was no reference to it in s 3 of the handbook. There is no challenge to that part of the judge's decision. I think that the judge may well have been wrong about that. Be that as it may, the entitlement to benefits under the policy was part of the employment package that, to the knowledge of the claimant, was available to him. It was referred to in the handbook as a benefit available to employees. By contrast, in *McCamley* the existence of the policy was unknown to the plaintiff and his trade union. The plaintiff had no contractual entitlement to receive benefits pursuant to it, nor even any reasonable expectation that he would receive such benefits. In those circumstances, it is not altogether surprising that the benefits should be regarded as bounty. The position is significantly different where the employee has a contractual entitlement to the benefit, or at least a reasonable expectation that he will receive it on the basis that it forms part of the employment package which is offered to him by his employer. It is somewhat unreal to describe a benefit paid in such circumstances as being charitable or benevolent.

THE INSURANCE EXCEPTION

[41] Mr Foy QC submits that the payments should not be deducted because they fall within the insurance exception. The existence of the insurance exception is not in doubt. It was first formally recognised in *Bradburn v Great Western Rail Co* [1874] LR 10 Ex 1. In that case, the plaintiff had received a sum of money from a private insurer to compensate him for lost income as a result of an accident caused by the negligence of the defendant. It was held that he was entitled to full damages as well as the payment from the insurer. Pigott B said:

> ". . .I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, "laying by for a rainy day". He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. . .; and I think that it ought not, upon any principle of justice, to be deducted from the amount of the damages proved to have been sustained by him through the negligence of the defendants."

[42] In *Parry,* Lord Reid said of the insurance exception (p 14D):

> "As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor."

[43] Lord Pearce said (p 35 A):

> "One must start, I think, with the firm basis that *Bradburn v Great Western Ry Co* was rightly decided and that the benefits for a private insurance by the plaintiff are not to be taken into account."

There are passages to similar effect in the speeches of Lord Morris (p 31D-G) and Lord Wilberforce (p 39F-G).

[44] In *Hussain*, Lord Bridge said of the insurance exception (p 527H):

> "First, where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor."

[45] In *Hodgson*, Lord Bridge referred to the first "classic" exception to the basic rule (p 819H) as: "moneys accruing to the injured plaintiff under policies of insurance for which he has paid the premiums". In *McCamley*, the court said that the payment of the insurance money in that case did not come within the insurance exception:

> "The basis on which that exception exists is that the plaintiff has a right in law or in equity to receive the money because he has paid the premiums himself or in some way contributed towards them."

[46] In *Hunt*, Lord Bridge (p 358A) described the insurance exception as:

> "..the fruits of insurance which the plaintiff himself has provided against the contingency causing his injuries (which may or may not lead to a claim by the insurer as subrogated to the rights of the plaintiff)."

[47] Finally, I should refer to *Page v Sheerness Steel Plc* [1996] PIQR Q26. In that case, the plaintiff was a member of a scheme which entitled him to permanent health insurance benefits. The issue was whether the insurance monies received by the plaintiff were to be treated as sick pay (and therefore deductible from the damages) or insurance monies falling within the insurance exception. I said at Q33:

> "In my view it is quite wrong to treat the plaintiff's membership of the Sick Pay Insurance Scheme in the present case as a contract of insurance within the meaning of the exception. There is no contract between the plaintiff and the insurance company. He did not pay the premiums. There is no evidence that the plaintiff would have got more pay but for the insurance, or that the existence of the insurance had an effect on his remuneration. . .
>
> I cannot accept Mr Purchas's submission that it is immaterial whether the plaintiff paid or contributed to the premiums or gave consideration for the insurance in some other way. It seems to me that it is an essential requirement of the insurance exception that the cost of the insurance be borne wholly or at least in part by the plaintiff. There are cases where insurance is provided by the employer at no cost to the plaintiff. . ."

[48] The part of the judgment of the Court of Appeal which dealt with this issue is not included in the report at [1997] 1 WLR 652. But my reasoning was supported by the court (see pp 108-111 of the approved transcript), as it was in the House of Lords: see [1999] AC 345, 381H-382A.

[49] Mr Foy advances two main submissions. First, he says that it is immaterial to the question of deductibility of the proceeds of insurance whether the claimant has paid or contributed to the payment of the premium. The relevant question is whether the insurance payments are of the same character as wages or sick pay; it is only if they are that they should be deducted. Secondly, even if the insurance exception only comes into play where the claimant pays or contributes to the premium, then on the facts of this case the claimant did contribute to the payment of the premium, since the money which enabled the defendants to pay the premium was the fruit of the labour of their employees, including the claimant: it does not matter that a specific sum cannot be identified as a premium contribution. Mr Foy relies on *Parry* in support of both submissions.

[50] The first submission is in plain conflict with the statements of the scope of the insurance exception as is clear from the passages in the authorities to which I have referred. Time and again, reference has been made to the need for payment of the premium by the claimant. That is consistent with the rationale for the

insurance exception as explained in *Bradburn* and by Lord Reid in *Parry*. As I have said, Mr Foy relies on *Parry* itself. In view of what was said by their lordships specifically about the insurance exception in that case, it would be most surprising if *Parry* provided support for the proposition that a claimant is entitled to the benefit of the insurance exception even if he has not paid or contributed in some way to the payment of the premium.

[51] The question in *Parry* was whether a disablement pension should be deducted from the plaintiff's damages. The House of Lords held that it should not be deducted. The issue was whether the pension was to be treated as "a form of insurance" or "something quite different" (p 16A). Lord Reid said that a contributory pension should not be deducted because of its "intrinsic nature". That is because "by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights. . .His earnings are greater than his weekly wage. . . The products of the sums paid into the pension fund are in fact delayed remuneration for his current work". But as Lord Reid pointed out, the employee does not get back in the end the accumulated sums paid into the fund on his behalf. It depends, for example, on how long he lives. It is for this reason that the pension can be said to be a form of insurance. As he said (p 16H), the true situation is that wages are a reward for contemporaneous work, whereas a pension is "the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind". In *Parry,* the claimant had contributed to the pension scheme from his pay, but it seems that this fact may not have been central to the decision that the pension was not deductible. Lord Pearce said (p 36E) that a dividing line could not be drawn between contributory and non-contributory pensions. And Lord Wilberforce was clearly of the same opinion. Thus at p 42E, he said:

> "If, therefore, his earning capacity is reduced by his injury, there would seem no good reason why he should not recover damages for any loss of earning capacity as well as receiving his pension. This line of argument is consistent with, and supported by, that view of the matter which, I think rightly, regards the pension as representing the earnings, or reward of past saving, to the extent his own contribution and his past service as to the rest."

[52] It is true that the decision in *Parry* was to treat the pension payments as an exception to the net loss rule. They were assimilated to the insurance exception, because the pension payments were not to be characterised as wages, or the equivalent of wages. But that is not to say that pension payments are the same as insurance payments. As Lord Wilberforce said at p 42B:

> "I regret that I cannot agree that it is easy to reason from one type of benefit to another. One cannot argue from non-deductibility of gifts to non-deductibility of proceeds if insurance, nor from the non-deductibility of insurance to the non-deductibility of pensions. Accident insurances are not gifts or like gift, they are essentially wagers: pensions, if insurance at all, are not insurance in the same sense as accident insurance, and mere use of the common word is not enough to produce a common principle."

[53] It is thus fallacious to reason from the fact that (i) pension payments are treated as being analogous to insurance payments, and (ii) it is immaterial whether the claimant has contributed to a pension scheme, that (iii) it is also immaterial whether the claimant has contributed to insurance premiums. The weight of authority is decisively against Mr Foy's first submission. Perhaps the clearest statement which blocks his argument is my own in *Page,* where I explicitly rejected the submission that it is immaterial whether a claimant paid or contributed to the premium or gave consideration for the insurance in some other way.

[54] Mr Foy's second submission is that the claimant should be treated as having paid or contributed to the premium simply by virtue of the provision of labour pursuant to his contract of employment. A similar argument was rejected by this court in *Hussain.* Lloyd LJ said (p 345H) that the evidence did not support the conclusion that the plaintiff would have received more pay but for the insurance. He continued:

> "In truth the judge was, I think, resting his conclusion on a broader ground. Even if the plaintiff's wage would have been the same, he has nevertheless earned the benefits payable under the scheme by working for the defendants. As Mr Flather put it, in language adopted by the judge, the benefits are part of the wage structure.

> The difficulty I feel with that argument is that it would apply equally to sickness or injury benefit paid during the first 13 weeks of incapacity. It was never suggested that this payment should be left out of account. Yet those payments were "earned" in exactly the same way as the subsequent payments."

[55] Kerr LJ dealt with the point at p 351D-E. He too concluded that the monies were to be deducted on the grounds that there was no evidence that the plaintiff's wages would have been higher but for the insurance scheme. Lloyd LJ's way of dealing with the broader ground was endorsed by Lord Bridge in *Hussain* at p 529H. Mr Foy's submission is also inconsistent with what I said in *Page* (see para 47 above).

[56] It follows that an employee is not to be treated as having paid for, or contributed to the cost of, insurance merely because the insurance has been arranged by his employer for the benefit of his employees. The insurance monies must be deducted unless it is shown that the claimant paid or contributed to the insurance premium directly or indirectly. Payment or contribution will not be inferred simply from the fact that the claimant is an employee for whose benefit the insurance has been arranged. There is little guidance in the English cases as to what is sufficient to constitute evidence of indirect payment or contribution. The issue has, however, been discussed in a number of Canadian cases, most notably in *Cunningham v Wheeler* [1994] 113 DLR (4th) 1. The majority decision was given by Cory J, who said (p 15B) that what was required was:

> ". . .that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage, reflected in a collective bargaining agreement, will be sufficient."

[57] He then gave a non-exhaustive list of possible examples of the sort of evidence that could well be sufficient to establish that the employee had paid for the benefit. In her dissenting judgment, McLachlin J said that she regarded this approach as likely to generate uncertainty (pp 38A-39F). She preferred to hold that there was a general rule of deduction, subject only to exceptions for charitable payments, and non-indemnity insurance and pensions. If the payment was in the nature of an indemnity, then it should be deducted to prevent double recovery, regardless of whether the claimant had contributed to the cost, unless it was established that a right of subrogation would be exercised.

[58] The approach adopted by Cory J is similar to that which Lloyd and Kerr LJJ had in mind when they concluded that there was no evidence that the wages benefits in *Hussain* had been paid for directly or indirectly by the plaintiff on the facts of that case. Similarly, my own judgment in *Page*.

[59] Turning to the facts of the present case, Mr Foy cannot identify any evidence which shows that the claimant paid or contributed to the cost of the insurance policy. All he can point to is the fact that the fruits of the claimant's labour enabled the defendants to pay for the insurance. But for the reasons that I have given, that is not enough to avoid the deduction of the benefits from his damages.

CONCLUSION

[60] For the reasons that I have sought to explain, neither the benevolence exception nor the insurance exception applies in the present case. I would allow this appeal.

MUMMERY LJ:

[61] I agree.

BROOKE LJ:

[62] I also agree. When I was sitting as a member of a two-judge court in *Williams v BOC Gases Ltd* [2000] ICR 1181 I was doubtful whether the judgment of this court in *McCamley* was consistent with three decisions of the House of Lords that were delivered in the two years immediately preceding the decision in that case or in the four years that followed it (*Hussain, Hodgson v Trapp, Hunt v Severs*). On that occasion, however, it was unnecessary to decide the point, which is why I adopted the formula I used in para 26 of my judgment (see para 27 of Dyson LJ's judgment above).

[63] The point now arises directly for decision. I agree with Dyson LJ, for the reasons he gives in para 38 of his judgment that the judgment in *McCamley* should no longer be followed, and that it is unnecessary for us to refer the matter to the House of Lords in order for it to deliver the final *coup de grace*.

Judgment accordingly.