# DAMAGES FOR PERSONAL INJURIES: A STATEMENT OF THE MODERN AUSTRALIAN LAW

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## I. INTRODUCTION

In the last few years, the mode of assessment of damages for personal injury has, as Aickin J. has recently pointed out, 'gone through a process of both refinement and elaboration'.[1] The purpose of the present paper is to attempt, in the light of such refinement and elaboration, and in the light of the traditional learning on the subject, a succinct statement and explanation of the modern Australian law relating to damages for personal injury.

## II. DEFINITION, PURPOSE AND FORM OF DAMAGES AWARD

The remedy evolved by the courts of common law in actions founded on the ancient Writ of Trespass or on the Action on the Case was damages, a sum of money payable by a defendant to a successful plaintiff. Damages remains today as the principal remedy in tort.

An award of damages may serve a number of purposes. In the vast majority of cases in tort, the object of damages is to *compensate* the plaintiff for his loss, so far as money is able to do so, by giving him as nearly as possible that sum of money which will put him in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation.[2] From a practical point of view, compensation of the plaintiff is invariably the object of an award of damages in a personal-injury case, and damages which serve other purposes, such as punishment of the defendant (exemplary damages) or mere vindication of the plaintiff's right (nominal damages), have little or no application to personal-injury claims, and will not be considered in this paper.[3]

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1 Cullen v. Trappell (1980) 54 A.L.J.R. 295 at 306.

2 Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 at 39.

3 See Luntz *Assessment of Damages for Personal Injury and Death* (1974) 39-50.

Whatever be the object of damages in any particular case, it is important to note that, in respect of form, an award of damages can only be made unconditionally,[4] in a lump sum,[5] once-and-for all.[6] The policy behind the once-and-for-all-rule is finality of litigation: one and the same cause of action should give rise to only one claim for damages.[7] The effect is that once the cause of action is complete so that the plaintiff can sue for damages, he must claim for all loss, past and future, which arises out of the tortious act which constitutes the cause of action. Thus, for example, in a claim for damages for personal injury arising out of the defendant's negligent act, the plaintiff must claim for all loss sustained until the time of the trial and for all future losses which are expected to flow from the tortious act; he will not be allowed at some future date to bring another claim for damages against the defendant if some unforseen loss attributable to the original tort manifests itself after judgment, for such a claim would rest upon a cause of action in respect of which judgment had already been given, and any such future loss would not be seen as fresh 'damage' so as to constitute another cause of action.[8]

## III. RECOVERABLE HEADS OF DAMAGES IN PERSONAL-INJURY CASES

In *Teubner* v. *Humble*[9] Windeyer J. pointed out that there are three ways in which a personal injury can give rise to damage:

> First, it may destroy or diminish, permanently or for a time, an existing capacity, mental or physical: Secondly, it may create needs that would not otherwise exist: Thirdly, it may produce physical pain and suffering.

It is at once apparent that these losses may be said to fall into two classes: those that are productive of economic harm, and those that give rise only to non-economic damage. It is possible further to dissect these economic and non-economic losses into certain items or 'heads of damage' which provide, at least, a 'convenient reminder of matters that ought not to be forgotten.'[10]

4 Banbury v. Bank of Montreal [1918] A.C. 626 at 668, 700 and 716-7.
5 Fournier v. Canadian National Railway Co. [1927] A.C. 167 at 169. Cf. Lim Poh Choo v. Camden and Islington Area Health Authority [1980] A.C. 174 at 182, per Lord Scarman ('unless the parties agree otherwise') [hereinafter cited as Lim's Case].
6 Id. at 182-3.
7 For criticism see Gamser v. Nominal Defendant (1977) 136 C.L.R. 145 at 147.
8 Fitter v. Veal (1701) 12 Mod. Rep. 542.
9 (1963) 108 C.L.R. 491 at 505.
10 Id.

Thus, it is possible, and customary, to list the heads of recoverable damage in a personal-injury claim as follows:

(A) ECONOMIC LOSS, which includes:
  (1) Monetary loss suffered up until the time of the verdict;
  (2) Loss of earning capacity for the future;
  (3) Other monetary loss resulting from needs created by the tort (e.g. hospital and medical expenses).

(B) NON-ECONOMIC LOSS, which includes:
  (1) Pain and suffering, past and future;
  (2) Loss of enjoyment of life, past and future;
  (3) Loss of expectation of life.[11]

With the exception of economic losses sustained up until the time of the verdict, all the other heads of damage are usually referred to, for the sake of convenience, as 'general damages'. The common denominator of these damages is that they are not assessable with mathematical precision.[12] This is obvious in the case of non-economic loss where exact measurement is plainly impossible; and, it is also obvious in the case of future economic loss when one considers that such loss is *ex hypothesi* contingent.

In contrast to 'general damages', the term 'special damages' is nowadays generally used to refer to the plaintiff's actual monetary loss up until the date of the verdict.[13] Such loss is usually capable of fairly exact arithmetical calculation, and usually is not the subject of litigation but of agreement between the parties.

## IV. CERTAINTY AND PROOF OF DAMAGES

Given that general damages of their nature are incapable of assessment with any real degree of precision, the question immediately arises as to the standard of certainty which the court will require before awarding damages in a personal-injury action.

It is clear, of course, on general principles, that the plaintiff must prove both (a) the fact of damage, and (b) the amount of his damages.[14] The fact of damage is concerned with the scope of matters for which damages might be awarded once the general elements of the actionable tort of negligence have been established, and the standard of proof re-

11 E.g. Sharman v. Evans (1977) 138 C.L.R. 563 at 595-9.
12 Paff v. Speed (1961) 105 C.L.R. 549 at 558-9.
13 Id. But cf. Atlas Tiles Ltd v. Briers (1978) 52 A.L.J.R. 707 at 710, per Barwick C.J. [hereinafter cited as Atlas Tiles].
14 E.g. Watts v. Rake (1960) 108 C.L.R. 158 at 159.

quired of any alleged loss will vary according to the type of loss pleaded.[15] Thus, more exact proof will be required of most economic loss which it is alleged has been suffered up until the time of the trial than will be required of alleged non-economic losses and of alleged future economic losses. Indeed, in respect of future economic loss, it has been said that the court, inescapably, 'proceeds to its verdict in the dark, forced to speculate as best it can into the far, unknown, future';[16] in short, the court does the best it can, taking all the circumstances of the situation into account, estimating the likelihood of particular developments, but disregarding, on the *de minimis* principle, slight possibilities and entirely speculative chances.[17]

Once the court is satisfied as to the fact of damage, then it does not follow that 'the mere fact that it is impossible to assess the damages with precision and certainty relieves a wrongdoer from paying any damages in respect of the breach of duty of which he has been guilty'.[18] Of course, such evidence as to *quantum* as is available ought to be produced, and, in the absence of such evidence, although the court will do the best it can,[19] the plaintiff in effect runs the risk of a lower award.[20] Indeed, some courts have recently been very critical of 'the usual lack of specific evidence' of the amount of diminished earning capacity.[21]

In summary, we can say that 'the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount'.[22] Indeed, if the law were otherwise, many items of general damages would obviously be irrecoverable.

## V. THE LUMP-SUM AWARD

Because of the rule that damages must be awarded in a lump sum once-and-for-all, and given the law's liberal attitude to the degree of certainty with which future losses in particular need be proved, it is obvious that the basis of any personal-injury award which includes an

15 Ratcliffe v. Evans [1892] 2 Q.B. 524 at 532-3.

16 Thurston v. Todd [1965] N.S.W.R. 1158 at 1166, per Asprey J., aff'd [1966] 1 N.S.W.R. 321.

17 Jones v. Griffith [1969] 1 W.L.R. 795; Davies v. Taylor [1974] A.C. 297 esp. at 212-3. Contra, O'Brien v. McKean (1968) 118 C.L.R. 540 at 550, per Barwick C.J. [hereinafter cited as O'Brien's Case].

18 Chaplin v. Hicks [1911] 2 K.B. 786 at 792, per Vaughan Williams L.J.

19 E.g. Wade v. Allsop (1976) 50 A.L.J.R. 643 at 646-8.

20 Yammine v. Kalwy [1979] 2 N.S.W.L.R. 151.

21 E.g. Allan v. Loadsman [1975] 2 N.S.W.L.R. 789 at 793-4. See also Dessent v. Commonwealth of Australia (1977) 51 A.L.J.R. 482 at 487.

22 *McGregor on Damages* 14th ed. (1980) 190-1.

item of general damages may well be falsified by subsequent events, with consequent injustice to the one party or the other; indeed, as Lord Scarman has recently said:

> Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering (in many cases the major part of the award) will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.[23]

This problem is particularly acute in those personal-injury claims where the effects of the tort will continue long after damages have been awarded. The question is therefore posed of the extent to which this danger can be avoided, either within the framework of the existing law or outside the same?

It is established that the time at which damages are assessed is the date of judgment,[24] with the result that whatever happens between the time of the accident and the date of judgment is to be taken into account in assessing damages.[25] It follows that, in an appropriate case, postponement of the trial of the action to enable the plaintiff's condition to stabilize is one obvious way in which potentially unjust results of the once-and-for-all rule may be mitigated, though the limitation period will, of course, have to be kept in mind. Further, on appeal, the State and Territory Supreme Courts have power, either by Statute[26] or by virtue of their inherent jurisdiction,[27] to receive evidence as to matters which have occurred since the trial or, in the light of such evidence, to order a new trial. However, the exercise of such power is usually restricted to 'special circumstances', which will not exist where the 'new' evidence relates to the field or area of uncertainty upon which the trial judge has already made a decision.[28]

These limited methods of varying awards after trial do not go very far to solve the real problem raised by lump-sum awards in personal-injury claims, namely, the impossibility of the courts' satisfactorily predicting the future. This, taken together with the feeling that lumps-sum awards are in practice dissipated, has led to many suggestions that the law should be altered to allow the award of damages in the form of periodical payments which would be subject to review, depending on the

[23] Lim's Case, supra n. 5, at 183.
[24] O'Brien's case, supra n. 17, at 545.
[25] Baker v. Willoughby [1970] A.C. 467. See also Bubner v. Stokes [1952] S.A.S.R. 1.
[26] E.g. Supreme Court Act, 1970 (N.S.W.) s.106.
[27] See Murphy v. Stone Wallwork (Charlton) Ltd [1969] 1 W.L.R. 1023 (HL).
[28] E.g. Mitchell v. Mulholland [1971] A.C. 666; Costi v. Keats [1972] 2 N.S.W.L.R. 957.

changing circumstances of the plaintiff in the future.[29] The arguments against such an alteration of the law centre around the pressure which it is felt would be continuously placed on the legal system by actions for the adjustments of awards, and the experience of those countries which, allowing an option between the lump-sum award and periodical payments, have witnessed periodical payments' becoming a dead letter in practice. Further, any reform in favour of periodical payments which failed to deal with settlements as well as trial court awards would be unrealistic, and interference with settlements has, of course, serious implications for 'freedom of contract', even in the narrower sense in which that expression is understood to-day.[30]

However, the conclusion of the English Law Commission[31] that it is not worthwhile introducing a periodical-payments system within the existing torts framework is not inescapable, as witness recent legislative reforms in Australia. A comprehensive reform, although it applies only to the victims of motor accidents, is contained in s.16[32] of the Motor Vehicle (Third Party Insurance) Act 1943, of Western Australia. This provides in s.16(4) that, in its discretion,[33] the court may award general damages either in the form of a lump sum or of periodical payments or of both—any award of periodical payments being subject to review and alteration in the future.[34] A perhaps less radical measure is the introduction of interim awards. This has been done in South Australia, where s.30*b*[35] of the Supreme Court Act, 1935, empowers the court, after determining the liability of the parties, to defer the final award of a lump sum, and to grant interim damages (including periodical payments subject to review), until such time as the plaintiff's condition stabilizes, or, subject to the court's discretion, until four years have elapsed since the judgment determining liability.[36] Unlike the Western Australian legislation, this provision is not confined in its scope to motor-accident claims.

29 See McGregor, 'Personal Injury and Death', 11 *International Encyclopedia of Comparative Law* ch. 9, 20-7; Fleming, 'Damages: Capital or Rent?' (1969) 19 *University of Toronto Law Journal.*

30 Atiyah, *Accidents, Compensation and the Law* 2nd ed, (1975) 167.

31 *Report on Personal Injury Litigation—Assessment of Damages* (1973) (Law Com. 56) para. 29. But cf. *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Cmnd. 7054-1, esp. chs 11, 14.

32 Inserted by section 6 of the Motor Vehicle (Third Party Insurance) Act Amendment Act, 1972.

33 See Musca v. Colombini [1970] W.A.R. 33, aff'd (1969) 43 A.L.J.R. 453.

34 The W.A. system was recommended for Victoria in *Report of Inquiry into Motor Vehicle Accident Compensation in Victoria* (1978) para. 6.22.

35 Inserted by section 4 of the Supreme Court Act Amendment Act (No. 2), 1967.

36 A similar system was recommended for N.S.W. in the Law Reform Commission's *Working Paper on Deferred Assessment of Damages for Personal Injuries* (1969).

Reform has taken a quite different path in Victoria, Tasmania and the Northern Territory. The common features of the legislative schemes enacted in these jurisdictions is their limitation to motor accidents and their administration outside the realm of the ordinary courts. In Victoria[37] and Tasmania,[38] persons injured in motor accidents on the roads may apply for compensation to a Board, which may award periodical payments. Compensation is made on a no-fault basis, but is subject to set-off of what can be obtained in a common-law action. In an action of the latter type, compensation must, of course, still be in the form of a lump sum. However, the Northern Territory's Motor Accidents (Compensation) Act, 1979, which establishes a system of compensation based on no-fault liability, applies to the exclusion of the common law of torts, with the exception of claims for pain and suffering or loss of amenities of life.[39] Under the legislation the Board responsible for the administration of the Act, or, on appeal, the Motor Accidents (Compensation) Appeal Tribunal may award periodical payments.[40]

## VI. MAKING UP THE AWARD

### (A) The Approach of the Courts

A personal-injury case can be tried by a judge sitting alone or by a judge sitting with a jury.[41] How is the judge to instruct himself or the jury in the correct method of assessing the plaintiff's losses? There are two approaches:

(i) The 'global-award approach', which stresses that the trier of fact should consider that what is awarded is a single sum, which is computed not merely by having regard to the conventional heads of damage, but essentially by an exercise of an informed judgment, bearing in mind that it is the lump-sum award as a whole which must be juxtoaposed to the plaintiff's injury.[42]

(ii) The 'itemization approach', which focuses on the award as merely

37 Motor Accidents Act, 1973.

38 Motor Accidents (Liability and Compensation) Act, 1973.

39 Motor Accidents (Compensation) Act, 1979, s.5.

40 Ss. 13(6), 29(3).

41 For availability of jury trial see: A.C.T., Australian Capital Territory Supreme Court Act, 1933 (Cth), s.14; N.S.W., Supreme Court Act, 1970, ss. 86 & 87; N.T., Juries Act, 1962, s.7; Qld., Common Law Practice Act, 1867, s.78; S.A., Supreme Court Rules, 0.36 r.3; Tas., Supreme Court Civil Procedure Act, 1932, s.29; Vic., Rules of the Supreme Court, 0.36 r.7; W.A., Supreme Court Act, 1935, s.42; High Court, Judiciary Act, 1903 (Cth), s.77A; Federal Court, Federal Court of Australia Act, 1976 (Cth), s.39.

42 E.g. Arthur Robinson (Grafton) Pty Ltd v. Carter (1968) 122 C.L.R. 649 at 655.

> the total of several components—the conventional heads of damage—which ought to be considered separately before being combined into the final award.[43]

Although earlier High Court decisions tended to favour the global-award approach it is clear that the great weight of High Court and State Supreme Court authority now supports the itemization appraoch—as indeed the jurisprudence of England[44] and Canada[45] now does. This shift in the courts' approach is no doubt primarily accounted for by the declining use, except in Victoria,[46] of jury trials in personal-injury claims,[47] for the global-award approach is essentially a response to an environment in which jury trials flourish and in which appellate courts are faced with the task of deciding the reasonableness or otherwise of awards for which no reasons have been given. But, once the task of assessment is performed by a judge, whose reasoning is published and available for scrutiny, a more scientific approach towards the computation of awards is obviously possible.

There is also now a practical reason which dictates the itemization of awards in personal-injury cases. Legislation in all jurisdictions, except the Australian Capital Territory, Tasmania, the High Court and Federal Court, allows the courts, in their discretion, to award interest on damages between the date of the injury and the date of judgment.[48] These provisions have been interpreted to mean that the court can only award interest on that part of the award which represents losses suffered until the time of judgment, so that at least a temporal dissection of the award is required.[49]

Apart from the constraining force of these statutory provisions, however, there is no obligation on trial judges to itemize their awards, and they may, of they deem it appropriate, simply award a lump sum.[50] However, where, as is increasingly the case, a trial judge does itemize his award, he must be aware of the danger, said to be inherent in the itemization approach, of the 'overlapping' of heads of damage, for a failure to appreciate such overlapping may lead to double recovery for one and

43 E.g. Sharman v. Evans, supra n. 11, at 571-2.
44 E.g. Lim's Case, supra n. 5.
45 E.g. Andrews v. Grand and Toy Alberta (1978) 83 D.L.R. (3d) 452.
46 Cullen v. Trappell, supra n. 1 at 307.
47 Lawson *Remedies of English Law* 2nd ed. (1980) 54ff. And consider statutory provisions in n. 41 supra.
48 N.S.W., Supreme Court Act, 1970, s.94; N.T., Supreme Court Act, 1979, s.84; Qld., Common Law Practice Act, 1867, s.72; S.A., Supreme Court Act, 1935, s.306; Vic., Supreme Court Act, 1958, s.79A; W.A., Supreme Court Act, 1935, s.32.
49 Cullen v. Trappell, supra n. 1.
50 Griffiths v. Kerkemeyer (1977) 139 C.L.R. 161 at 163, 188-9.

the same loss. A classic illustration of the problem is found in the leading case of *Sharman* v. *Evans*:[51]

> P became a quadriplegic as a result of injuries suffered in an accident caused by D's negligence. She would be confined to hospital for the rest of her life. *Held:* In awarding damages for lost earning capacity, the court should make a broad deduction therefrom for what P would have spent on her board and lodging, for such expenses, which would have been met out of her future earnings, were now included in the damages awarded to her for future nursing and medical care, and unless this deduction were made, P would recover for the same loss twice over.[52] Alternatively, a deduction for board and lodging could be made from the hospital and medical expenses, and damages for lost earning capacity then allowed in full.[53]

It would seem, however, that the danger of double recovery has been greatly exaggerated, and, apart from the possible overlap between hospital expenses and lost earning capacity, it is difficult to discern overlaps between other heads of damage.[54] In particular, it is submitted that there is no real overlap between economic and non-economic loss, so that the plaintiff who, as a result of the accident, can now no longer enjoy some, perhaps expensive, pastime, should not have his damages for lost earning capacity reduced on the basis of an argument that, as he is compensated for loss of amenities, and as he would have had to provide for his amenities out of his earnings, he will recover twice over for the same loss unless the cost of this particular amenity is deducted from the award for lost earning capacity. There is a good deal wrong with this argument, but the fundamental fallacy in it is the assumption that the law is concerned with how the plaintiff would have, or will now, spend his surplus income.[55]

Provided that the trier of fact does have regard to this danger of overlapping, there is no reason why the plaintiff should not receive full compensation for his economic losses, no matter how large the award eventually turns out to be.[56] Those judicial pronouncements which stress that the trier of fact must award 'fair but not full nor perfect compensation'[57] — pronouncements which were aimed essentially at control-

51 Supra n. 11.
52 Id. at 576, per Gibbs and Stephen JJ.
53 Id. at 599, per Murphy J.
54 See Luntz, supra n. 3, at 32-9.
55 Sharman v. Evans, supra n. 11. Contra, Smith v. Central Asbestos Co. [1972] 1 Q.B. 244.
56 Lim's Case, supra n. 5, at 186-8.
57 Phillips v. London and South Western Railway Co. (1879) 5 C.P.D. 280.

ling jury awards[58]—must now be seen as referring only to the heads of non-economic damage.[59]

As to the function of appellate courts, it is clear that, despite verbal differences in formulation of the principle, an appellate court will only interfere with reluctance in an award made by a trial judge: it will do so only if the method which he has adopted towards assessment itself discloses an error, or if the assessment is so disproportionate to the plaintiff's injuries as to demonstrate error.[60] In the case of a jury award an appellate court will only interfere with an award which it considers so large or so small as to be unreasonable, that is, so disproportionate to the circumstances of the case that no reasonable jury could have made such an award.[61] In either case the appellate court may embark for itself on the process of itemization.[62]

(B) The Individual Heads of Damage

(i) *Lost Earning Capacity*

An injured plaintiff is entitled to damages for the extent to which his earning capacity has been diminished as a result of the tort, simply because such diminution is or may be productive of financial loss.[63] In the usual case, the plaintiff's financial loss in this respect is, of course, his loss of earnings. In so far as special damages are concerned, this head of damage presents relatively few problems of assessment, for the plaintiff's loss of earnings up until the time of the trial will usually be readily ascertainable.[64] So far as general damages are concerned, it might be thought, at first blush, that the proper method of effecting compensation to the plaintiff would be to take the plaintiff's annual or weekly earnings at the date of the trial less the amount which the plaintiff can now earn—a sum known as the multiplicand—and multiply this by the number of years for which the plaintiff's injury is expected to last—a figure called the multiplier. But, simply to take the product of the multiplicand and the multiplier would be to overcompensate the plaintiff for two reasons:

(a) the plaintiff is receiving an immediate lump-sum payment, whilst his loss of earnings would have occurred over a period in the future,

58 Tzouvelis v. Victorian Railway Commissioners [1968] V.R. 112 at 117.
59 Pickett v. British Rail Engineering Ltd. [1980] A.C. 136 at 168.
60 Planet Fisheries Pty Ltd v. La Rosa (1968) 119 C.L.R. 118.
61 Arthur Robinson (Grafton) Pty Ltd v. Carter, supra n. 42.
62 Sharman v. Evans, supra n. 11.
63 Graham v. Baker (1961) 106 C.L.R. 340 at 347.
64 Luntz, supra n. 3, at 140-3, 194-5.

so that allowance must be made for the fact that the money can be invested in the meantime and interest earned thereon; and,

(b) the plaintiff's receipt of the money is now certain, whereas if he had not been injured his receipt of future earnings would necessarily have been contingent in many ways, such as the plaintiff's ability to continue working, work continuing to be available to the plaintiff, and so on.

As a result, the successful plaintiff's award is computed in the following way:[65]

(a) The law refuses to ignore the effect of investment, so that the object of an award of damages for lost earning capacity is to provide the plaintiff with a fund which, when invested at a particular rate of interest, will yield, by the progressive use of both the capital and income components of the fund, the weekly equivalent of the earnings which the plaintiff has now lost, in such a way that at the end of the period of disability the fund will be exhausted. In practice, the courts use annuity tables to work out the appropriate figure.[66]

(b) The sum arrived at is also discounted to take account of contingencies, the so-called 'vicissitudes of life', principally, death, sickness, accident, unemployment and industrial disputes. In the past, despite some words of warning about the illogicality of this practice,[67] the courts have made substantial discounts on account of contingencies adverse to the plaintiff, without allowing sufficient weight to favourable contingencies—a practice encouraged by the courts' reluctance to rely on actuarial evidence in respect of contingencies,[68] even though such evidence is, in principle, admissible in Australia.[69] However, some recent cases[70] take a much less pessimistic view of what the future holds for the plaintiff, and, hopefully, the courts will now, where appropriate, be more easily persuaded than in the past that the adverse contingencies in any one case are cancelled out by the favourable contingencies.

The case of *Kaufman* v. *Van Rymenant*[71] illustrates how lost earning capacity is measured in practice:

> P's earning capacity was partially destroyed in an accident caused by D's negligence. The difference between what P was earning

65 Cullen v. Trappel, supra n. 1, at 298-9, 306.
66 Caledonian Colliers Ltd v. Spiers (1957) 97 C.L.R. 202 at 226-7.
67 E.g. Bresatz v. Przibilla (1962) 108 C.L.R. 541 at 543-4.
68 See Luntz, supra n. 3, at 178-87.
69 General Motors-Holden's Pty Ltd v. Moularas (1964) 111 C.L.R. 235.
70 E.g. Hall v. Tarlington (1978) 19 A.L.R. 501 at 506. Cf. Griffiths v. Kerkemeyer, supra n. 50, at 185--6.
71 (1975) 6 A.L.R. 153.

before the accident and what P could now earn was $3500 per annum. P's diminished earning capacity would last until his expected age of requirement (65), a period of 27 years. To obtain $3500 per year for a period of 27 years, plaintiff would now need a fund of $46 000 invested at 6%. A reduction had however, to be made for contingencies, and the figure was consequently discounted to $40 000 (a discount of approximately 13%) to allow for the possibility of early death. No other discount for contingencies was made, however, since the prospects of good fortune and ill fortune were equally balanced.

Computing the plaintiff's lost earning capacity in this manner has, not surprisingly, given rise to a number of problems both in relation to the method of assessment itself, and in respect of the application of that method in those cases where it may be said, broadly, that the plaintiff's situation is atypical in that his loss of earnings is not the obvious *indicium* of his lost earning capacity. On the one hand, it has been clearly accepted in Australia that the plaintiff is to be compensated not for loss of earnings as such, but rather for his lost earning capacity, which is regarded as a faculty, an asset in itself, of which loss of earnings is but one possible measure, albeit the most usual measure.[72] On the other hand, the proposition that all of the problems which arise in relation to this head of damage can be solved by concentration on the concept of earning capacity as a matter of fundamental legal doctrine must be rejected, for, in truth, the solution of these problems is to be found in an analysis of the policy considerations to which each individual problem directs attention, rather than in the application of an overall theory.[73] But, because the conceptual approach has been influential in Australia, it is necessary to bear it in mind when discussing some of the practical problems which have arisen around this head of damage.

*First*, the problem has arisen whether, in computing the multiplicand, regard is to be had to the plaintiff's gross, or to his net, earnings. 'Net earnings' must be understood here as encompassing not only gross earnings less taxation on the same, but also gross earnings less such expenses as are necessarily incurred in earning the same, for example, the cost of transport in travelling to work.

The question of taxation has caused the High Court of Australia some difficulty. In 1956 the House of Lords held in *British Transport Commission* v. *Gourley*[74] that in computing the plaintiff's lost earning

72 O'Brien's Case, supra n. 17.

73 Atiyah, 'Loss of Earnings or Earning Capacity', (1971) 45 *Australian Law Journal* 228. Contra, Parsons, 'Excursus', (1955) 28 *A L J* 571-2.

74 [1956] A.C. 185 [hereinafter cited as Gourley's Case].

capacity regard is to be had to the plaintiff's net earnings after taxation. This practice was followed in Australia until 1978, when the High Court, faced with the wrongful dismissal case of *Atlas Tiles Ltd.* v. *Briers,*[75] which squarely raised the issue of whether damages should be awarded on the basis of gross or net wages, refused, by a majority of three to two, to follow *Gourley's* Case, and held that in assessing damages for lost earning capacity no deduction was to be made from gross earnings on account of the taxation which the plaintiff would have had to pay on such earnings.

The result in *Atlas Tiles* was justified in terms of an earning-capacity theory which regards lost earning capacity as a *capital* asset which cannot be measured by reference to *net* earnings.[76] It was also justified by saying that the incidence of taxation should not go to reduce the plaintiff's damages because taxation is a completely collateral matter; in short, it is too remote.[77] Further, form a practical point of view, it can be argued that it is almost impossible for the courts to take future[78] income tax liability into account since this involves too speculative an exercise, not only in relation to future rates of taxation, but also in relation to the plaintiff's individual tax position.[79] These arguments can be met by pointing out that it is out of touch with reality to classify taxation as a completely collateral matter,[80] and that there is essentially no more difficulty in speculating about future taxation than in speculating about anything else in the future.[81] But the strongest criticism of the *Atlas Tiles* approach is that it breaches the compensation principle, for the plaintiff cannot be said to have lost what he would never have received.[82] These criticisms persuaded the High Court in 1980 to overturn its own decision in *Atlas Tiles*, and in *Cullen* v. *Trappell*[83] the Court held, by a majority of four to three, that the rule in *Gourley's* Case should be followed in Australia.

The result is that, in assessing damages for lost earning capacity, regard is had in the first place to the plaintiff's net income after taxation. But, as the purpose of the award is compensation, the plaintiff

75 Supra n. 13.
76 Id. at 709-13; Cullen v. Trappell, supra n. 1, at 296-7, 308.
77 Atlas Tiles, supra n. 13, at 710-13, 721; Cullen v. Trappell, supra n. 1, at 297.
78 For this reason Jacobs J. would see no difficulty with using net income for special damages and gross income for general damages: Atlas Tiles, supra n. 13, at 722. Contra, Cullen v. Trappell, supra n. 1, at 305-6.
79 Atlas Tiles, supra n. 13, at 710, 721-2, 723-4; Cullen v. Trappell, supra n. 1, at 297, 305; Gourley's Case, supra n. 74, at 217.
80 Atlas Tiles, supra n. 13, at 714, 718; Gourley's Case, supra n. 74, at 203, 207.
81 Atlas Tiles, supra n. 13, at 714 and 717-8; Gourley's Case supra n. 74, at 203, 214-5.
82 Atlas Tiles, supra n. 13, esp. at 714; Gourley's Case, supra n. 74, esp. at 208.
83 Supra n. 1.

would not be fully compensated if the taxation which will be payable in the future on the interest of the assumed exhausting fund were not reflected in the overall award: *Cullen* v. *Trappell*[84] makes it clear that the effect of such taxation must be taken into account. To do this, it may be thought that the courts will have to have recourse to complicated mathematical formulae. However, it seems that the courts will not strive for mathematical accuracy, but rather will simply depress the assumed rate of investment in proportion to the assumed percentage rate of taxation payable on the income components on the award.[85]

As regards expenses necessarily incurred in earning wages, it is established that these must be deducted in assessing lost earning capacity in so far as the plaintiff is now saved these expenses.[86] The result is, of course, comptaible with the compensation principle, which is the basis of the decision in *Cullen* v. *Trappell.*[87]

*Secondly* the question has arisen whether in assessing damages for lost earning capacity account is to be taken of future inflation. In *O'Brien* v. *McKean*[88] the High Court answered the question in the negative for the following reasons: the plaintiff is receiving compensation not for a loss of earnings in the future, but for the destruction of an asset, his earning capacity, which is a present loss measured in terms of the money values at the time of the award;[89] the plaintiff, having been awarded a lump sum as compensation for his lost earning capacity, can by wise investment offset the effects of inflation;[90] and, evidence of the depreciating value of money in the future is inadmissible as being too speculative.[91] These arguments are obviously not very strong, for there is perhaps more solid evidence of future inflation than of many other contingencies, and there is no reason why the plaintiff should be assumed to be a skilled investor.[92] Indeed, there are some slight signs that the High Court may eventually reconsider its ruling in *O'Brien's* Case.[93] Meanwhile, the question has arisen as to what effect, if any, inflation has on the choice of the percentage rate at which it is assumed that the lump

84 Id. at 298-300.
85 Id. at 304-5 (semble.); Treacey v. Churchill [1980] 1 N.S.W.L.R. 442.
86 Sharman v. Evans, supra n. 11 at 577.
87 Supra n. 1.
88 Supra n. 17.
89 Id. at 546-7, 557.
90 Id. at 547.
91 Id. at 546, 552, 553. .
92 Tzouvelis v. Victorian Railway Commissioners, supra n. 58 at 126, 134, 138-9: Fleming, 'The Impact of Inflation on Tort Compensation' (1978) 26 *American Journal of Comparative Law* 51.
93 E.g. Cullen v. Trappell, supra n. 1, at 304, 307. And see now Barrell Insurance Pty. Ltd. v. Pennant Hills Restaurants Pty. Ltd. (1981) 34 A.L.R. 162.

sum will be invested, for the higher the rate chosen the lower will be the award, and inflationary conditions lead to high interest rates. Some courts have therefore chosen an investment rate appropriate to a period of stable currency thereby seemingly disregarding inflation as required by *O'Brien* v. *McKean;*[94] the result is, of course, to provide the plaintiff with some protection against inflation since he can invest his award at a much higher rate of interest than that assumed by the court. Other courts have, however, discounted at current rates of interest,[95] whilst others seem to be seeking a compromise between current high rates of interest and the rates appropriate to a period of stable currency by taking an average rate over a lengthy period.[96] Consistency on this point is unattainable in Australia since the High Court has held that there is no arbitrary rule as to the appropriate interest rate, which depends rather on the discretion of the trial judge having regard to the particular circumstances of each case.[97]

*Thirdly,* it may happen that the plaintiff's life has been shortened by the tort. It is established in Australia—and now in England too[98]—that the multiplier is to be reckoned having regard to the plaintiff's pre-accident expectation of life.[99] This result can be justified in terms of the conceptual approach to lost earning capacity,[100] or simply in terms of the ordinary man's sense of justice.[101] A gloss on the rule is that in awarding compensation for the period known as the 'lost years'—that is, the period when the plaintiff is assumed to be dead—a deduction must be made from the plaintiff's income to allow for the costs of his own maintenance.[102] This is justified by reference to the function of compensation during the lost years: the basis for recovery lies in the interest which the plaintiff has in utilizing that part of his income which he would not spend on his own maintenance in making provision for his dependants, or for such other persons or causes which he may wish to support.[103]

*Fourthly,* what damages for lost earning capacity are to be awarded to persons who, although they have an earning capacity, do not exercise

94 E.g. Slater v. Kyalde Pty Ltd (1979) 22 S.A.S.R. 196.
95 E.g. Griffiths v. Kerkemeyer, supra n. 50.
96 MacLeod v. Booker [1978] Qd. R. 427. Cf. Austin v. Marcolin Construction and Welding Pty Ltd [1978] Qd. R. 424.
97 Hawkins v. Lindsley (1974) 49 A.L.J.R. 5.
98 Pickett v. British Rail Engineering Ltd, supra n. 59.
99 Skelton v. Collins (1966) 115 C.L.R. 94.
100 Teubner v. Humble (1963) 108 C.L.R. 491 at 509.
101 Pickett v. British Rail Engineering Ltd, supra n. 59, at 150.
102 Sharman v. Evans, supra n. 11, at 579-83.
103 Pickett v. British Rail Engineering Ltd, supra n. 59, at 151.

it at all, or only exercise it partially? The question arose in *Mann* v. *Ellbourne*:[104]

> Before an accident which totally destroyed her earning capacity, P worked as a stenographer at about two-thirds of her total capacity. She was unlikely ever to exceed that level in the future. *Held:* P was entitled to damages for lost earning capacity based on the use to which she would actually have put that capacity (in this case, two-thirds of the total capacity), plus the loss of the chance to exploit her capacity to the full.

This result is compatible with a conceptual approach if it is remembered that earning capacity only gives rise to a claim in so far as it is, or may be, productive of financial loss. The result can also be justified on the basis that it is not fair to award a person who on the evidence would not have exercised his capacity at all, or only partially, the same amount as a person who would have exercised his capacity to the full.

It may be thought that it follows logically that housewives and charity workers who receive no financial reward for their labours should receive no compensation for lost earning capacity, although their claim for loss of amenities may be the greater. But it has been suggested that this result is not inevitable. One argument which may be made is that the diminution or destruction of their working capacity is productive of economic loss, namely the cost of replacing their services, and hence should give rise to some claim.[105] Alternatively, a claim would be justified simply on the conceptual approach to this head of damage.[106]

(ii) *Needs Created*

An injured plaintiff may find that the tort of which he is the victim has given rise to needs which would not otherwise exist, such as, medical, nursing and hospital expenses, the cost of adapting a home, or of special appliances, or of employing domestic help. It is well established that all such reasonable needs created by the defendant's tort are recoverable by the plaintiff.[107] The most important items usually claimed under this head of damage are medical, hospital and nursing expenses (hereafter referred to simply as 'medical expenses'), and it is on these that we shall concentrate in this section.

In so far as medical expenses are to be incurred in the future, the law must, as with lost earning capacity, make provision both for present receipt of the cost of such expenses and for contingencies; once again,

104 (1973) 8 S.A.S.R. 298.
105 Sharman v. Evans, supra n. 11, at 598-9.
106 Atlas Tiles, supra n. 13, at 709-10.
107 E.g. Bresatz v. Przibilla, supra n. 67, at 545-7.

therefore, a lump sum is computed utilizing mathematical tables.[108] There is, however, one important point of departure: because the court is here concerned with the financial ability to purchase necessary goods and services for however long the plaintiff will need them—and not with discounting an asset to present value as is the case with lost earning capacity—evidence of cost inflation is in principle admissible, although the courts will require strong evidence of the inflationary cost of the service or item in question.[109]

Assuming that the expenditure in question is a necessary or reasonable one, it must also be shown that the sum claimed represents a reasonable cost for the particular item or service. The test of reasonableness is that provided by Gibbs and Stephen JJ. in *Sharman* v. *Evans*:[110]

> The touchstone of reasonableness in the case of the cost of providing nursing and medical care for the plaintiff in the future is, no doubt, cost matched against health benefits to the plaintiff. If cost is very great and benefits to health slight or speculative the cost-involving *[sic]* treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits.

Thus, in *Sharman* v. *Evans* itself the cost of maintaining a paraplegic at her mother's home for the rest of her life was unreasonable, for the cost of so doing was far greater than the lower—and reasonable—cost of maintaining her in a government-subsidised hospital, and the benefit to the plaintiff of being cared for at her mother's home was entirely one of amenity, which could be provided for by allowing her the cost of occasional day visits home.

We have assumed so far that the plaintiff is provided with necessary goods and services at some cost to himself. But, can the plaintiff claim, for example, where, as frequently happens, he is cared for voluntarily by a member of his family or by a friend, so that he himself incurs no cost in providing for his needs? This question was considered by the High Court in *Griffiths* v. *Kerkemeyer*:[111]

> P became a quadriplegic in an accident caused by D's negligence. For the rest of his life he would require constant nursing attention, and, at the time of the trial this was being provided gratuitously by his fiancee and his family. The trial judge awarded the plaintiff *inter alia* $15,000 as the value of services rendered by P's fiancee

108 Lindsley v. Hawkins [1973] 2 N.S.W.L.R. 581, varied (1974) 49 A.L.J.R. 5.
109 O'Brien's Case, supra note 17 at 548-51, 558.
110 Supra n. 11 at 573.
111 Supra. n. 50.

and family to the date of judgment, and he stated that one-half of the amount of $80,000 awarded as the cost of future care of P was for the voluntary services which would be rendered by P's fiancee and family in the future. The High Court upheld these awards, even though P was under no legal obligation to pay his fiancee and family for their services.

The High Court was able to reach this conclusion by identifying the plaintiff's loss not as the expenditure of money for nursing services, but as the existence of the need for those services, or, to put it another way, the loss of the capacity which occasions the need for the services, so that it becomes irrelevant that the need has been satisfied gratuitously.[112] The result is, at least on the reasoning of Stephen and Mason JJ., to emphasize the objective monetary value of the plaintiff's loss rather than the outlays of money which the plaintiff will have to make as a result of his injuries.[113] Gibbs J. would qualify this reasoning to the extent of only allowing recovery where the satisfaction of the need is or may be productive of financial loss, presumably not necessarily to the plaintiff.[114] In any event, all of their Honours were agreed that the loss is to be measured by the standard or market cost of the services in question.[115] Further, it is clear that, as the loss is the plaintiff's loss, the portion of his damages attributable to this head of damage is not held on trust for the person(s) rendering the gratuitous service.[116]

The result in *Griffiths* v. *Kerkemeyer*, which effectively overrules previous authority establishing the need for the plaintiff to be under a legal liability to pay for medical services before he could sustain a claim for the same, is to be welcomed not only because it accords with popular notions of justice,[117] but also because it is sound in terms of loss-distribution theory.[118]

But it must be stressed that it does not follow from *Griffiths* v. *Kerkemeyer* that the source from which the gratuitous services have been provided is irrelevant, for there is still lurking in the background that body of rules which requires that in certain circumstances collateral benefits must be deducted from the recoverable damages.[119] *Griffiths* v. *Kerkemeyer* does establish that where the source of such benefits is the voluntary services of relatives and friends, these are not to be taken into

112 Id. at 165, 173, 193.
113 Id. at 178, 193.
114 Id. at 165, 186.
115 Id. at 164, 1818, 193.
116 Id. at 177, 193-4.
117 Id. at 168.
118 Id. at 176.
119 On collateral benefits see *infra*.

account in reduction of the plaintiff's damages. But if such services were provided by the State to a plaintiff free of charge, such services would not, it is submitted, have to be paid for by the wrongdoer, for the effect would be to allow the plaintiff to recover twice over for the same loss.[120] In practice, no problem of double recovery will arise since services will be provided free of charge to a plaintiff by the State or by virtue of private hospital and medical insurance only in so far as such expenses are not recoverable by a plaintiff in a damages claim.[121]

(iii) *Non-Economic Loss*

In a personal-injury action, non-economic loss is traditionally, though not very logically,[122] claimed under the following heads of damage:

(a) Pain and suffering, whether mental or physical, and whether past,[123] present or future. The law is concerned only with pain and suffering that is actually experienced by the plaintiff; it follows, therefore, that a permanently unconscious plaintiff, who can experience no pain, can have no claim under this head.[124]

(b) Loss of expectation of life, which, as the name suggests, seeks to compensate a plaintiff whose life expectancy has been reduced by the accident. This 'curious and unsatisfactory head of damage',[125] which emerged for historical reasons which are no longer relevant,[126] consists entirely of the objective element of the loss itself,[127] which has been defined as the loss of 'the prospect of a predominantly happy life.'[128] Since, however, it is impossible to place a valuation on the balance of happiness over unhappiness, this head of damage has, since *Benham* v. *Gambling*,[129] been compensated by the award of a conventional sum, at present in the region of $2000 to $3000.[130]

120 Griffiths v. Kerkemyer, supra n. 50, at 165, 196-70, 178 and 194.

121 See National Heatlh Act, 1953 (Cth), ss. 21, 50; Handley v. Datson [1980] V.R. 66.

122 All these heads of damage could be, and originally probably were, subsumed under a general heading of 'pain and suffering'.

123 Compensation for which will not generally be high: The Mediana [1900] A.C. 113 at 116-7.

124 Skelton v. Collins, supra n. 99.

125 Sharman v. Evans, supra n. 11, at 584, per Gibbs and Stephen J.J.; see also *id* at 595, per Murphy J.

126 Kahn-Freud, 'Expectation of Happiness' (1941) 5 *Modern Law Review* 81.

127 Sharman v. Evans supra n. 11 at 584. Contra, Skelton v. Collins, supra n. 99, at 113.

128 Benham v. Gambling [1941] A.C. 157, 166, per Viscount Simon L.C.

129 Id.

130 Sharman v. Evans, supra n. 11 at 584, cf. at 568, 590. See also Treacey v. Churchill, supra n. 85. The amount will increase with depreciation in the value of currency: Yorkshire Electricity Board v. Naylor [1968] A.C. 529.

(c) Loss of enjoyment of life, also called loss of amenities of life, which is concerned with the loss resulting from the destruction or diminution of a faculty and from the consequent inability of the injured person to enjoy life to the full, as apart from his injury, he may have done.[131] This head of damage is made up of both objective and subjective elements: the objective element focuses on the faculty which has been lost, whilst the subjective element focuses on the plaintiff's appreciation of the loss of the faculty. In the case where the plaintiff is totally or partially aware of his loss, substantial damages will be recovered under this head.[132] However, where the plaintiff is unconscious of his loss, it is established in Australia that, as damages can obviously be recoverable only for the objective element, which, as with loss of expectation of life, depends on the balance of happiness over unhappiness and which is accordingly really unassessable, only a moderate, though not a conventional,[133] sum should be recovered.[134]

Leaving aside damages for loss of expectation of life, the question arises as to how the courts can translate into damages subjective pain and suffering, and both the subjective and objective aspects of loss or amenities of life? Restitution is, of its nature, plainly impossible, but the courts have insisted that, although perfect compensation is not possible,[135] the objective is still to give fair compensation.[136] The real problem is, of course, that there are no acceptable criteria for judging what is fair compensation for a particular non-economic loss whilst concentration is focused in the abstract upon either the subjective or objective aspects of that loss. It has, therefore, been inevitable that the courts would have regard to decisions in comparable cases.[137] The objection to the courts doing so centres around the argument that no two cases are comparable,[138] but the answer to this is that the tariff which results from this approach is essentially flexible, and is, in any event, only a starting-point.

A more satisfactory approach to the quantification of non-economic loss could be developed by regarding the purpose of damages as that of providing the plaintiff with a reasonable solace for his pain, suffering

131 Skelton v. Collins, supra n. 99 at 113.
132 Sharman v. Evans, supra n. 11.
133 Hawkins v. Lindsley, supra n. 97.
134 Skelton v. Collins, supra n. 99. Contra, Lim's Case, supra n. 5.
135 See, e.g., Lee Transport Co. Ltd v. Watson (1940) 64 C.L.R. 1 at 13-4.
136 Thatcher v. Charles (1961) 104 C.L.R. 57 at 63.
137 See O'Brien's Case, supra n. 17, at 556.
138 Planet Fisheries Pty Ltd v. La Rosa, supra n. 60 at 124-5.

and loss of amenities.[139] Again, a flexible tariff could be used as a starting-point.

(C) *Collateral Benefits*

As a result of a personal injury a plaintiff may receive a number of benefits to which he would not otherwise be entitled. He may, for example, receive sick pay, or the proceeds of some insurance policy, or a pension, or social security benefits; or, he may be the recipient of charitable payments from some third party. The problem to which the law must address itself is the extent, if any, to which these receipts are to be taken into account in reduction of the plaintiff's damages.[140]

The most general attempt at a solution to the problem is to be found in the words of Windeyer J. in *National Insurance Co. of New Zealand Ltd.* v. *Espagne*:[141]

> In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if:
>
> (a) they were to be received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or
>
> (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages.

But Windeyer J.'s rules, as His Honour himself acknowledged,[142] are not exhaustive, and do no more than state the results of a number of specific decisions. But they are important simply because of the tendency of the courts in this area to reason by analogy from one benefit to another.

Windeyer J.'s first rule covers the decision in *Bradburn* v. *Great Western Railway Company*,[143] the first case to raise the collateral-benefits problem. In that case the Court of Exchequer Chamber held that the defendant cannot rely on a plaintiff's accident insurance policy to reduce his liability to the plaintiff, since *inter alia* the plaintiff bought this benefit for himself. This reasoning has been applied by analogy to employment-related pensions, whether contributory or non-

139 See, e.g. Teubner v. Humble, supra n. 100, at 506; Skelton v. Collins, supra n. 99, at 130-1, 136 per Windeyer J.

140 See Fleming, 'Collateral Benefits' 11 *International Encyclopedia of Comparative Law* ch. 11.

141 (1961) 105 C.L.R. 569 at 599-600 [hereinafter cited as Espagne's Case].

142 Id. at 600.

143 (1874) L.R. 10 Ex. 1.

contributory.[144] As regards Windeyer J.'s second rule, it has its genesis in the proposition that the benefits of benevolence do not reduce the damages recoverable, for the purpose of such payments is to benefit the plaintiff in any event, there being no intention to relieve the defendant of any liability.[145] This reasoning was applied by analogy in *Espagne's* Case:[146]

> P was awarded, under the Social Services Act 1947 (Cth.), an invalid pension in respect of permanent incapacity and permanent blindness resulting from an accident caused by D's negligence. *Held*: This pension was to be ignored in assessing P's damages since the pension was intended to benefit P irrespective of any right of recovery he may have against D, for whose relief from liability the pension was not intended.

It does not follow from this decision, however, that all payments under the Social Services Act 1947 (Cth), are to be ignored in the assessment of the plaintiff's damages. Thus, the better opinion is that unemployment benefits are to be taken into account in reduction of defendant's liability, for unemployment benefits are intended to replace wages lost, and so, as they deal with the same subject-matter as damages for lost earning capacity, there is no reason why the plaintiff should receive them together with common-law damages.[147] On the other hand an invalid pension of the type in *Espagne's* case would have been paid by the Commonwealth whether the plaintiff had lost any wages or not.

Although the 'purpose-of-the-benefit' test enshrined in *Espagne's* case is of potentially general application, and although it could even be used to explain the insurance cases, thereby rendering Windeyer J.'s first rule superfluous, it is nevertheless true that, unless the purpose of the benefit is clear from the intention of the donor or the surrounding circumstances, the test cannot easily be applied. Thus, in what is perhaps the most important area of extraneous benefits, namely, benefits provided by the Welfare State, unless the Statute governing the benefit expressly provides for cumulation or non-cumulation of the benefit with common-law damages, difficult questions of statutory construction can arise in a search for the supposed intention of Parliament.[148]

It is not surprising that there have been other attempts to discover a

144 Graham v. Baker, supra n. 63; Parry v. Cleaver [1970] A.C.1.

145 Deering v. Norton (1970) 92 W.N. (N.S.W.) 437.

146 Supra n. 141.

147 Tuncel v. Renown Plate Co. Pty Ltd [1976] V.R. 501. Contra, Canny v. John Pfieffer Pty Ltd (1979) 28 A.C.T.R. 11. Sick-leave payments are similar: see Luntz, supra n. 3, at 227-39.

148 Consider, e.g., the problem of the interpretation of s.25(1)(d) of the Social Services Act, 1947 (Cth) in Espagne's Case, supra n. 141.

general theoretical framework for this branch of the law in terms of punitive considerations,[149] and in terms of doctrines of remoteness and causation.[150] The deficiencies of these various approaches have now been exposed,[151] but the 'purpose-of-the-benefit' test, is, apart from difficulty of application, itself hardly satisfactory in policy terms. For example, it is simply not satisfactory, in terms of loss-distribution theory, that the plaintiff should be able to cumulate common-law damages and the proceeds of an accident insurance policy or a pension.[152] Indeed a policy-oriented analysis of each benefit which may come before the courts seems both desirable and inevitable in the light of Dixon C.J.'s warning that 'it is hardly possible to work out any principle which would apply to every case.'[153]

(D) *Mitigation of Loss*

The concept of mitigation of damages is concerned with the conduct of the plaintiff subsequent to his injuries. It is a corollary of the compensation principle that the plaintiff should take reasonable steps either to reduce the original loss or to avert further loss.[154] The reasons for this are not difficult to appreciate: it would obviously be unjust if an 'unreasonable' plaintiff who does not mitigate his loss were to receive more in damages than the 'reasonable' plaintiff who does; further, the mitigation requirement is one method by which the overall cost to society of legally compensatable injuries can be reduced.[155] However, it must be pointed out that the defendant has no legally enforceable right against the plaintiff to demand that the plaintiff mitigate his loss,[156] and the plaintiff who fails to mitigate in effect merely runs the risk of a lower award.[157]

Dr McGregor[158] has pointed out that the mitigation concept embraces three different but inter-related rules:

(i) The plaintiff cannot recover for loss which could have been reasonably avoided. It is established that no more is required of the

149 Id. at 599.
150 Id. at 576, 580.
151 Id. at 571-2, 589-96; Parry v. Cleaver, supra n. 144, at 15, 28, 30, 33-4.
152 See McGregor, 'Compensation versus Punishment in Damages Awards' (1965) 28 *Modern Law Review* 629; Atiyah, 'Collateral Benefits Again' (1969) 32 *Modern Law Review* 397.
153 Espagne's Case, supra n. 141, at 573.
154 British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Rail Co. of London Ltd. [1912] A.C. 673 at 689.
155 See Ogus *The Law of Damages* (1973) 85.
156 Darbishire v. Warran [1963] 1 W.L.R. 1067 at 1075.
157 E.g. Craig v. Garfitt-Moltram (1977) 17 A.C.T.R. 12.
158 Supra n. 22, at 150.

plaintiff than that he should act reasonably in the circumstances, and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer.[159] Further, the *onus* is upon the defendant to establish that the plaintiff failed to take reasonable steps to mitigate his loss.[160]

The question whether the plaintiff has acted reasonably in the circumstances is not always capable of an easy answer. Thus, while it can be said that the plaintiff's failure to follow medical advice and submit to an operation which will alleviate his condition will, in the normal case, be unreasonable,[161] the position is not so clear if the plaintiff has religious objections to a particular form of treatment. The courts lean towards an objective test. Thus, in *Walker-Flynn* v. *Princeton Motors Pty Ltd:*[162]

> P, a young Roman Catholic woman whose pelvis was fractured in an accident caused by D's negligence, had, by the date of the trial given birth to two children by caesarian section, and evidence was led that further caesarian sections would become progressively more hazardous, but that P, because of her religious beliefs, would not minimize the danger of a future pregnancy by resorting to artificial means of birth control. The trial judge directed the jury to decide whether the religious belief was genuinely held and reasonable, and, if it was, to award damages on that basis. The jury awarded substantial damages, and the award and direction were upheld on appeal.

However, Professor Luntz[163] cautions that 'it seems unlikely, if the plaintiff belongs to a relatively small sect, that the defendant will be required to take the plaintiff's religious idiosyncrasies as he finds them . . .' Thus, it may well be unreasonable for a Jehovah Witness to refuse a blood transfusion in mitigation of his loss.[164]

It should also be noted that a plaintiff's delay in bringing his action may be unreasonable, and, therefore, a breach of the mitigation rule, for example, if his condition is thereby worsened.[165]

(ii) The plaintiff can recover for loss incurred in reasonable at-

159 Banco de Portugal v. Waterlow & Sons Ltd [1932] A.C. 452.
160 Watts v. Rake (1960) 108 C.L.R. 158.
161 E.g. Smajic v. Bonic (1968) 88 W.N. (Pt 1) (N.S.W.) 588.
162 (1960) 60 S.R. (N.S.W.) 488.
163 Supra n. 3, at 70.
164 Consider Boyd v. State Government Insurance Office (Q'ld.) [1978] Qd. R. 195.
165 E.g. Marziale v. Hathazi (1975) 13 S.A.S.R. 150. Quaere, effect of inflation on P's failure to mitigate: see Feldman and Libling, 'Inflation and the Duty to Mitigate' (1979) 95 *Law Quarterly Review* 270.

tempts to mitigate his loss, even it seems if in the result his loss is greater than if he had not acted at all.[166]

(iii) The plaintiff cannot recover for loss which has been avoided, even if he has done more than was required of him under rule (i).[167]

[166] See McGregor, supra n. 22, at 174-6.

[167] British Westinghouse Electric and Manufacturing Co. Ltd v. Underground Electric Railway Co. of London Ltd, supra n. 154.