JAMAICA

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL 9/78

BEFORE: THE HON. MR. JUSTICE LEACROFT ROBINSON: PRESIDENT
THE HON. MR. JUSTICE KERR, J. A.
THE HON. MR. JUSTICE CARBERRY, J.A.

BETWEEN: FRANK COLEMAN - SECOND DEFENDANT: APPELLANT

AND DONALD MacDONALD - FIRST DEFENDANT: RESPONDENT

AND CAROL SMYTH - PLAINTIFF : RESPONDENT

Mr. Lennox Sanguinetti and Miss Webb for the Appellant.
Mr. J. D. MacDonald for first Defendant - Respondent.
Mr. R. D. Alberga Q.C. for Plaintiff - Respondent.

June 20 and 21 and September 24, 1979.

CARBERRY J. A.

This was an appeal from the Judgment of Sir John Summerfield, Chief Justice of the Cayman Islands, in a negligence action heard before him in the Grand Court of the Cayman Islands on the 3rd, 4th and 5th of May, 1978. The Judgment was delivered on the 28th June, 1978, and in it the Chief Justice found for the Plaintiff against the second Defendant, and acquitted the first Defendant, finding that the second Defendant was entirely to blame for the accident that resulted in the Plaintiff's injuries. The Plaintiff was awarded by way of damages the sum of C.I. $10,500.00 (agreed general damages), and the equivalent in Caymanian dollars of Canadian $9,365.14 (special damages: medical expenses). The second Defendant appealed from the finding that he alone was responsible for the accident, claiming that the accident was due to the fault of the first Defendant either entirely or at least in part, and he also appealed against the award of special damages claiming that these are not in the circumstances of this case recoverable

We dismissed the appeal on both liability and damages, promising to put our reasons in writing at a later date: we do so now.

The action arose out of a collision that occurred in the vicinity of Holiday Inn Hotel on the night of the 3rd August, 1974. The Hotel lies on the western side of the main road that runs from George Town to West Bay. The road is asphalted, level and some 32 -33 feet wide at the scene of the accident. It runs from north to south.

The Plaintiff Carol Smyth, a Canadian now resident in Toronto and employed to the Royal Bank of Canada, was at that time resident in Grand Cayman and employed in the George Town Branch of that Bank. On the evening in question she was invited by the first Defendant, Donald MacDonald, a young man also resident in Toronto but then residing in Grand Cayman, to take a ride on his new motor cycle, a Honda 750 cc. They left on this ill fated expedition from the Beach Club Colony Hotel, which also lies on the West Bay road about a mile south of Holiday Inn Hotel. It was the Plaintiff's first experience of the joys and perils of riding as pillion passenger on a motor cycle and she stipulated for a short ride, at a not very fast speed. They turned left and rode north along the West Bay Road. The speed limit on that road is 50 miles per hour, and they did not exceed it. It was a dry fine night. There is a moderate bend to the left in the road in front of the Holiday Inn Hotel. To the north of the Hotel lies its parking area which opens on to the road. As the young couple approached the Holiday Inn Hotel and the bend in the road in front of it, they became aware of a car coming out of the Hotel car park. It was a Dodge Dart motor car driven by the [illegible] Defendant, Frank Coleman,

and, as it transpired, the second Defendant intended to turn right and go south along the West Bay Road, that is in the opposite direction to that in which the motor cycle was proceeding.

In Cayman the rule of the road requires drivers to drive on their left, so that the manoeuvre intended by the second Defendant involved coming out of the car park and turning right, across the path of the approaching motor cycle. Driving on the main road the motor cyclist had prior right of way over the driver emerging from the car park, and this was increased or strengthened by the car driver's intended turn to his right, across the path of the approaching motor cycle. It was clearly his duty not to come out, especially if he was turning right, until it was safe to do so having regard to the traffic on the main road.

Despite the approaching motor cycle, the lights of which were clearly visible, the second Defendant, after apparently pausing at the car park entrance (and so leading the first Defendant the motor cycle driver to believe that he was about to stop), nevertheless came out and turned right across the path of the approaching motor cycle, and a collision took place on the eastern side of the road (the right hand side for the motor cyclist) with the motor cyclist swinging to his right to avoid the collision, and the car apparently just in process of straightening up after turning right and trying to reach its left before the motor cyclist passed.

The Plaintiff was thrown from the motor cycle and broke both legs: she spent roughly half a year in Hospitals, principally in Canada, undergoing various operations on both legs, as a result of which she has been left with various scars on her right leg and a

certain residual disability therin. She suffered no loss of earnings as her employers, the Royal Bank of Canada, paid her full pay while she was incapacitated and she has since resumed her employment with them, on the same terms as before, with no loss of salary or pension rights. Her general damages were agreed at C.I. $10,500. and there is no appeal on that score, though there is with regard to the bill for her medical expenses, or special damages.

No contributory negligence was alleged against the Plaintiff, and as the passenger (or pillion rider) she must clearly recover against one or other or both defendants.

As was to be expected each Defendant driver blamed the other for the accident, alleging that the other was wholly or entirely to blame. The broad outlines of the accident have already been indicated. In addition there was a drag or skid mark of 48' 5" made by the motor cycle which ran from roughly left of the middle of the road or slightly to the left of it, over to the point of impact on what would have been the motor cyclist's right hand side of the road.

The learned Chief Justice in an admirably careful and considered judgment reviewed the evidence given by the parties and in particular by each Defendant (the Plaintiff had little to contribute, as pillion rider she saw little). The first Defendant, the motor cycle rider, described his efforts to avoid the accident: he had expected the car to stop; he slowed down and made to pass in front of it, realizing it nevertheless intended to continue to come out he was unable to swing sharply back to his left and pass behind it, and instead attempted to go still further to his right and pass in front of it, the car however accelerated as he [illegible] apparently intending to

cross over in front of him and gain the other side of the road. Collision was now inevitable, he locked his brakes changed down and went still further to his right still expecting the car to stop: it did not.

The second Defendant, the driver of the motor car, gave evidence to the effect that having came to the entrance of the car park he stopped, looked both left and right, saw no traffic coming, (if the approaching motor cyclist could and did see his headlights, the car driver's failure to see the headlight of the approaching motor cyclist would indicate no, or/proper lookout); he then came out into the main road, and only at that stage in the middle of crossing did he perceive the approach of the other vehicle on his right, then he attempted to get out of its way by accelerating to complete his turn and get on to his proper side of the road leaving the other half of the road clear for the approaching vehicle. To his surprise it came over in his direction and hit him after he had already straightened up on his side of the road.

Not surprisingly, the Chief Justice accepted the evidence of the first Defendant and rejected that of the second Defendant. He found, and we see no reason to disagree with him, "that what really happened was that the second Defendant, in deciding to emerge from the access road and cross the main road, misjudged the distance of the light of the motor cycle from him. This can easily happen at night. In consequence he emerged when the motor cyclist was too close to allow him to cross safely; and too close to allow the motor cyclist to brake sufficiently or to take any other avoiding action to prevent the collision."

The Chief Justice clearly rejected the suggestion that the speed

of the cyclist played any part in the second Defendant's misjudging of the distance away of the cyclist, and observing that the manoeuvre of the car had placed the motor cyclist in a dire quandry as to what to do, he found "that the second Defendant was wholly to blame for the collision and the ensuing injuries to the Plaintiff."

Before us the appellant argued that the Chief Justice had erred in not accepting the second Defendant's version of the accident, and in not finding the first Defendant, the motor cyclist, at fault, in taking avoiding action too late, and in taking the wrong avoiding action. With a pillion rider who had little or no experience he should have been more careful and should not have allowed himself to get into this situation. This seems to us to completely ignore the fact that it was the second Defendant who created the situation, and that the position so created was well within the rule in The Bywell Castle (1879) 4 P.D. 219. (C.A.), or for that matter the situation in Brandon v Osborn Garrett & Co. (1924) 1 K.B. 548

The Appellant, the second Defendant, had created by his negligence a position of extreme danger for the on-coming motor cyclist, and the latter was not to blame if in the agony of the moment he had not manoeuvred with perfect skill and presence of mind.

The apportionment of liability between two joint tortfeasors involves the same exercise as apportionment in cases of contributory negligence; it involves consideration of both causation and blameworthiness. A Court of Appeal will not lightly interfere with the

assessment made by the trial Judge unless a clear error of law or fact has been made: Quintas v National Smelting Co. Ltd. (1961) 1 All E.R. 630;)(C.A.) The Abadessa (1967) 1 A.C. 826; Brown v Thompson (1968) 2 All E.R. 708 (C.A.)

Despite the strenous efforts of Mr. Sanguinetti we remained unpersuaded that any such error had occurred, and we did not find it necessary to hear the Respondents on the issue of liability.

The problem posed by the claim for special damages, the Plaintiff's medical expenses, seemed more worthy of consideration and was fully argued before us, though here too we reached the clear conclusion that the Chief Justice had correctly decided to allow the claim, and on reflection we do not entertain even the slight doubt on the matter that he expressed.

The problem arose in this way. The Plaintiff is and was then insured in respect of her health with or in what is described as the Ontario Health Insurance Plan. She pays one third of the premiums involved and her employers pay the other two thirds. The plan or insurance scheme is apparently operated by the Ministry of Health of the province of Ontario, Canada. The Plaintiff's entire medical and hospital bills amounting in all to Can. $ 9,365.14 were paid for her by this organization, and the full details of all the charges were set out in her Statement of Claim. It is clear that this scheme paid no more and no less than the medical, surgical and hospital charges involved in treating the Plaintiff for the very serious injuries that she experienced in this accident. In short it indemnified her in respect of these expenses, but apparently, under the terms of the

scheme, where her injuries have resulted from the negligence of persons against whom she may bring an action for damages, the Plaintiff is obliged to repay to the scheme the expenses that she collects from the other side on this score. The operators of the scheme regard themselves as "subrogated" to the Plaintiff's interest, and have the right to recover from the Plaintiff what she recovers from the Defendant in respect of these medical expenses.

Though the scheme is designed for the province of Ontario, it apparently will cover participators who are abroad but who keep up their payments and involvement in the scheme, and this was apparently done by the Plaintiff and her employer (both in Canada and Cayman) the Royal Bank of Canada.

The Plaintiff's medical Reports were put in by consent, and they have not been challenged in any way. No one challenges the expenses either, in the sense that they are admitted to have been incurred and to have been paid, though not by the Plaintiff herself but by the Ontario Health Insurance Plan. Further it is not suggested in any way that the expenses are not reasonable. What is suggested is that as the Plaintiff did not pay them herself out of her own pocket in the first place, but that some one else paid them for her, the Plaintiff is not entitled to recover them (though she will do so in trust for the O.H.I.P.), they are not a loss that she has incurred.

It is to be noted that there is no suggestion that the Plaintiff will be making a profit; she is obliged to turn over this money to her state Government. The Defendant on the other hand, who would normally be liable to pay those expenses (once liability for)

charges reasonable; the fact that she is obliged to pay them over to the Ministry of Health of Ontario and will not be able to "pocket" them is an additional factor making for their recovery, as is the fact that the payment was as a result of insurance for which the Plaintiff pays the premimums, though in part only.

The problem posed here stands at the edge of a much larger controversy that has been raging for some time in all the countries using the English commom law. The damages awarded to a Plaintiff in an action for negligence are compensatory not punitive; they are intended to provide restitution for the plaintiff, not to visit retribution on the defendant: (See per Diplock L.J. in Browning v The War Office (1963) 1 Q.B. 750 at 764).

From this basis springs the problem: granted that a Plaintiff has been injured by the Defendant, so that he has been unable to work and earn wages, and has incurred expenses for medical treatment and the like, what is to happen if some third person, from motives of benevolence or otherwise, pays to the Plaintiff sums of money intended to compensate or provide for his salary, or meet his expenses; does this receipt by the Plaintiff mean that the Plaintiff is to be debarred in whole or in part from making his claim for lost salary or for the expenses incurred from the Defendant? Is it to be said that the Plaintiff has by reason of the receipt of this extraneous money not suffered the loss that has been inflicted on him: that there is no longer any further need, pro tanto, for restitution from the Defendant, and that to demand it of him is to exact retribution rather than extract restitution? Another way of asking this question is to ask

whether in this situation the Defendant is to reap the charity or benefit intended for the Plaintiff, or to benefit perhaps from the provision that the Plaintiff has made by way of insurance or otherwise?

The Defendant's approach to the matter is to say that the particular loss, no thanks to me it is true, has not been experienced due to the payment made by the provider, so why should I have to meet it? The Plaintiff's approach is to say the Defendant has injured me and should pay for those losses: the fact that some third person has provided me with money is no concern of the Defendant, it was not meant to help him, or to relieve him from liability, it was meant to help me, and his liability remains. Why should not the Defendant pay what he was due to pay? Why should I not retain with thanks the benefits that a compassionate provider moved by pity has given to me? There are various other in-between or complicating factors: The third person or provider may be the Plaintiff's own employer: where he provides sick pay or leave, then the truth of the matter is that it is he who has lost: he is paying wages or salary and getting no equivalent in services in return because the Defendant's negligence has deprived him pro tempore, (sometimes permanently) of the Plaintiff's services, yet as the matter now stands the employer can not sue to recover those lost wages: Attorney General for New South Wales v Perpetual Trustee Co. (1955) A.C. 457: (1955) 1 All E.R. 846 (P.C) and I.R.C. v Hambrook (1956) 1 All E.R. 578 (C.A) overruling Attorney General v Valle Jones (1935) 2 K.B. 209; (1935) All. E.R. 175. Nor can the Plaintiff sue to recover them, for if they were paid to him as of right, i.e. under the

terms of his service contract, then it is said the Plaintiff has not lost them and so cant recover, either. See for example Graham v Baker (1961) 106 C.L.R. 340 and Browning v War Office (supra). However if the employer pays them as purely voluntary payments, or perhaps has the prudence to pay them on terms that he will get them back if the Plaintiff recovers them from the Defendant, then the Plaintiff may recover them, though he will do so on trust to repay the employer: see for example Dennis v London Passenger Transport Board: (1948) 1 All E.R. 779 (Denning J); Myers & Guelph v Hoffman (1956) 1 D.L.R. (2nd) 272 (Ontario High Ct).

Nevertheless disability pensions in contrast to sick pay are never to be deducted or reckoned in the Defendant's favour: see Payne v Railway Executive (1952) 1 K.B. 26; (1951) 2 All E.R. 910 (CA) and Parry v Cleaver (1970) A.C. 1; (1969) 1 All E.R. 555 (H.L.) following a series of Australian High Court decisions, Paff v Speed (1961) 105 C.L.R. 549; National Insurance Co. of New Zealand v Espagne (1961) 105 C.L.R. 569; Graham v Baker (supra) and Jones v Gleeson (1965) 39 Aus. L.J.R. 258 (All of which were contrary to Browning v War Office and the latter of which refused to follow it).

The techniques involved in the several common law courts in attempting to resolve the problem are fascinating. Sometimes resort is had to the doctrine of "causation": can it be said that the provision made by the provider was "caused" by the accident that befell the Plaintiff? If it was not so "caused" but was due to "extraneous" factors, then the provision will not assist the Defendant: see for example Hay v Hughes (1975) 1 All E.R. 257 (CA) (grandmother taking

in orphaned grandchildren). At other times resort is had to the doctrine of "remoteness" and it is said that the provision by the provider was too remote and therefore not deductable. At other times resort is made to the concept of whether it is "just and equitable" that the Plaintiff should get the benefit of the provision without having to account or whether the Defendant should in effect get the benefit of the provision in having it deducted from the damages he is required to pay: see for example Lord Denning M.R. Browning v War Office) (supra) (The cannons of what is just and equitable are apt to be elusive, as that judgment was overruled in Parry v Cleaver (supra)). In the Australian cases both Dixon C.J. and Windeyer J. have been apt to discard "causation" and to direct attention to the "forgotten man," the actual "Provider" and to ask whether the provider meant the Plaintiff to have the provision regardless of whether he recovered from the Defendant or not. See the Espagne case (1961) supra. In the case of charitable or public fund subscriptions for victims of natural or other disasters it is usually easy to see that the provider meant the Plaintiff to enjoy the provision regardless of the Defendant's liability, and in such a case the provision is not deductable in favour of the Defendant: see Redpath v Belfast & County Down Railway (1947) N.I. 167. The problem, unfortunately, is likely not only to remain with us, but to increase, because with the growth of the "Welfare State" and public provisions for citizens who suffer from some form of disablement or the other, there enters on the scene a new "provider" whose intention will not be gleaned from his utterances but must be deciphered from the Statutory instruments or Laws setting it up.

In all this welter of authority there are at least two lines of cases which however provide a clear and unambiguous answer to the problem presently before us.

There are first the Insurance cases:

It is convenient to set out in full the relevant paragraph taken from McGregor on Damages 13th Edn. (1972) para. 1116(a): dealing with deductions in calculating loss of future earnings:

> "(a) Insurance moneys. As early as 1874 it was decided in Bradburn v G.W. Rlwy. ((1874) L.R. 10 Ex. 1) that, where the Plaintiff had taken out accident insurance, the moneys received by him under the insurance policy were not to be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys. This decision has withstood all the recent changes of judicial heart over the issue of collateral benefits and is solidly endorsed by Parry v Cleaver ((1970) A.C. 1) not only by the majority who relied upon it by analogy, but also by the minority who sought to distinguish it. The argument in favour of non-deduction is that even if in the result the Plaintiff may be compensated beyond his loss he has paid for the accident insurance with his own moneys and the fruits of this thrift and foresight should in fairness enure to his and not to the defendant's advantage."

At page 765, para. 1133, McGregor on Damages, again deals with insurance moneys, this time with reference as to their deductability in respect of claims for medical expenses. The passage reads thus:

> "1133 (a) Insurance moneys. Whether a plaintiff whose mdeical expenses have been paid for him under a private medical insurance scheme to which he subscribes, such as that run by B.U.P.A., is entitled nevertheless to claim the expenses as part of his damages is a question which does not appear to have been explicitly passed upon by the courts. It would seem likely that the analogy of the non-deductibility of insurance moneys in relation to loss of earnings - a rule unanimously supported by their lordships in Parry v Cleaver - would prevail since the argument in favour of non-deduction, viz. that the plaintiff has paid for the insurance with

> his own moneys and should not be deprived of the fruits of his thrift and foresight to the defendant's advantage, applies as much in this context as in the other. Indeed the plaintiff may have an accident insurance policy, the moneys from which he can deploy as he cares between the payment of his medical expenses and the replenishment of his lost earnings, or which indeed he may spend in any other way he choses. Nor should it make any difference that, as may frequently be the case here, the insurance moneys, instead of being paid directly to the plaintiff, are applied directly by the insurer in payment of the medical expenses."

We are of the view that the opportunity having now occurred for this court to deal "explicitly" with the problem so far as it relates to the recovery of medical expenses, we ought to hold and do hold that the payment of the medical expenses by accident insurance taken out by the Plaintiff, whether solely or by way of a contribution with her employer, does not in any way prevent their recovery from the Defendant and that the principle enunciated in Bradburn v G.W. RlWy (supra) applies. As was said by Pigott B: "He (the Plaintiff) does not receive that sum of money (the insurance) because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it".

While it is true that the Plaintiff in this case contributed one third only of the premium, the argument that only one third of the medical expenses should therefore be paid by the Defendant is but an ingenious attempt to reap where the Defendant has not sown. It fails. But it should be added that if it were the case that the Defendant were the employer who had contributed the other two thirds of the premium, then the Defendant would be entitled to two thirds of the

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benefit of the insurance coverage: Parsons v B.N.M. Laboratories (1964) 1 Q B 95; (1963) 2 All E.R. 658; Turner v Ministry of Defence (1969) 113 S.J. 585 (C.A.).

See further Jones v Gleeson (1965) 39 A.L.J.R. 258, a decision of the High Court of Australia (approved by the House of Lords in Parry v Cleaver), where that Court refused to permit the deduction of a contributory pension from the damages (awarded for future loss of income) though the Plaintiff contributed only in part to the pension fund, the other part being furnished by the Plaintiff's employers.

In Parry v Cleaver (1970) A.C. 1 at 14 et (1969) 1 All E.R. 555, at 558 D Lord Reid said as regards "benevolent" contributions to the Plaintiff and benefits of insurance policies:

> "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, and that the only gainer would be the wrongdoer.....
> 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. Here again I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest."

After referring to Bradburn's case, and another, he continues:

> "Then I ask --- why should it make any difference that he insured by arrangement with his employer rather than with an insurance company?"

He went on to hold that a contributory pension was in reality a form of insurance, and that this was true even of a non contributory

pension: the employee in effect insured and earned this benefit by his past services.

The dissenting judgments in that case, so far as the proceeds of insurance policies were concerned, were to like effect: See Lord Morris 31 D&(at p. 572 G) and Lord Pearson at 49 & (at 588).

Apart from the fact that these expenses were paid by the proceeds of an accident insurance policy, they were also recoverable on other grounds, both in principle and on authority.

There is no question but that they were expenses rendered necessary by the defendant's conduct and that the charges made therefore were reasonable. There is nothing punitive in calling on a defendant to pay for the expenses which have been incurred by or on behalf of the Plaintiff as a result of the injury that he has caused to the Plaintiff.

Had the Plaintiff borrowed money from the bank to pay these expenses clearly they would be recoverable. Nor does it make any difference that a third person has advanced them on behalf of the Plaintiff: See Allen v. Wates (1935) 1 K.B. 200 (C.A.) (husband paying injured wife's medical expenses); Liffen v. Watson (1940) 1 K.B. 556 (1940) 2 All E.R. 213 (C.A.) (injured domestic servant allowed to recover not only lost wages but value of lost board - though her father had maintained her in this period); Winkworth v. Hubbard (1960) 1 Ll.L.R. 150: (son recovering expensive medical bill paid for by his mother: Streatfield J. said at p. 158:

> "It is said that one reason why he cannot recover them is because he himself did not pay them; they were all paid by his wealthy mother. The way he (Plaintiff) put it was: . . . that . " I anticipate that I will

> be repaying my mother, "and that seems to be quite a fit and proper attitude for a young man to adopt. The mere fact that they have been paid by somebody who is wealthier than he is himself does not seem to me to be any good reason why he should not recover them.")

And see also Schneider v Eisovitch (1960) 2 Q.B. 430; (1960) 1 All E.R. 169 where friends of the Plaintiff incurred considerable out of pocket expense to go to France and bring back Plaintiff and the body of her husband, both having been seriously injured in a motor car accident. Paull J. at p. 174, allowing the recovery of these expenses said: "In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability.....I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the Plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out of pocket expenses of the friend or friends who rendered these services are reasonable bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted, and, thirdly that the plaintiff undertakes to pay the sum awarded to the friend or friends."

The reference to a "legal liability to pay" is a reference to the view previously entertained in some of these cases, that unless the Plaintiff was under a legal liability to repay the advance made by the "provider" the advance was not recoverable from the Defendant. See Gage v King (1960) 3 All E.R. 62 at 65. This was extended to cases where services were provided, and payment for them was involved: e.g. spouses giving up work to look after injured spouse: See Janey v Gentry (1966) 110 Sol Jo 408. This led in some cases to the parties, husband and wife, mother and son, going through the formality of signing contracts prepared by their legal advisers to pay for the service or to repay the advance: See Hagger v dePlacido (1972) 2 All E.R. 1029.

It will be noticed that Paull J. in Schneider v Eisovitch (supra) had laid down as the third condition for recovery of advances made voluntarily (or otherwise) to cover the Plaintiff's necessary expenses, that Plaintiff should have undertaken to repay those advances, following in this respect Dennis v L.P.T.B. (1948) 1 All E.R. 779 where Denning J. (as he then was) had imposed such a condition.

These earlier requirements of an obligation by the Plaintiff to the provider have been relaxed and virtually eliminated in later cases: see Jattson v Port of London Authority (1969) 1 LL.L.R. 95, MeGaw J. at 102; and Cunningham v Harrison (1973) 3 All E.R. 463 where Lord Denning M.R. at page 469 said:

> ".....it has been said in some cases that a Plaintiff can only recover for services rendered to him when he was legally liable to pay for them: see for instance Kirkham v Boughey (supra) and Janney v Gentry (supra). But, I think that view is much too narrow. It seems to me that when a husband is grieviously injured -- and is entitled to damages -- then it is only right and just that, if his wife renders service to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for her and pay it over to her. She can not herself sue the wrong doer: see Best v Samuel Fox & Co. Ltd. (1952) A.C. 716; but she has rendered services necessitated by the wrongdoing, and she should be compensated for it. ...."

This line of authority was carried still further in Donnelly v Joyce (1973) 3 All E.R. 475; (1973) 3 W.L.R. 514, where MeGaw L.J giving the judgment of the Court of Appeal said: at p 479H to 480 E

" Counsel for the defendant's first proposition is that a plaintiff cannot succeed in a claim in relation to someone else's loss unless the plaintiff is under a legal liability to reimburse that other person. The plaintiff, he says was not under legal liability to reimburse his mother. A moral obligation is not enough. Counsel for the defendant's second proposition is that if, contrary to his submission, the existence of a moral, as distinct from a legal, obligation to reimburse the benefactor is sufficient, nevertheless there is no moral obligation on the part of a child of six years of age to repay its parents for money spent by them, as in this case.

We do not agree with the proposition, inherent in counsel for the defendant's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff - the injured person - the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages - for the purpose of the ascertainment of the amount of his loss - is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the 'provider'; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received, because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do. The question of legal liability to reimburse the provider may be very relevant to the question of the legal right of the provider to recover from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer."

The Judgment of the Court of Appeal is a long one, and further extracts from it would unnecessarily prolong our own. It is we think fairly summed up in the headnote to the report in the All England Reports, which reads:

> "Held - In an action for damages for personal injuries incurred in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supplying the plaintiff's need. It followed therefore that the defendant was liable to the plaintiff for the cost of the mother's services, i.e. her loss of wages, necessitated by the defendant's wrongdoing.
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> Roach v Yates (1937) 3 All E.R. 442 and Liffen v Watson (1940) 2 All E.R. 213 applied. Dictum of Paull J. in Schneider v Eisovitch (1960) 1 All E.R. at 174 approved. Haggar v de Placido (1972) 2 All E.R. 1029 disapproved."

We would respectfully agree with the Judgment of the English Court of Appeal given by MeGaw L.J. and would adopt as our own his closing remarks: "In our judgment, the loss here in question, on principle and authority, was the.....plaintiff's loss.
(She) is entitled to recover damages in respect of the fair and reasonable cost of the special attention, necessitated by the defendant's wrong doing. The fair and reasonable cost is the amount awarded by the judge under this head....."

In the result therefore it appears to us that the learned Chief Justice was correct in holding that this Plaintiff was entitled to recover from the Defendant "the special damages claimed on the understanding and condition that they are paid to the Ontario Ministry of Health in satisfaction of that Ministry's subrogated rights." Indeed, it is our view that she would have been so entitled

even if she was under no legal obligation to pay same over to the Ontario Ministry of Health.

The Plaintiff was entitled to recover this sum from the Defendant not only under the principles laid down in Bradburn v Great Western Railway, as to accident insurance policies, but also under the wider principles indicated in Donelly v Joyce. If, as is alleged, the Plaintiff is under a legal obligation to refund this sum to the Ontario Ministry of Health, then even on the narrowest view advanced in the cases that we have been referred to and have mentioned above, the Defendant is liable to reimburse this sum to the Plaintiff so that that legal obligation may be discharged.

We have referred to several English and Commonwealth judgments in this particular area. They show that all the common law jurisdictions have wrestled with these problems in one way or another. It seems fitting to conclude with the observations made by Windeyer J. in National Insurance Co. of New Zealand Ltd. v Espagne (1961) 105 C.L.R. 569 in the High Court of Australia, in a passage in which he tentatively attempted to sum up the cases on this topic as of that date. He says in a passage that seems most apt to our present case, and which appears at pages 599 to 600:

> "What finally emerges? Phrases such as causa causans, collateral matter and so forth being discarded, how are we to ascertain what is remote? Is there a governing principle in all these cases? So far as any rules can be extracted, I think they may be stated, generally speaking, as follows: 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 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. The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that by subrogation or otherwise, the contract my require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause."

Though qualified by the observation that each case must depend on its own facts, the passage cited above appears to us to reinforce the conclusion to which we came based on a study of the recent line of cases, and the older line of authority in the "insurance" cases. For these reasons the appeal was dismissed, the Order or Judgment of the learned Chief Justice was affirmed, and the Respondents were held entitled to the usual costs of the appeal, to be taxed or agreed.

Seacroft Robinson: President

I agree

Kerr, J. A.

I agree

negligence against him has been established), seeks to avoid their payment and to become as it were the unintended beneficiary of the Plaintiff's (and her employers') accident or health insurance plan, to which he made no contribution direct or indirect.

Does the fact that these medical expenses incurred by the Plaintiff (and which were both reasonable and necessary) were paid for the Plaintiff by the Ontario Health Insurance Plan prevent the Plaintiff from recovering them from the Defendant, particularly when under the terms of the judgment appealed from she will recover them in trust for the Insurers, and they have been awarded to her "on the understanding and condition that they are paid to the Ontario Ministry of Health in satisfaction of that Ministry's subrogated rights"?

It is unfortunate that we do not have the exact terms and conditions of the Ontario Health Insurance Plan in evidence before us. This is to some extent understandable. The Plaintiff is resident in Canada and her lawyers in Cayman. Her medical reports were apparantly circulated to the Defendants before the trial, her expenses were itemized in detail and apparently neither were going to be seriously challenged; it appears that the fact that these bills were paid by the O.H.I.P. was not fully appreciated by the Defendants, while the Plaintiff's lawyers on their side did not expect that the fact to provoke the challenge that was made. However it seems to us though handicapped by the lack of the details of the scheme that on any view of the matter the Plaintiff must be entitled to recover these expenses from the Defendant responsible for her injuries, once it is clear that they were in fact incurred (and paid), were necessary and the