[Home] [Databases] [World Law] [Search] [Copyright] [Privacy] [Disclaimers] [Feedback]

United Kingdom House of Lords Decisions

You are here: BAILII >> Databases >> United Kingdom House of Lords Decisions >> [2001] UKHL 36

[Database Home Page] [Database Search] [Database Case Name Search] [Recent Cases] [Noteup] [Context] [Help]

Cantwell v. Criminal Injuries Compensation Board (Scotland) [2001] UKHL 36 (5th July, 2001)

HOUSE OF LORDS

Lord Bingham of Cornhill Lord Steyn Lord Hope of Craighead Lord Hobhouse of Wood-borough Lord Scott of Foscote

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

CANTWELL

(RESPONDENT)

v.

CRIMINAL INJURIES COMPENSATION BOARD

(APPELLANTS)

(SCOTLAND)

ON 5 JULY 2001

[2001] UKHL 36

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I gratefully adopt, and need not repeat, his most helpful review of the facts and issues in this appeal.

2. The Criminal Injuries Compensation Scheme 1990 was an extra-statutory scheme for compensating victims of crimes of violence. Its object was to put qualifying victims in the same position financially as they would have been in had they not been injured but not to make them better off. Paragraph 12 of the scheme provided for the assessment of compensation on the basis of common law damages (subject to the other provisions of the scheme), and common law damages for personal injuries are intended to compensate, not enrich. On this short ground the decision under appeal appears anomalous. From his normal date of retirement Mr **Cantwell** lost the retirement pension which (but for his injury) he

would have drawn; he gained an ill-health pension which (but for his injury) he would not have drawn. If, as the First Division held, he is to be compensated for loss of his retirement pension after his normal retirement date without giving credit for his ill-health pension received during that period, there being only £1,500 per annum difference between the two, he will be much better off financially than if he had never been injured. This anomaly was fully recognised by the First Division, which described its decision as "inequitable", but the court felt constrained to decide as it did by section 10(a) of the Administration of Justice Act 1982, which Lord Hope has quoted and which, in the court's view, needed amendment.

3. On a straightforward application of the approach indicated in *Parry v Cleaver* [1970] AC 1, Mr **Cantwell** would have been required to give credit for his ill-health pension received after his normal retirement date, since this would have involved an appropriate comparison of pension with pension, like with like. This was the approach adopted by a majority of the Criminal Injuries Compensation Board and upheld by the Lord Ordinary. Since *Parry v Cleaver* was treated as authoritative in England and Wales and was, as I understand, regarded in Scotland as an accurate reflection of Scots legal principles, this ruling would appear to have been sound in principle and just in its practical outcome.

4. The issue in *Parry v Cleaver*, however, concerned the proper treatment of a police officer's ill-health pension received before his normal date of retirement, and it was ruled that no account should be taken of this in calculating his loss up to that date. That is not a result for which either party to this appeal contends. The Board ruled in the present case that in calculating Mr **Cantwell's loss until his date of normal retirement there should be deducted one half of the value of the ill-health pension he had received up to that time. That decision was not challenged by either party before the Lord Ordinary, the First Division or the House. It was plainly based on paragraph 20 of the scheme, which Lord Hope has quoted. That paragraph did indeed provide for the deduction of half of any taxable "pension accruing as a result of the injury". The parties are agreed that this description covered Mr Cantwell's ill-health pension received up to his normal retirement date. It might be thought to cover Mr Cantwell's ill-health pension received after his date of normal retirement also since paragraph 20 drew no distinction between pensions received before and after the applicant's date of normal retirement. The contention that paragraph 20 governed Mr Cantwell**'s entitlement after as well as before his date of normal retirement was however rejected by a majority of the Board, the Lord Ordinary and the First Division, and has not been repeated in the House. It is accordingly not open to review. But one can understand why a minority of the Board saw logical force in this contention.

5. Although the First Division reluctantly treated section 10 of the 1982 Act as determinative of the appeal to it, this section was not mentioned by the Board in its judgment and the Lord Ordinary agreed with the submission on behalf of the Board that

> "there is no sound reason whatsoever for concluding that the effect of Section 10 of the 1982 Act is to alter the common law position in Scotland to the effect contended for by [Mr **Cantwell**]."

If, as I understand, *Parry v Cleaver* was or would have been accepted as accurately reflecting the principles of the Scots common law, and if section 10(a) did not alter the Scots common law, one is bound to wonder why the provision was enacted at all and why it was enacted in terms which led the First Division to put upon it the construction which, not to my mind surprisingly, it did. The best efforts of counsel have done little to dispel this mystery. The report of the Scottish Law Commission to which Lord Hope refers gives no hint of an intention to depart from *Parry v Cleaver*, but nor does it identify any omission or anomaly which section 10(a) could have been intended to address. If section 10(a) was enacted for the avoidance of doubt it has not proved notably successful.

6. It seems clear from references which Lord Hope has given that in the period of nearly twenty years since section 10(a) was enacted it has not been understood to have the effect which the First Division has given to it in this case. Yet many claims relating to pension loss after the date of normal retirement must have been disposed of during that period, presumably according to conventional *Parry v Cleaver* principles. Lord Hope has shown how section 10(a)

may be read conformably with those principles. Since those principles, when applied to the post-normal retirement period, yield what is to my mind a just result, and since no reason has been shown why section 10(a) should have been intended to yield a different result in a case such as this, I am happy to concur in making the order which Lord Hope proposes.

LORD STEYN

My Lords,

7. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hobhouse of Woodborough. For the reasons they have given I would also make the order which is proposed.

LORD HOPE OF CRAIGHEAD

My Lords,

8. This case raises a short but important point relating to the calculation of the amount of damages for personal injury. Although it takes the form of a dispute between the injured party and the Criminal Injuries Compensation Board as to whether compensation is available to the injured party under a scheme for compensation which is administered by the Board, the case is of much wider interest. This is because the decision which your Lordships are being asked to take will affect the calculation of damages for personal injury in all cases on similar facts in the ordinary courts in Scotland.

9. On 21 May 1992 the respondent Ian **Cantwell** was assaulted in the course of his duty as a police officer. The injuries which he sustained were such that on 1 June 1993 he had to retire on medical grounds from the police force. In normal course he would not have retired until 16 April 1996. On taking early retirement he became entitled to an ill-health pension under the Police Pensions Regulations 1987 (SI 1987/257), as amended by further regulations in 1990 (SI 1990/805) and 1996 (SI 1996/867). He commuted part of that pension into a lump sum. The remainder took the form of a continuing annual pension, which is taxable. But he lost his entitlement under the 1987 Regulations to a retirement pension on reaching his normal retirement age. Their Lordships were told that in round figures the sum which the respondent has received since his retirement date by way of ill-health pension is £13,700 per annum. If he had continued in service to his normal retirement age he would have received a retirement pension of £15,200. It should be noted that, although the two pensions are distinguished from each other in the 1987 Regulations by means of a different adjective, they are both pensions and they are both products of the same scheme.

10. The respondent applied for compensation to the Criminal Injuries Compensation Board. The function of the Board is to decide what compensation should be paid to the victims of crimes of violence under a scheme known as the Criminal Injuries Compensation Scheme. The Scheme has now been superseded by new arrangements, and it is in the course of being wound up. But the Board continues to deal with applications which were lodged under the Scheme, and the respondent's application falls into that category. Paragraph 5 of the Scheme provides that compensation will not be payable unless the Board are satisfied that the injury was one for which the total amount of compensation payable after deduction of social security benefits, but before any other deductions under the Scheme, would not be less that the minimum amount of compensation, which shall be £1,000. Paragraph 12 states that, subject to the other provisions of the Scheme, compensation will be assessed on the basis of common law damages.

11. The respondent's application for compensation was refused by a single member of the Board, Mr Crawford Lindsay QC, on 28 September 1995 on the ground that, taking account of the benefits, past and future, which would have to be deducted under the Scheme, the sum which the respondent would be awarded was below £1,000. The respondent applied for a hearing, which took place in Glasgow before five members under the chairmanship of the Chairman of the Board, Lord Carlisle of Bucklow QC. On 17 July 1997 the Board issued a judgment in which the decision of the single member was confirmed.

12. The proper treatment of the respondent's claim for loss of pension was the critical issue

which the Board had to decide. Paragraph 20 of the Scheme provides:

> "Where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury. Where the victim has died in consequence of the injury, and any pension is payable for the benefit of the person to whom the award is made as a result of the death of the victim, the compensation will similarly be reduced to take account of the value of that pension. Where such pensions are taxable, one-half of their value will be deducted; where they are not taxable, eg where a lump sum payment not subject to income tax is made, they will be deducted in full. For the purposes of this paragraph 'pension' means any payment payable as a result of the injury or death, in pursuance of pension or other rights whatsoever connected with the victim's employment, and includes any gratuity of that kind and similar benefits payable under insurance policies paid for by employers. Pension rights accruing solely as a result of payments by the victim or a dependent will be disregarded."

13. It was common ground that the respondent's ill-health pension under the Police Pensions Regulations is a "pension" within the meaning of paragraph 20 of the Scheme. It appears that under these Regulations there is no pension fund as such. But was accepted that the pension payments to which police officers are entitled under the Regulations are not of such a kind that they were to be regarded as accruing solely as a result of payments by the victim. It was agreed that the case is to be treated in the same way as if there had been a fund to which the respondent contributed and the remainder necessary to pay the benefits had been paid by the police authority. So the ill-health pension is not excluded from the ambit of the Scheme by the last sentence of paragraph 20. The respondent paid weekly contributions to the police authority. The amount of the pension which he received was related to the total amount of the contributions paid by him during his period of service.

14. The decision of 17 July 1997 was a majority decision, as appears from the last three paragraphs of the judgment in which the Board said:

> "For the reasons that we have given, we believe the policy followed by the Criminal Injuries Compensation Board of deducting half of any ill-health pension up to the date of occupational retirement and thereafter deducting the net amount of pension in full from the net amount of pension otherwise payable is correct. It follows, therefore, that any application for a hearing against the decision of Mr Crawford Lindsay in this case should proceed on the basis that the benefits should be deducted from any award of compensation in accordance with the principles of this judgement.
>
> Since this is an important matter of interpretation of the Scheme, it is right to note that the five member Board was not unanimous on the matter of the deduction of the full value of the pension during the post-retirement period.
>
> The minority were of the view that on a proper construction of paragraph 20 of the Scheme the deduction of only one half of the ill-health pension is not restricted to the pre-retirement period but applies also to the post-retirement period."

15. It is not disputed that, if the majority view is correct, the sum which the respondent would have been awarded under the Scheme would have been less than the minimum award of £1,000. But the respondent was not content with this decision. He presented a petition for judicial review to the Court of Session in which he sought reduction of the decision of the single member and the decision of the Board by which the decision of the single member was confirmed. On 28 July 1998 the Lord Ordinary (Lord Milligan) refused the prayer of the petition. On 9 February the First Division (the Lord President (Rodger), Lord Coulsfield and Lord Cowie) allowed the respondent's reclaiming motion, reduced the decision of the Board and remitted the respondent's application to the Board for reconsideration: 2000 SC 407.

The issue

16. As Mr Campbell QC for the appellants said in his opening remarks, the question in this appeal relates to the characterisation of a claim for loss of pension. The respondent's claim for compensation included as one of its elements a claim that he had been denied the opportunity

of increasing his pension entitlement by continuing to work until he reached the normal retirement age. The question is whether, in assessing the amount to be paid for this part of his claim of damages, account should be taken of the amount of the ill-health pension payments which he has received and will continue to receive after reaching that age.

17. The Lord Ordinary said that in his view there was much to be said for the view that, taking the words of paragraph 20 of the Scheme according to their plain and ordinary meaning, any deduction in respect of the respondent's pension benefits for the period following normal retirement age should be in respect only of one half of the value of those benefits. But he found what he considered to be sound reasons for construing the relevant sentence of that paragraph as applying only where the common law basis of assessment did not already provide for deduction of those benefits in full. He also rejected an argument which had not been put to the Board that the effect of section 10(a) of the Administration of Justice Act 1982 was that the ill-health pension should be left out of account altogether in assessing the amount of the respondent's claim.

18. The opinion of the First Division was delivered by Lord Coulsfield. He dealt first with the relevant provisions of the Scheme. He said that the court were of the opinion that the correct view was that they were designed to regulate the position before normal retirement, and that they agreed with the Board and the Lord Ordinary on this point: p 717B-C. He then proceeded to consider the wording of section 10 of the Administration of Justice Act 1982. He noted what was said in *Parry v Cleaver* [1970] AC 1 about the proper treatment of pensions for the period of retirement in English law, and the argument that a comparison of an ill-health pension with a retirement pension was a comparison of like with like which showed that a deduction could properly be made in assessing post-retirement loss. But he concluded that section 10(a) of the Act excludes any deduction in respect of a contractual benefit such as the benefit in issue in this case, whether that benefit relates to a period before or after normal retirement date: p 418A-B. He said that the court had considered very carefully whether any other meaning could properly be given to the statutory words which would lead to a different result, but that it had been unable to do so: p 418C.

19. It is clear from Lord Coulsfield's concluding remarks that the court reached its decision with reluctance, as it was well aware that the result was in conflict with the position in England and that it was inequitable. The issue in this appeal is whether that decision was inevitable. If another solution to the problem of interpretation can be found which produces a result which is equitable and in accordance with principle, it should of course be adopted. It should be noted however that the respondent did not seek to challenge the court's decision that the provisions of paragraph 20 of the Scheme were designed to regulate the position before the retirement date and that they did not relate to the calculation of pension loss after that date.

20. Section 10 of the Administration of Justice Act 1982, as amended by the Jobseekers Act 1995 and the Employment Rights Act 1996, provides:

> "Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount -
>
> (a) any contractual pension or benefit (including any payment by a friendly society or trade union);
>
> (b) any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies;
>
> (c) any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence;
>
> (d) any redundancy payment under the Employment Rights Act 1996, or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 135 of that Act had applied;

(e) any payment made to the injured person or to any relative of his by the injured person's employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;

(f) subject to paragraph (iv) below, any payment of a benevolent character made to the injured person or to any relative of his by any person following upon the injuries in question;

but there shall be taken into account -

(i) any remuneration or earnings from employment;

(ii) any contribution-based jobseeker's allowance (payable under the Jobseekers Act 1995);

(iii) any benefit referred to in paragraph (c) above payable in respect of any period prior to the date of the award of damages;

(iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question, where such a payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit."

21. The 1982 Act followed a report of the Scottish Law Commission on the "Admissibility of Claims for Services and Admissible Deductions" in damages for personal injuries: Scot Law Com No 51 (1978). A draft bill was appended to that report. Part II of the 1982 Act, which deals with damages for personal injuries in Scotland, is based almost entirely on the wording of the draft bill. In paragraph 4 of its report the Scottish Law Commission said that their concern had been to identify what anomalies or uncertainties exist within the present framework of law relating to damages for personal injuries. In paragraph 5 they said that in their review of this branch of the law they had sought, among other things:

"(a) to take account of the general principles of Scots law relating to delictual liability, and to suggest departures from those principles only where required to meet a practical need;

...

(c) to ensure that the compensation will be such that, so far as practicable, the injured person will be placed in the same position as he would have been if he had not sustained the injuries, and not in a position either more or less financially beneficial."

In paragraph 47 they said that in their approach to the problem of deductions they had taken for granted the general principle of the Scots law of reparation that damages are intended to be compensatory. In the light of this background it is appropriate first to consider how the common law stood as regards the question of post-retirement pension loss before dealing with the problem as to how section 10 of the 1982 Act should be interpreted.

The common law prior to the 1982 Act

22. The guiding principle in Scots Law, as the Scottish Law Commission observed in their report, is that damages for personal injury are intended to be compensatory. The principle is that the compensation which the injured party receives by way of the sum of money as damages should as nearly as possible put him in the same position as he would have been in if he had not sustained the wrong for which he is to be compensated: per Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 7 R (HL) 1, 7. The compensatory approach requires like to be compared with like. The nature of the loss for which the injured party seeks to be compensated must be identified. If it can be shown that he has received, or will receive, a benefit which is of same as that which he has lost, that benefit must be set off against the loss. If this is not done, the injured party will be placed in a better position financially than he was

before the accident. As I said in *Longden v British Coal Corporation* [1998] AC 653, 665A the issue of deductibility where the claim is for loss of pension cannot be properly answered without a clear understanding of the nature of the loss claimed.

23. In some cases, as Windeyer J in *Paff v Speed* (1961) 105 CLR 549, 567 explained in a passage which was quoted in *Parry v Cleaver* [1970] AC 1, 41 by Lord Wilberforce, it will be sufficient for the defender simply to call evidence which contradicts the case the pursuer seeks to establish. He may be able to show, in answer to a claim for loss of pension, that the pursuer has in fact a pension. Or he may be able to show, in answer to a claim for medical expenses, that he received the medical treatment in question free of charge. In other cases the benefit received may be so closely related in kind to that which is lost that the same result must follow if the injured party is not to be overcompensated. The typical case is that of loss of wages. A claim that the injured party has lost wages because his employment was terminated as a result of the accident may be met by evidence that he has returned to employment elsewhere from which he has in fact been receiving wages. In each case, as Windeyer J said, the first consideration is the nature of the loss or damage that the pursuer says he has suffered. On this approach it would seem to be clear that, where the claim is for loss of pension and that it relates to a period during which that lost pension would otherwise have been payable, account should be taken of a pension which is payable to the injured party for the same period.

24. In *Parry v Cleaver* [1970] AC 1 the plaintiff, like the respondent in the present case, was in pensionable employment as a police officer. He was disabled from continuing in that employment as a result of the defendant's negligence. He lost the wages which he would actually received until his retirement from the police force. He also lost the opportunity, by continuing to serve and make his contributions under the pension scheme, to obtain his full retirement pension when he reached his retirement age. On the other hand he obtained employment as a clerk from which he gained wages which were admittedly to be set off against the wages which he lost. He also became entitled for the rest of his life to an ill-health pension, but this pension was lower than it would have been if he had continued in the police force until the retirement age.

25. The main question in the case was whether the ill-health pension was to brought into account in the assessment of his damages. Lord Reid said at p 13 that it was necessary to begin by considering general principles:

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

26. He then drew a distinction, as regards the ill-health pension, between the position up to the retiring age from the police force and the position after the retiring age. He held that the ill-heath pension had to be left out of account for the period up to the retiring age. But he noted that there was no dispute that the ill-health pension had to be brought into account in order to calculate the loss for the latter period. Lord Reid explained the reason for this difference of treatment at p 20-21:

> "It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier period. The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind."

27. I think that it is clear from this passage that Lord Reid's answers to the two question which he had identified at p 13 would have been, first, that what the plaintiff lost as a result of

the accident was the diminution in the ultimate product of the insurance scheme and, secondly, that the question whether he had received something else which he would not have received if there had been no accident did not arise. As Oliver LJ said in *Auty v National Coal Board* [1985] 1 WLR 784, 807H, the conclusion which is to be drawn from this passage in Lord Reid's speech is that, to the extent of the ill-health pension payable after retirement age, the plaintiff had suffered no loss.

28. Lord Pearce said at p 33C-D:

> "There is no dispute that he is entitled to recompense from the age of 48 for the difference between the pension which he would have got but for the accident and the pension which he will in fact receive. That is a simple comparison of pensions. Since he is claiming for that period in respect of a diminution in pension it is obvious that he must give credit for the smaller pension which he will get against the larger pension which he would have got."

Lord Wilberforce also said at p 42F-G that he saw no inconsistency in treating these two periods differently. He said that they gave rise to two quite different equations, and that the difficult legal questions which related to the earlier period did not arise in relation to the latter, where all that was needed was an arithmetical calculation of pension loss.

29. Your Lordships were not referred to any Scottish case prior to the 1982 Act in which consideration had been given to the question credit had to be given, in the assessment of a pursuer's claim for the loss of a retirement pension, for an ill-health or disability pension to which the pursuer became entitled under the same scheme as a result of the accident. But I do not think that it can be doubted that the same result would have been reached as that which was achieved by agreement in *Parry v Cleaver*. The observations of their Lordships on that part of the plaintiff's claim were, of course, obiter. But they would have been treated with great respect in Scotland, as the principles upon which they were based are entirely consistent with the principle of Scots law that damages are intended to be compensatory. In *Wilson v National Coal Board* 1981 SC (HL) 9 the speeches in *Parry v Cleaver* were referred to as useful guides to the position in Scotland: per the Lord President (Emslie) at pp 14-15, Lord Keith of Kinkel at p 21. The point could have been made with equal force in Scotland that in essence the claim was one for diminution of pension as both the retirement pension and the ill-health pension were products of the same scheme, that the calculation to establish the amount of the loss required like to be compared with like and that it was in the end simply a matter of arithmetic.

Section 10 of the 1982 Act

30. The question is whether the words used in section 10 preclude the approach to this issue which was approved in *Parry v Cleaver* [1970] AC 1 and which, there is every reason to think, would have been adopted in Scotland if the statute had not intervened to produce what has been held by the First Division to produce the opposite result.

31. The first part of section 10 contains a list of payments and benefits which are not be taken into account so as to reduce the amount of damages to the injured person. I shall call this, for short, "the prohibition". The second part contains a list of payments and benefits which are to be taken into account. I shall call this "the direction". Mr Campbell conceded that the respondent's ill-health pension is a contractual pension within the meaning of section 10(a). So it is common ground that it is caught by the prohibition in the first part of the section. But the extent of the prohibition nevertheless requires to be analysed, as also does the extent of the direction in the second part. This turns upon what is meant by the words "taken into account" in assessing the amount of damages.

32. It should be noted that these two lists have one thing in common. The items in each list are of the kind that requires a decision on grounds of policy as to whether or not they should be taken into account in the assessment. This because their common characteristic is that they may be thought to be receipts of a different kind from the loss claimed or relate to a different period. The issue to which both lists appear to be directed is the possible mitigation of a loss which has been suffered by the injured party. The words "so as to reduce that amount" indicate that the lists only arise for consideration once the amount of the loss claimed has been

identified.

33. There are however two possible meanings that can be given to the phrase "that amount". One is that the exercise refers to the total amount claimed, so that both the prohibition and the direction must be applied to the total amount without regard to the nature of the various heads of the claim. The other is that regard must be had to the nature of each head of loss or damage, and that the prohibition and direction as the case may be is to be applied to each head only so far as it is relevant to the nature of the item of loss claimed.

34. The distinction between these two meanings can be demonstrated by assuming that the claim is in whole or in part a claim for solatium. Solatium is an amount awarded to the injured party for pain and suffering caused by the injury. It is an award for non-pecuniary loss. So it is assessed without regard to the amount of any sums lost or received after the accident by way of earnings, pension or other benefit. Taken literally it, the direction in section 10(i) that any remuneration or earnings from employment shall be taken into account in assessing "the amount of damages" payable to the injured person would appear to require remuneration or earnings from employment after the accident to be brought into account by way of deduction in the assessment of solatium. But to do this would require a pecuniary gain to be set off against a loss that is not pecuniary. It is hard to believe that such a surprising result was intended by Parliament. In practice solatium continues to be assessed, as it always has been, as a self-contained head of damages without taking into account any remuneration or other payments lost or received since the accident. On the other hand section 10(iv) requires account to be taken of any payments of a benevolent character made directly to the injured person by the responsible person following on the injuries. Payments of this kind may be presumed to have been made as payments to account of damages. So there can be no objection on grounds of principle to setting off these payments against any amount to be awarded as solatium when assessing the amount of damages.

35. These examples show that the correct approach is to apply the prohibition or the direction in section 10, as the case may be, only in so far as the nature of the payment or benefit that is in issue is relevant to an assessment of the head of damages claimed. The first step is to identify the nature of the loss claimed and then to calculate the amount of that loss. Only when this has been done does the question arise as to whether or not the listed receipts should be taken into account so as to reduce that amount.

36. The prohibition in section 10(a) refers to "any contractual pension or benefit". Where the head of damages which is in issue is a claim for loss of earnings, the prohibition is plainly relevant to the calculation of the amount of the injured party's pecuniary loss for the relevant period. But what is to be done where the head of damages which is in issue is a claim for the loss of a contractual pension or benefit is met by evidence of the receipt of a pension, or a benefit of the same kind, under the same contract? The answer is to be found in the nature of the claim. In the situation which I have envisaged, the injured party's loss can only be measured by comparing the pension or benefit which has been lost with that which has been received. The measure of the loss is the difference between these two amounts, comparing like with like. There is no place for the prohibition in that calculation. The loss can only be measured by taking the contractual pension or benefit into account. Once that calculation has been completed there is no need of the prohibition. It is obvious that the contractual pension or benefit cannot be taken into account again at that stage. That would be open to the objection of double-counting.

37. In my opinion the report of the Scottish Law Commission supports this interpretation of section 10. It was proceeded by a consultation paper (Memorandum No 21, Damages for Personal Injuries: Deductions and Heads of Claim, 1 December 1975). Paragraph 4 of the consultation paper set out the background to the Commission's consideration of the question what benefits received by an injured person should be taken into account in assessing his claim for damages. The following sentence identifies the mischief which the Commission was seeking to address:

> "The fundamental difficulty is whether the extraneous mitigation of losses which the injured person would otherwise sustain can be regarded as reducing the amount of these losses for the purpose of calculating the defender's liability."

38. As Lord Coulsfield said at p 417F-G of his opinion in the present case, there is not a trace in the Commission's report of any reasoning which might support a departure from Lord Reid's argument in *Parry v Cleaver* [1970] AC 1 that a comparison of an ill-health pension with a post-retirement pension is a comparison of like with like and therefore no deduction can properly be made in assessing post-retirement loss. Nor is there any argument which would justify a situation in which a pursuer could receive his ill-health pension, post-retirement in full and also compensation for what could only be regarded as a notional post-retirement loss. On the contrary, I would add, the report contains clear statements in the passages in paragraphs 5 and 47 to which I have already referred that the Commission's recommendations proceed upon a recognition of the general principle of Scots law of reparation that damages are intended to be compensatory. It is clear that the Commission did not intend to depart from the principle that the injured party should not be placed in a better position financially than he was before the accident.

39. There is no sign in the reported cases that section 10 of the 1982 Act has been regarded hitherto as giving rise to the difficulty which in their decision in the present case the learned judges of the First Division have identified. As S A Bennett, *Setting Off on the Wrong Foot*, 2000 SLT (News) 214, has pointed out, it seems rather to have been taken for granted that the provision did not fall to be applied to claims in respect of loss of pension rights. In *Mitchell v Glenrothes Development Corporation*, 1991 SLT 284, one of the heads of damages claimed was loss of pension rights. Lord Clyde assessed the amount to be paid under this head of claim by applying a multiplier to a multiplicand based on the current level of the pursuer's wage. At p 291B he said that one of the factors which he took into account was the possibility of another pension being forthcoming. He referred in the course of his discussion of this head of claim to the treatment of claims for loss pension rights in *Parry v Cleaver* [1970] AC 1 and *Auty v National Coal Board* [1985] 1 WLR 784. There is no suggestion in his opinion that the treatment of claims of this kind in England was not a reliable guide to how they should be treated in Scotland. In *Davidson v Upper Clyde Shipbuilders*, 1990 SLT 329, 334L, Lord Milligan agreed with counsel for the pursuer's acceptance that the pursuer could make no claim for loss of pension rights for the period after which she would have become entitled to a widow's pension in her own right after her husband's death. He said that this was consistent with the decision in *Auty's* case and with the reasoning in Lord Reid's speech in *Parry's* case.

40. In *Leebody v Liddle*, 2000 SCCR 495, the pursuer's claim for damages also included a claim for loss of pension rights. The amount of the difference between the pension which the pursuer would have received under his employers' pension scheme had he retired at the age of 65 and the reduced pension which he would receive from the age of 65 under his actual retirement arrangements was agreed. The defenders' argument was that against any such reduction there had to be set the pension benefits received and to be received up to that birthday as well as the pension benefits to be received after that date. The pursuer's argument was that the effect of section 10(a) of the 1982 Act was to prevent a pension obtained on early retirement being brought into account so as to reduce loss of earnings. Lord Ordinary, Lord Macfadyen, was referred to Lord Milligan's opinion in the present case but not to the decision of the First Division. The present case was still at avizandum when the case before him was being argued. The First Division did not have the advantage of seeing Lord Macfayen's opinion as it was not delivered until after their decision in the present case had been issued.

41. At p 522E-523A Lord Macfadyen said:

> "I do not consider that section 10(a) provides a complete answer to the issue which as to be decided in this case. What the section makes clear, in my opinion, is that pension benefits must not be brought into account so as to diminish a claim for loss of earnings. Neither party contended that the effect of the section was also to prohibit wholly the bringing into account of pension benefits so as to diminish a loss of pension benefits. The absurdity of adopting that view of the effect of the section was clearly pointed out [by Lord Milligan] in *Cantwell* at p 11. The issue which requires to be addressed in the present case is the extent to which pension benefits actually received or to be received ought to be brought into account so as to diminish pension loss suffered or to be suffered. In my opinion the proper approach is to examine the loss claimed period by period. In respect of the period up to normal retirement age the pursuer may be able to

point to a loss of earnings (although the pursuer in the present case happens not to have established such a loss). If he does so, any pension benefits which he is entitled to receive in that period cannot be brought into account so as to diminish the loss of earnings. That is the effect of section 10(a) (in Scotland) and *Parry v Cleaver* (in England). Attention can then be turned to the period after the normal retirement date. In respect of that period the loss is of pension benefit. A loss of pension benefit can only be calculated by comparing the pension benefit to which the pursuer would have been entitled if the accident had not happened with the pension benefit he will actually receive in the events which have happened. It therefore seems to me to be inevitable that the actual pension received during that period should be brought into account in the computation of the loss."

42. I consider that this passage correctly sets out the approach which is to be taken to claims for loss of pension. The periods before and after the normal retirement age require to be considered separately. Prior to the retirement age the claim is for loss of earnings. Pension benefits received during that period cannot be set off against the claim for loss of earnings. The effect of section 10(a) of the 1982 Act was to make it clear that the decision to that effect in the English case of *Parry v Cleaver* [1970] AC 1 applied also in Scotland. After the retirement date the claim is for loss of pension. In order to compare like with like, pension benefits received and to be received after that date must be brought into account. As this is the only way in which the amount of the compensation due for the loss of pension can be calculated, section 10(a) does not apply.

43. I would therefore hold that the law of Scotland requires the calculation of the respondent's claim for loss of his retirement pension to take his ill-health pension into account in the assessment of the amount which he has lost. It seems to me that this conclusion is inevitable on the facts of this case, as the two pensions are both products of the same scheme. It may be thought that the only reason why the issue has given rise to difficulty is the difference between the names which have been given to them by the Regulations. The correct view of the facts shows that the claim is simply one for the diminution in the amount of the pension to which the respondent is entitled under the Scheme. The amount by which his pension has been diminished cannot be calculated without setting the amount of the ill-health pension against the amount of the retirement pension.

Paragraph 20 of the Scheme

44. Paragraph 20 of the Criminal Injuries Compensation Scheme departs from the common law, because it states that where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury. Where the pension is taxable, as it is in the present case, one-half of its value is to be deducted. The Board observed in its judgment in the present case that the policy followed by the Board has been to deduct half of any ill-health pension up to the date of occupational retirement and thereafter to deduct the net amount of the pension in full from the net amount of the pension otherwise payable. As I have already noted, there was a difference of view as to whether this policy was correct on a proper construction of paragraph 20. The minority view was that the deduction of one-half of the ill-health pension applied also to the post-retirement period.

45. It has to be said that paragraph 20 is less than explicit on this point. Mr Mitchell QC for the respondent did not invite your Lordships to endorse the view of the minority. For completeness however I should add that I agree with the judges of the First Division that the majority view was the correct one. The first sentence of paragraph 20 says that compensation will be "reduced" to take account of any pension accruing as a result of the injury. Although it does not say so in terms, it seems to me that this sentence must be directed to the period prior to the retirement date when the claim is for loss of earnings. It assumes that the necessary arithmetic has been done to calculate the amount of that loss. It then requires a reduction to be made from that amount, which is limited to one-half of the pension where it is taxable. But after the retirement date the claim is for loss of pension. The amount of the compensation for the pension loss cannot be calculated without bringing fully into account the whole of any pension accruing as a result of the injury. That calculation must be completed before any question can arise about reducing the compensation. In the absence of clear language to the contrary, paragraph 20 must be read as having no application to the question how a claim for

loss of pension after the retirement date is to be calculated.

Conclusion

46. I would hold that the construction of section 10(a) which the First Division felt compelled to adopt was wrong and that the Lord Ordinary was right to refuse the respondent's application for judicial review. I would allow the appeal, recall the interlocutor of the First Division and restore the interlocutor of the Lord Ordinary.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

47. I too agree. The statutory provision relevant to the present case is s.10 of the Administration of Justice Act 1982, as amended. This provides among other things that "in assessing the damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount .... any contractual pension or benefit ....". At the time he received his injury, Mr **Cantwell** was a serving police officer covered by the statutory Police Pensions scheme. It is agreed that this scheme is to be treated as a "contractual" pension scheme even though it was the creature of section 1 of the Police Pensions Act 1976 and the Police Pension Regulations made thereunder. The terms of the scheme are to be found in the Regulations and in particular Schedule B to the 1987 Regulations (SI. 1987 No.257) as amended. It is essentially a contributory scheme with the benefits calculated by reference to periods of service and average earnings. Following the drafting of s.1 of the Act and Part B of the 1987 Regulations, the Schedule deals with the various personal awards which may be made under the scheme. These include the "Policeman's Ordinary Pension" payable to a policeman who retires after at least 25 years pensionable service (Article B1 and Part I of the Schedule) and the "Policeman's Ill-Health Pension" payable to a policeman who retires early on the grounds of ill-health (Article B3 and Part III of the Schedule).

48. As a result of his injury, Mr **Cantwell suffered a number of losses. These included losses of earnings and loss of pension. At the time of the incident Mr Cantwell** was not too far off completing his 25 years service and becoming entitled to retire on the full 'ordinary' retirement pension. Following his injury he had, in effect, to take early retirement. Because he was retiring on health grounds, he immediately qualified for (among other personal awards) an ill-health pension payable under Part III of the scheme without having to wait until he reached his normal retirement age. As his pension became payable earlier than otherwise would have been the case and because he was no longer working and therefore no longer notionally contributing to his pension out of his wages as a police officer (together with notional employer's contributions), the pension was lower than it would have been if he had continued to work in the police force till his normal retirement age. Accordingly, when he came to the age when, if in good health he would normally have retired, he was only entitled to a reduced pension. He thus suffered a loss of pension which he was entitled to recover from the wrongdoer or from the Criminal Injuries Compensation Board.

49. The argument of Mr **Cantwell** is that he has lost his 'ordinary' pension of about £15,200 pa and has received an 'ill-health' pension of about £13,500 instead. He says that under s.10 the £13,500 is to be disregarded and not taken into account. Accordingly he submits that he is entitled to claim compensation on the basis of having lost £15,200 pa not £1,700 pa. He was not successful before the single member or the Appeal Board. The Lord Ordinary upheld the Appeal Board but the Inner House disagreed and held that the claim should have been allowed: [2000] SC 407.

50. Both counsel adopted the formulation of Lord Reid in *Parry v Cleaver* [1970] AC 1 at p.13:

> "Two questions can arise. First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if

> there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages."

Lord Reid is thus posing two questions of fact and a third question of law. Mr Cantwell would answer them (on the figures we are using): £15,200; £13,500; no. The appellants would answer the first question £1,700 and the remaining questions do not arise; s. 10 does not apply because there is no sum which is being taken into account in reduction of the amount of Mr Cantwell's loss.

51. In my judgment the appellants are right. Like very many questions arising in relation to the law of the assessment of damages, it is really a question of fact and finding the answer depends not so much upon any principle of law but on the application of sound processes of reasoning. In the present case what is involved is Mr Cantwell's loss of pension following his reaching the age at which he would ordinarily have retired. There is no dispute between the parties as to the treatment of the earlier period between the time he received his injuries and the time he reached his normal retirement age. On any view the first question to be answered is what loss has Mr Cantwell suffered. Mr Cantwell has been enabled to formulate his claim only because the pension scheme uses different terms to describe the full-term pension - the 'ordinary' pension - and the advanced but reduced pension - the 'ill-health' pension. He will not get the former; he will only get the latter. But he will get a pension under the scheme. It is still the same scheme; the payer remains the same. It remains the same type of pension, that is to say, a pension paid out of contributions which are treated as having been made over the duration of his employment in the police service. The only thing that has changed during the relevant period is that it is paid at a reduced rate. In this situation, to say that the sum which Mr Cantwell would have received but for the accident and which, by reason of the accident, he can no longer get was £15,200 pa does not accord with the admitted facts. He has not lost the whole of that sum. He has only lost part of it. The correct way to describe what has happened is to say that his pension has been reduced. Similarly, if the reduction in his pension had been smaller, say, £100 pa, it would more readily be appreciated that it would be an abuse of language to say that he had lost £15,200. Yet the logic of his argument would be the same. Mr Cantwell's argument fails on the facts. (See also Lord Reid's dictum at [1970] AC pp.20-1 stressing the need to compare like with like, followed and applied by Oliver LJ in *Auty v NCB* [1985] 1 WLR 784 at p.807.)

52. In view of this there is no need to go into the legal fallacy which underlies much of the argument of Mr Cantwell. The law draws a distinction between the suffering of a loss and the mitigation of that loss. Mitigation is a form of the avoidance of loss either as the result of receiving some benefit which would not have been received but for the incident which gave rise to the loss or as the result of voluntarily taking advantage of an opportunity to reduce the loss. The subject matter of s.10 is the inclusion or exclusion of mitigation. The statute makes additional provision for what may and may not be taken into account by way of mitigation in qualification or supplement of the common law rules. But the original structure is still there. The question of mitigation only comes into the assessment after the loss itself has been ascertained. It is true that criteria of causation are used throughout the enquiry as are criteria of remoteness. But mitigation and avoidance of loss remain concepts of the mitigation and avoidance of losses which have already been identified. It is this first vital step which Mr Cantwell's argument misses out.

53. For these reasons and those given by my noble and learned friend Lord Hope of Craighead, I agree that the appeal should be allowed as he has proposed.

LORD SCOTT OF FOSCOTE

My Lords,

54. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hobhouse of Woodborough. For the reasons they have given I, too, would allow the appeal and make the order proposed.

© 2001 Crown Copyright

BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback
URL: *http://www.bailii.org/uk/cases/UKHL/2001/36.html*

245

OPINION OF LORD MILLIGAN

in Petition

of

IAN CANTWELL

Petitioner;

against

CRIMINAL INJURIES
COMPENSATION BOARD

Respondents:

for

Judicial Review of Decisions by the
Criminal Injuries Compensation Board

---

28 July 1998

The petitioner is a former police officer. On 21 May 1992 he sustained injuries to his right shoulder and arm, ribs, knee and foot while involved in the arrest of a man subsequently charged with attempted murder of a member of the public and subsequently sentenced to 3 years imprisonment on a reduced charge. Unfortunately, the petitioner's injuries turned out to be sufficiently severe for him to be required to be retired medically from the police force on 1 June 1993, the ground of retiral being that he was suffering from post-traumatic capsulitis of the right shoulder. He was 36 at the time of his retirement. As a result of his medical retirement, he received an injury gratuity of £2,579, an injury pension of £2,063 per annum, an ill-health pension, part of which he commuted into a lump sum of £51,583 and a continuing

annual pension of £10,316. In addition, he received invalidity benefit. He applied for compensation to the respondents and his application was refused in the following terms,

> "Taking into account the benefits past and future which have to be deducted under the Scheme, the sum which the applicant would be awarded is below £1,000, the minimum award. Consequently, I am not permitted to make any further award. See paragraph 5 of the Scheme."

The petitioner applied for a hearing before the respondents stating, "I consider that the single member has erred in law and has miscalculated the financial position and that I should receive a very substantial award". The single member decision was issued on 28 September 1995 and, on 17 April 1997, the five member board of the respondents disposed of the petitioner's appeal by holding on the issues before them, by a majority of 3 to 2, that in assessing whether, and if so for what amount, the petitioner was entitled to criminal injuries compensation the benefit of his ill-health pension for the period following the date of his notional or normal retirement should be taken into account in full, and not only to the extent of one half as is the case in relation to such ill-health pension between the date of his medical retirement and the date of his normal or notional retirement. The minority of the five member board took the view that deduction of only one half of the ill-health pension applied not only to the pre-notional retirement period but applied also after that period. The minority took that view on what they considered to be a proper construction of Paragraph 20 of the Criminal Injuries Compensation Scheme in force.

Mr Stephenson, for the petitioner, explained that the petitioner's normal or notional retirement date, which I will refer to as his normal retirement date, was

16 April 1996. The petitioner sought (a) reduction of the decisions of 28 September 1995 and 17 April 1997; (b) an order requiring that the respondents reconsider the petitioner's application for compensation under the 1990 Criminal Injuries Compensation Scheme; and (c) a declarator that when assessing whether compensation is payable to the petitioner under paragraphs 12, 20 and 5 of the 1990 Scheme the respondents are not entitled to treat as deductible any part of the payments of police ill-health pension made, or to be made, to the petitioner. Failing obtaining the declarator sought in (c), the petitioner sought declarator (d) that when assessing whether compensation is payable to the petitioner under paragraph 12, 20 and 5 of the 1990 Scheme the respondents are not entitled to treat as deductible more than one half of the payments of Police ill-health pension made, or to be made, to the petitioner.

Mr Stephenson referred to the Police Pension Regulations 1987 (SI 257), as amended by the Police Pension Amendment Regulations 1990 (SI 805) and the Police Pension Amendment Regulations 1996 (SI 867). The 1987 Regulations were effective from 6 April 1988. As a police officer "disabled as the result of an injury received in the execution of duty" the petitioner became entitled to an ill-health award in the form of an ill-health pension calculated in accordance with Part III of Schedule B, subject to Parts VII and VIII of that Schedule, in terms of Regulation B3 of the 1987 Regulations, as amended. In terms of Regulation G2 (1) the petitioner, as an officer who had not elected out of paying contributions in terms of Regulation G2(3), paid pension contributions to the police authority at the rate of 1p a week less than 11% of his pensionable pay. Election out of paying such contributions was provided for by Regulation G4(1), such election being available on or after 6 April 1988 by notice in writing. Police ill-health pension was calculated and paid

according to years of service and the right to payment of such pension arose out of a police officer's contract of service and contributions made in the course of that service. While it was not suggested that the contributions made by police officers fully funded the benefits arising under the scheme, the employers contributing to that cost, the Scheme under which the benefits arose was nevertheless a contributory Scheme in a very real sense, with contributions depending upon earnings and benefits being quantified by years of service and earnings during those years of service and, accordingly, by contributions actually made. Had the petitioner elected to cease making contributions prior to the incident in which he was injured he would have received return of contributions but not the pension sought to be deducted in assessment of criminal injuries compensation. Mr Stephenson referred to the provisions of the 1990 Scheme. The Scheme provides, "5. Compensation will not be payable unless the board are satisfied that the injury was one for which the total amount of compensation payable after deduction of social security benefits, but before any other deductions under the Scheme, would not be less than the minimum amount of compensation. This shall be £1,000 ... 12. Subject to the other provisions of this Scheme, compensation will be assessed on the basis of common law damages ... 20. Where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury ... Where such pensions are taxable, one-half of their value will be deducted; where they are not taxable, e.g. where a lump sum payment not subject to income tax is made, they will be deducted in full. For the purposes of this paragraph, "pension" means any payment payable as a result of the injury or death, in pursuance of pension or other rights whatsoever connected with the victim's employment, and includes any gratuity of that kind and similar benefits

payable under insurance policies paid for by employers. Pension rights accruing solely as a result of payments by the victim or a dependant will be disregarded." In applying the provisions of this Scheme, the respondents should assume that the victim had raised an action for damages at common law against the person responsible for his injury. So far as the reference in paragraph 12 to other provisions of the Scheme was concerned, a common sense, non-technical approach was required. He referred to the case of *P's Curator Bonis* v *Criminal Injuries Compensation Board* (1997 SLT 1180). In that case, the ward concerned suffered severe congenital, mental and physical abnormalities on account of consanguinity of her parents. Criminal injuries compensation was refused on the grounds that the abnormalities suffered were not "injuries" as they were inherent in her. This decision was sustained. Lord Osborne said (at page 1193):-

> "It is plain that the first issue which I have to decide is one of the interpretation of the words "personal injury", which appear in para 5 of the scheme, in the context in which they appear. That being so, it is necessary to consider the several authorities which were cited relating to the approach which should be adopted to the interpretation of the respondents' scheme. In *R* v *Criminal Injuries Compensation Board, ex p Schofield*, (1971 1WLR 926) although Bridge J dissented, I have understood that his observations relating to the proper approach to the interpretation of the respondents' schemes have enjoyed acceptance and approval. At p 931 he said: "one must bear in mind that the scheme, as the document is entitled which enshrines the rules for the board's conduct, is not recognisable as any kind of legislative document with which the court is familiar. It is not expressed in the kind of language one

expects from a parliamentary draftsman, whether of statutes or statutory instruments. It bears all the hallmarks of a document which lays down the broad guidelines of policy". He then stated: "that in the operation of the scheme, in the day to day consideration of applications, inevitably, within the broad guidelines laid down by the scheme itself, the board's decisions are constantly shaping the policy more precisely, and if the executive, who are wholly responsible for the form of the scheme and can change it any day in the week by a written answer to a parliamentary question, do not think the board is shaping the policy in the right way, then a suitable amendment of the scheme can be made without any of the difficulties which accompany amendments to legislation properly so called. It is against that background that I approach the problem of construction ... and against that background it seems to me that it would be wrong for this court to intervene and say that the board have misconstrued the scheme unless it is very clear that that is the only tenable view". In *R* v *Criminal Injuries Compensation Board, ex p Staten* (1972 1WLR 569),Lord Widgery CJ said in relation to the scheme: "I think the court should look at these words and give them their ordinary sensible meaning". In *R* v *Criminal Injuries Compensation Board, ex p Webb* (1987 QB 74),a similar approach was taken by Lawton LJ. He said, "The scheme is not a statutory one. The government has made funds available for the payment of compensation without being under a statutory duty to do so. It follows, in my judgement, that the court should not construe the scheme as if it were a statute but as a public announcement of what the government was willing to do. This entails the court deciding what would be a reasonable and literate man's

understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence." Finally, in *Gray* v *Criminal Injuries Compensation Board* (1993 SLT 28),Lord Weir accepted that the approach described above to the interpretation of the scheme was correct. It is this common sense and non-technical approach to the interpretation of the scheme which I endeavour to adopt."

Mr Stephenson said that the Scheme had been in existence in excess of 33 years. There had been several revisions to bring the Scheme into line with current intentions. What the respondents required to do was to fix notional common law damages and then turn to other paragraphs, in particular paragraph 20 in the present case, for instruction as to how specific items required to be dealt with. Thus, in the present case, paragraph 20 of the Scheme provided instruction as to how to calculate if there was pension loss. In this connection, the correct approach was to look firstly at the final sentence of paragraph 20. This dealt with a self-provided pension. Firstly, if pension rights accrue solely as a result of payments by the applicant they fall to be disregarded. Secondly, if a third party, such as the applicant's employer, contributes towards the cost of pension rights such pension benefits will be to an extent dictated by whether they are taxable or non-taxable. If they are taxable then one-half will be deductible in accordance with the early part of paragraph 20 and, if non-taxable, they will be deductible in full. There was nothing unusual in disregarding such a pension. This was the common law position in Scotland. In terms of the Administration of Justice Act 1982, Section 10, "Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount - (a) any contractual

pension or benefit (including any payment by a friendly society or trade union); ..."
Thus, a common law assessment would exclude the petitioner's pension as a deduction. Section 10 of the 1982 Act does not apply in England in terms of Section 77(3) of that Act. Accordingly, the respondents made a deduction which would be appropriate at common law in England but not in Scotland. Mr Stephenson next referred to the case of *Longden* v *British Coal Corporation*(1997 1WLR 1336). It was held by the House of Lords in that case that in England, where injury had caused the plaintiff to retire prematurely, incapacity and disability pensions were, because of their special nature, exceptions to the general rule that all receipts resulting from an accident had to be set against losses due to the accident, and that, accordingly, the periodical sums received by the plaintiff during the period prior to normal retirement age did not fall to be deducted from his claim for loss of retirement pension, but that the lump sum received by him on his resignation should be apportioned between the periods before and after normal retirement age and the part attributable to the period after normal retirement age set off against his claim, since it represented the commutation of the annual payments that he would otherwise have received during the same period. The only speech in the appeal was delivered by Lord Hope of Craighead. After dealing with the position in England he said (at page 1349D),

> "I should for completeness add that we were referred by Mr McLaren to the law in other jurisdictions on the question whether there should be a deduction from damages for this type of benefit. In both Scotland and Ireland this question has been resolved by statute. For Scotland section 10 of the Administration of Justice Act 1982 provides that, subject to any agreement to

the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount any contractual pension or benefit. For Ireland section 2 of the Civil Liability (Amendment) Act 1964 (No. 17 of 1964) provides that in assessing damages in an action to recover damages in respect of a wrongful act resulting in personal injury not causing death account shall not be taken of any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury. In *Cooper* v *Miller* (1994) 113 DLR (4th) I the Supreme Court of Canada held that pensions which were not in the nature of an indemnity for the loss claimed should remain non-deductible against a claim of damages. In Australia it was held in *National Insurance Co of New Zealand Ltd* v *Espagne*, 105 CLR 569 that in assessing damages to be awarded in an action for personal injuries caused by negligence the award of an invalid pension was to be disregarded: see also *Redding* v *Lee* (1983) 151 CLR 117. Thus far the position in these other jurisdictions is consistent with what was decided in *Parry* v Cleaver. But it does not appear that the issue with which we are concerned in this case has been considered in any of these jurisdictions. So I do not think that we can gain any assistance from them as to what, on public policy grounds, should be done in this case."

Mr Stephenson said, in relation to Lord Hope's reference to *Parry* v *Cleaver*(1970 AC 1), that the decision in that case was consistent with the position in Scotland only so far as payments prior to normal date of retirement are concerned.

Mr Stephenson then referred to the case of *Lewicki* v *Brown & Root Wimpey Highland Fabricators* (1996 SLT 145). In that case, Lord Prosser held that

contractual payments made to the pursuer under the defenders' disability scheme fell within the terms of Section 10 of the 1982 Act and would not therefore be taken into account so as to reduce any damages payable to the pursuer and he excluded from probation certain averments by the defenders on that matter. This decision was reclaimed (1996 SLT 1283) and, apart from the exclusion of certain further averments, the reclaiming motion was refused. Mr Stephenson said that the respondents appeared to rely on the cases of *Parry* v *Cleaver* and *Smoker* v *London Fire Authority* (1991 2 AC 502), maintaining that these cases were followed in the case of *Lewicki*. This was not so. All the judges in the *Lewicki* case made it clear with regard to deductibility that after categorisation Section 10 must be applied. What was said in these cases was relevant in the present context only to characterisation (Lord Justice Clerk Ross at 1285C and 1286E and 1286G; Lord McCluskey at 1287F and 1287K; and Lord Osborne at 1290I).

Accordingly, in the submission for the petitioner, all payments under the ill-health scheme concerned fell to be disregarded in assessment of criminal injuries compensation.

Mr Stephenson then turned to his alternative submission that, if any deduction fell to be made a deduction should be one half only of the value of the benefits both for the period prior to normal retirement and thereafter. This appeared to be the view of the minority of the five member board of the respondents. In terms of paragraph 20 of the respondents' 1990 Scheme it was provided clearly that where deduction fell to be made in respect of a pension and that pension was taxable only one-half of the value of that pension fell to be deducted, without between the respective periods before and after normal retirement.

Miss Dunlop, for the respondents, said that the first submission for the petitioner appeared to involve that in Scotland no account is to be taken in calculating post-retirement loss of the fact that the pursuer or claimant does still receive a pension, albeit a reduced one. This was said to be as a result of Section 10 of the 1982 Act. The result of this would be that, if an injured person would have received £10,000 annually on retirement but, because of ceasing work early will only receive £9,000 annually, he will be allowed to retain the benefit of the £9,000 annually without it being taken into account in assessment of compensation for his loss of the £10,000 annually which he would have received but for early retirement. If this was the true position, it was a startling result. It was to be expected that the point would have arisen in a case in Scotland concerning common law compensation but this had not happened. Furthermore, it did not produce a common sense result for criminal injuries compensation purposes. It produced a result which was far from the goal which is set for the Criminal Injuries Compensation Scheme of putting a victim in the same position as the victim would have been and not over-compensating or enriching the victim from the public purse. In any event, the common law position in Scotland with regard to ill-health pension payments accords with the decision in *Parry* v *Cleaver* and was not altered by Section 10 of the Administration of Justice Act 1982 to the effect contended for by the petitioner. Miss Dunlop submitted that the primary position adopted by the petitioner was wrong. The terms of paragraph 12 of the 1990 Scheme required to be looked at first. The outcome of this stage of the required exercise was that there should be no deduction of pension payments up to the normal date of retirement but that the loss after that date would be the diminution in pension payments from what the pension payments would have been but for the enforced early

retirement. It was then necessary to turn to paragraph 20 of the Scheme. The terms of the first and last sentences of this paragraph were of particular importance. The first sentence involved that where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury. The last sentence involved that pension rights accruing solely as a result of payments by the victim or a dependent will be disregarded. The first sentence involved a general statement that if the claimant gained pension payments as a result of the injury these would be taken into account. The last sentence involved a concession to that statement. If a pension had been bought and paid for exclusively by the claimant this would be disregarded. Miss Dunlop referred to a 1978 report entitled "Review of the Criminal Injuries Compensation Scheme: Report of an Inter Departmental Working Party" which, she said, led to the 1979 Scheme which was superseded by the 1990 Scheme. In particular, she referred to paragraph 16.6 of that report where it was stated,

> "We have also considered whether a deduction should be made from the pension because of the contributions made by the victim before his injury. Such a calculation would be difficult because the benefit might not be directly related to the previous contributions, particularly if the victim died or retired very early in his career. We think there is a case for making some allowance for previous contributions and favour, one again, a simple percentage deduction. We think that the combined deduction for income tax and contributions might reasonably be 50% and for this reason recommend that 50% of the gross pension should be taken into account in assessing compensation."

Miss Dunlop said that this was the origin of the reference to 50% in paragraph 20 of the 1990 Scheme. In the present case, the last sentence of paragraph 20 had no application. It was accepted in the present case that the police authority contributed from its own funds towards the petitioner's pension entitlement and accordingly there was no question of the petitioner having pension rights accruing solely as a result of payments by himself. The petitioner's actual position, incidentally, had he ceased making contributions himself to his pension entitlement would have been that he would have become entitled to a deferred pension. Miss Dunlop then referred to a further report, a report entitled "Criminal Injuries Compensation: A Statutory Scheme" by an inter-departmental working party in 1986. She referred in particular to paragraph 20.3 and the conclusion therein, albeit "reluctant", that "the only practical means of dealing with payments by employers is to regard all such payments as benefits arising out of employment which should be taken into account in assessing compensation". That position was then noted as contrasting with the position where pension rights accrued solely as a result of payments by the victim or a dependant, which should continue to be disregarded by the board in the same way as benefits from personally effected insurance. Miss Dunlop summarised the respondents' position as involving, firstly, that the common law approach required by paragraph 12 resulted in the head of loss in the form of diminished pension payments after the date when an applicant would otherwise have retired falling to be computed on the difference between what he would have received and what he will actually receive; and, secondly, that if the respondents' primary position was wrong so far as the effect of Section 10 of the 1982 Act was concerned and the petitioner's position correct on that matter, then paragraph 20 must govern the position and deduction throughout the

whole period should be at the rate of 50% as the petitioner's pension did not accrue solely as a result of payments by him and therefore could not be totally disregarded.

Mr Sutherland, for the petitioner, said that there were three areas to be considered. The first was the position at common law, the second general consideration of the Scheme, and the third the precise terms of paragraph 20 of the Scheme. So far as the common law position is concerned, paragraph 12 of the Scheme indicated that as a generality the Board is to put itself into the same position as the court dealing with a civil claim for damages. The Board have taken the view that the common law is as contained in the cases of *Parry* v *Cleaver* and *Smoker* v *London Fire and Civil Defence Authority*. The board have said that at common law an ill-health pension resulting from an accident is not deductible from loss of earnings but is deductible from a retirement pension in assessing loss because comparing an ill-health pension to a retirement pension amounts to comparing like-with-like. He referred to what was said by Lord Reid in P*arry's* case on the matter of like-with-like comparison. There was no logic in what the Board had done. The Board considered that the position in *Parry* and *Smoker's* cases was endorsed so far as Scotland was concerned by the decision in *Lewicki's* case. The Board's position on that matter also was fundamentally misconceived. This was because the whole matter was regulated by Section 10 of the 1982 Act. Section 10 post-dated P*arry's* case. Parliament must be taken to have taken cognisance of the decision in *Parry's* case. Section 10 was plain in its terms. It was clear and unambiguous and "a joy to read". Section 10 set out a code for calculation. In practice, pension payments were not taken into account in fatal accident cases and there was no reason why Section 10 should be applied differently in non-fatal cases. The reasoning behind the decision in *Parry's* case was

not confined to avoiding benefiting the tortfeasor in whose place the Board stands. Part of the principle involved, as identified by Lord Reid in referring to the case of *Forgie* v *Henderson* (1818) 1 Murray 410 (1970 AC at page 14F), was that such payments were in the nature of insurance, a return for money invested and the victim's prudence should not result in a diminution of his legal entitlement any more than any other terms of insurance. The case of *Lewicki* in its use of the decisions in the cases of *Parry* and *Smoker* was relevant only so far as categorising of the nature of payments was concerned. In short, in Scotland the receipt of a contractual pension falls to be left out of account in the assessment of damages at common law. The common law position was unaffected by provisions of the 1990 Scheme. It was for the Board to demonstrate otherwise.

Mr Sutherland then turned to general consideration of the Scheme. He said that, in any event, whatever might be the position in a civil action for damages, the terms of the Scheme may override the provisions of the common law. He accepted that this was a potentially double-edged consideration. He said that the terms of the Scheme must be given their normal common sense meaning. The opening words of paragraph 12 made it clear that there was no reason for the Board to have taken the so-called consecutive approach to the sections in the Scheme. The correct approach to the matter was to look at the provisions of the Scheme first, or at least during the making of a common law assessment, all in terms of paragraph 12 of the Scheme. In this respect, the Board's approach was wrong, involving assessing damages at common law and then looking at paragraph 20. Mr Sutherland referred to *R* v *Criminal Injuries Compensation Board*, e.p. Lain (1967 2 AER 770) and to what was said by Lord Parker (at page 776F) with regard to the Criminal Injuries Compensation

Scheme introduced in 1965. In terms of paragraph 9 of that Scheme it was stated, "Subject to what is said in the following two paragraphs, compensation will be assessed on the basis of common law damages and will take the form of ..." Paragraph 13 provided that, "where applicable, the compensation will ... be reduced by the amount of any payments from public funds accruing, as a result of the injury or death, to the benefit of the person to whom the award is made." Lord Parker said, "The first point made by counsel for the applicant was that the board were wrong in law in deducting any part of the payments receivable whether by way of national insurance or police pensions. The argument quite shortly was that under para 9 of the scheme the compensation is to be assessed on the basis of common law damages "subject to what is said in the following two paragraphs". Turning to the second of these paragraphs, para 11, it is clear that a widow's compensation is to be assessed as under the Fatal Accidents Acts, 1846 to 1959, and under Section 2 of the Act of 1959 no part of the payments in question would be deductible. That, says counsel for the applicant, is an end of the matter. For my part, I am quite unable to accept that contention, which would render para. 12 and para. 13 of the scheme of no effect. It is I think clear that paras 9 to 13 inclusive must be read together as forming the code by which compensation is to be assessed. Paragraph 9 lays down the starting point, how, what I may call, gross compensation is to be assessed, subject to the limitations in para. 10, and then para. 12 and para. 13 provide for deductions in certain circumstances. It may be that the words "where applicable" in para. 13 are mere surplusage, but to treat them as such is to be preferred to a construction which would render para. 13 of no effect." The 1965 Scheme involved different provisions and was phrased differently. In the 1990 Scheme there was specific provision with regard to

pensions and paragraph 20 should be looked at for present purposes. It was not legitimate for the Board to say that they looked at the question of pensions at common law and then separately considered it under paragraph 20. Paragraphs 19 and 20 were doing the same thing. They involved particular treatment of particular items. Accordingly, what should be looked at was paragraph 20.

Mr Sutherland then turned to the precise wording of paragraph 20. He said that the scheme post-dated *Parry's* decision. Paragraph 20 provided for disregarding pension rights accruing solely as a result of payments by the victim. If it had been intended that such pension rights should be disregarded only when looking at loss of earnings prior to notional retirement the Scheme would have so provided. The petitioner's pension does not accrue "as a result of the injury" in terms of the first sentence of paragraph 20. It accrues as a result of the prudence of the petitioner. What had been said by inter-department working parties was of little consequence. Such reports had been produced with a view to legislation which was not enacted so far as the matters in issue in this case are concerned. The petitioner's pension scheme was voluntary in that a contributor could opt out. It was clear that the ill-health element would not be payable if a contribution was not being paid. No outsider contributed to this pension, namely no party other the petitioner and the police authority. Accordingly, the petitioner's pension benefits should be disregarded with respect to the period after normal retirement in accordance with what was the true position at common law, unaffected adversely by the provisions of the 1990 Scheme, and, in any event, whatever the position at common law, the same result arose from the specific terms of paragraph 20 of the Scheme properly construed. Finally, Mr Sutherland reiterated the alternative contention for the petitioner that, if pension

payments fell to be taken into account at all in respect of the period after normal retirement, any deduction was restricted to one-half because of the specific terms of paragraph 20 of the 1990 Scheme.

Mr Campbell, for the respondents, said that the 1990 Scheme, in terms of paragraph 12, envisaged assessment of compensation as if the claim was at common law and the correct first stage of the assessment exercise was to look at paragraph 12, in accordance with what Lord Parker said in the case of *Lain*. Such an approach would provide a figure of common law compensation of x pounds. The Scheme then provided for, if appropriate, deductions from that figure in terms of the specific provisions of the Scheme. The general thrust of the Scheme was that victims would be compensated for their loss. Any result whereby the victim would be better off than a common law claimant would be in an inherently surprising outcome. To avoid that inherently surprising outcome it would make sense to interpret paragraph 20 as specifically designed to deal with reductions from the common law outcome. The pension benefits with which this case is concerned are benefits as a result of the claimant's injury. Accordingly, on the face of it, paragraph 20 applies unless the last sentence thereof operates to exclude the petitioner's pension benefits from being taken into account. The last sentence of paragraph 20 was dealing with the situation where the pension was funded solely by the claimant. The claim for loss of pension benefits in terms of paragraph 12 was properly based on the pension benefits which the petitioner had been receiving and potentially would receive on the one hand, and those which he could have expected to receive but for his enforced premature retirement on the other hand. The respondents had correctly given the reasons for the difference between the basis of assessment for common law damages and that for criminal

injuries compensation. The latter being funded from the public purse there was no reason to compensate the victim for more than his actual loss, subject only to the specialty regarding solely self-provided insurance. With reference to the petitioner's alternative submission regarding limitation of deduction to 50% for the period after notional retirement as well as the period before such retirement, Mr Campbell referred to the view of the majority of the five member board that it would be ironic if an alteration in the Scheme which is clearly intended to limit the payment of compensation so as to avoid providing the applicant with an income higher than that which he would otherwise have enjoyed, should be interpreted so as to have the effect of meaning that throughout the period after the date of his normal retirement he should benefit to the extent of one half of his ill-health pension. This was clearly the correct view. Mr Campbell said that there had been no submission to the Board that Section 10 of the 1982 Act was of critical importance so far as the effect of the decision in *Parry's* case was concerned in Scotland. Such a submission inevitably would have very far-reaching consequences. It would be odd if Parliament created a different rule in Scotland overturning the basic principle of law that damages were aimed at compensation and not enrichment. The basic principle was one of indemnity. There may, indeed, be exceptions, as the decision in *Parry's* case shows, but such exceptions should be justifiable, as in *Parry's* case. Section 10(a) of the 1982 Act covers in the present case not a loss of pensions claim but a loss of earnings claim different in kind to a pension. What the petitioner had lost here prospectively was the difference between the retirement pension which he could have expected to have received but for his premature retirement and the pension which he would now

be receiving during the period following his normal retirement date. On the whole matter, the declarators sought should be refused.

In my opinion, the decision of the respondents on both the matters in issue is correct. I accept the submissions for the respondents to that effect. The matters in issue relate to the proper basis of compensation for criminal injuries and the starting point for the assessment exercise required has to be paragraph 12 of the relevant scheme, the Criminal Injuries Compensation Scheme 1990. It is there provided, "Subject to the other provisions of this Scheme, compensation will be assessed on the basis of common law damages ..." There then follows, in paragraphs 13-20 inclusive, provisions clearly within the reference to "other provisions of this Scheme" in paragraph 12. Paragraph 21 deals with offset from criminal injuries compensation of compensation otherwise recovered by way of civil damages or compensation ordered by a criminal court. Thus, paragraphs 12-21 inclusive relate to "Basis of compensation", the explanatory heading to these paragraphs. The general reference in paragraph 12 to a basis of common law damage assessment "subject to the other provisions of this Scheme" clearly leaves open by its terms the possibility of there being provision in one of the succeeding paragraphs mentioned for criminal injuries compensation exceeding in some respect common law damages. Paragraph 12 could have been expressed in terms which totally excluded any such possibility. The position of the respondents is that the very nature of the scheme, funded as it is out of the public purse, involves that criminal injuries compensation will never in any respect exceed damages recoverable at common law and that paragraphs 13-21 inclusive of the Scheme are clearly concerned solely with reductions in assessment as compared with common law damages in so far as they have the effect of varying the

common law position. Underlying the respondents' position is what I regard as a very important point in determining the basis for criminal injuries compensation, namely that the scope for public policy exceptions to the general rule that compensation should not exceed loss actually sustained may be less in the case of criminal injuries compensation than in the case of common law damages but will never ever be greater.

The petitioner's primary submission related to what the common law position in Scotland is and not to any contention that the petitioner's position in relation to criminal injuries compensation was better than in a common law damages case, at least so far as pension benefits are concerned. I agree with the respondents that there is no sound reason whatsoever for concluding that the effect of Section 10 of the 1982 Act is to alter the common law position in Scotland to the effect contended for by the petitioner. The petitioner next contended that, if he was wrong about the effect of Section 10, paragraph 20 by its terms nevertheless produced the same result by varying the common law position so that his ill-health pension benefits fell to be disregarded for the period after his normal retirement as well as for the period before it. In theory, as I have already mentioned, paragraph 20 could have been so worded to place the petitioner in a better position so far as his pension benefits are concerned with regard to criminal injuries compensation than the position he would be in for the purposes of a common law damages claim. If it appeared from the wording of paragraph 20 that this might, at least, well be the intention of what was provided, then in my view regard would have to be paid to the point about the limits of criminal injuries compensation referred to in my initial comments. However, for the purposes of this particular point, I find it unnecessary to have regard to such considerations. This is because, in my view, the ill-health pension benefits concerned clearly do not

accrue "solely as a result of payments by the victim". In my opinion, what is envisaged in the final sentence of paragraph 20 is the situation where the victim, or a dependant of the victim, has contracted and paid for pension benefits independently of, as in this case, financial support from an employer. I find this construction reinforced by the terms of the first sentence of paragraph 20, which unambiguously suggests to me that the paragraph is concerned with reduction of compensation, which to have practical significance can only mean reduction as compared with the position at common law.

So far as the petitioner's alternative submission to the effect that deduction of pension benefits for the period following notional retirement should be restricted to one half in terms of paragraph 20 is concerned, I agree with the conclusion of the majority of the five member board for the reasons given in their judgment. It was said on behalf of the petitioner that the Scheme required to be construed by taking words in their plain and ordinary meaning. In the respondents' judgment this same language is used when it is observed that, "the correct approach to the interpretation of the Criminal Injuries Compensation Scheme, is as has been said on many occasions by the High Court, to be to take the words in their plain and ordinary meaning." The immediately relevant sentence in paragraph 20 provides, "Where such pensions are taxable, one half of their value will be deducted; where they are not taxable, eg where a lump sum payment not subject to income tax is made, they will be deducted in full." The petitioner's pension is taxable. The reference in the sentence quoted to "such pensions" leads back to the reference to "any pension accruing as a result of the injury". I have already concluded for other purposes that the petitioner's pension is such a pension. Accordingly, if this sentence is looked at in isolation, accepting that

the petitioner's pension is "such pension", there is undeniably much to be said for the view that taking the words in their plain and ordinary meaning any deduction in respect of the petitioner's pension benefits for the period following normal retirement should be in respect only of one half of the value of those benefits. While this is so, I find in the whole context of the sentence concerned sound reasons not to construe that sentence in the way sought by the petitioner. The sentence appears in the immediate context of a paragraph which, in my view, sets out in its opening sentence to be concerned with restriction on common law damages basis of assessment and, in particular, not enhancement of that basis. In my view, the immediate context of that sentence alone points to restriction of the sentence to applying only where common law damages basis of assessment does not already provide for deduction in full. In any event, at worst for the respondents' position, I consider that such construction is at least tenable within the immediate context of paragraph 20 and that, if the wider context of the purposes of the Scheme are taken into account such tenable construction would clearly be that to be preferred to the construction advanced for the petitioner. The majority of the five member board observe that it would be ironic if the petitioner's construction was correct. I agree that this would be so if the petitioner's contention was correct but, in my opinion, it is not.

Accordingly, on the whole matter, I repel the plea-in-law for the petitioner, sustain the first and third pleas-in-law for the respondents and refuse this application for judicial review and for the reduction, order for reconsideration and declarators therein sought.

OPINION OF LORD MILLIGAN

in Petition

of

IAN CANTWELL

Petitioner;

against

CRIMINAL INJURIES
COMPENSATION BOARD

Respondents:

for

Judicial Review of Decisions by the
Criminal Injuries Compensation Board

Act: Sutherland, Q.C., Stephenson
Macbeth Currie & Co

Alt: Dunlop
R Brodie

28 July 1998

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lord Coulsfield
Lord Cowie

P21/14G/97

OPINION OF THE COURT

delivered by LORD COULSFIELD

in

RECLAIMING MOTION

in the cause

IAN CANTWELL
Petitioner and Reclaimer;

against

CRIMINAL INJURIES
COMPENSATION BOARD
Respondents:

Act: Sutherland, Q.C.; Macbeth Currie (Petitioner and Reclaimer)
Alt: Dunlop, Q.C., Dunlop; R. Henderson (Respondent)

9 February 2000

The petitioner and reclaimer is Ian Cantwell who was, until 1992, a serving police constable. In normal course he would have retired on 16 April 1996. Unfortunately, however, on 21 May 1992, in the course of his duties, the petitioner was assaulted by a man whom he was arresting for attempted murder. As a result of the attack, he suffered severe soft tissue injuries to his right shoulder and had to be retired from the police force on medical grounds on 1 June 1993. On his medical retirement the petitioner received, in addition to invalidity benefit, a gratuity, an injury pension and an ill-health pension, part of which he commuted into a lump sum. The remainder of his ill-health pension took the

form of a continuing annual pension, which is taxable. However, as counsel for the petitioner emphasised, the effect of the relevant police pension regulations is that a person who receives an ill-health pension can never become entitled to an ordinary retirement pension. Accordingly, having received an ill-health pension, the petitioner did not become entitled to the ordinary retirement pension on reaching his normal retirement age on 16 April 1996.

The petitioner made an application for compensation to the Criminal Injuries Compensation Board but that application was refused by a single member on the ground that:

> "Taking into account the benefits, past and future, which have to be deducted under the Scheme the sum which the applicant would be awarded is below £1,000.00, the minimum award. Consequently I am not permitted to make any further award. (See Paragraph 5 of the Scheme)." (Letter dated 28 September 1995).

Although it is not explained in detail in the decision, it is common ground that the key point in the member's decision was that, applying the Board's settled interpretation of the relevant provisions of the Criminal Injuries Compensation Scheme ("the scheme"), one half of the petitioner's ill-health pension up to his normal retirement date should be deducted from his claim for loss of earnings up to that date and that the whole of the ill-health pension should be deducted from any claim for loss of pension after that date.

The petitioner applied for a hearing which was held in Glasgow and took place before five members, including Lord Carlisle, the chairman, because the petitioner was challenging the Board's established interpretation of an important provision in the

scheme. In their judgment issued on 17 April 1997, the Board by a majority confirmed the decision of the single member. In July 1997, the petitioner lodged a petition for judicial review, seeking reduction of the decisions of the single member and of the Board but the Lord Ordinary refused that application on 28 July 1998. The petitioner now reclaims against the decision of the Lord Ordinary.

The scheme, which was introduced in 1964, has been superseded by new arrangements and is being wound down, but the Board continues to deal with applications lodged under it. As is well known, payments under the scheme have no statutory basis: rather, *ex gratia* payments are made to applicants by the Secretary of State under the Royal Prerogative. The basis on which the payments are to be made is set out in the scheme, which was originally published in 1964 and has undergone revisions over the years. Following a report by an interdepartmental working group in 1978, the scheme was revised in 1979. Another interdepartmental working group reported in 1986 and, after that report, the scheme was again revised in 1990. The petitioner's application fell to be considered under the 1990 version of the scheme. The text of that version is divided by a number of cross headings. One of these headings is "Basis of Compensation", which covers paragraphs 12 to 21. The opening sentence of paragraph 12 is as follows:

> "Subject to the other provisions of this Scheme, compensation will be assessed on the basis of common law damages and will normally take the form of a lump sum payment, although the Board may make alternative arrangements in accordance with paragraph 9 above."

The remainder of paragraph 12 deals with provisional and interim awards. Paragraph 13 permits the Board, in certain limited circumstances, to reopen an assessment and paragraph 14 limits the level of an award for loss of earnings or earning capacity by reference to the gross average industrial earnings at the date of assessment and also provides that there shall be no element of exemplary or punitive damages. Paragraphs 15 and 16 deal with awards in cases of fatal injury, while paragraph 17 deals with damage to property and paragraph 18 with the cost of private medical treatment, which is only reimbursed if the Board think it reasonable to do so. Paragraph 19 provides that compensation is to be reduced by the full value of any present or future entitlement to United Kingdom social security benefits, payments of criminal injuries compensation under arrangements in force in Northern Ireland and social security benefits from other countries. It also provides that compensation will be reduced by the full value of payments under insurance arrangements "except as excluded below". Paragraph 19 also provides that in assessing the entitlement account will be taken of income tax liability likely to reduce the value of the benefits and further that the Board:

> "will disregard monies paid or payable to the victim or his dependants as a result of or in consequence of insurance personally effected, paid for and maintained by the personal income of the victim or, in the case of a person under the age of 18, by his parent."

Paragraph 20 is the most important provision for the present purpose. It provides:

> "Where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury. Where the victim has died in consequence of the injury, and any pension is payable for the benefit of the person

to whom the award is made as a result of the death of the victim, the compensation will similarly be reduced to take account of the value of that pension. Where such pensions are taxable, one-half of their value will be deducted; where they are not taxable, eg where a lump sum payment not subject to income tax is made, they will be deducted in full. For the purposes of this paragraph, 'pension' means any payment payable as a result of the injury or death, in pursuance of pension or other rights whatsoever connected with the victim's employment, and includes any gratuity of that kind and similar benefits payable under insurance polices paid for by employers. Pension rights accruing solely as a result of payments by the victim or a dependant will be disregarded."

In their decision, the Board first dealt with the question whether the ill-health pension which became payable to the petitioner on his medical retirement was a pension which fell within paragraph 20 of the scheme. It was argued to the Board that the ill-health pension did not come within paragraph 20 because it was not a pension accruing as a result of the injury. On that point, the Board say:

"We do not accept the argument that since the Police Officer has the right to choose whether or not he will enter into a pension scheme, that payments under that pension accrue as a result of his decision to enter into the scheme rather than as a result of the injury he has suffered. The words 'pension rights accruing solely as a result of payments by the victim or a dependant will be disregarded' means, in our opinion, that pension payments will be disregarded when the whole of the pension has been paid for and provided by the individual outside his employment.

> Thus we are satisfied that the loss occasioned by the Applicant for which he is entitled to compensation under the Scheme should be assessed on the basis of what he would be entitled to under common law damages qualified and limited by the terms of Paragraph 20."

The last sentence above quoted represents a critical step in the Board's reasoning, since it expresses their view that paragraph 20 operates to limit or reduce the amount which would otherwise be recoverable by the claimant and is not an independent provision governing the treatment of ill-health pensions and similar payments generally. The Board return to that point later in their decision, after having referred to *Parry* v. *Cleaver* [1970] A.C. 1 and to *Smoker* v. *London Fire and Civil Defence Authority* [1991] 2 A.C. 502 and *Lewicki* v. *Brown & Root Wimpey Ltd.* 1996 S.C. 200. They point out that, in terms of those decisions, the Board would be correct in deducting the full net value of the ill-health pension from the net value of the pension which the petitioner would otherwise have received during the period after his normal retirement date. They suggest that the rationale for the decision in *Parry* v. *Cleaver*, that such a pension should not be deducted from loss of earnings prior to the normal retirement date, was that a wrongdoer should not benefit from the fact that an individual had chosen to provide for his own misfortune or that he was receiving benefits from the public at large or benevolence from friends or relations. They continue:

> "The situation under the Criminal Injuries Compensation Scheme is, in our opinion, wholly different. There is no wrongdoer being held liable to pay compensation. We are concerned merely with compensating an applicant out of state funds for the loss actually suffered. Paragraph 19 does, for example, as we

have pointed out, require that any award shall be reduced by the full value of any other state benefits thus ensuring that the State does not go beyond compensating the individual for the loss he has actually incurred.

We are clear that Paragraph 20 of the scheme was intended to and does relate to the period until the Applicant reaches the age of occupational retirement and provides that any such pension payable during that time is deductible in full, save that if the pension is taxable, as is an ill-health pension, then one half of its value only will be deducted."

The Board then refer to part of the 1978 interdepartmental working party report as supporting that interpretation of the intention of paragraph 20. Finally, the Board record that they were not unanimous, in relation to the post retirement period, and that the minority were of the view that, on a proper construction of paragraph 20, the rule that only one half of the ill-health pension should be deducted applied to the post-retirement period as well as to the pre-retirement period.

Before the Lord Ordinary, counsel for the petitioner advanced an argument which was not dealt with in the decision of the Board, to the effect that the "common law" position in Scotland, in terms of section 10 of the Administration of Justice Act 1982, was that the ill-health pension should be left out of account altogether in assessing the petitioner's claim. Counsel also advanced the arguments which had been rejected by the Board, namely that the petitioner's pension should be excluded from consideration by the last sentence of paragraph 20 and that, alternatively, only 50% of the pension should be deducted, both before and after the normal date of retirement. The Lord Ordinary rejected these arguments. He held - without explaining his conclusion - that there was no

sound reason for concluding that the effect of section 10 of the 1982 Act was to alter the common law position in Scotland to the effect contended for by the petitioner and, with regard to the other two points, he agreed with the reasoning of the majority of the Board.

Accordingly, the decision of the Board, with which the Lord Ordinary agreed, is built up in the following way: (i) the first step is to ascertain what the damages recoverable at common law would be, with the result that any ill-health pension received after the normal retiring age must be deducted in ascertaining the loss after that date: (ii) the police ill-health pension which the petitioner receives is not excluded from this rule by paragraph 20 of the scheme because it is not a pension which is paid solely in consequence of payments made by the petitioner: and (iii) once the common law rule has been applied, the provisions of paragraph 20 come into operation and require the deduction of one half of the pension received before normal retirement age in ascertaining the loss to that date.

As against that, Mr. Sutherland on behalf of the petitioner submitted that, in assessing compensation in a case like this, the Board should first calculate the petitioner's loss of earnings to his normal retiring age and the value of the ordinary retirement pension which would have been payable to him after his normal retirement age. He made a number of alternative submissions as to what should happen next. Firstly, he submitted that because the petitioner's pension was one which accrued "solely as a result of payments by" the petitioner, it should be disregarded in terms of the last sentence of paragraph 20. Alternatively, if the pension did not fall within that sentence, then in terms of paragraph 20 the Board should deduct from the loss of earnings element one half of the value of the ill-health pension payable up to the petitioner's normal retirement age. So

far as the period after normal retirement age was concerned, Mr. Sutherland submitted that the Board should not deduct the ill-health pension payments since they fell within the scope of either head (a) or (b) in section 10 of the Administration of Justice Act 1982. Finally, if he were wrong in these submissions, all the pension payments fell squarely within the terms of paragraph 20 and the Board should therefore deduct only one half of them, for the period after the normal retirement date as well as for the period up to that date.

Counsel for the Board submitted that in assessing the petitioner's claim, the Board had first to calculate his loss due to the attack which he had suffered. That loss comprised two elements: loss of earnings down to his normal retirement date and loss of pension after that date. There was no dispute about the calculation of the petitioner's loss of earnings, which would be done in the way in which that was always done in damages claims. The dispute between the parties revolved around the calculation of the second element, the petitioner's loss of pension after his normal retirement date. The Board contended that, to ascertain what loss of pension the petitioner had suffered, it was necessary first to calculate the value of the pension which he would have received if he had retired at his normal retirement date: then to deduct from that the value of the ill-health pension which he would receive during that period. The difference represented the petitioner's loss of pension. In order to calculate the petitioner's gross loss the Board would then add together the loss of earnings and loss of pension so calculated. Then, because of the requirement of paragraph 20, they would deduct from the total - but strictly speaking from the element representing the petitioner's loss of earnings - one half of the ill-health pension payments attributable to the period down to the petitioner's

normal date of retirement. Alternatively, if the full value of the ill-health pension was not to be deducted for the period after the normal retirement date, one half at least should be deducted or, in other words, paragraph 20 should be applied uniformly to the ill-health pension payments, whether before or after the normal retirement date.

It is convenient to deal first with the question of the possible application of the last sentence of paragraph 20. Payment of the ill-health pension, as well as other benefits, received by the petitioner is, as we understand the position, governed by the Police Pension Regulations 1987 (S.I. 1987/257) as amended by further regulations in 1990 (S.I. 1990/805) and 1996 (S.I. 1996/867). Under Regulation G2(1) of the 1987 Regulations, the petitioner, as an officer who had not elected out of paying contributions in terms of Regulation G2(3), paid contributions to the police authority at the rate of 1p. per week less than 11% of his pensionable pay. Election out of paying such contributions could be made under Regulation G4(1) by notice in writing. It was not suggested, either to the Lord Ordinary or to us, that the contributions made by police officers such as the petitioner fully funded the benefits arising under the scheme. Nevertheless it was submitted that the pension and other benefits arose under the scheme in respect of contributions made by the petitioner which depended upon earnings and benefits being quantified by reference to years of service and earnings during those years. In addressing us, however, Mr. Sutherland accepted that, although there might be no other contributor to any fund apart from the policemen themselves, the payments of benefits were made by police authorities and a fund created by contributions from policemen would not necessarily meet the cost of the payments made. Counsel for the respondents submitted that the consequence of that concession was that the pension

payments could not be regarded as rights accruing solely as a result of payments by the victim. In our view, that is correct and as a result the ill-health pension payable in the present case is not excluded from the ambit of paragraph 20 of the scheme.

We shall deal next with the argument as to whether paragraph 20 only falls to be applied to reduce the amount of compensation which would be payable on a common law based calculation. We assume, for the moment, that in such a calculation the amount of ill-health pension received after normal retirement date would be deducted from any loss of retirement pension claimed after that date. The general approach to the interpretation of provisions in the scheme is not in doubt. As Lawton L.J. said in *R.* v. *Criminal Injuries Compensation Board ex parte Webb* [1987] Q.B. 1974:

> "The court should not construe the scheme as if it were a statute but as a public announcement of what the Government was willing to do. This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation for personal injury by a crime of violence".

The words of the scheme should be given "their ordinary sensible meaning": *R.* v. *Criminal Injuries Compensation Board ex parte Staten* [1972] 1 W.L.R. 569. Further, it is legitimate to take into account anything that can be learnt from the interdepartmental working party reports as to the intention lying behind any alterations to the scheme which have been made from time to time. It can immediately be said that it is clear that the working party report of 1986 proceeded on the assumption that the general law was as laid down in *Parry* v. *Cleaver supra* and for that reason, and also because there is no doubt that in the law of England *Parry* v. *Cleaver* still represents the general law in

England and Wales and the scheme applies both in Scotland and England and Wales, we shall put aside for the moment the petitioner's argument in relation to section 10 of the 1980 Act.

It is, however, necessary to have careful regard to what *Parry* v. *Cleaver supra* decided, both for the purposes of the application of the scheme and for the purposes of the section 10 argument. The case was one in which a plaintiff in pensionable employment was disabled by the negligence of the defendant and received a disablement pension. Lord Reid began his opinion by stating that the questions were how damages for the financial loss were to be assessed and in particular how the disablement pension was to be dealt with. He continued:

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

Lord Reid then referred to *British Transport Commission* v. *Gourley* [1956] A.C. 185 which, he said, established, if it was not clear before, that it is a universal rule that the plaintiff cannot recover more than he has lost and that realities must be considered rather than technicalities but that the decision in *Gourley*'s case had nothing to do with the question whether sums coming to the plaintiff as proceeds of insurance or by reason of benevolence should be deducted. He continued:

"So I must enquire what are the real reasons, disregarding technicalities, why these two classes or receipts are not brought into account. I take first the case of the benevolence."

Lord Reid then referred to the decision in *Redpath* v. *Belfast and County Down Railway* [1947] N.I. 167 and continued:

"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. We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of 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. I need not quote from the well-known case of *Bradburn* v. *Great Western Railway Company* (1874) L.R. 10 Ex.

1 but I may refer to an old Scottish case, *Forgie* v. *Henderson* (1818) 1 Murray 413 where the pursuer was assaulted by the defender. During part of his resulting illness he received an allowance from a friendly society, and Lord Chief-Commissioner Adam said, at page 418, in charging the jury:

'I do not think that you can deduct the allowance from the Society, as that is of the nature of an insurance, and is a return of money paid'.".

At page 16, Lord Reid said:

"A pension is intrinsically of a different kind from wages. If one confines one's attention to the period immediately after the disablement it is easy to say that but for the accident he would have got £x, now he gets £y, so his loss is £x - £y. But the true situation is that wages are a reward for contemporaneous work but that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind."

Lord Reid went on to consider a wide range of authorities and at page 20 reaffirmed his view that the pension up to the retiring age of the plaintiff should not be brought into account. He then said that thereafter the position was different and continued:

"For a time after retirement from the police force he would still have been able to work at other employment, so allowance must be made for that. As regards police pension, his loss after reaching police retiring age would be the difference between the full pension which he would have received if he had served his full time and his ill-health pension. It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier

period. The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind."

The approach of the court in *Parry* v. *Cleaver* was followed in *Smoker supra* although the House of Lords in that case was urged to reconsider *Parry* v. *Cleaver* on the ground that it departed from the fundamental principle that a plaintiff could only recover his actual net loss. The importance of that principle was reaffirmed in *Hussain* v. *New Taplow Paper Mills* [1988] A.C. 524 and *Longden* v. *British Coal Corporation* [1998] A.C. 668. Both of those cases recognised the primacy of the exceptions for benevolence and the products of insurance and both were concerned with what Lord Bridge, in the former case, described as one of a number of borderline cases in which there could be divergences of judicial opinion as to what justice, reasonableness and public policy might require. Lord Bridge in *Hussain* also noted that some of the problems arising were resolved by legislation, sometimes in the form of a compromise solution providing that only a proportion of benefits should be taken into account.

As we have mentioned, in their decision the majority of the Board took account of the report of the 1978 interdepartmental working party. In particular, they quote paragraph 16.2 of that report which is headed "Pensions in Non Fatal Cases" and states:

> "We have already made the point that there is no strong case for permitting a State compensation scheme for loss of earnings or dependency to provide an income for the applicant which is in effect higher than he or she enjoyed before the injury. At present in non-fatal cases the scheme follows the common law which is governed by the decision in the House of Lords in the case of *Parry* v. *Cleaver* ([1970] A.C. 1). This prevents the courts taking occupational pensions into account in assessing the liability of a defendant on the grounds that he should not benefit from any prudence or foresight or contractual arrangement on the part of the victim. In practice this means that the annual value of the compensation (or damages) for loss of earnings, pensions and payments from insurance policies may exceed the applicant's income before the incident. (In this context we are not concerned with compensation for pain and suffering: that is additional). We take the view that there is a strong case for restoring the purchasing power of the applicant, but little justification for going further. The arguments in the case of *Parry* v. *Cleaver* are related to the liability of the wrongdoer and in our opinion are not appropriate to that part of a Government compensation scheme which seeks only to restore the victim's (or the applicant's) financial loss. We therefore recommend that benefits from occupational pension schemes and analogous payments which accrue to the applicant in consequence of the injury should be taken into account in determining loss of income. In this one respect we

recommend a fundamental departure from the common law basis of assessment. The number of cases involved, however, is not large although they are often disproportionately difficult to assess."

With reference to that paragraph, the Board comment, in their decision in the present case:

"We think it would be ironic if an alteration in the Scheme which is clearly intended to limit the payment of compensation so as to avoid providing the Applicant with an income higher than that which he would otherwise have enjoyed, should be interpreted so as to have the effect of meaning that throughout the period after the date of his normal retirement he should benefit to the tune of one half of his ill-health pension. Clearly in our view that was not what was intended by those who drafted the 1979 Scheme."

In our view, that is a correct assessment of the intention of the working party as expressed in the preceding passage which he have quoted from their report. It is clear that the intention was to displace the rule applied in consequence of *Parry* v. *Cleaver* in so far as that rule applied to the period up to normal retirement date.

However, the 1978 report also contains recommendations in regard to the amount of any pension which should be deducted and a question does arise as to the effect of those recommendations. In paragraph 16.3 the report recommends an end to a previous distinction between fatal and non-fatal cases. In fatal cases, before 1978, compensation was reduced by four fifths of the value of any pension and the working party comment that neither the principle nor the fraction was defensible. In paragraph 16.5, the working party say:

"In excluding the value of a pension, regard should be had only to the net amount of pension payable to the applicant after deduction of income tax. This could involve the Board in the calculation of the income tax liability of the applicant during the period in which the pension will be paid. We would prefer not to involve the Board or its staff in an assessment of income tax liability, particularly since such an assessment can only be a very broad estimate which could not take into account future changes in personal circumstances or rates of tax and allowance. We suggest as an alternative that a simple proportion of pension should be taken into account in assessing compensation in all cases. Certain lump sum payments under pension schemes are paid without deduction of tax. We think that these might reasonably be taken into account in full."

In the following paragraphs the working party consider whether an allowance should be made for pension contributions and come to the conclusion that there is a case for making some such allowance and that again it should be dealt with by a simple pension percentage deduction. Putting the two matters of allowance for income tax and contributions together, the working party recommended a deduction of 50% of the gross pension. That, plainly, was the recommendation which was put into effect in the scheme which followed the report. The working party report which preceded the 1990 scheme recommended a change in this part of the scheme. It recommended that the income tax liability should be taken into account but that there should be no allowance for pension contributions and therefore recommended that there should be an allowance at the basic rate of income tax only. That recommendation, however, was apparently not taken

forward into the 1990 scheme which, as we have seen, continues to allow for a simple 50% deduction.

The position therefore seems to be that the recommendation that a flat 50% deduction should be made does not rest on any consideration of principle or equity but primarily on considerations of convenience and simplicity. That being so, it is arguable, that the same considerations apply to the period after the normal retirement date, and that the same rule should be applied. In addition, counsel for the reclaimer submitted strongly that the straightforward terms of the scheme had one simple meaning, namely that in all cases 50% of the taxable pension was to be deducted. The terms of paragraph 12 show that the common law rule, whatever it may be, is to be applied subject to, among other things, paragraph 20 and it was submitted that there is nothing in the terms of the scheme to support the two-stage approach which would apply a common law deduction in full at one stage and take account of something which would not be deducted under common law at a later stage and in a different way.

The petitioner's argument has some appeal, but we find it difficult to envisage that, if the working party had had in mind some modification of the *Parry* v. *Cleaver* rules in relation to the post-retirement period, they would not have mentioned it expressly: and there is no such express mention in the report. Further, we think that we must respect the settled practice of the Board, which has been followed since the modification to the Scheme introduced after the 1978 report. Looking to all the circumstances, it seems to us that the correct view is that the relevant provisions of the Scheme were designed to regulate the position before normal retirement. We therefore agree with the decision of the Board and of the Lord Ordinary on this point.

We proceed to deal with the arguments concerning section 10 of the 1982 Act. As we have already mentioned, the rule laid down in *Parry* v. *Cleaver* was attacked, in some cases, on the ground that it failed to give proper effect to the principle that a claimant can only recover his net loss. Section 10 of the 1982 Act followed on a consultation paper and a report issued by the Scottish Law Commission. The terms of the report do not differ materially from those of the consultation paper. It is not necessary to quote from the report at length: it is sufficient to say that the whole concern of the report is whether the approach taken in *Parry* v. *Cleaver* should be accepted and, if so, how a number of problem or borderline cases should be dealt with; and whether such cases required particular legislation. The conclusion of the report, like that of an English Law Commission report at a slightly earlier date, was that the *Parry* v. *Cleaver* approach should be accepted. There is not a trace in the Scottish Law Commission report of any disagreement with that view, nor of any suggestion that post-retirement pensions should be disregarded; indeed there is no discussion of the position of post-retirement pensions at all. It would therefore be surprising to find that some important change in the *Parry* v. *Cleaver* rule had been made in the statute following on the Scottish Law Commission recommendations, particularly in view of the way in which the applicable principles were explained by Lord Reid in the passages quoted above. There is not a trace of any reasoning which might support a departure from Lord Reid's argument that a comparison of an ill-health pension with a post-retirement pension is a comparison of like with like and therefore that a deduction can properly be made in assessing post-retirement loss. No more is there any argument which would justify a situation in which a pursuer could receive his ill-health pension, post-retirement, in full, and also compensation for what

could only be regarded as a notional post-retirement loss. Moreover, the interpretation of section 10 for which the petitioner contends would introduce a sharp difference between the common law in Scotland and in England, and one for which no justification seems to exist.

The question remains, however, why, if the above is correct the 1982 Act is expressed as it is. Counsel for the respondents struggled nobly, but with little success, to suggest circumstances in which section 10(a) of the 1982 Act, might have been meant to apply, other than those of the present case. Section 10 provides:

> "Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount -
>
> (a) any contractual pension or benefit (including any payment by a friendly society or trade union)
>
> (b) any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies ...."

On its plain terms, that provision excludes any deduction in respect of a contractual benefit, whether that benefit relates to a period before or after normal retirement date. Section 10 applies to the assessment of damages, without any restriction: its application is not limited to any part or element of loss. The benefit in issue in this case is a contractual benefit. Section 10(a) therefore requires that it should be left out of account in assessing "common law" damages: and counsel for the Board accepted that in the initial stage of the Board's assessment of a claim, the assessment of "common law" damages must

proceed on the basis of the common law as modified by statute. It is difficult to see how any other approach could reasonably be taken. The result seems to us to be very unfortunate, for the reasons which we have indicated above. We have therefore considered very carefully whether we could see any meaning which could properly be given to the statutory words which would lead to a different result, but we have not been able to do so. The only other argument put forward by the respondents was that section 10 simply did not have in view the question of assessment of post-retirement loss. To give effect to that argument, however, would amount to holding that the plain terms of the statute should not be given effect because, in our judgment, that effect cannot have been intended. We are not aware of any authority which would justify a court in making such a decision. In these circumstances, we find ourselves obliged to hold that the effect of section 10 is that no deduction fell to be made in respect of the petitioner's pension for the period after his normal retirement date. The results appears to us to be inequitable, and we think that consideration ought to be given to amending the statute. In the present case, we require to sustain the petitioner's plea in law, repel the respondents' pleas, reduce the decision of the Board and remit to them to reconsider the petitioner's application.

Cantwell v. Criminal Injuries Compensation Board (Scotland) [2001] UKHL 36 (5th July, 2001)

HOUSE OF LORDS

Lord Bingham of Cornhill Lord Steyn Lord Hope of Craighead Lord Hobhouse of Woodborough Lord Scott of Foscote

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

CANTWELL
(RESPONDENT)
v.
CRIMINAL INJURIES COMPENSATION BOARD
(APPELLANTS)
(SCOTLAND)
ON 5 JULY 2001
[2001] UKHL 36

LORD BINGHAM OF CORNHILL
My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I gratefully adopt, and need not repeat, his most helpful review of the facts and issues in this appeal.

2. The Criminal Injuries Compensation Scheme 1990 was an extra-statutory scheme for compensating victims of crimes of violence. Its object was to put qualifying victims in the same position financially as they would have been in had they not been injured but not to make them better off. Paragraph 12 of the scheme provided for the assessment of compensation on the basis of common law damages (subject to the other provisions of the scheme), and common law damages for personal injuries are intended to compensate, not enrich. On this short ground the decision under appeal appears anomalous. From his normal date of retirement Mr Cantwell lost the retirement pension which (but for his injury) he would have drawn; he gained an ill-health pension which (but for his injury) he would not have drawn. If, as the First Division held, he is to be compensated for loss of his retirement pension after his normal retirement date without giving credit for his ill-health pension received during that period, there being only £1,500 per annum difference between the two, he will be much better off financially than if he had never been injured. This anomaly was fully recognised by the First Division, which described its decision as "inequitable", but the court felt constrained to decide as it did by section 10(a) of the Administration of Justice Act 1982, which Lord Hope has quoted and which, in the court's view, needed amendment.

3. On a straightforward application of the approach indicated in *Parry v Cleaver* [1970]

AC 1, Mr Cantwell would have been required to give credit for his ill-health pension received after his normal retirement date, since this would have involved an appropriate comparison of pension with pension, like with like. This was the approach adopted by a majority of the Criminal Injuries Compensation Board and upheld by the Lord Ordinary. Since *Parry v Cleaver* was treated as authoritative in England and Wales and was, as I understand, regarded in Scotland as an accurate reflection of Scots legal principles, this ruling would appear to have been sound in principle and just in its practical outcome.

4. The issue in *Parry v Cleaver*, however, concerned the proper treatment of a police officer's ill-health pension received before his normal date of retirement, and it was ruled that no account should be taken of this in calculating his loss up to that date. That is not a result for which either party to this appeal contends. The Board ruled in the present case that in calculating Mr Cantwell's loss until his date of normal retirement there should be deducted one half of the value of the ill-health pension he had received up to that time. That decision was not challenged by either party before the Lord Ordinary, the First Division or the House. It was plainly based on paragraph 20 of the scheme, which Lord Hope has quoted. That paragraph did indeed provide for the deduction of half of any taxable "pension accruing as a result of the injury". The parties are agreed that this description covered Mr Cantwell's ill-health pension received up to his normal retirement date. It might be thought to cover Mr Cantwell's ill-health pension received after his date of normal retirement also since paragraph 20 drew no distinction between pensions received before and after the applicant's date of normal retirement. The contention that paragraph 20 governed Mr Cantwell's entitlement after as well as before his date of normal retirement was however rejected by a majority of the Board, the Lord Ordinary and the First Division, and has not been repeated in the House. It is accordingly not open to review. But one can understand why a minority of the Board saw logical force in this contention.

5. Although the First Division reluctantly treated section 10 of the 1982 Act as determinative of the appeal to it, this section was not mentioned by the Board in its judgment and the Lord Ordinary agreed with the submission on behalf of the Board that

> "there is no sound reason whatsoever for concluding that the effect of Section 10 of the 1982 Act is to alter the common law position in Scotland to the effect contended for by [Mr Cantwell]."

If, as I understand, *Parry v Cleaver* was or would have been accepted as accurately reflecting the principles of the Scots common law, and if section 10(a) did not alter the Scots common law, one is bound to wonder why the provision was enacted at all and why it was enacted in terms which led the First Division to put upon it the construction which, not to my mind surprisingly, it did. The best efforts of counsel have done little to dispel this mystery. The report of the Scottish Law Commission to which Lord Hope refers gives no hint of an intention to depart from *Parry v Cleaver*, but nor does it identify any omission or anomaly which section 10(a) could have been intended to

address. If section 10(a) was enacted for the avoidance of doubt it has not proved notably successful.

6. It seems clear from references which Lord Hope has given that in the period of nearly twenty years since section 10(a) was enacted it has not been understood to have the effect which the First Division has given to it in this case. Yet many claims relating to pension loss after the date of normal retirement must have been disposed of during that period, presumably according to conventional *Parry v Cleaver* principles. Lord Hope has shown how section 10(a) may be read conformably with those principles. Since those principles, when applied to the post-normal retirement period, yield what is to my mind a just result, and since no reason has been shown why section 10(a) should have been intended to yield a different result in a case such as this, I am happy to concur in making the order which Lord Hope proposes.

LORD STEYN

My Lords,

7. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hobhouse of Woodborough. For the reasons they have given I would also make the order which is proposed.

LORD HOPE OF CRAIGHEAD

My Lords,

8. This case raises a short but important point relating to the calculation of the amount of damages for personal injury. Although it takes the form of a dispute between the injured party and the Criminal Injuries Compensation Board as to whether compensation is available to the injured party under a scheme for compensation which is administered by the Board, the case is of much wider interest. This is because the decision which your Lordships are being asked to take will affect the calculation of damages for personal injury in all cases on similar facts in the ordinary courts in Scotland.

9. On 21 May 1992 the respondent Ian Cantwell was assaulted in the course of his duty as a police officer. The injuries which he sustained were such that on 1 June 1993 he had to retire on medical grounds from the police force. In normal course he would not have retired until 16 April 1996. On taking early retirement he became entitled to an ill-health pension under the Police Pensions Regulations 1987 (SI 1987/257), as amended by further regulations in 1990 (SI 1990/805) and 1996 (SI 1996/867). He commuted part of that pension into a lump sum. The remainder took the form of a continuing annual pension, which is taxable. But he lost his entitlement under the 1987 Regulations to a retirement pension on reaching his normal retirement age. Their

Lordships were told that in round figures the sum which the respondent has received since his retirement date by way of ill-health pension is £13,700 per annum. If he had continued in service to his normal retirement age he would have received a retirement pension of £15,200. It should be noted that, although the two pensions are distinguished from each other in the 1987 Regulations by means of a different adjective, they are both pensions and they are both products of the same scheme.

10. The respondent applied for compensation to the Criminal Injuries Compensation Board. The function of the Board is to decide what compensation should be paid to the victims of crimes of violence under a scheme known as the Criminal Injuries Compensation Scheme. The Scheme has now been superseded by new arrangements, and it is in the course of being wound up. But the Board continues to deal with applications which were lodged under the Scheme, and the respondent's application falls into that category. Paragraph 5 of the Scheme provides that compensation will not be payable unless the Board are satisfied that the injury was one for which the total amount of compensation payable after deduction of social security benefits, but before any other deductions under the Scheme, would not be less that the minimum amount of compensation, which shall be £1,000. Paragraph 12 states that, subject to the other provisions of the Scheme, compensation will be assessed on the basis of common law damages.

11. The respondent's application for compensation was refused by a single member of the Board, Mr Crawford Lindsay QC, on 28 September 1995 on the ground that, taking account of the benefits, past and future, which would have to be deducted under the Scheme, the sum which the respondent would be awarded was below £1,000. The respondent applied for a hearing, which took place in Glasgow before five members under the chairmanship of the Chairman of the Board, Lord Carlisle of Bucklow QC. On 17 July 1997 the Board issued a judgment in which the decision of the single member was confirmed.

12. The proper treatment of the respondent's claim for loss of pension was the critical issue which the Board had to decide. Paragraph 20 of the Scheme provides:

> "Where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury. Where the victim has died in consequence of the injury, and any pension is payable for the benefit of the person to whom the award is made as a result of the death of the victim, the compensation will similarly be reduced to take account of the value of that pension. Where such pensions are taxable, one-half of their value will be deducted; where they are not taxable, eg where a lump sum payment not subject to income tax is made, they will be deducted in full. For the purposes of this paragraph 'pension' means any payment payable as a result of the injury or death, in pursuance of pension or other rights whatsoever connected with the victim's employment, and includes any gratuity of that kind and similar benefits payable under insurance policies paid for by employers. Pension rights accruing solely as a result of payments by the victim or a dependent will be

disregarded."

13. It was common ground that the respondent's ill-health pension under the Police Pensions Regulations is a "pension" within the meaning of paragraph 20 of the Scheme. It appears that under these Regulations there is no pension fund as such. But was accepted that the pension payments to which police officers are entitled under the Regulations are not of such a kind that they were to be regarded as accruing solely as a result of payments by the victim. It was agreed that the case is to be treated in the same way as if there had been a fund to which the respondent contributed and the remainder necessary to pay the benefits had been paid by the police authority. So the ill-health pension is not excluded from the ambit of the Scheme by the last sentence of paragraph 20. The respondent paid weekly contributions to the police authority. The amount of the pension which he received was related to the total amount of the contributions paid by him during his period of service.

14. The decision of 17 July 1997 was a majority decision, as appears from the last three paragraphs of the judgment in which the Board said:

> "For the reasons that we have given, we believe the policy followed by the Criminal Injuries Compensation Board of deducting half of any ill-health pension up to the date of occupational retirement and thereafter deducting the net amount of pension in full from the net amount of pension otherwise payable is correct. It follows, therefore, that any application for a hearing against the decision of Mr Crawford Lindsay in this case should proceed on the basis that the benefits should be deducted from any award of compensation in accordance with the principles of this judgement.
>
> Since this is an important matter of interpretation of the Scheme, it is right to note that the five member Board was not unanimous on the matter of the deduction of the full value of the pension during the post-retirement period.
>
> The minority were of the view that on a proper construction of paragraph 20 of the Scheme the deduction of only one half of the ill-health pension is not restricted to the pre-retirement period but applies also to the post-retirement period."

15. It is not disputed that, if the majority view is correct, the sum which the respondent would have been awarded under the Scheme would have been less than the minimum award of £1,000. But the respondent was not content with this decision. He presented a petition for judicial review to the Court of Session in which he sought reduction of the decision of the single member and the decision of the Board by which the decision of the single member was confirmed. On 28 July 1998 the Lord Ordinary (Lord Milligan) refused the prayer of the petition. On 9 February the First Division (the Lord President (Rodger), Lord Coulsfield and Lord Cowie) allowed the respondent's reclaiming motion, reduced the decision of the Board and remitted the respondent's application to the Board for reconsideration: 2000 SC 407.

The issue

16. As Mr Campbell QC for the appellants said in his opening remarks, the question in this appeal relates to the characterisation of a claim for loss of pension. The respondent's claim for compensation included as one of its elements a claim that he had been denied the opportunity of increasing his pension entitlement by continuing to work until he reached the normal retirement age. The question is whether, in assessing the amount to be paid for this part of his claim of damages, account should be taken of the amount of the ill-health pension payments which he has received and will continue to receive after reaching that age.

17. The Lord Ordinary said that in his view there was much to be said for the view that, taking the words of paragraph 20 of the Scheme according to their plain and ordinary meaning, any deduction in respect of the respondent's pension benefits for the period following normal retirement age should be in respect only of one half of the value of those benefits. But he found what he considered to be sound reasons for construing the relevant sentence of that paragraph as applying only where the common law basis of assessment did not already provide for deduction of those benefits in full. He also rejected an argument which had not been put to the Board that the effect of section 10(a) of the Administration of Justice Act 1982 was that the ill-health pension should be left out of account altogether in assessing the amount of the respondent's claim.

18. The opinion of the First Division was delivered by Lord Coulsfield. He dealt first with the relevant provisions of the Scheme. He said that the court were of the opinion that the correct view was that they were designed to regulate the position before normal retirement, and that they agreed with the Board and the Lord Ordinary on this point: p 717B-C. He then proceeded to consider the wording of section 10 of the Administration of Justice Act 1982. He noted what was said in *Parry v Cleaver* [1970] AC 1 about the proper treatment of pensions for the period of retirement in English law, and the argument that a comparison of an ill-health pension with a retirement pension was a comparison of like with like which showed that a deduction could properly be made in assessing post-retirement loss. But he concluded that section 10(a) of the Act excludes any deduction in respect of a contractual benefit such as the benefit in issue in this case, whether that benefit relates to a period before or after normal retirement date: p 418A-B. He said that the court had considered very carefully whether any other meaning could properly be given to the statutory words which would lead to a different result, but that it had been unable to do so: p 418C.

19. It is clear from Lord Coulsfield's concluding remarks that the court reached its decision with reluctance, as it was well aware that the result was in conflict with the position in England and that it was inequitable. The issue in this appeal is whether that decision was inevitable. If another solution to the problem of interpretation can be found which produces a result which is equitable and in accordance with principle, it should of course be adopted. It should be noted however that the respondent did not seek to

challenge the court's decision that the provisions of paragraph 20 of the Scheme were designed to regulate the position before the retirement date and that they did not relate to the calculation of pension loss after that date.

20. Section 10 of the Administration of Justice Act 1982, as amended by the Jobseekers Act 1995 and the Employment Rights Act 1996, provides:

> "Subject to any agreement to the contrary, in assessing the amount of damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount -
>
> (a) any contractual pension or benefit (including any payment by a friendly society or trade union);
>
> (b) any pension or retirement benefit payable from public funds other than any pension or benefit to which section 2(1) of the Law Reform (Personal Injuries) Act 1948 applies;
>
> (c) any benefit payable from public funds, in respect of any period after the date of the award of damages, designed to secure to the injured person or any relative of his a minimum level of subsistence;
>
> (d) any redundancy payment under the Employment Rights Act 1996, or any payment made in circumstances corresponding to those in which a right to a redundancy payment would have accrued if section 135 of that Act had applied;
>
> (e) any payment made to the injured person or to any relative of his by the injured person's employer following upon the injuries in question where the recipient is under an obligation to reimburse the employer in the event of damages being recovered in respect of those injuries;
>
> (f) subject to paragraph (iv) below, any payment of a benevolent character made to the injured person or to any relative of his by any person following upon the injuries in question;
>
> but there shall be taken into account -
>
> (i) any remuneration or earnings from employment;
>
> (ii) any contribution-based jobseeker's allowance (payable under the Jobseekers Act 1995);
>
> (iii) any benefit referred to in paragraph (c) above payable in respect of any period prior to the date of the award of damages;

(iv) any payment of a benevolent character made to the injured person or to any relative of his by the responsible person following on the injuries in question, where such a payment is made directly and not through a trust or other fund from which the injured person or his relatives have benefited or may benefit."

21. The 1982 Act followed a report of the Scottish Law Commission on the "Admissibility of Claims for Services and Admissible Deductions" in damages for personal injuries: Scot Law Com No 51 (1978). A draft bill was appended to that report. Part II of the 1982 Act, which deals with damages for personal injuries in Scotland, is based almost entirely on the wording of the draft bill. In paragraph 4 of its report the Scottish Law Commission said that their concern had been to identify what anomalies or uncertainties exist within the present framework of law relating to damages for personal injuries. In paragraph 5 they said that in their review of this branch of the law they had sought, among other things:

"(a) to take account of the general principles of Scots law relating to delictual liability, and to suggest departures from those principles only where required to meet a practical need;

...

(c) to ensure that the compensation will be such that, so far as practicable, the injured person will be placed in the same position as he would have been if he had not sustained the injuries, and not in a position either more or less financially beneficial."

In paragraph 47 they said that in their approach to the problem of deductions they had taken for granted the general principle of the Scots law of reparation that damages are intended to be compensatory. In the light of this background it is appropriate first to consider how the common law stood as regards the question of post-retirement pension loss before dealing with the problem as to how section 10 of the 1982 Act should be interpreted.

The common law prior to the 1982 Act

22. The guiding principle in Scots Law, as the Scottish Law Commission observed in their report, is that damages for personal injury are intended to be compensatory. The principle is that the compensation which the injured party receives by way of the sum of money as damages should as nearly as possible put him in the same position as he would have been in if he had not sustained the wrong for which he is to be compensated: per Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 7 R (HL) 1, 7. The compensatory approach requires like to be compared with like. The nature of the loss for which the injured party seeks to be compensated must be identified. If it can be shown that he has received, or will receive, a benefit which is of same as that which he has lost, that benefit must be set off against the loss. If this is not done, the injured party will be placed in a better position financially than he was before the accident. As I

said in *Longden v British Coal Corporation* [1998] AC 653, 665A the issue of deductibility where the claim is for loss of pension cannot be properly answered without a clear understanding of the nature of the loss claimed.

23. In some cases, as Windeyer J in *Paff v Speed* (1961) 105 CLR 549, 567 explained in a passage which was quoted in *Parry v Cleaver* [1970] AC 1, 41 by Lord Wilberforce, it will be sufficient for the defender simply to call evidence which contradicts the case the pursuer seeks to establish. He may be able to show, in answer to a claim for loss of pension, that the pursuer has in fact a pension. Or he may be able to show, in answer to a claim for medical expenses, that he received the medical treatment in question free of charge. In other cases the benefit received may be so closely related in kind to that which is lost that the same result must follow if the injured party is not to be overcompensated. The typical case is that of loss of wages. A claim that the injured party has lost wages because his employment was terminated as a result of the accident may be met by evidence that he has returned to employment elsewhere from which he has in fact been receiving wages. In each case, as Windeyer J said, the first consideration is the nature of the loss or damage that the pursuer says he has suffered. On this approach it would seem to be clear that, where the claim is for loss of pension and that it relates to a period during which that lost pension would otherwise have been payable, account should be taken of a pension which is payable to the injured party for the same period.

24. In *Parry v Cleaver* [1970] AC 1 the plaintiff, like the respondent in the present case, was in pensionable employment as a police officer. He was disabled from continuing in that employment as a result of the defendant's negligence. He lost the wages which he would actually received until his retirement from the police force. He also lost the opportunity, by continuing to serve and make his contributions under the pension scheme, to obtain his full retirement pension when he reached his retirement age. On the other hand he obtained employment as a clerk from which he gained wages which were admittedly to be set off against the wages which he lost. He also became entitled for the rest of his life to an ill-health pension, but this pension was lower than it would have been if he had continued in the police force until the retirement age.

25. The main question in the case was whether the ill-health pension was to brought into account in the assessment of his damages. Lord Reid said at p 13 that it was necessary to begin by considering general principles:

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

26. He then drew a distinction, as regards the ill-health pension, between the position

up to the retiring age from the police force and the position after the retiring age. He held that the ill-heath pension had to be left out of account for the period up to the retiring age. But he noted that there was no dispute that the ill-health pension had to be brought into account in order to calculate the loss for the latter period. Lord Reid explained the reason for this difference of treatment at p 20-21:

> "It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier period. The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind."

27. I think that it is clear from this passage that Lord Reid's answers to the two question which he had identified at p 13 would have been, first, that what the plaintiff lost as a result of the accident was the diminution in the ultimate product of the insurance scheme and, secondly, that the question whether he had received something else which he would not have received if there had been no accident did not arise. As Oliver LJ said in *Auty v National Coal Board* [1985] 1 WLR 784, 807H, the conclusion which is to be drawn from this passage in Lord Reid's speech is that, to the extent of the ill-health pension payable after retirement age, the plaintiff had suffered no loss.

28. Lord Pearce said at p 33C-D:

> "There is no dispute that he is entitled to recompense from the age of 48 for the difference between the pension which he would have got but for the accident and the pension which he will in fact receive. That is a simple comparison of pensions. Since he is claiming for that period in respect of a diminution in pension it is obvious that he must give credit for the smaller pension which he will get against the larger pension which he would have got."

Lord Wilberforce also said at p 42F-G that he saw no inconsistency in treating these two periods differently. He said that they gave rise to two quite different equations, and that the difficult legal questions which related to the earlier period did not arise in relation to the latter, where all that was needed was an arithmetical calculation of pension loss.

29. Your Lordships were not referred to any Scottish case prior to the 1982 Act in which consideration had been given to the question credit had to be given, in the assessment of a pursuer's claim for the loss of a retirement pension, for an ill-health or disability pension to which the pursuer became entitled under the same scheme as a result of the

accident. But I do not think that it can be doubted that the same result would have been reached as that which was achieved by agreement in *Parry v Cleaver*. The observations of their Lordships on that part of the plaintiff's claim were, of course, obiter. But they would have been treated with great respect in Scotland, as the principles upon which they were based are entirely consistent with the principle of Scots law that damages are intended to be compensatory. In *Wilson v National Coal Board* 1981 SC (HL) 9 the speeches in *Parry v Cleaver* were referred to as useful guides to the position in Scotland: per the Lord President (Emslie) at pp 14-15, Lord Keith of Kinkel at p 21. The point could have been made with equal force in Scotland that in essence the claim was one for diminution of pension as both the retirement pension and the ill-health pension were products of the same scheme, that the calculation to establish the amount of the loss required like to be compared with like and that it was in the end simply a matter of arithmetic.

Section 10 of the 1982 Act

30. The question is whether the words used in section 10 preclude the approach to this issue which was approved in *Parry v Cleaver* [1970] AC 1 and which, there is every reason to think, would have been adopted in Scotland if the statute had not intervened to produce what has been held by the First Division to produce the opposite result.

31. The first part of section 10 contains a list of payments and benefits which are not be taken into account so as to reduce the amount of damages to the injured person. I shall call this, for short, "the prohibition". The second part contains a list of payments and benefits which are to be taken into account. I shall call this "the direction". Mr Campbell conceded that the respondent's ill-health pension is a contractual pension within the meaning of section 10(a). So it is common ground that it is caught by the prohibition in the first part of the section. But the extent of the prohibition nevertheless requires to be analysed, as also does the extent of the direction in the second part. This turns upon what is meant by the words "taken into account" in assessing the amount of damages.

32. It should be noted that these two lists have one thing in common. The items in each list are of the kind that requires a decision on grounds of policy as to whether or not they should be taken into account in the assessment. This because their common characteristic is that they may be thought to be receipts of a different kind from the loss claimed or relate to a different period. The issue to which both lists appear to be directed is the possible mitigation of a loss which has been suffered by the injured party. The words "so as to reduce that amount" indicate that the lists only arise for consideration once the amount of the loss claimed has been identified.

33. There are however two possible meanings that can be given to the phrase "that amount". One is that the exercise refers to the total amount claimed, so that both the prohibition and the direction must be applied to the total amount without regard to the nature of the various heads of the claim. The other is that regard must be had to the nature of each head of loss or damage, and that the prohibition and direction as the

case may be is to be applied to each head only so far as it is relevant to the nature of the item of loss claimed.

34. The distinction between these two meanings can be demonstrated by assuming that the claim is in whole or in part a claim for solatium. Solatium is an amount awarded to the injured party for pain and suffering caused by the injury. It is an award for non-pecuniary loss. So it is assessed without regard to the amount of any sums lost or received after the accident by way of earnings, pension or other benefit. Taken literally it, the direction in section 10(i) that any remuneration or earnings from employment shall be taken into account in assessing "the amount of damages" payable to the injured person would appear to require remuneration or earnings from employment after the accident to be brought into account by way of deduction in the assessment of solatium. But to do this would require a pecuniary gain to be set off against a loss that is not pecuniary. It is hard to believe that such a surprising result was intended by Parliament. In practice solatium continues to be assessed, as it always has been, as a self-contained head of damages without taking into account any remuneration or other payments lost or received since the accident. On the other hand section 10(iv) requires account to be taken of any payments of a benevolent character made directly to the injured person by the responsible person following on the injuries. Payments of this kind may be presumed to have been made as payments to account of damages. So there can be no objection on grounds of principle to setting off these payments against any amount to be awarded as solatium when assessing the amount of damages.

35. These examples show that the correct approach is to apply the prohibition or the direction in section 10, as the case may be, only in so far as the nature of the payment or benefit that is in issue is relevant to an assessment of the head of damages claimed. The first step is to identify the nature of the loss claimed and then to calculate the amount of that loss. Only when this has been done does the question arise as to whether or not the listed receipts should be taken into account so as to reduce that amount.

36. The prohibition in section 10(a) refers to "any contractual pension or benefit". Where the head of damages which is in issue is a claim for loss of earnings, the prohibition is plainly relevant to the calculation of the amount of the injured party's pecuniary loss for the relevant period. But what is to be done where the head of damages which is in issue is a claim for the loss of a contractual pension or benefit is met by evidence of the receipt of a pension, or a benefit of the same kind, under the same contract? The answer is to be found in the nature of the claim. In the situation which I have envisaged, the injured party's loss can only be measured by comparing the pension or benefit which has been lost with that which has been received. The measure of the loss is the difference between these two amounts, comparing like with like. There is no place for the prohibition in that calculation. The loss can only be measured by taking the contractual pension or benefit into account. Once that calculation has been completed there is no need of the prohibition. It is obvious that the contractual pension or benefit cannot be taken into account again at that stage. That would be open to the objection

of double-counting.

37. In my opinion the report of the Scottish Law Commission supports this interpretation of section 10. It was proceeded by a consultation paper (Memorandum No 21, Damages for Personal Injuries: Deductions and Heads of Claim, 1 December 1975). Paragraph 4 of the consultation paper set out the background to the Commission's consideration of the question what benefits received by an injured person should be taken into account in assessing his claim for damages. The following sentence identifies the mischief which the Commission was seeking to address:

> "The fundamental difficulty is whether the extraneous mitigation of losses which the injured person would otherwise sustain can be regarded as reducing the amount of these losses for the purpose of calculating the defender's liability."

38. As Lord Coulsfield said at p 417F-G of his opinion in the present case, there is not a trace in the Commission's report of any reasoning which might support a departure from Lord Reid's argument in *Parry v Cleaver* [1970] AC 1 that a comparison of an ill-health pension with a post-retirement pension is a comparison of like with like and therefore no deduction can properly be made in assessing post-retirement loss. Nor is there any argument which would justify a situation in which a pursuer could receive his ill-health pension, post-retirement in full and also compensation for what could only be regarded as a notional post-retirement loss. On the contrary, I would add, the report contains clear statements in the passages in paragraphs 5 and 47 to which I have already referred that the Commission's recommendations proceed upon a recognition of the general principle of Scots law of reparation that damages are intended to be compensatory. It is clear that the Commission did not intend to depart from the principle that the injured party should not be placed in a better position financially than he was before the accident.

39. There is no sign in the reported cases that section 10 of the 1982 Act has been regarded hitherto as giving rise to the difficulty which in their decision in the present case the learned judges of the First Division have identified. As S A Bennett, *Setting Off on the Wrong Foot*, 2000 SLT (News) 214, has pointed out, it seems rather to have been taken for granted that the provision did not fall to be applied to claims in respect of loss of pension rights. In *Mitchell v Glenrothes Development Corporation*, 1991 SLT 284, one of the heads of damages claimed was loss of pension rights. Lord Clyde assessed the amount to be paid under this head of claim by applying a multiplier to a multiplicand based on the current level of the pursuer's wage. At p 291B he said that one of the factors which he took into account was the possibility of another pension being forthcoming. He referred in the course of his discussion of this head of claim to the treatment of claims for loss pension rights in *Parry v Cleaver* [1970] AC 1 and *Auty v National Coal Board* [1985] 1 WLR 784. There is no suggestion in his opinion that the treatment of claims of this kind in England was not a reliable guide to how they should be treated in Scotland. In *Davidson v Upper Clyde Shipbuilders*, 1990 SLT 329, 334L, Lord Milligan agreed with counsel for the pursuer's acceptance that the pursuer could

make no claim for loss of pension rights for the period after which she would have become entitled to a widow's pension in her own right after her husband's death. He said that this was consistent with the decision in *Auty's* case and with the reasoning in Lord Reid's speech in *Parry's* case.

40. In *Leebody v Liddle*, 2000 SCCR 495, the pursuer's claim for damages also included a claim for loss of pension rights. The amount of the difference between the pension which the pursuer would have received under his employers' pension scheme had he retired at the age of 65 and the reduced pension which he would receive from the age of 65 under his actual retirement arrangements was agreed. The defenders' argument was that against any such reduction there had to be set the pension benefits received and to be received up to that birthday as well as the pension benefits to be received after that date. The pursuer's argument was that the effect of section 10(a) of the 1982 Act was to prevent a pension obtained on early retirement being brought into account so as to reduce loss of earnings. Lord Ordinary, Lord Macfadyen, was referred to Lord Milligan's opinion in the present case but not to the decision of the First Division. The present case was still at avizandum when the case before him was being argued. The First Division did not have the advantage of seeing Lord Macfayen's opinion as it was not delivered until after their decision in the present case had been issued.

41. At p 522E-523A Lord Macfadyen said:

> "I do not consider that section 10(a) provides a complete answer to the issue which as to be decided in this case. What the section makes clear, in my opinion, is that pension benefits must not be brought into account so as to diminish a claim for loss of earnings. Neither party contended that the effect of the section was also to prohibit wholly the bringing into account of pension benefits so as to diminish a loss of pension benefits. The absurdity of adopting that view of the effect of the section was clearly pointed out [by Lord Milligan] in *Cantwell* at p 11. The issue which requires to be addressed in the present case is the extent to which pension benefits actually received or to be received ought to be brought into account so as to diminish pension loss suffered or to be suffered. In my opinion the proper approach is to examine the loss claimed period by period. In respect of the period up to normal retirement age the pursuer may be able to point to a loss of earnings (although the pursuer in the present case happens not to have established such a loss). If he does so, any pension benefits which he is entitled to receive in that period cannot be brought into account so as to diminish the loss of earnings. That is the effect of section 10(a) (in Scotland) and *Parry v Cleaver* (in England). Attention can then be turned to the period after the normal retirement date. In respect of that period the loss is of pension benefit. A loss of pension benefit can only be calculated by comparing the pension benefit to which the pursuer would have been entitled if the accident had not happened with the pension benefit he will actually receive in the events which have happened. It therefore seems to me to be inevitable that the actual pension received during that period should be brought into account in the computation of the loss."

42. I consider that this passage correctly sets out the approach which is to be taken to claims for loss of pension. The periods before and after the normal retirement age require to be considered separately. Prior to the retirement age the claim is for loss of earnings. Pension benefits received during that period cannot be set off against the claim for loss of earnings. The effect of section 10(a) of the 1982 Act was to make it clear that the decision to that effect in the English case of *Parry v Cleaver* [1970] AC 1 applied also in Scotland. After the retirement date the claim is for loss of pension. In order to compare like with like, pension benefits received and to be received after that date must be brought into account. As this is the only way in which the amount of the compensation due for the loss of pension can be calculated, section 10(a) does not apply.

43. I would therefore hold that the law of Scotland requires the calculation of the respondent's claim for loss of his retirement pension to take his ill-health pension into account in the assessment of the amount which he has lost. It seems to me that this conclusion is inevitable on the facts of this case, as the two pensions are both products of the same scheme. It may be thought that the only reason why the issue has given rise to difficulty is the difference between the names which have been given to them by the Regulations. The correct view of the facts shows that the claim is simply one for the diminution in the amount of the pension to which the respondent is entitled under the Scheme. The amount by which his pension has been diminished cannot be calculated without setting the amount of the ill-health pension against the amount of the retirement pension.

Paragraph 20 of the Scheme

44. Paragraph 20 of the Criminal Injuries Compensation Scheme departs from the common law, because it states that where the victim is alive compensation will be reduced to take account of any pension accruing as a result of the injury. Where the pension is taxable, as it is in the present case, one-half of its value is to be deducted. The Board observed in its judgment in the present case that the policy followed by the Board has been to deduct half of any ill-health pension up to the date of occupational retirement and thereafter to deduct the net amount of the pension in full from the net amount of the pension otherwise payable. As I have already noted, there was a difference of view as to whether this policy was correct on a proper construction of paragraph 20. The minority view was that the deduction of one-half of the ill-health pension applied also to the post-retirement period.

45. It has to be said that paragraph 20 is less than explicit on this point. Mr Mitchell QC for the respondent did not invite your Lordships to endorse the view of the minority. For completeness however I should add that I agree with the judges of the First Division that the majority view was the correct one. The first sentence of paragraph 20 says that compensation will be "reduced" to take account of any pension accruing as a result of

the injury. Although it does not say so in terms, it seems to me that this sentence must be directed to the period prior to the retirement date when the claim is for loss of earnings. It assumes that the necessary arithmetic has been done to calculate the amount of that loss. It then requires a reduction to be made from that amount, which is limited to one-half of the pension where it is taxable. But after the retirement date the claim is for loss of pension. The amount of the compensation for the pension loss cannot be calculated without bringing fully into account the whole of any pension accruing as a result of the injury. That calculation must be completed before any question can arise about reducing the compensation. In the absence of clear language to the contrary, paragraph 20 must be read as having no application to the question how a claim for loss of pension after the retirement date is to be calculated.

Conclusion

46. I would hold that the construction of section 10(a) which the First Division felt compelled to adopt was wrong and that the Lord Ordinary was right to refuse the respondent's application for judicial review. I would allow the appeal, recall the interlocutor of the First Division and restore the interlocutor of the Lord Ordinary.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

47. I too agree. The statutory provision relevant to the present case is s.10 of the Administration of Justice Act 1982, as amended. This provides among other things that "in assessing the damages payable to the injured person in respect of personal injuries there shall not be taken into account so as to reduce that amount .... any contractual pension or benefit ....". At the time he received his injury, Mr Cantwell was a serving police officer covered by the statutory Police Pensions scheme. It is agreed that this scheme is to be treated as a "contractual" pension scheme even though it was the creature of section 1 of the Police Pensions Act 1976 and the Police Pension Regulations made thereunder. The terms of the scheme are to be found in the Regulations and in particular Schedule B to the 1987 Regulations (SI. 1987 No.257) as amended. It is essentially a contributory scheme with the benefits calculated by reference to periods of service and average earnings. Following the drafting of s.1 of the Act and Part B of the 1987 Regulations, the Schedule deals with the various personal awards which may be made under the scheme. These include the "Policeman's Ordinary Pension" payable to a policeman who retires after at least 25 years pensionable service (Article B1 and Part I of the Schedule) and the "Policeman's Ill-Health Pension" payable to a policeman who retires early on the grounds of ill-health (Article B3 and Part III of the Schedule).

48. As a result of his injury, Mr Cantwell suffered a number of losses. These included losses of earnings and loss of pension. At the time of the incident Mr Cantwell was not too far off completing his 25 years service and becoming entitled to retire on the full 'ordinary' retirement pension. Following his injury he had, in effect, to take early retirement. Because he was retiring on health grounds, he immediately qualified for (among other personal awards) an ill-health pension payable under Part III of the scheme without having to wait until he reached his normal retirement age. As his pension became payable earlier than otherwise would have been the case and because he was no longer working and therefore no longer notionally contributing to his pension out of his wages as a police officer (together with notional employer's contributions), the pension was lower than it would have been if he had continued to work in the police force till his normal retirement age. Accordingly, when he came to the age when, if in good health he would normally have retired, he was only entitled to a reduced pension. He thus suffered a loss of pension which he was entitled to recover from the wrongdoer or from the Criminal Injuries Compensation Board.

49. The argument of Mr Cantwell is that he has lost his 'ordinary' pension of about £15,200 pa and has received an 'ill-health' pension of about £13,500 instead. He says that under s.10 the £13,500 is to be disregarded and not taken into account. Accordingly he submits that he is entitled to claim compensation on the basis of having lost £15,200 pa not £1,700 pa. He was not successful before the single member or the Appeal Board. The Lord Ordinary upheld the Appeal Board but the Inner House disagreed and held that the claim should have been allowed: [2000] SC 407.

50. Both counsel adopted the formulation of Lord Reid in *Parry v Cleaver* [1970] AC 1 at p.13:

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

Lord Reid is thus posing two questions of fact and a third question of law. Mr Cantwell would answer them (on the figures we are using): £15,200; £13,500; no. The appellants would answer the first question £1,700 and the remaining questions do not arise; s. 10 does not apply because there is no sum which is being taken into account in reduction of the amount of Mr Cantwell's loss.

51. In my judgment the appellants are right. Like very many questions arising in relation to the law of the assessment of damages, it is really a question of fact and finding the answer depends not so much upon any principle of law but on the application of sound processes of reasoning. In the present case what is involved is Mr Cantwell's loss of pension following his reaching the age at which he would ordinarily have retired. There

is no dispute between the parties as to the treatment of the earlier period between the time he received his injuries and the time he reached his normal retirement age. On any view the first question to be answered is what loss has Mr Cantwell suffered. Mr Cantwell has been enabled to formulate his claim only because the pension scheme uses different terms to describe the full-term pension - the 'ordinary' pension - and the advanced but reduced pension - the 'ill-health' pension. He will not get the former; he will only get the latter. But he will get a pension under the scheme. It is still the same scheme; the payer remains the same. It remains the same type of pension, that is to say, a pension paid out of contributions which are treated as having been made over the duration of his employment in the police service. The only thing that has changed during the relevant period is that it is paid at a reduced rate. In this situation, to say that the sum which Mr Cantwell would have received but for the accident and which, by reason of the accident, he can no longer get was £15,200 pa does not accord with the admitted facts. He has not lost the whole of that sum. He has only lost part of it. The correct way to describe what has happened is to say that his pension has been reduced. Similarly, if the reduction in his pension had been smaller, say, £100 pa, it would more readily be appreciated that it would be an abuse of language to say that he had lost £15,200. Yet the logic of his argument would be the same. Mr Cantwell's argument fails on the facts. (See also Lord Reid's dictum at [1970] AC pp.20-1 stressing the need to compare like with like, followed and applied by Oliver LJ in *Auty v NCB* [1985] 1 WLR 784 at p.807.)

52. In view of this there is no need to go into the legal fallacy which underlies much of the argument of Mr Cantwell. The law draws a distinction between the suffering of a loss and the mitigation of that loss. Mitigation is a form of the avoidance of loss either as the result of receiving some benefit which would not have been received but for the incident which gave rise to the loss or as the result of voluntarily taking advantage of an opportunity to reduce the loss. The subject matter of s.10 is the inclusion or exclusion of mitigation. The statute makes additional provision for what may and may not be taken into account by way of mitigation in qualification or supplement of the common law rules. But the original structure is still there. The question of mitigation only comes into the assessment after the loss itself has been ascertained. It is true that criteria of causation are used throughout the enquiry as are criteria of remoteness. But mitigation and avoidance of loss remain concepts of the mitigation and avoidance of losses which have already been identified. It is this first vital step which Mr Cantwell's argument misses out.

53. For these reasons and those given by my noble and learned friend Lord Hope of Craighead, I agree that the appeal should be allowed as he has proposed.

LORD SCOTT OF FOSCOTE

My Lords,

54. I have had the advantage of reading in draft the speeches of my noble and learned

friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hobhouse of Woodborough. For the reasons they have given I, too, would allow the appeal and make the order proposed.