of case, which is questionable, a passing remark of Mr. Justice Frankfurter, in the *National City Bank Case*,[28] that the transactions between the Republic of China and the petitioner could be regarded as aspects of "a continuous business relationship", may form at least a suggestive guide. Perhaps we can say that that is the "ultimate thrust of the consideration of fair dealing", with reference to allowing a set-off and counter-claim. Policy and principle such as this would far more guarantee the full justice[29] which the principle of permitting any set-off or counter-claim demands.

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MITIGATION OF DAMAGE IN TORT

BRITISH TRANSPORT COMMISSION v. *GOURLEY*

I

In this case,[1] the plaintiff sustained injuries because of the defendant's negligence. The item of his damages comprising loss of wages was assessed by the trial judge at £37,720 without regard to the income tax and surtax which would normally have been payable by him on such wages had he not been injured. The trial judge alternatively estimated this sum at £6,695, taking such hypothetical taxation into account. The Court of Appeal held, following previous cases, that taxation was *res inter alios acta* and therefore irrelevant in assessing damages. Now their decision has been reversed by the House of Lords (Earl Jowitt, Lords Goddard, Reid, Radcliffe, Tucker, and Somervell of Harrow; Lord Keith of Avonholm dissenting).

In so deciding, the House of Lords considered, and—for the most part—overruled a line of precedents dating from 1933. That the problem had not arisen before that date is due, no doubt, to the low pre-war incidence of taxation. It first arose for consideration in *Fairholme* v. *Firth & Brown Ltd.*,[2] in which the plaintiff, formerly the Managing Director of the defendant company, sued the defendants for wrongful dismissal; having decided in his favour on the issue of liability, the Court of Appeal then held that the fact that his wages would normally be liable to taxation was not a valid consideration in the computation of damages. Their decision was based on the reasoning that taxation was *res inter alios acta*, and was further bolstered by considerations of "inveterate practice". This line of reasoning commended itself to Atkinson, J. in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.*,[3] to the Supreme Court of South Australia in *Davies* v. *Adelaide Chemical & Fertilizer Co. Ltd.*,[4] to Lord Keith sitting as Lord Ordinary in *Blackwood* v. *Andre*,[5] and to the Court of Appeal in *Billingham* v. *Hughes*.[6] An example of the logic of these cases is found in the remarks of Lord Keith in *Blackwood's Case*: "The Court, in my opinion, has no concern with the incidence of taxation in assessing the damages of an injured taxpayer. The argument rests on a consideration of facts which really are *res inter alios acta*, and for these reasons the argument must in my opinion be rejected."[7] Behind this purely legal reason there is a quite apparent

[28] (1954) 348 U.S. 356, 365.

[29] See *Strousberg* v. *Costa Rica* (1880) 29 W.R. 125 (*per* James, L.J. at 125).

[1] (1956) 2 W.L.R. 41. For other discussions of the case, see W. T. Baxter, "*British Transport Commission* v. *Gourley*" (1956) 19 Mod. L.R. 365, and M. Stevenson and A. Orr, "The Tax Element in Damages" (1956) 1 *British Tax Review* 5, neither of which articles was available to the writer in time to incorporate any reference to the arguments of their learned authors in the text of this case-note. Case now reported (1956) A.C. 185.

[2] (1933) 149 L.T. 332; 49 T.L.R. 470.

[3] (1946) K.B. 356.

[4] (1947) S.A.S.R. 67.

[5] (1947) S. C. 333.

[6] (1949) 1 K.B. 643.

[7] (1947) S.C. 333, 334.

moral one: "the only person who is going to benefit (from the mitigation of damages) is the person who is liable in damages".[8] However, as the object of the damages in these circumstances is compensatory and not punitive, it is difficult to see that this is a pertinent reason.

The writer knows of only two cases where taxation has been held to mitigate damages in tort, a Scottish one—*M'Daid* v. *Clyde Navigation*,[8a] and a decision of Owen, J. in *Atkinson* v. *Port Line Ltd.*,[9] apparently neglected in argument in most of the cases quoted above. In the former the injured plaintiff was taxed under the P.A.Y.E. system, whereby deductions from his wages were made before his receipt of those wages. Lord Sorn declared that to disregard taxation here would be "out of touch with reality". The case was distinguished by Lord Keith in *Blackwood's Case*[10] on the grounds that such considerations might be valid if wages were "taxed at the source" but that similar reasoning was inapplicable to other systems of taxation. The writer submits, however, that it is a trifle unreal to hold that whether taxation be considered in mitigation of damages or not should depend on the formalities of tax-gathering.

It was substantially Lord Sorn's point of view which won the day in *Gourley's Case*.[11] The House of Lords' point of view is simple and, it is submitted with respect, convincing. Starting with the proposition that the object of awarding damages is compensatory, their Lordships argued that the question of whether or not tax should be taken into account in mitigation of damages should be determined as far as possible by the ordinary rules governing assessment of damages; that every one whose income is not positively exiguous is subject to taxation, and that this burden is automatically and immediately lifted when the taxpayer's injury puts him out of work. Indeed, to hold otherwise would be to enable the plantiff to make a profit out of litigation.

The two traditional difficulties in accepting this reasoning might be examined a little further: (1) There is the purely verbal difficulty that if taxation be deducted from the overall damages, one is no longer compensating the plaintiff for "loss of wages". But, as Mr. Ross Parsons has demonstrated, if compensation be the object of damages in such a case (as it clearly is), one is really considering "loss of earnings" and not "loss of wages".[12] (2) The main stumbling-block seems to be the argument that to consider taxation in such a context would be to treat of a matter which is really *res inter alios acta*. This argument has a certain appealing facility about it, which, however, can soon be seen to be specious. It is submitted that the maxim is even more harmful and arbitrary in its automatic application than such maxims usually are; and that, whatever importance it might command in certain spheres of the law of contract, it has little place in the delictual rules relating to remoteness of damage. On principle, as Earl Jowitt suggests, the same considerations should apply to the aggravation as to the diminution of damages. If A injures B, a concert pianist by profession, so that B's hand is amputated, A cannot be heard to plead that B's trade is an irrelevant factor in the assessment of damages as being *res inter alios acta*, i.e. a matter of no moment to him but of importance only between B and his audiences. Broadly speaking, the law has chosen directness of causality, and no other criterion, for ascertaining the remoteness of damage in tort. On similar reasoning, the writer agrees that the degree of immunity from taxation which is conferred on the victim of negligence is a direct result of the act and a proper consideration for diminishing damages.

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[8] *Id.* at 333.
[8a] (1946) S.C. 462.
[9] Unreported, noted *Sydney Morning Herald*, 20th June, 1946.
[10] (1947) S.C. 333.
[11] (1956) 2 W.L.R. 41.
[12] R. W. Parsons, "The Mitigation of Tort Damages for Loss of Wages" (1954) 28 *A.L.J.* 563.

II

The interest of the case lies not so much in the actual reasoning of the court (which, it is submitted, only constitutes a logical application of the basic doctrine governing the assessment of damages in tort), as in the effect it will have on the principles relating to the assessment of damages in other departments of the law.[13] Although it is too early to foretell its impact, in the writer's opinion, this will depend on the validity of two suppositions, neither of which was decided in the case: firstly, that an award of damages in tort (at least for personal injuries) when in the recipient's hands is not liable to tax either as income or as capital; and, secondly, that there is a basic similarity from a taxation point of view between such damages and damages for breach of contract (at least if for wrongful dismissal).

Gourley's Case[14] was argued on the footing that no part of the damages awarded to the plaintiff would be assessable income for taxation purposes. So Earl Jowitt said:[15] "It was agreed by counsel on both sides—and I think rightly agreed—that the respondent would incur no tax liability in respect of the award of £37,720 or alternatively, £6,695"; and Lord Goddard said:[16] "The parties agreed that under the present law no part of the sum awarded as damages was subject to income tax or surtax and the appeal proceeded on that footing." It seems that, in England, while there is no decision directly in point, money received as the "loss of wages" component in a damages claim for personal injury is not so assessable; certainly, though again there is lacking authority directly in point, it is standard practice to exclude such sums from one's taxable income in Australia.[17]

However, in view of the fact that Lord Goddard at least was disposed to equate for taxation purposes damages awarded in an injury claim with damages awarded for wrongful dismissal,[17a] it is submitted that the law on this point is not beyond argument. In *Wiseburgh* v. *Domville* (*Inspector of Taxes*)[18] the Court of Appeal (Lord Evershed, M.R., Birkett, L.J. and Roxburgh, J.) held that compensation awarded to the plaintiff appellant for wrongful determination of an agency agreement constituted profits or gains from the taxpayer's trade and not the replacement of an enduring capital asset, and therefore was caught by the English Income Tax Act, 1918 as properly assessable income. In *Anglo-French Exploration Co. Ltd.* v. *Clayson* (*Inspector of Taxes*)[19] the Court of Appeal (Lord Evershed, M.R., Birkett and

[13] It has yet to be seen how far they would determine cases involving the payment of compensation for land; on this matter the cases show some divergence of opinion. The curious are referred to *Comyn* v. *Attorney-General* (1950) I.R. 152; and *W. Rought Ltd.* v. *West Suffolk County Council* (1955) 2 Q.B. 338.

That *Gourley's Case* will enjoy a growing importance in the law of torts seems assured by the recent case of *Hall & Co. Ltd.* v. *Pearlberg* (1956) 1 W.L.R. 244, which concerned the assessment of damages in an action for trespass to land and conversion.. The Official Referee in estimating the amount of damages properly chargeable for loss of rent (following *Gourley's Case*) calculated the amount of tax which would have been payable had rent been received and deducted that sum from the amount which he would have awarded if he had disregarded the fact that income derived from the payment of rent was liable to tax. The result of the latter case on appeal to the House of Lords has now been reported ((1956) 3 W.L.R. 589), where the principle of *Gourley's Case* was applied to the computation of compensation for voluntary acquisition of land. The dispossessed owner in this case was held entitled to an amount for loss of profits for the period during which he was looking for other accommodation, and from the sum otherwise payable on this count there was deducted the amount of tax for which he would have been liable if he had actually earned that sum. This decision renders some of Professor Baxter's remarks in (1956) 19 *Mod. L.R.* 365 at 372, untenable.

[14] (1956) 2 W.L.R. 41.

[15] *Id.* at 43.

[16] *Id.* at 50.

[17] *Cf.* J. A. L. Gunn, *Commonwealth Income Tax Law and Practice*, 4 ed. (1954) 173.

[17a] (1956) 2 W.L.R. 41, 51; and the equation was enunciated and applied by Pilcher, J. in *Beach* v. *Reed Corrugated Cases* (1956) 1 W.L.R. 807; (1956) 2 All E.R. 652.

[18] (1956) 1 All E.R. 754.

[19] (1956) 1 All E.R. 762.

Jenkins, L.JJ.) held that payment of a lump sum as compensation for relinquishing a contract of service fell within the same class. Neither case purports to lay down a general rule that such sums will always be assessed as taxable income, and each reiterates that every case must be considered on its own facts. But taken together they do indicate that at least some classes of damages for wrongful dismissal constitute taxable income. But that they will lead to some judicial re-thinking is clear from the High Court decision of *Californian Oil Products Ltd.* (*in liquidation*) v. *Federal Commissioner of Taxation*[20] where, on facts differing in no material respect from those of *Wiseburgh's Case*,[21] it was held that money paid by way of compensation for the wrongful determination of an agency agreement clearly constituted capital (at least if paid in a lump sum), and was, therefore, not assessable income for taxation purposes.

The recent case of *Beach* v. *Reed Corrugated Cases*,[22] a decision of Pilcher, J., seems to make the mystery even more impenetrable; for his Honour here, while holding that no distinction as regards tax liability is to be drawn between damages for personal injuries based on tort and damages for wrongful dismissal based on breach of contract, delivered his judgment on the assumption that the damages actually awarded for the wrongful dismissal concerned would *not* be liable to tax.

One inexperienced in the complexities of taxation law must speak with some diffidence of the distinction between capital and income, about which an enormous body of literature has been written by economists to prove that it does not exist, while in an equally large number of cases judges are constrained to formulate and apply such a distinction. Nor does the matter turn on any difference in definition in this regard between the English and Australian Acts. Broadly speaking, in every case a court must decide whether the sum of money involved be capital or income before dealing with the provisions of the particular Act applicable. It is clear that, as the law now stands, damages received for loss of wages are not taxable capital in Australia; whether or not it be taxable as income depends on whether a distinction can be drawn between such damages and damages arising from wrongful dismissal. The writer cannot see any logical distinction—we can only wait for courts to elucidate the matter further.

If it eventually happens that damages representing loss of wages are so assessable, the task of a judge assessing damages in a negligence action will be unenviable. He would firstly have to decide whether or not the money, when awarded, constituted income or capital for taxation purposes; secondly, if it were income, whether or not it would be assessable for tax; and thirdly, if so assessable, what standards to apply when assessing it. Finally, if damages were awarded on the basis that they would not be assessable income, the revenue authorities would not be bound by the decision under the doctrine of *res judicata* since they were not parties to it.

III

Perhaps the most interesting topic for speculation on the reading of this case is the effect it will have on what are usually regarded as related topics. It is proposed to deal with them under three main heads:

1. Compulsory forms of payment by a third party to the plaintiff. It is submitted that *prima facie* these should be treated as factors minimizing damage in tort, not being essentially different from taxation in legal conception.

2. Voluntary payments by a third party to the plaintiff. In the writer's opinion, these form a radically different class; they are in no sense directly caused by the accident, and are as much *novae causae intervenientes* as damage

[20] (1935) 52 C.L.R. 28.
[21] (1956) 1 All E.R. 754.
[22] (1956) 1 W.L.R. 807; (1956) 2 All E.R. 652.

done by a third party to the original collision in cases such as where ship A, after being damaged by ship B, retraces her steps and is damaged a second time by ship C.[23]

3. Contractual or semi-contractual payments by a third party to the plaintiff. Under this head I include insurance,[24] pensions,[25] and possibly sick-pay.[26] Broadly speaking, I think that the authorities, which almost unanimously decline to consider these collateral benefits deductible from damages, survive *Gourley's Case*.[27] Principally, the reason is a moral one—to hold otherwise would put a premium on prodigality, and render the benefits of paying accident insurance premiums nugatory; for it would give the uninsured just as generous treatment as the insured. It is extremely difficult, however, to connect this obviously beneficial social policy with an appropriate rule of law. Perhaps they can be treated as the converse of *Liesbosch* (*Owners*) v. *S.S. Edison* (*Owners*).[28] One may argue that just as the plaintiff's penury in that case, caused as it was by ultraneous circumstances and not by the defendant, rendered further damage too remote, so in these cases the wealth accumulated through the labour or wisdom of the plaintiffs should not be set at nought by being deducted from the damages recoverable.

IV

It remains to see how the ratio of *Gourley's Case*[29] stands in relation to that type of case described by Asquith, L.J. (as he then was) as "where accidental *de facto* recoupment of part of the loss caused by the wrongdoer is ignored." (*Sharman* v. *Folland*).[30] Following is a short list of some circumstances of the kind meant:

1. The plaintiff has been living in expensive hotels; as a result of the injury she was forced to lodge with her parents. The defendants unsuccessfully claim mitigation of damages by reason of the saving of hotel bills after the accident.[31]

2. Ship A claims damages from ship B for delaying its departure in breach of contract, whereby there has occurred financial loss due to the cancellation of passages. Some of the passengers then travel by ship C, which is partly owned by the owners of ship A. Ship B claims that the damages recoverable for the delayed departure should be reduced by reason of the fact that the owners recovered some of the money in the additional passages on ship C.[32]

3. A is injured and has to leave her employment with B, who had provided her with board and lodging as well as wages. After her injury, she is taken in by C, who does not charge her for her board and lodging. B claims that no sum may be awarded for loss of board and lodging.[33]

4. A claims damages for loss of his servant B through C's negligence; C claims that the damages should be diminished by the amount of B's wages, as A now does B's duties himself.[34]

5. A is severely injured by B while en route to catch an aeroplane; he is hospitalised and forced to miss the plane, which crashes, killing all on board.

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[23] For this point of view, *cf.* the argument of Parke, J. in *Yates* v. *White* (1838) 4 Bing. (N.C.) 272; and the decisions in such cases as *Payne* v. *Railway Executive* (1952) 1 K.B. 26; *Van Heerden* v. *African Guarantee and Indemnity Co. Ltd.* (1951) 3 S.A.L.R. (C.P.D.) 730; *Bradford Corpn.* v. *Webster* (1920) 2 K.B. 135; *Liffen* v. *Watson* (1940) 1 K.B. 556; and the *dicta* in *Admiralty Commissioners* v. *S.S. America* (1917) A.C. 38; *cf.* also the *Restatement*, paragraph 924, comment f. There are many authorities on this point, and useful analogies may be found in the cases under Lord Campbell's Act.

[24] *Cf. Bradburn* v. *Great Western Railway* (1874) L.R. 10 Ex. 1.

[25] *Cf. Payne* v. *Railway Executive* (1952) 1 K.B. 26.

[26] A complicated question, the authorities on which are collected by R. W. Parsons, "The Mitigation of Tort Damages for Loss of Wages" (1954) 28 *A.L.J.* 563, at 567-570.

[27] (1956) 2 W.L.R. 41.

[28] (1933) A.C. 449.

[29] (1956) 2 W.L.R. 41.

[30] (1950) 2 K.B. 43, 46.

[31] *Ibid.*

[32] *Jebsen* v. *East and West India Dock Co.* (1875) L.R. 10 C.P. 300.

[33] *Liffen* v. *Watson* (1940) 1 K.B. 556.

[34] *Donovan* v. *Cammell Laird & Co. Ltd.* (1949) 82 Ll. L.R. 642.

B claims diminution or extinction of damages for having saved A's life.

Although these cases are compendiously treated by the textbooks as falling in the same class,[35] it is submitted that if treated on principles precisely analogous to those governing remoteness of damage they will either be cases where the benefit accruing from the injury is or is not too remote to consider in the assessment of damages. The writer can see no reason why cases (1), (2) and (4) should be treated differently from the cases of voluntary payment considered above; in each of these three cases, there is a *nova causa interveniens* rendering the benefit too remote. In (1), for example, the voluntary forbearance of A's parents to charge for board and lodging expenses is a new intervening cause in a very real sense.

Cases (2) and (5) present special problems. If we apply the standard tests used in relation to remoteness of damage, there is no doubt that the benefit accruing from the injury should not be considered too remote. But the fact that the defendants' claims to mitigate damages would verge on the absurd indicates that they are hardly sound law, albeit theoretically satisfying the "direct causation" test. As with insurance claims mentioned above, it is submitted that to consider the facts in these cases in mitigation of damages would be contrary to public policy. For the common law has never pursued a scholastic symmetry of legal principles to the exclusion of common sense. Perhaps no more need be said on these and similar claims than Lord Halsbury, L.C. said in his speech in *The Mediana*:[36]

> Supposing a person took away a chair out of my room and kept it for twelve months, could anyone say you had a right to diminish the damages by showing that I usually did not sit in that chair, or that there were plenty of other chairs in the room. The proposition, so nakedly stated, appears to me to be absurd.

R. P. MEAGHER, Case Editor—Third Year Student.

SOME ASPECTS OF MALICE AND ESTOPPEL IN THE CRIMINAL LAW

MRAZ v. *THE QUEEN*

A woman died during or immediately after an act of intercourse with a man. The man was tried for murder and acquitted but was convicted of manslaughter. He appealed against the conviction on the ground that the jury had been misdirected as to the possibility of returning a verdict of manslaughter. The appeal was unsuccessful in the Court of Criminal Appeal, but successful in the High Court where it was ordered that a judgment and verdict of acquittal be entered. The Crown then indicted the man for rape and, after his special pleas to that indictment had been overruled, he was convicted of that crime. He again appealed against his conviction, unsuccessfully to the Court of Criminal Appeal, but successfully to the High Court where it was held that, having regard to the acquittal of murder, the Crown was estopped from indicting him for rape. About this case it might fairly be said that both the protracted litigation and the man's final acquittal were the result of the judge's misdirection of the jury at the trial for murder.[1]

It is proposed to deal with this litigation in two parts. In the first part, the indictment for murder, the conviction of manslaughter and the appeals against that conviction will be considered and commented upon. In the second part, the indictment for rape, the special pleas, the conviction of rape and the appeals against that conviction will be considered and commented upon.

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[35] *Cf.* D. A. McI. Kemp and M. S. Kemp, *The Quantum of Damages in Personal Injury Claims* (1954) 32-42.

[36] (1900) A.C. 113, 117.

[1] *Mraz* v. *The Queen* (1955) 55 S.R. (N.S.W.) 479; (1954-56) 93 C.L.R. 493; (1956) 73 W.N. 425. Appeal to the High Court in September 1956 as yet unreported.