ARNUP v M.W. WHITE LTD

QUEEN'S BENCH DIVISION

(H.H.J. Richard Seymour Q.C.): March 27, 2007[1]

[2007] EWHC 601; [2007] P.I.Q.R. Q6

Contributions; Death in service benefits; Employee benefit trusts; Fatal accidents; Measure of damages

H1 *Quantum—fatal accident—payments to widow as result of policies taken out or financed by the tortfeasor—whether fell within s.4 of Fatal Accidents Act 1976—whether benefits accruing as a result of death—benevolence and insurance exceptions*

H2 Kevin Arnup was killed on December 22, 2003, in the course of his employment as yard foreman with M, a waste recycling company. His widow brought actions under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 (as amended). Liability was accepted, subject to the issue of contributory negligence. Quantum was in dispute. In January 2004, the claimant received a payment of £129,600 from M, and she signed a receipt describing the payment as "in respect of MW White death benefit scheme". This was a result of a life assurance benefit worth four times the deceased's salary, following a policy which had been taken out by M to the benefit of its employees pursuant to its M.W. White Ltd"Death in Service Benefit" Scheme. A second payment of £100,000 was made in February 2004, and the claimant signed a receipt stating that the payment was "in respect of benefits received from MW White Employee Benefit Trust". The latter was the result of a settlement by M with Bridgewater Corporate Services Ltd, who thereby became trustees of a sum of money made over to them by M. Bridgewater had exercised its power under the settlement to effect life assurance by entering into a Life Policy with Lloyd's underwriters and the named assured, the MW White Ltd Employee Trust. A schedule of insured persons was included detailing each of M's employees, and each was assured in the sum of £100,000.

H3 Thus, the two payments made to the claimant were as a result of schemes towards which M's employees had made no direct contribution themselves. M argued that these payments should be taken into account by the court considering quantum, submitting that they were not benefits covered by s.4 of the Fatal Accidents Act 1976; they did not "accrue" to the dependants by reason of the death, and that they were ex gratia discretionary payments made by or on behalf of

[1] Paragraph numbers in this judgment are as assigned by the court.

the defendant. The claimant submitted that to take account of the payments would fall foul of s.4. The matter was tried as a preliminary issue.

H4 **Held,** that the payment of £129,600 did fall to be taken into account in the assessment of damages, but the £100,000 did not. Neither payment became payable to the claimant upon the death of her husband. The death was the occasion for the making of the payments, but not what caused them to accrue. Therefore neither fell within the scope of s.4. The amount of £129,600 became payable under the Death in Service Policy to M, not to the claimant. M decided whom to pay it to thereafter. The amount of £100,000 became payable on the death of the claimant's husband, but again, it did not become payable to the claimant; it became payable to Bridgewater, who were the Trustees of M.W. White Ltd Benefit Trust, and not bound to pay the money to anyone.

H5 As far as s.4 was concerned, no special approach was to be adopted because the tortfeasor was the source of the money or services provided.

H6 When considering the insurance exception, the mere fact that the employer had arranged the insurance for the benefit of his employees was not enough, and it is obvious in such circumstances that in some degree the employer has taken account of the benefit in determining how much to pay the employees. The issue was whether it could be demonstrated that the employee had made a contribution to the cost of the insurance in the sense of a reduced hourly wage. Evidence was needed that, but for the insurance provision, the employee would have been paid more. There was no evidence to this effect in this case, and therefore the payments to the claimant did not fall within the insurance exception. However, the payment of £100,000 did fall within the scope of the benevolence exception. Bridgewater had an unfettered discretion when it came to dealing with the assets which formed the trust fund, and was totally independent of the company. For the purposes of the application of the benefit exception, it was a third party.

H7 **Cases considered in the judgment:**

(1) *Pirelli General Plc v Gaca* [2004] EWCA Civ 373; [2004] P.I.Q.R. Q5; [2004] 1 W.L.R. 2683
(2) *Hayden v Hayden* [1992] 1 W.L.R. 986; [1992] P.I.Q.R. Q111; [1993] 2 F.L.R. 16
(3) *Stanley v Saddique* [1992] Q.B. 1; [1991] 2 W.L.R. 459; [1991] 1 All E.R. 529
(4) *R. v Criminal Injuries Compensation Board Ex p. K (Children)* [1999] Q.B. 1131; [2000] P.I.Q.R. Q32; [1999] 2 W.L.R. 948
(5) *H (A Child) v S (Damages)* [2002] EWCA Civ 792; [2003] P.I.Q.R. Q1; [2002] 3 W.L.R. 1179
(6) *Hay v Hughes* [1975] Q.B. 790; [1975] 2 W.L.R. 34; [1975] 1 All E.R. 257
(7) *McIntyre v Harland & Wolff Plc* [2006] EWCA Civ 287; [2006] P.I.Q.R. Q8; [2006] 1 W.L.R. 2577
(8) *Bradburn v Great Western Rail Co* (1874–75) L.R. 10 Ex. 1
(9) *Redpath v Belfast & County Down Railway* [1947] N.I. 167
(10) *Parry v Cleaver* [1970] A.C. 1; [1969] 2 W.L.R. 821; [1969] 1 All E.R. 555
(11) *Williams v BOC Gases Ltd* [2000] I.C.R. 1181; [2000] P.I.Q.R. Q253; The Times, April 5, 2000

(12) *Cunningham v Wheeler* [1994] 113 D.L.R. (4th) 1
(13) *Page v Sheerness Steel Co Plc* [1996] P.I.Q.R. Q26

H8 **Legislation considered in the judgment:**
(1) Fatal Accidents Act 1976 (as amended)
(2) Law Reform (Miscellaneous Provisions) Act 1934
(3) Fatal Accidents Act 1846
(4) Administration of Justice Act 1982

H9 Preliminary issue decided by H.H. Judge Richard Seymour Q.C., sitting as a Judge of the High Court in the Queen's Bench Division, on March 15, 2006, in an action brought by the claimant Melanie Arnup against M.W. White Ltd, following the death of her husband during his employment with the defendant.

H10 *Robert Weir*, instructed by *Kester Cunningham John*, for the claimants.
Christopher Purchas Q.C., instructed by *Fox Hartley*, for the defendant.

APPROVED JUDGMENT

H.H. JUDGE RICHARD SEYMOUR Q.C.:

Introduction

1 This action arises out of the death on December 22, 2003 of Mr Kevin Arnup. He was killed during the course of his employment by the defendant, M.W. White Ltd (the Company). The business of the Company is the recycling of waste paper. At the time of his death Mr Kevin Arnup was employed as the yard foreman at the premises of the Company in Station Road, Ketteringham, Norwich, Norfolk. For the purposes of its business the Company operated at those premises a piece of machinery called a paper hogger. On December 22, 2003 the paper hogger became jammed. Mr Kevin Arnup was working at the time the paper hogger became jammed with his son, the second claimant, Mr Jason Arnup. The pair of them climbed into the paper hogger to try to remove the blockage. While they were inside the paper hogger, the machine started up. Mr Jason Arnup was able to escape from the machine without suffering any physical damage. His father was crushed to death.

2 Mr Kevin Arnup was born on March 23, 1967. Thus he was 36 years of age at the date of his death. He was survived by his wife, Mrs Melanie Arnup, as well as by his son, Mr Jason Arnup. Mr Jason Arnup was born on July 28, 1988, so he was 15 years of age at the time of his father's death. He is now 18. Mr and Mrs Kevin Arnup had two other children, who were both adult by the date of death of their father.

3 Mr Kevin Arnup did not leave a will. Letters of administration in respect of his estate were granted to Mrs Arnup on March 16, 2006.

4 In this action Mrs Arnup claims damages against the Company in respect of the death of her husband pursuant to the provisions of Law Reform (Miscellaneous

Provisions) Act 1934 and Fatal Accidents Act 1976 as amended. In addition Mr Jason Arnup claimed damages in respect of the consequences for him of the incident in which his father died. The claim of Mr Jason Arnup has been settled.

5 Liability in respect of the death of Mr Kevin Arnup is not in issue. There is a dispute as to the extent to which Mr Kevin Arnup was contributorily negligent in relation to his death. This judgment is not concerned with that issue, which will be tried hereafter if the parties are not able to reach agreement about it.

6 An important issue in this action in relation to the claims founded on the death of Mr Kevin Arnup is the amount of the damages which should be awarded. That issue seems to focus on what account, if any, in the assessment of the damages should be taken of two payments made to Mrs Arnup. The first of these payments was an amount of £129,600 paid to Mrs Arnup on January 16, 2004. That amount was described in the receipt in respect of it which Mrs Arnup was asked to sign, and did sign, as a payment "*in respect of M W White death benefit scheme*". The second amount was of £100,000 paid to Mrs Arnup on February 16, 2004. In the receipt which Mrs Arnup was asked to sign, and did sign, in relation to that payment it was described as "*in respect of benefits received from M W White Employee Benefit Trust*".

7 The position adopted on behalf of the Company was that the two amounts to which I have referred should be brought into account in its favour in the assessment of the damages due in respect of the death of Mr Arnup. That position was contested on behalf of Mrs Arnup. Her case was that the bringing of the amounts in question into account was prevented by the provisions of Fatal Accidents Act 1976 s.4, as substituted by Administration of Justice Act 1982 s.3(1). Fatal Accidents Act 1976 s.4, as so substituted, is in these terms:

> "In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded."

8 I shall come to explain the arguments advanced on behalf of each of the Company and Mrs Arnup in support of their respective positions. However, in the light of those positions District Judge Pelly ordered on November 21, 2006 that there be tried a preliminary issue,

> "to determine whether the following payments should be set off against the claims made for loss of dependency as contended by the defendant in its counter schedule:
>
> (i) Payment of £129,600 from the M W White Limited Death Benefit Scheme.
> (ii) Payment of £100,000 from the M W White Limited Employee Benefit Trust."

9 It has fallen to me to try that issue, and it is with that issue that this judgment is concerned.

10 Before coming to the arguments adduced on that question it is appropriate to explain what was the M. W. White Ltd Death Benefit Scheme and what was the M. W. White Ltd Employee Benefit Trust.

The M.W. White Ltd Death Benefit Scheme and the M.W. White Ltd Employee Benefit Trust

11 Mr Kevin Arnup was employed by the Company from May 20, 1996 until the date of his death.

12 By a deed (the Deed) executed on November 5, 1998 the Company, called in the Deed the Principal Employer, declared that it was establishing with effect from December 1, 1998 a scheme to be named M.W. White Death in Service Benefit. In this judgment I shall refer to that scheme as the Scheme.

13 For the purposes of the Deed those referred to as Members were said, in cl.1, to be such employees and/or directors who may from time to time be admitted to membership of the Scheme.

14 By cl.2 of the Deed provision was made as follows:

> "The benefits of the Scheme which are summarised in a written announcement which has been or will be given to all Members of the Scheme, shall be secured by a policy or policies ('the Policy') effected in the name of the Principal Employer with Legal and General Assurance Society Limited or any other insurance company as described in Section 659B of the Income and Corporation Taxes Act 1988 (the 'Insurer')."

In this judgment I shall call what was described in cl.2 of the Deed [as] the Policy, the Death in Service Policy.

15 By cl.3 of the Deed it was provided that:

> "The Scheme shall be administered in accordance with this Declaration and the Rules of the Scheme ('the Rules'). The Principal Employer shall be the trustees of the Scheme and shall hold the Policy upon trust for the purposes of the Scheme and shall be the Administrator for the purposes of the Act."

16 Rules governing the Scheme (the Scheme Rules) were adopted by the Company on November 22, 1999.

17 The Scheme Rules included:

> **"3. Payment of Life Assurance Benefit**
>
> (a) The Life Assurance Benefit described in Appendix A shall, subject to the provisions of Rule 12 and Appendix B, be payable as a lump sum in accordance with Rule 4, on the death of an Insured Member before Benefit Termination Date.
>
> . . ..
>
> **4. Application of Life Assurance Benefit at Principal Employer's Discretion**
>
> (a) In respect of any lump sum benefit which is expressed to be payable in accordance with this Rule the Principal Employer shall have power within the period of two years after the Insured Member's death (but not later than one day prior to the expiry of the perpetuity period applicable to the Scheme in accordance with the Declaration of Trust if that day shall be prior to the expiry of the said period of

two years) to pay such benefit to the Insured Member's estate and/or to pay or apply such benefit to or for the benefit of any one or more of the Insured Member's Dependants and Relations living at the Insured Member's death and/or such persons or bodies as the Insured Member may have notified in writing to the Principal Employer in such manner as the Principal Employer shall decide. In exercising this power the Principal Employer may have regard to but shall not be bound by any wishes notified to the Principal Employer by the Insured Member.

(b) If at the end of the period within which the Principal Employer may exercise the power set out above the Principal Employer shall not have exercised that power, or shall have exercised it only in respect of part of the said benefit, the Principal Employer shall pay the whole or the balance (as the case may be) of such benefit to the Insured Member's estate, ...

(c) In this Rule—

'Dependants' means persons who in the opinion of the Principal Employer shall have been wholly or partly maintained or financially assisted by the Insured Member (including being dependant upon the Insured Member to maintain a joint standard of living); and

'Relations' means the spouse, parents ancestors and descendants (however remote) of the Insured Member and the brothers, sisters, uncles, and aunts (whether of the whole or half blood) of the Insured Member and the descendants of any of them, and shall be construed as if the stepchild or adopted child of any person were that person's natural child."

18 The Life Assurance Benefit described in Appendix A to the Scheme Rules was, for present purposes, "an amount equal to four times his Scheme Earnings at the date of his death". The effect of the definitions of Scheme Earnings and Earnings in Appendix A to the Scheme Rules was that the Scheme Earnings was the annual basic rate of pay of the Member in question as at October 1 preceding the date of death.

19 An Insured Member for the purposes of the Scheme Rules was defined in Appendix A as, in effect, a Member for whom Legal & General Assurance Society Ltd (L & G) had agreed to insure the benefits arising under the Scheme. A Member of the Scheme was any person included in the Scheme. The Benefit Termination Date was defined in Appendix A to the Scheme Rules as meaning, for each Member, his 65th birthday.

20 Mr Kevin Arnup was admitted as a Member, and as an Insured Member, of the Scheme. In a new contract of employment signed by him on January 18, 1999 there was included in Mr Kevin Arnup's terms a provision concerning pensions as follows:

"Pensions

You are entitled to membership of the company's pension scheme once you have completed the probationary period of 3 months prior to 1st

> December each year. Your [*sic*] will be required to contribute 5% of your basic earnings in order to enjoy membership. The company will contribute 5% of your basic earnings and provide you with a 4 × salary death in service benefit."

21 On August 15, 2001 the Company entered into a settlement (the Settlement) with a company in the Isle of Man called Bridgewater Corporate Services Ltd (Bridgewater). In the Settlement the Company was called the Settlor. In cl.1(d) of the Settlement the expression the Beneficiaries was defined for the purposes of the Settlement as meaning:

> "the present and future directors officers or employees or retired directors officers or employees of the Settlor or any company resulting from the amalgamation or reconstruction of the Settlor and the spouses children and remoter issue or such present and future directors officers or employees or retired directors officers and employees PROVIDED THAT neither the Settlor nor any person or persons who previously may have added property to the Trust Fund shall be one of the Beneficiaries."

22 The expression the Trust Fund was defined for the purposes of the Settlement in cl.1(a). For present purposes it is enough to say that the Company provided to Bridgewater a sum of money.

23 In the Settlement Bridgewater was called the Trustees. By cl.7 of the Settlement it was provided that:

> "THE Trustees shall in addition and without prejudice to all statutory powers have the powers and immunities set out in the First Schedule provided that the Trustees shall not exercise any of their powers so as to conflict with the beneficial provisions of this Settlement."

24 One of the powers conferred on Bridgewater by the First Schedule to the Settlement was:

> **"9 Powers in relation to life insurance policies**
>
> THE Trustees may apply all or any part of the Trust Fund in purchasing or maintaining any policy of insurance on the life of any person and shall have all the powers of an absolute beneficial owner in relation to any such policy."

25 Bridgewater exercised the power to effect life assurance by entering into a policy of life assurance numbered CSPXXXX28505 (the Life Policy) with Lloyd's underwriters. The named assured was M.W. White Ltd Employee Trust. There was included in the Life Policy a schedule of insured persons. They were named as 27 Employees of M. W. White Ltd. Employee Trust. The life of each of those persons was assured in the sum of £100,000. It was common ground that Mr Kevin Arnup fell within the description of the insured persons in the schedule.

26 By cl.4 of the Settlement it was provided, so far as is presently material, that:

> "THE Trustees shall hold the capital and income of the Trust Fund
>
> (a) upon such trusts in favour or for the benefit of all or one or more of the Beneficiaries exclusive of the other or others of them

(b) in such shares or proportions if more than one Beneficiary and
(c) and subject to such terms and conditions and
(d) with and subject to such
  (i) powers and provisions for maintenance education or other benefit or for the accumulation of income
  (ii) administrative powers and
  (iii) discretionary or protective powers or trusts

as the Trustees shall in their absolute discretion appoint . . .”

27 In a letter dated August 16, 2001 to Mr Kevin Arnup (although the evidence was that a similar letter was written to all of the employees of the Company at that time) Mr Paul White wrote, so far as is presently material:

“M W White Limited Employee Benefit Trust

Having in mind the possibility of a Profit Related Bonus Scheme becoming a reality, the Directors of M W White Limited have set up an Employee Benefit Trust earlier this month, which is solely for the benefit of past, present and future employees of the Company.

The Trustees of M W White Limited Benefit Trust are:—

Bridgewater Corporate Services Ltd.

[the address of Bridgewater was then set out]

The Directors’ purposes in creating such a Trust were to:—

a) Encourage employees in the effectiveness of their work by communicating to them the possibility of receipt of benefits from the Trust.
b) Help to retain quality staff by their receipt of benefits from the Trust.
c) Enable and facilitate the Company to attract suitable personnel.
d) Provide for possible rewards and benefits to employees once their performance, over a period, has been assessed.
e) Creating a vehicle which would exist as a separate legal entity to the Company and which has the ability to acquire assets and liabilities, with appreciating investments.
f) Ensure that the Company’s remuneration and benefit package is comparable with or better than it’s [*sic*] competitors.

The Trust will be financed by contributions from the Company, when and in such amounts as the Company determines at it’s [*sic*] discretion. The Company can suggest to the Trustees the manner in which the Trust might be distributed, although this remains strictly a matter for the Trustees to determine. Undistributed assets of the Trust will be administered by the Trustees to maximise the funds available for future distributions. There is no requirement that all the funds be distributed by the Trust in the year of receipt. In this way, the Trust can build up the fund in particularly profitable years and can then consider making recommendations for distribution in future, less profitable years.

The Trust will be able to provide benefits on a continuing basis for the 'Beneficiaries', who will be past, present or future employees (including Directors) of M W White Ltd. The Directors expect that recommendations will be made to the Trustees, in the future, so that the trust's assets can be used to reward individuals according to their own efforts on behalf of the Company.

Being a 'Beneficiary' does not automatically construe [*sic*] a right to reward, but all 'Beneficiaries' will be considered under the scheme. All employees, past present and future, are automatically eligible for recommendation but it may be only some will actually be recommended for receipt of rewards.

Rewards can take various forms—a list appears below. This is not exhaustive but only gives some examples of benefits you may receive.

Provision of sickness benefit.

Bonuses for exceptional performance as a result of a specific event.

Loyalty bonuses for long term service.

Profit related bonuses on an exceptional or annual basis.

Capital loans to individuals—on an interest free or nominal basis.

The Directors would remind you that benefits do not automatically accrue to individuals. Awards may be made to any of the 'Beneficiaries' as a result of recommendation by the Directors to the Trustees. All bonuses in the future will be paid to you by the Trustees, normally subject to deduction of tax and National Insurance."

The motivation for the M. W. White Ltd Death Benefit Scheme and the M. W. White Ltd Employee Benefit Scheme

28 An issue which arose during the hearing before me was why it was that the Company had established the Scheme and had entered into the Settlement. The significance of this issue was said to be that it could be important, in the light of the authorities to which I shall come, whether Mr Kevin Arnup had contributed indirectly to the Death in Service Policy or the Life Policy. It was common ground that he had made no direct contribution to either of these policies.

29 Mr Paul White, the managing director of the Company, gave evidence before me. He told me that the directors of the Company were himself and his wife and that they were the sole shareholders in the Company. Thus the fixing of wages of employees and the benefits offered to employees were matters for them. Mr White was pressed quite firmly by Mr Robert Weir, who appeared on behalf of Mrs Arnup, on the suggestion that the Company took into account in assessing what wages to pay to employees, including Mr Kevin Arnup, the other benefits offered to employees, such as the Death in Service Policy and the Life Policy. Mr White told me that the existence of these policies, once they were in existence, was a consideration in setting wages, but not a major one. He also told me that when the Company pension scheme was introduced, at the same time as, but separate from, the Death in Service Policy, two or three of the then employees chose not to join the scheme, but their wages were not affected by that decision. He said that the main

reason for introducing a Company pension scheme was that it was feared at the time that the government was going to introduce a requirement for employers to offer a pension scheme to employees. He told me that the Company would not necessarily have increased wages if it had not introduced a pension scheme. Mr White said that the pension scheme was part of the overall package offered to employees, but that there was no direct relationship between the cost of the pension scheme and wages. He told me that the pension scheme was something which he thought that the Company could offer employees to give them more security.

30 According to Mr White, the making of the Settlement was undertaken to recognise the contributions made by employees to the success of the Company over the years. He said that, as an employer, the Company tried to do as much as it could for employees. The existence of the Settlement, however, was not something which was advertised to potential employees as a benefit of employment with the Company. That said, one of the small considerations in entering into the Settlement was attracting personnel. However, Mr White told me that the major impetus of entering into the Settlement was the desire to give something back to employees.

31 Mr White was cross-examined on the letter dated August 16, 2001 which he had written to Mr Kevin Arnup. It was suggested to him that the reasons of the Company for inviting Bridgewater to establish the Life Policy were those set out in the letter. However, as was plain from the terms of the letter and from the terms of the Settlement, what the letter was about was in fact the whole potential of the Settlement, and in particular a possible profit-related bonus scheme. Life assurance was not even mentioned in the letter. The power to obtain a life assurance policy was in fact one of 22 powers conferred upon Bridgewater contained in the first schedule to the Settlement.

32 I was impressed by Mr White and I am satisfied that, in his evidence, he was doing his best to help the court openly and frankly. In the end, as it seemed to me, what his evidence amounted to on the issue of the motivation for the Scheme and for entering into the Settlement, was that the Company wished to benefit employees by both of those measures. It was recognised that it was likely to be to the advantage of the Company to take those steps, but nothing approaching a cost/benefit analysis was undertaken. No specific consideration was taken of the impact of the benefits to employees arising from the existence of the Death in Service Policy or of the making of the Settlement. However, in a very general way it was appreciated that the fact of the benefits of the Death in Service Policy, and the fact of having entered into the Settlement, were likely to make the Company appear more attractive to employees and potential employees than if those benefits were not available. That assessment seems to me to be just common sense. Broadly only the morbid or the excessively cautious would be much attracted by the availability of life assurance equal to four times annual basic salary, such cover ceasing at age 65. Most people most of the time would probably not expect that benefit to be of any real advantage to them. Mr White in his evidence told me that he thought that what most of his employees were interested in was how much was in his pay packet at the end of the week. As for the benefits of the Settlement, the letter of August 16, 2001 itself made it clear that it guaranteed an individual absolutely nothing at all.

The circumstances in which payments were made to Mrs Arnup

33 In the light of the course of the argument before me it is important to record the evidence as to how the payments made to Mrs Arnup came to be made. There was in fact no issue about what had happened.

34 The relevant matters were dealt with in a witness statement of Mr David Hughff, managing director of Smith & Pinching General Insurance Services Ltd, an insurance broker retained to act on behalf of the Company. In his statement Mr Hughff explained the way in which the two payments had come to be made:

> "13. Accordingly following the deceased's accident M W White Ltd. advised Smith & Pinching of the circumstances and having obtained a copy of the death certificate we passed this to Legal & General. They issued a cheque for £129,600 (being four times Mr. Arnup's final salary) to M W White Limited in its capacity as trustees. In turn M W White Limited, as Trustee, decided that the money should be applied for the benefit of Kevin Arnup's widow and drew a cheque for £129,600 payable to Mrs. Melanie Arnup, which I delivered to her personally and for which she signed an acknowledgement dated 16 January 2004.
>
> . . .
>
> 23. Following Kevin Arnup's fatal accident the Company notified the circumstances to the Trustees [Bridgewater] and requested that may [*sic*—presumably 'they' was meant] make a claim on the Accident and Illness policy [which I have called the Life Policy] for the benefit of Melanie Arnup. The Trustees then submitted a claim to the Insurers who, on receiving proof of death, issued a cheque for £100,000 payable to the Trustees, who in accordance with the Company's wishes issued a cheque for the same amount payable to Melanie Arnup. I delivered this cheque to her and she signed an acknowledgement on 16 February 2004."

35 Mr Hughff was not required to attend court for cross-examination. Mr White dealt with the claim on the Life Policy at para.9 of his witness statement:

> "Following Kevin Arnup's fatal accident I contacted the Trustees to ask them to make a claim on the Trust's Accident and Illness Insurance Policy and pay the money to Melanie Arnup so that she was able to make ends meet despite the loss of her husband. I was not obliged to make this request and the Trustees were not bound to act upon it; nevertheless a claim was made and the proceeds were paid to Melanie Arnup."

36 Mr White gave oral evidence before me to the same effect. In relation to the payment to Mrs Arnup of the amount of £129,600 claimed under the Death in Service Policy Mr White told me that he made the decision that the money should be paid to Mrs Arnup, rather than, for example, to the estate of Mr Kevin Arnup.

Submissions on behalf of the Company

37 While Mr Christopher Purchas Q.C., who appeared on behalf of the Company, elaborated quite considerably on his written skeleton argument, and in particular took me through relevant authorities, a convenient summary of his argument on the

issue which District Judge Pelly directed should be tried was to be found in his skeleton argument:

> "8. The defendant maintains that the court should determine this issue by consideration of the following questions.
>
> a. Does the section [Fatal Accidents Act 1976 s.4 as substituted] properly construed mean that the 'benefits' to be disregarded include payments made by a defendant which were intended to assist the dependants and thereby compensate them in part for their financial loss following the death of the deceased?
> b. Where a defendant exercises a discretion or causes a discretion to be exercised so as to provide the dependant with funds that are intended to assist them and thereby compensate them in part for their loss do such funds 'accrue' to the claimant as a result of death within the meaning of the section?
>
> 9. The defendant makes the following submissions in respect of both questions as follows:
>
> a. The provenance and historical background of section 4 suggests that the draftsman had in mind benefits that accrue to a dependant either from the estate of the deceased or from some other source independent of the defendant.
> b. The draftsman cannot have intended the section to cover benefits in the form of payments by a defendant in full or part compensation of the loss otherwise it would be difficult to settle any claim.
> c. If the draftsman had intended the section to include sums received from a defendant it would doubtless have been made clear because the effect of doing so would inevitably result in a conflict between the section and the fundamental principles that a claimant should not recover more than he has lost and a defendant should not be required to pay twice for the same loss.
> d. The purpose underlying section 4 was to prevent a defendant benefiting unjustifiably from charitable donations from third parties or from the proceeds of a life assurance policy that the deceased had taken out for the protection of his dependants.
> e. Accordingly its purpose was in effect to mirror the position at common law in respect of assessment of damages for personal injury where charitable donations from third parties and the proceeds of an insurance policy paid for by a claimant are disregarded. But an important exception is where the payment or the insurance is funded by the wrongdoer *Pirelli General v. Jan Gaca* [2004] EWCA Civ 373.
> f. Public policy militates in favour of payments such as those made by the defendant being taken into account, as employers would

otherwise be discouraged from setting up funds or trusts for the benefit of their employees.

g. Public policy also favours an employer making ex gratia payments to an employee following an accident. Such payments have to be taken into account in the assessment of damages for personal injury. The same principle should apply to the Fatal Accidents Act. It should also apply to the two payments made by or at the instigation [of] the defendant in this case which were equivalent to discretionary ex gratia payments.
h. Section 4 should in accordance with general principles be construed purposively so that it accords with the common law and justice. Such construction would militate in favour of the payments being taken into account.
i. Support for this construction is to be found from the decision of the Court of Appeal in *Hayden v. Hayden* [1992] 1 WLR 986 which held that additional services provided to his children by a father following the death of their mother in circumstances where the father was also the defendant, were not a benefit that accrued as a result of her death. Accordingly the value of his services was taken into account as otherwise it would mean that the father would have to pay twice for the same loss firstly by carrying out the services and secondly by paying for them as part of the award of damages.
j. If instead of carrying out the services himself the defendant father in Hayden had provided funds to pay for the cost of the services from a trust that he had set up for the benefit of his children either before or after the death of the mother the same principle would surely have applied.
k. Hayden was not followed in *Stanley v. Saddique* [1992] QB 1, *R. v. Criminal Injuries Compensation Board* [1999] QB 1131 and *H v. S* [2003] QB 965 but those cases can be distinguished because in none of them was the person providing the services also the defendant.
l. There is also support from Kemp and Kemp at 29–083 that where the substitute carer is the tortfeasor the care should be taken into account.

10. For the above reasons it is submitted that the two payments should be taken into account and are not caught by section 4 of the Fatal Accidents Act because:

a. They are not benefits covered by the section
b. They did not 'accrue' to the dependants by reason of the death
c. They were ex gratia discretionary payments made by or on behalf of the defendant."

38 At its highest, the way in which Mr Purchas put his client's case seemed to involve the proposition that any payment made to a dependant of a deceased by, or as a result of action on the part of, the tortfeasor liable in respect of the death fell to be brought into account in assessing the damages due under Fatal Accidents Act 1976 s.3, regardless of the terms of Fatal Accidents Act 1976 s.4.

39 Mr Weir laid some stress on the terms of Fatal Accidents Act 1976 s.3(1), and so it is convenient to set out its terms:

> "In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively."

40 In his oral submissions Mr Purchas refined his submissions in relation to when and by what means he contended that, in the circumstances of the present case, the payments of £129,600 and £100,000 accrued to Mrs Arnup. The basic submission was that the payments did not accrue as a result of the death of Mr Kevin Arnup. At different points in his submissions Mr Purchas contended that the payments accrued as a result of the benevolence of the Company in establishing the Scheme and the Settlement, alternatively they accrued as a result of the decision of the Company, in the case of the sum paid in respect of the Death in Service Policy, to pay the money to Mrs Arnup, rather than to one of the other permitted recipients, or, in the case of the sum paid under the Life Policy, the request of Mr White that the money should be paid to Mrs Arnup, to which Bridgewater agreed. Mr Purchas submitted that, while the death of Mr Kevin Arnup was the occasion of the making of the payments, it was not what caused the payments to accrue.

Submissions on behalf of Mrs Arnup

41 The submissions of Mr Weir focused on seeking to demonstrate that the contentions of Mr Purchas were not supported by the relevant authorities. I shall come to the authorities shortly. However, in essence Mr Weir made three submissions, two of which were only relevant if the first did not succeed. The first submission was, simply, that the two payments made to Mrs Arnup were caught by Fatal Accidents Act 1976 s.4 as benefits which accrued to her as a result of the death of her husband. He contended that it was immaterial whether payments which accrued as a result of the death of the deceased were made by, or as a result of action on the part of, the tortfeasor. If they did, and that had the effect that the tortfeasor had to pay twice for some element of compensation, that was the consequence which Parliament had ordained in enacting the substituted Fatal Accidents Act 1976 s.4. The relevance to his submissions of Fatal Accidents Act 1976 s.3(1), contended Mr Weir, was that in this case, unlike in some of the cases to which my attention was drawn, there was no issue that Mrs Arnup had sustained a loss as a result of the death of her husband.

42 Of the two alternative submissions advanced by Mr Weir, one concerned both the payment made in respect of the Death in Service Policy and the payment made in respect of the Life Policy, but the other concerned only the payment made in respect of the Life Policy. If, which he of course did not accept, it was relevant to consider what the position would have been had the principles adopted in the assessment of damages in personal injury cases applied in this case, Mr Weir sought to rely on what is sometimes called the insurance exception in relation to the payment made in respect of the Death in Service Policy and the payment in respect of the Life Policy, and, separately, on what is sometimes called the benevolence exception in respect of the payment made in respect of the Life Policy. By the insurance exception I mean the well-established principle that a tortfeasor cannot,

in an assessment of damages in a personal injury case, rely, in reduction of the damages, upon the proceeds of an insurance policy entered into by the claimant at his own expense. By the benevolence exception I mean the equally well-established principle that the tortfeasor in such a case cannot rely, in reduction of the damages, upon sums paid to the claimant as a result of the charity or benevolence of third parties. Mr Weir contended that in the present case Mr Kevin Arnup had contributed to the Death in Service Policy and to the benefits provided under the Settlement in that each had formed part of a package of terms under which he was employed by the Company. Consequently the sums generated by the Death in Service Policy and the Life Policy did not fall to be brought into account in any event because he had contributed to the premiums. The separate point in relation to the Life Policy was that that had been paid not by the Company, the defendant, but by a third party, Bridgewater.

43 A subsidiary point, made by Mr Weir in his written skeleton argument, but not really deployed in oral argument, was that the payments to Mrs Arnup of the £129,600 and the £100,000 were not paid to her in her capacity as a dependant of Mr Kevin Arnup, but in her capacity as his widow. The short answer to that argument, as it seems to me, is that Fatal Accidents Act 1976 in s.1(3) defines who is a dependant for the purposes of that Act as including the wife or husband or former wife or husband of the deceased. In other words, Mrs Arnup was a dependant of Mr Kevin Arnup because she was his widow and, it was contended, had suffered loss in consequence of his death. Her role as widow could not be divorced from her capacity as a dependant.

The law—payments made following the death of the deceased by or on behalf of a tortfeasor

44 Given the far reaching implications of the case of the Company put at its widest, it is convenient to begin my consideration of the relevant authorities by looking at those which were said to bear on the issue of principle of how payments on the part of a tortfeasor following the death of the deceased should be treated, and in particular whether they were in principle outside the scope of Fatal Accidents Act 1976 s.4.

45 The authority upon which Mr Purchas placed great reliance was *Hayden v Hayden* [1992] 1 W.L.R. 986. In that case the mother of the plaintiff girl had been killed in a road accident for which her father was responsible. Following the death of the mother the father had given up work in order to look after his daughter and had done so for some seven years by the date of the trial. An issue which arose was how, if at all, account should be taken, in assessing the damages to which the girl was entitled in respect of the loss of her dependency upon her mother, of the fact that since the mother's death the girl had been looked after by her father. That issue fell to be considered when the case reached the Court of Appeal against the background of the decision of that court in *Stanley v Saddique* [1992] Q.B. 1 that the word "benefit" in Fatal Accidents Act 1976 s.4, as substituted by Administration of Justice Act 1982 s.3(1), was not restricted to direct pecuniary benefit but included the benefit accruing to a child as a result of its absorption into a new

family unit. Thus, before coming to the decision in *Hayden v Hayden*, it is material to consider the decision in *Stanley v Saddique*.

46 In *Stanley v Saddique* again there was a child plaintiff seeking damages in respect of the death of her mother in a road accident. The tortfeasor in this case was not the father. The mother and the father were not married. The trial judge found that the mother had not been a very good mother. After the death of the mother the father married and the plaintiff was taken into the family unit constituted as a result of the marriage. The stepmother was found by the trial judge to have been a much better mother to the plaintiff than her natural mother. The issue arose of whether that increase in the quality of care should be taken into account in assessing the claim of the plaintiff. The case for the defendant in the Court of Appeal was that that increase in the quality of care should be taken into account and was not prevented by the terms of the substituted Fatal Accidents Act 1976 s.4. An argument as to the construction of the substituted section made it necessary for the Court of Appeal to consider the history of the development of claims for damages for fatal accidents. The leading judgment was that of Purchas L.J. It is unnecessary for the purposes of this judgment to set out extensively the learned Lord Justice's narration of the history of the legislation and some of the authorities. However, it is appropriate to cite this conclusion, at p.10 of the report, which followed a reference to Fatal Accidents Act 1846:

> "Since this Act was passed, by successive statutes a wholly artificial statutory structure had been erected controlling the recovery of damages resulting from death. The Fatal Accidents Act 1846 enacted amendments which are not relevant to this appeal. The Fatal Accidents (Damages) Act 1908 in section 1 provided that in the assessment of damages there should not be taken into account any payment made under any contract of assurance or insurance. Prior to the passing of the Act of 1908 the normal common law rule of assessment of damages, namely that the net result of the injuries caused by the death balanced against any benefits accruing therefrom, represented the measure of damages. Public policy dictated that those who were provident enough to effect contracts for their own protection should not be penalised. Besides this, a series of common law decisions removed gratuitous or voluntary payments from the benefits deducted from the damages on the basis that they did not arise out of, or as a consequence of, the death. A similar approach applied in the case of actions for personal injuries where the victim survived."

Mr Weir emphasised the comment by Purchas L.J. that the structure of the law in respect of damages for death was wholly artificial. He contended that that observation was a complete answer to the reliance of Mr Purchas on public policy in the present case. In effect, Mr Weir submitted that, in relation to claims for damages in fatal accidents cases, it was Parliament which had determined public policy in the form of the statutory provisions made from time to time.

47 Purchas L.J. in *Stanley v Saddique* dealt with the issue of the construction of Fatal Accidents Act 1976 s.4, as substituted, at 13–14:

> "The problem is to decide whether in construing the new section 4 there is any justification for construing the words 'benefits which have accrued or will or

> may accrue to any person from his estate or otherwise as a result of his death shall be disregarded' as in any way being restricted or whether they should be given the full ambit of the word 'otherwise'. Mr. Clegg submitted that the specific exclusion of a widow's remarriage or prospects of remarriage from the assessment of damages provided in section 3(3) indicated that otherwise must be restricted in some way, otherwise section 3(3) was otiose. He suggested that the exclusion should be restricted to direct pecuniary benefits. However, if this course is taken the word 'otherwise' would not be sufficiently wide to reinstate the various rights to benefits which had been progressively introduced since the Act of 1908 culminating in the sections of the Act of 1976 which were wholly replaced by section 3(1) of the Act of 1982. As a result of the passage of this Act none of the pre-existing statutory exemptions from the deductions of benefits from Fatal Accidents Acts damage survived unless it is through the medium of the word 'otherwise'. It seems inconceivable that Parliament would have effected a wholesale repeal of all the long-standing previous statutory exceptions from the deduction of benefits by a side wind of this sort with the exception of the exclusion of the prospects of remarriage on the part of the widow (semble but not the widower). In my judgment, the preferable construction is that advanced by Mr. Ashworth, namely, that section 3(3) was left in as being a particularly significant question of policy, but that by section 4 Parliament intended to further the departure from ordinary common law assessment of damages for personal injuries by the artificial concept which has for many decades been the basis of damages recoverable under the Fatal Accidents Acts."

48 The other members of the Court of Appeal in the case of *Stanley v Saddique* were Ralph Gibson L.J. and Sir David Croom-Johnson. Ralph Gibson L.J. gave a judgment concurring in the result. Sir David Croom-Johnson agreed with both judgments. The significance of that is that Sir David Croom-Johnson was a party to the decision in *Hayden v Hayden*. The other members of the Court of Appeal in the latter case were McCowan L.J. and Parker L.J. McCowan L.J. dissented. Sir David Croom-Johnson was thus part of the majority.

49 It seems clear that McCowan L.J. considered that the decision in *Stanley v Saddique* was binding on the court in *Hayden v Hayden* and led to the conclusion that the decision of the trial judge to take account of the care provided by the father after the death of the mother was wrong. At 993 McCowan L.J. said:

> "Attractively as Mr. Crowther puts his arguments, I find myself unable to accept them. The principle which emerges from the decision in *Stanley v. Saddique* is that there is to be no reduction in the amount of damages which would otherwise be awarded to take account of care voluntarily provided in substitution for the deceased's motherly services. That principle cannot, in my judgment, be affected by whether or not the person providing the care was the tortfeasor."

50 Sir David Croom-Johnson in his judgment in *Hayden v Hayden* at 996 said in terms that he considered that the decision in *Stanley v Saddique* was binding on the court. The reasons for his conclusion that, nonetheless, the trial judge was not in error in taking account of the care of the plaintiff by the father after the death of the

mother, seem to be explained in two passages, the first at 998 and the second at 999–1000:

> "If the result of making an allowance for the fact that the defendant has himself continued to act as a loving father means that his ultimate financial liability to the plaintiff is smaller, there is nothing wrong or objectionable in that. Emotive phrases like allowing the defendant 'to profit from his wrongdoing' are beside the point. It is preferable to say that what he has done has had, as one result, the reduction of his liability. Mr. Crowther has submitted that to award any damages under his heading (i) was wrong in law, but I do not think that it was. There must be a claim for loss of the mother's services, in the special circumstances of this case, over and above what the defendant has been able to replace. The judge has included it, and rightly so, although he has not particularised the amount. However, Mr. Crowther has kept this point open should he wish to rely on it elsewhere.
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> . . ..
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> The facts of the instant case, however, are wholly different from those in *Stanley v. Saddique (Mohammed)* [1992] QB 1. The plaintiff remained in the family home with her father and, for a time, with her older brothers and sisters until they left home. She continued to be looked after by him. No reasonable judge or jury would regard the defendant, in doing what he did, as doing other than discharge his parental duties, many of which he had been carrying out in any event, and would be expected to continue to do. The reasoning of the trial judge in the instant case seems to be that he was making the first of Diplock LJ's two estimates, that is, of the initial loss to the plaintiff caused by the death of the mother. Whether that is so or not, the continuing services of the father are not a benefit which has accrued as a result of the death. In the end, what is a 'benefit' must be a question of fact. Accordingly both the appeal and the cross-appeal should be dismissed."

51 What it seems to me is to be derived from these two passages is, first, that Sir David Croom-Johnson took the view that, in assessing the loss suffered by a child whose parent had been killed, it was appropriate to consider not the individual services provided by each parent separately, but rather the totality of the services provided by both of them collectively, so that a father could, by his increased activities, replace the services previously provided in fact by the mother, and, second, that in acting as a parent in looking after a child, even if the parent assumes duties which he had not previously performed as a result of the death of the other parent, the surviving parent was not doing anything as a result of the death, but was simply acting as a parent. Translated into the provisions of Fatal Accidents Act 1976 ss.3 and 4, as substituted, for the purposes of assessing what loss the child had suffered under Fatal Accidents Act 1976 s.3(1), one took account of the reduction, if any, in the totality of parents' services, and in any event, services provided by a parent to his child was not a "benefit" which "accrued" as a result of the death; the giving of such services amounted to performance of an obligation which the parent owed because he was a parent. Whether this analysis is correct or not, and, as we shall see, in the later case of *R. v Criminal Injuries Compensation Board Ex p. K (Children)* [1999] Q.B. 1131, Brooke L.J. analysed the case perhaps slightly

differently, there is, as it seems to me, no justification in the judgment of Sir David Croom-Johnson for the conclusion that he was seeking to expound a principle of the assessment of damages in a fatal accident case applicable specifically to cases in which a tortfeasor had provided services in place of those previously provided by the deceased.

52 The other member of the majority in *Hayden v Hayden*, Parker L.J., seemed to reach his conclusion that it was appropriate for the services provided by the father to be taken into account in assessing damages for two reasons. The first was similar to the conclusion of Sir David Croom-Johnson that it was necessary to consider whether there had been a loss of services, and if so, to what extent, by reference to the totality of the services of both parents before and after the death of the mother. The second was that Parker L.J. was persuaded that there was a conflict in the authorities as to whether the provision by a relative of gratuitous services to a child after the death of a parent was to be considered to be a "benefit" which accrued from the death, or referable to the benevolence of the relative, and he preferred the latter view. However, at the end of his judgment Parker L.J. did make some observations which seem to have been directed to what he considered was fair and just.

53 At 1000 in the report of *Hayden v Hayden* Parker L.J. identified the issue in that case:

> "For the defendant it is submitted that the value of his services should be taken into account, i.e. set against the value of the mother's lost services in arriving at her loss and for the plaintiff that the services must be wholly disregarded by reason of the provisions of section 4 of the Fatal Accidents Act 1976 as amended by section 3(1) of the Administration of Justice Act 1982."

If that was the question, the decision of Parker L.J. in favour of the father would seem to involve necessarily the conclusion that the opinion of Parker L.J. was that the father's services did fall to be taken into account in assessing whether there had been any, and if so what, loss sustained by the plaintiff as a result of the death of her mother.

54 Later in his judgment, at 1003, Parker L.J. dealt with the matter of the cause of any "benefit" from the provision of care by a relative:

> "It is thus clear that he [Purchas LJ in *Stanley v. Saddique*] regarded the services of the stepmother as being a benefit resulting from the death of the deceased which is directly contrary to the decision in *Hay v. Hughes* [1975] QB 790. On the point of construction Ralph Gibson LJ with hesitation agreed with Purchas LJ and Croom-Johnson LJ agreed with both judgments. With conflicting decisions on the point whether the gratuitous services of a relative do or do not result from the death of the mother I for my part have no hesitation in following *Hay v. Hughes* [1975] QB 790 rather than *Stanley v. Saddique (Mohammed)* [1992] QB 1 and if this is right section 4 does not apply."

55 *Hay v Hughes* [1975] Q.B. 790, to which I was referred, was a decision before the passing of Fatal Accidents Act 1976, and obviously before the passing of the substitution of s.4 of that Act. Neither party before me urged me to follow it, if it

was of any relevance to the circumstances of the case before me, although Mr Purchas wished to reserve the right to raise the current status of that decision hereafter, if appropriate. In fact, in my judgment, the difference of approach adopted in *Hay v Hughes*, on the one hand, and *Stanley v Saddique*, on the other, to the issue of what is the proper approach, for the purposes of assessing damages under Fatal Accidents Act 1976, to the question of whether the provision by a relative of gratuitous care to a child following the death of a parent, is of no assistance in resolving the matters in issue in this case.

56 The remaining observation of Parker L.J. in *Hayden v Hayden* which it is appropriate to set out was at 1005 and was this—

> "If then it [the assessment of damages in a fatal accident case] is a jury question, would a jury be likely to say that the tortfeasor who had provided the services and given up his job so to do must nevertheless pay what it would have cost to provide the services which he himself has provided. That a jury could conceivably come to the conclusion must I suppose be accepted but if it reached the opposite conclusion it could not in my view be held to have reached an unreasonable verdict. Suppose for example that the deceased mother was hopelessly inadequate, that the tortfeasor was a trained nanny and, appalled by what she had done, gave up her job and provided the child with services infinitely better than those provided by the deceased mother. Can it possibly be the law that she must then pay the cost of employing another nanny. I think not and, if it were, I would regard it as regrettable."

57 There is in fact a perfectly acceptable answer to the problem posed by Parker L.J., as was pointed out by Kennedy L.J., although not specifically commenting on this passage from the judgment of Parker L.J., in *H (A Child) v S (Damages)* [2002] 3 W.L.R. 1179. However, that passage of Parker L.J., beyond expressing dissatisfaction at what the law might be, in my judgment sheds no light on the issues which I have to decide.

58 It is somewhat ironic that whilst, on analysis, it appears that no support can be found in the judgments of the majority in *Hayden v Hayden* for the proposition that, for the purposes of the application of Fatal Accidents Act 1976 s.4, some special rule applies to cases in which the tortfeasor provides services or money to a dependant following a death, subsequent cases, in seeking to distinguish the decision in *Hayden v Hayden*, have drawn attention to the feature of that case that it concerned services provided by the tortfeasor.

59 The approach of Parker L.J. in *Hayden v Hayden* to the issue of whether the provision of gratuitous services by a relative to a child following the death of a parent of the child accrued as a result of the death suggested in some quarters that, contrary to what appeared to have been decided in *Stanley v Saddique*, the analysis remained after the substitution of Fatal Accidents Act 1976 s.4 by Administration of Justice Act 1982 s.3(1) that which had commended itself to the Court of Appeal in *Hay v Hughes*. In an effort to clarify the law the matter was raised in the Divisional Court of this Division in *R. v Criminal Injuries Compensation Board Ex p. K (Children)*. The leading judgment in that case was that of Brooke L.J. His analysis of the decision in *Hayden v Hayden* and the then current status of the decision in *Stanley v Saddique* was set out at 1135–1136:

> "It is necessary to avoid thinking that *Hayden v. Hayden* sets out any principles of law of general application to the valuation of children's claims for three reasons. The first is that the assessment of damages is a jury question and the Court of Appeal had no power to interfere with the judge's award of £20,000 unless it was plainly too high or too low. The second is that in that case the father was the tortfeasor who was liable to pay damages for the benefit of his child. The third was that there was no third party who stepped in to look after the orphaned child, like the grandmother in *Hay v. Hughes* [1975] QB 790, the estranged father's new wife in *Stanley v. Saddique* [1992] QB 1, or the uncle and aunt in the present case: it was the father himself who expanded the scope of his parental duties towards his daughter in the home they shared.
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> Both McCowan LJ (who dissented) and Sir David Croom-Johnson said that the court was bound by the earlier decision in Stanley v. Saddique: see *Hayden v. Hayden* [1992] 1 WLR 986, 993, 996. Both were satisfied that as a decision of the Court of Appeal on the proper construction of section 4 of the Act of 1976, as amended, they were bound to follow it. Sir David Croom-Johnson, who was a member of the court which decided *Stanley v. Saddique*, was conscious that it had held that benefits equivalent to those rendered by the grandmother in *Hay v. Hughes* [1975] QB 790 did accrue to a child as a result of the death within the meaning of the new statute, and that to that extent *Hay v. Hughes* should not now be followed: see *Hayden v. Hayden* [1992] 1 WLR 986, 996D–F. In those circumstances, Mr. Langstaff accepted that we ought not to follow the opinion expressed by Parker LJ in Hayden's case so as to hold that we might be at liberty to follow *Hay v. Hughes* [1975] QB 790 rather than *Stanley v. Saddique* [1992] QB 1 and to find that section 4 did not apply at all."

60 The other member of the Divisional Court was Rougier J. His views, expressed at 1143, were to the same effect as those of Brooke L.J.:

> "It seems to me that if and in so far as the Board may have been relying on this observation [that of Parker LJ preferring the approach in *Hay v. Hughes*] in support of a decision that section 4 does not apply, they were overlooking two factors. First, the majority of the court in *Hayden v. Hayden* [1992] 1 WLR 986 declared that *Stanley v. Saddique* [1992] QB 1 was binding upon them. Secondly, they were able to distinguish *Hayden v. Hayden* on two specific differences of fact: (1) that the defendant himself was the tortfeasor who was continuing to provide the services, so that to make him pay for them would effectively be awarding triple damages, and (2) that the defendant, as the father of the children [*sic*—there was one child], had been providing services before the death by reason of no more than parental duty, so that the services he provided after death could not be said to arise as a result of the death."

61 As matters turned out, the decision in *R. v Criminal Injuries Compensation Board Ex p. K (Children)*, in dealing with the decision in *Hayden v Hayden* as it did, left outstanding the suggestion that a parent who looked after a child after the death of another parent was only discharging his parental duty, and therefore the

child could make no claim for damages calculated by reference to reasonable compensation for the parent for the services provided. That issue was revisited in *H (A Child) v S (Damages)* In that case yet once more a mother was killed in a road accident. She had been married, but was divorced. There were children of the marriage. However, at the date of her death the mother was living with another man, and she received no financial support from the father of the children. After the death two of the children went to live with their father and his new wife. Another child remained with the man with whom the mother had been living. A claim for damages under Fatal Accidents Act 1976 was made on behalf of the children. The father of the children was not a party to the claim. Points taken on behalf of the tortfeasor on the hearing of the appeal included that the father should not be compensated for looking after his children because he was simply performing his parental duty, and that in any event any sum awarded in respect of compensation for him for his services would be unlikely to reach him, and thus on that account also no award should be made in respect of his services. The only substantive judgment in the Court of Appeal was that of Kennedy L.J. He stated his conclusions on the questions which I have identified at 979:

> "29. In my judgment, in the light of the authorities, the position is reasonably clear. Where, as here, infant children are living with and are dependant on one parent, with no support being provided by the other parent, in circumstances where the provision of such support in the future seems unlikely, and the parent with whom they are living is killed, in circumstances giving rise to liability under the Fatal Accidents Act 1976, after which the other parent (who is not the tortfeasor) houses and takes responsibility for the children, the support which they enjoy after the accident is a benefit which has accrued as a result of the death and, pursuant to section 4 of the 1976 Act, it must be disregarded, both in the assessment of loss and in the calculation of damages.
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> 30. However, such damages can only be awarded on the basis that they are used to reimburse the voluntary carer for services already rendered, and are available to pay for such services in the future. In the words used by Lord Bridge in Hunt v. Severs [1994] 2 AC 350, 363, damages are held on trust and if the terms of the trust seem unlikely to be fulfilled then the court awarding damages must take steps to avoid that outcome. Contrary to what was said by Crane J in Bordin's Case [2000] Lloyd's Rep Med 287, 294, I believe that the trust is one which the court can, and in an appropriate case should, enforce. . . ."

62 The point made by Kennedy L.J. in [30] of his judgment is in fact, as it seems to me, the answer to the issue which perplexed Parker L.J. and which caused him to express dissatisfaction at what the law seemed to be. In the case in which a tortfeasor, who is a parent of a child, has looked after the child following the death, for which he is responsible, of the other parent, any claim for the cost of replacing the services of the deceased by those of the tortfeasor is conceptually for a sum which the child should hold on trust to compensate the carer for his services.

Because the carer is also the tortfeasor, what in fact is the nature of the claim is one against the tortfeasor in favour, beneficially, of himself. That element of claim must, therefore, fail for circularity.

63 In my judgment no support is given by the judgments in *R. v Criminal Injuries Compensation Board Ex p. K (Children)* or by that in *H (A Child) v S (Damages)* for the submission of Mr Purchas that the provision of services or money by a tortfeasor to a dependant falls to be treated in some special manner for the purposes of Fatal Accidents Act 1976 s.4. The highest at which the matter can be put, in my judgment, is that in each of those cases the matter was left open.

64 There is one further authority to which my attention was drawn in the present context, the decision of the Court of Appeal in *McIntyre v Harland & Wolff Plc* [2006] EWCA Civ 287. In that case the deceased contracted mesothelioma during the course of his employment by the defendant. At the time of his diagnosis he was working for the defendant in Libya. He chose not to return to Libya, but to spend his last months with his wife, the claimant, in England. As a result he was dismissed by the defendant. On his dismissal he became entitled to payment of an amount out of the defendant's provident fund scheme and also to payment of an amount pursuant to the labour law of Libya. Those sums were in fact paid to his estate after his death. Had he not become ill, the expectation was that the deceased would have been able to continue to work for the defendant until retirement, and that he would then have received an enhanced payment from the provident fund scheme. The claimant included in her claim under Fatal Accidents Act 1976 a claim for loss of the expectation of the enhanced payment from the provident fund scheme. The defendant contended, first, that the claimant had not lost the amount of the benefit from the provident fund scheme, because under the scheme only one payment was due, albeit either on termination of employment or retirement, and the deceased's estate had had it. The Court of Appeal rejected that argument, but it is not material to the issues which I have to decide. Buxton L.J., who delivered the only substantive judgment in the Court of Appeal, dealt with the second contention of the defendant in this way:

> "10. Second, therefore, if what the defendants say will be double recovery on the claimant's part is to be avoided, account has to be taken of the fact and amount of the rule 9 payment [that is, that in fact made to the deceased under the provident fund scheme]. But there section 4 does come into operation. The rule 9 payment that occurred was not a payment to the claimant but a payment to Mr. McIntyre. What the claimant has in the event obtained is not that payment, but the amount by which his estate is enhanced by having the payment made into it. But that enhancement only benefits the claimant because it forms part of Mr. McIntyre's estate: the very item that section 4 says should not be brought into the account and for which credit does not have to be given.
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> 11. That outcome does on one view lead to double recovery, because the claimant obtains not only the value of the rule 9 payment in fact made to her husband but also compensation for the loss of the rule 13 payment [that payable on retirement] that would in hypothesis have been made to her

husband. But as is very well recognised, it is no objection in itself in a section 4 case that 'double recovery' has resulted. That possibility is inherent in the statute itself, because the issue of disregard of a sum cannot arise unless that sum would in a proper computation and without disregard be taken into account as reducing the damages."

65 Mr Weir relied heavily on the decision in *McIntyre v Harland & Wolff Plc*. In his written skeleton argument in [6] he contended that, "the defendant's submissions are blocked by Court of Appeal authority on this issue", that being the decision in *McIntyre v Harland & Wolff Plc.* Mr Weir submitted that in that case, "the CA held that section 4 applied to a payment made by the defendant employer to the widow of the deceased employee". In one sense, of course, that is correct. However, Mr Purchas countered that the provident fund scheme in that case was contributory, so that, he contended, the amount of the payment from it would have fallen to have been disregarded in assessing damages in a personal injury case. I have to say that I am not sure about that. On the facts set out by Buxton L.J. the provident fund scheme seems to have been more in the nature of a savings scheme than an insurance scheme, albeit that the employer matched each £1 contributed by the employee with £0.50 of its own at the point of payment. Clearly the employer could not claim the benefit of the employee's own savings in reduction of damages, but whether the employer would have been able to claim, in a personal injury case, the benefit of its own additions to the employee's savings might depend upon knowing more about how the scheme was supposed to operate than is revealed in the judgment of Buxton L.J. However, the point is not important for present purposes.

66 What I think plainly emerges from the decision in *McIntyre v Harland & Wolff Plc* which is relevant to the issues before me is that there is no objection in principle to applying the provisions of Fatal Accidents Act 1976 s.4 to amounts paid by a tortfeasor to the estate of the deceased. If that is so, there seems to be no logical reason for adopting a different approach to amounts paid by the tortfeasor to a dependant of the deceased. Thus I accept the submission of Mr Weir that the decision of the Court of Appeal in *McIntyre v Harland & Wolff Plc* is an answer to the submission of Mr Purchas put at its widest. In the light of that decision it cannot be said that any provision of services or money by a tortfeasor to the estate of the deceased or to a dependant falls to be treated differently from the provision of services or money from other sources.

67 I accept the submission of Mr Weir that, in the context of claims for damages in fatal accident cases, the sole arbiter of public policy is Parliament. Parliament created the possibility of making claims in this type of case in the first place and has regulated the rules to be applied in such cases ever since. As Purchas L.J. pointed out in *Stanley v Saddique*, what Parliament has created is "a wholly artificial statutory structure". It would, in my judgment, be quite wrong for the court to seek to lay over the statutory structure, or to subvert it from beneath with, principles derived from other types of case, specifically, since it was these upon which Mr Purchas sought to rely, those applicable in personal injury cases.

68 Mr Purchas did not, as I understood it, submit that, if I were unpersuaded that a special approach should be adopted to all services and money provided by a

tortfeasor to a dependant, there were nonetheless particular types of service or particular types of monetary payments which might require special treatment. However, I think that it was implicit in his submissions, first, that the provision of parental services, as in *Hayden v Hayden*, was in a special category, and, second, that the provision of services or money which would not be disregarded in an assessment of damages in a personal injury case were in a special category.

69 It is not necessary for the purposes of this judgment to reach any conclusion as to the current status of the decision of the Court of Appeal in *Hayden v Hayden*. It seems never to have been followed. In any case which I was shown in which it had been considered, it had been distinguished. I can distinguish it too, on the simple grounds that the issues before me do not depend upon the provision by a tortfeasor to his child of services following the death of the other parent.

70 In my judgment, any implicit submission that, in assessing damages in a fatal accident case, the provision by the tortfeasor of services or money to the estate of the deceased or to a dependant which would not be disregarded in a personal injury case fell to be treated as being in a special case fails on the ground that it is inconsistent with the judgment of the Court of Appeal in *McIntyre v Harland & Wolff Plc.* The payment of the sum due under the labour law of Libya would have been taken into account in assessing damages in a personal injury case, but the Court of Appeal applied the provisions of Fatal Accidents Act 1976 s.4 to it.

71 In the result, therefore, I reject the submissions of Mr. Purchas that, for the purposes of Fatal Accidents Act 1976 s.4, a special approach falls to be adopted to services or money provided by the tortfeasor to the deceased or to a dependant.

Applicability of Fatal Accidents Act 1976 s.4 in this case

72 In the circumstances it is necessary to consider the applicability of the provisions of Fatal Accidents Act 1976 s.4 to the particular payments in this case.

73 Although Mr Weir told me that he had understood Mr Purchas to be submitting that the amount of £129,600 from the Death in Service Policy or the amount of £100,000 from the Life Policy, or both, were not "benefits" for the purposes of Fatal Accidents Act 1976 s.4, I think that that was a misunderstanding on his part. I understood Mr Purchas's submission not to be that they were not "benefits" at all, but that they were not "benefits" which should be disregarded under the section.

74 The real question, as it seemed to me, was whether either or both of the amount of £129,600 from the Death in Service Policy or the amount of £100,000 from the Life Policy, "accrued ... to any person from his estate or otherwise as a result of [Mr. Kevin Arnup's] death".

75 That question was essentially a matter of causation, and, in my judgment, needed to be approached as such.

76 It was, I think, quite plain that neither the amount of £129,600 nor the amount of £100,000 became payable to Mrs Arnup on the death of her husband.

77 The amount of £129,600 became payable under the Death in Service Policy on the death of Mr Kevin Arnup, but payable to the Company, not to Mrs Arnup. Under r.4 of the Scheme Rules the Company could not keep the sum paid in respect of the death of Mr Kevin Arnup, but had to pay it out. However, it had quite a wide

range of discretion as to to whom it paid it. It could, for example, have paid the money to the children of Mr Kevin Arnup. It could have paid it to the parents of Mr Kevin Arnup, if they were still living. The Company could have paid part of the money to Mrs Arnup and the rest to other relations. The Company in fact chose to pay all of the money, and very promptly, to Mrs Arnup.

78 The amount of £100,000 also became payable under the Life Policy on the death of Mr Kevin Arnup, but, again, it was not payable under that policy to Mrs Arnup, it was payable to Bridgewater. Bridgewater was not bound to pay the money on to anyone. It could have added it to the trust funds held under the Settlement. If Bridgewater decided to disburse the money, it could have used it in any way permitted by the Settlement to benefit any of the defined "Beneficiaries". In fact, Bridgewater decided, at the suggestion of the Company, to pay the whole of the £100,000 to Mrs Arnup.

79 I reject the submission of Mr Purchas that, in the circumstances which I have described, the reason that each of the payments accrued to Mrs Arnup was as a result of the benevolence of the Company in establishing the Scheme and the Settlement in the first place. However, I do accept his submission that neither payment accrued as a result of the death of Mr Kevin Arnup. In my judgment Mr Purchas was correct in submitting that the death of Mr Kevin Arnup was the occasion for the making of the payments, but not what caused the payments to accrue to Mrs Arnup.

80 As it seems to me, what caused the payment of £129,600 to accrue to Mrs Arnup was the decision of the Company to pay that sum to her. What caused the payment of £100,000 to accrue to Mrs Arnup was the decision of Bridgewater to act on the suggestion or request of the Company that that amount be paid to her.

81 Consequently, in my judgment, on the facts neither of the payments made to Mrs Arnup fell within the scope of Fatal Accidents Act 1976 s.4.

The insurance exception and the benevolence exception

82 My conclusion that the provisions of Fatal Accidents Act 1976 s.4 do not actually apply to the payments with which this judgment is concerned makes it necessary to consider the alternative submissions of Mr Weir.

83 Both the insurance exception and the benevolence exception are relevant in the assessment of damages in a personal injury case, and Mr Purchas accepted that they are relevant also in the assessment of damages in a fatal accident case. Certainly there is no logical reason why the public policy which has led to the recognition of the insurance exception and the benevolence exception in personal injury cases should not also be recognised in fatal accident cases, if it is material to do so.

84 Both the insurance exception and the benevolence exception have been considered recently in the Court of Appeal in *Pirelli General Plc v Gaca* [2004] EWCA Civ 373. The leading judgment in that case was that of Dyson L.J. In the course of his judgment he reviewed extensively the relevant authorities.

85 While Dyson L.J. considered in his judgment later formulations of the insurance exception, none of the later formulations departed in principle from the first two cited by him in his judgment, at [41] and [42]:

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

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

42. In Parry, Lord Reid said of the insurance exception (p14D):

'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'."

86 Dyson L.J.'s commencement of his consideration of the benevolence exception was this:

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

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

14. A number of the subsequent cases in which the scope of, and reasons for, the exception have been discussed were not benevolence exception cases. Nevertheless, they contain dicta of the highest authority. In Parry, the issue was whether a disablement pension fell to be taken into account in the assessment of the plaintiff's financial loss. At p 13H, Lord Reid said of the benevolence and insurance exceptions that 'the common law has treated this matter as one depending on justice, reasonableness and public policy'. After referring to the judgment of Andrews CJ, Lord Reid said (p 14C) that 'it would be revolting to the ordinary man's sense of justice, and so 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'."

87 In the course of his judgment Dyson L.J. cited from a judgment of Brooke L.J., who was in fact a member of the court in *Pirelli General Plc v Gaca*, in *Williams v BOC Gases Ltd* [2002] I.C.R. 1181. The passage cited included this:

> "32. In my judgment, these arguments are not strong enough to resist the force of the principles reiterated by Lord Bridge in his three speeches in the House of Lords to which I have referred. The 'benevolence' exception is limited in terms to gifts arising from the benevolence of third parties, and does not cover benevolent gifts made by the wrongdoer himself, for which allowance ought prima facie to be made against any compensation he might have to pay. Neither of the justifications for the benevolence exception apply to the tortfeasor. Deductibility will encourage him to make benevolent payments in future to injured employees, rather than the reverse. And it certainly cannot be said that in making the gift, his intention was to benefit the plaintiff rather than to relieve himself of liability pro tanto: he would have been happy to achieve both purposes at once. A fortiori in a case in which he said in terms, at the time he made the gift, that it was to be treated as an advance against any damages he might have to pay.
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> 33. I can see nothing unjust in the fact that on this approach Mr. Williams will not be able to recover more money from his employers because he can prove that some of the ailments from which he was suffering when he retired on medical grounds were caused by his employers' negligence. As a matter of public policy employers ought to be encouraged to make payments of this kind to their employees who retire on medical grounds, and there is no principle of public policy known to me which should tend to encourage employees to sue their employers if they have already received sums attributable to their injuries which exceed what their employers might otherwise be liable to pay."

88 On the facts of the present case Mr Kevin Arnup paid nothing towards the Death in Service Policy or the Life Policy. However, Mr Weir submitted that he in fact paid indirectly towards those policies because his terms of employment took into account the availability of those benefits, and, as he contended, Mr White in his evidence had accepted that the availability of those benefits had been taken into account by the Company in fixing the wages paid to employees. Thus, submitted Mr Weir, in the present case the sums of £129,600 and £100,000 fell to be left out of account in the assessment of the damages to be awarded to Mrs Arnup in respect of the death of her husband on the grounds of the insurance exception.

89 The applicability of the insurance exception in a case in which an employee has the benefit of insurance cover arranged by his employer as part of his contract of employment has been little considered, it seems, in England. It was, however, an issue in *Pirelli General Plc v Gaca*.

90 Dyson L.J. dealt with the issue at the end of his judgment as follows:

> "54. Mr. Foy's second submission is that the claimant should be treated as having paid or contributed to the premium simply by virtue of the provision of labour pursuant to his contract of employment. A similar argument was rejected by this court in Hussain. Lloyd LJ said (p 345H) that the evidence did not support the conclusion that the plaintiff would have received more pay but for the insurance. He continued:
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> > 'In truth the judge was, I think, resting his conclusion on a broader ground. Even if the plaintiff's wage would have been the same, he has nevertheless earned the benefits payable under the scheme by working for the defendants. As Mr. Flather put it, in language adopted by the judge, the benefits are part of the wage structure.
> >
> > The difficulty I feel with that argument is that it would apply equally to sickness or injury benefit paid during the first 13 weeks of incapacity. It was never suggested that this payment should be left out of account. Yet those payments were "earned" in exactly the same way as the subsequent payments.'
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> 55. Kerr LJ dealt with the point at p 351D–E. He too concluded that the monies were to be deducted on the grounds that there was no evidence that the plaintiff's wages would have been higher but for the insurance scheme. Lloyd LJ's way of dealing with the broader ground was endorsed by Lord Bridge in Hussain at p 529H. Mr. Foy's submission is also inconsistent with what I said in Page (see para 47 above).
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> 56. It follows that an employee is not to be treated as having paid for, or contributed to the cost of, insurance merely because the insurance has been arranged by his employer for the benefit of his employees. The insurance monies must be deducted unless it is shown that the claimant paid or contributed to the insurance premium directly or indirectly. Payment or contribution will not be inferred simply from the fact that the claimant is an employee for whose benefit the insurance has been arranged. There is little guidance in the English cases as to what is sufficient to constitute evidence of indirect payment or contribution. The issue has, however, been discussed in a number of Canadian cases, most notably in *Cunningham v. Wheeler* [1994] 113 DLR (4th) 1. The majority decision was given by Cory J, who said (p 15B) that what was required was:
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> > '. . . that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage, reflected in a collective bargaining agreement, will be sufficient'.
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> 57. He then gave a non-exhaustive list of possible examples of the sort of evidence that could well be sufficient to establish that the employee had paid for the benefit. In her dissenting judgment, McLachlin J said that she regarded this approach as likely to generate uncertainty (pp 38A–39F). She preferred to hold that there was a general rule of deduction, subject only to exceptions for

charitable payments, and non-indemnity insurance and pensions. If the payment was in the nature of an indemnity, then it should be deducted to prevent double recovery, regardless of whether the claimant had contributed to the cost, unless it was established that a right of subrogation would be exercised.

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

91 In order to understand the references to the judgment of Dyson L.J. in *Page*, it is necessary to refer back to his judgment in *Pirelli General Plc v Gaca* at [47]. There Dyson L.J. cited a passage of his judgment in *Page v Sheerness Steel Co Plc* [1996] P.I.Q.R. Q26 at Q33. Part of that citation was this:

> "In my view it is quite wrong to treat the plaintiff's membership of the Sick Pay Insurance Scheme in the present case as a contract of insurance within the meaning of the exception. There is no contract between the plaintiff and the insurance company. He did not pay the premiums. There is no evidence that the plaintiff would have got more pay but for the insurance, or that the existence of the insurance had an effect on his remuneration . . ."

92 Mr Weir invited my attention to the judgment of Cory J. in *Cunningham v Wheeler*. In particular he relied upon this passage:

> "The application of the insurance exception to benefits received under a contract of employment should not be limited to cases where the plaintiff is a member of a union and bargains collectively. Benefits received under the employment contracts of non-unionised employees will also be non-deductible if proof is provided of payment in some manner by the employee for the benefits. Although there may not be evidence of negotiations for the wages/benefits package which makes up the employee's remuneration, evidence that the employer takes the cost of benefits into account in determining wages would adequately establish that the employee contributed to the plan by means of payroll deductions, that would prove the employee's contribution. Again, these suggested methods of proof are not an exhaustive list."

93 In reliance on that passage Mr Weir submitted that he had persuaded Mr White in his evidence to agree that he took the benefits in relation to the Death in Service Policy and the Settlement into account in fixing the wages paid to the Company's employees, and that that was enough to mean that they were benefits to which Mr Kevin Arnup contributed.

94 In my judgment Mr Weir's submission as to the making of contributions by Mr Kevin Arnup was based on a misunderstanding of the judgment of Cory J., at least insofar as that judgment has been approved by the Court of Appeal as representing

the law of England. What is plain from the judgment of Dyson L.J., with which Mummery and Brooke L.JJ. agreed, is that what is not sufficient to give rise to the insurance exception in the case of an employee is the mere fact that "the insurance has been arranged by his employer for the benefit of his employees". If an employer has arranged an insurance for the benefit of his employees it is obvious, in my judgment, that in some degree the employer has taken account of the benefit in determining how much to pay the employees. That is not the issue. The issue is whether it can be demonstrated that the employee has made a contribution to the cost of the insurance in the sense of, as Cory J. put it in the passage quoted by Dyson L.J., "a reduced hourly wage". In other words, what needs to be shown on the evidence is that, but for the provision of the insurance, the employee would have been paid more for his work for the employer. In the passage from the judgment of Cory J. upon which Mr Weir particularly relied the learned judge spoke of the need for "proof ... provided of payment in some manner by the employee for the benefits". Thus in the passage on which Mr Weir relied, the reference to the employer taking the cost of benefits into account in determining wages, was not, as it seems to me, intended to mean that it was sufficient if the employer had some vague regard to it in assessing what wages to pay—for that is no better than saying that the employee contributed to the insurance by virtue of being employed by the employer and working for him. What Cory J. meant, certainly as understood and applied by the Court of Appeal in *Pirelli General Plc v Gaca*, was an identifiable relationship between the provision of the insurance and the rate of pay; that is to say, evidence that, but for the provision of the insurance the employee would have been paid more.

95 There was no evidence that, but for the provision of the Scheme or the Settlement, Mr Kevin Arnup would have been paid more by the Company than he was in fact paid. Indeed the evidence was to the contrary, that those who did not elect to join the pension scheme were paid no more than those who did. Consequently, I am not satisfied that the payments of £129,600 and £100,000 to Mrs Arnup fell within the scope of the insurance exception.

96 However, I am satisfied that the payment of £100,000 did fall within the scope of the benevolence exception. I recognise that the Company requested Bridgewater to claim on the Life Policy and to pay the proceeds of so doing to Mrs Arnup. However, the proceeds of the claim on the Life Policy were not within the gift of the Company. All it could do was to suggest to Bridgewater what it might do. It was not suggested that Bridgewater was a mere cipher of the Company. The Settlement was deliberately established so that Bridgewater would have an unfettered discretion as to how to deal with the assets which formed the trust fund included in the Settlement from time to time. Bridgewater was, on the evidence, totally independent of the Company, with a separate and distinct role to perform under the Settlement. For the purposes of the application of the benevolence exception, therefore, it was a third party, in my judgment. The situation in relation to Bridgewater and the disbursement of the proceeds of the claim on the Life Policy following the death of Mr Kevin Arnup was thus little different from what the position would have been if the Company, after the death, had approached an established charity, or a wealthy philanthropist, with the circumstances in which

Mrs Arnup then found herself, and commended her to it as a worthy object of benevolence.

Conclusion

97 In the result, therefore, I find that the answer to the issue directed by District Judge Pelly to be tried in this action is that the payment of £129,600 does fall to be taken into account in the assessment of the claim of Mrs Arnup, but the payment of £100,000 does not.