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Damages -- Collateral Source Rule -- Pensions as Reducing Factor on Personal Injury

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Additional significance is added to the principal case by the decision of the United States Supreme Court in *Gideon v. Wainwright*\(^{26}\) where the Court decreed that counsel must be provided in criminal cases.\(^{26}\) Since all accused now have the right to counsel, the corollary right to adequate opportunity to prepare the defense is also extended.\(^{27}\) While *State v. Lane* and *Gideon v. Wainwright* are large steps forward in the protection of the rights of those accused of non-capital crimes, there are many problems which remain unanswered. The courts have the duty both to provide the defendant a speedy trial and to clear overcrowded trial dockets. A continuance in every case could frustrate the speed of justice and cause administrative turmoil and unnecessary delay. On the other hand, appointment of counsel to represent indigent defendants will involve all members of the bar, including those who do not deal primarily with criminal cases. As a result continuance to allow proper preparation by attorneys will be essential in carrying out the purposes of such an appointment.

As the principal case held, the immediate solution to the problem has been to make the denial of continuance appealable. The most obvious alternative solution to the problem would be a statute similar to G.S. § 15-4.1 which would provide for an automatic continuance, in proper circumstances, upon motion of counsel. However, statutory procedures alone can never fully satisfy due process in every case. Ultimately the solution must lie in an increased awareness of this problem and a sympathetic treatment of the indigent by the trial judiciary. It is believed that the trial judges, having been apprised of the problem as presented in the principal case, are equal to the task.

**TOM D. EFIRD**

**Damages—Collateral Source Rule—Pensions as Reducing Factor on Personal Injury**

In *Browning v. The War Office*\(^{1}\) the English Court of Appeal considered the question of reducing an award for damages by the

\(^{1}\) [1963] 2 Weekly L. R. 52 (C.A.).
amount of a disability pension which the plaintiff was receiving. Plaintiff, a sergeant in the United States Air Force, lost his arm in an automobile collision while stationed in England. The injury resulted in his discharge and an award of a disability pension amounting to nearly one-half of the salary he had been receiving. Plaintiff's claim for recovery was predicated on his loss of earnings, and the trial court awarded damages without considering the pension. Here-tofore, the leading English case on the subject had held that pensions were in that class of collateral sources along with plaintiff's insurance and gifts which do not go to mitigate loss of earnings. But on appeal, in Browning, the court held that this precedent had been overruled and that pensions were the equivalent of earnings and were allowed to mitigate damages.

With this decision England has adopted a purely compensatory theory of damages whereby the aim is to compensate the injured party for the loss of earnings sustained, and nothing more. This theory is based on the logic that no matter how serious the actual injury is to the plaintiff in terms of lost income, the defendant should not be required to compensate plaintiff for more than the difference in income prior to the injury and income from both earnings and collateral sources after the injury. For example, in the present case plaintiff was receiving 450 dollars a month in earnings prior to the injury. After the injury, and the termination of his regular salary, plaintiff began to receive 217 dollars a month as a disability benefit from the United States government. Some courts might say that the plaintiff was injured in the amount of 450 dollars a month by

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2 In Payne v. Railway Executive, [1952] 1 K.B. 26, the English court had held that pension payments to which a serviceman was entitled could not be considered when figuring pecuniary loss, especially since the pension could be reduced after the judgment at the discretion of the authorities.

3 The court held that Payne v. Railway Executive had been overruled by British Transp. Comm'n v. Gourley [1956] 2 Weekly L.R. 41. Gourley dealt exclusively with the question of taxes being considered in figuring damages. The court held taxes a valid consideration in the computation of pecuniary loss for personal injury, stating that damages should compensate and not punish. Now, by analogy, the court decides that to award plaintiff damages for losses which are covered by disability pensions would be to punish the defendant.

The Gourley case itself is contrary to the predominant American view regarding taxes. E.g., Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Atlantic Coast Line Ry. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874 (1956); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952). These cases generally hold that the income tax savings should not be considered when fixing damages for loss of earnings because of personal injuries. Contra, Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918 (1957).
losing his status in the Air Force. But by applying the compensatory theory and taking into consideration the income from the collateral source the court in *Browning* concluded that the plaintiff's injury was 233 dollars per month and not 450 dollars.

Not all income from collateral sources will reduce defendants' liability. Such items as gratuitous payments from third parties, insurance for which the plaintiff has paid, and those payments to plaintiff which he must repay will not reduce the liability of the defendant.\(^4\) It should be noted that these items are excluded because of the particular circumstances of payment in each case, and for this reason they are not recognized as mitigating in any jurisdictions.\(^5\) This is the class of payments in which England previously held disability benefits to exist until the principal case. *Browning* removed disability payments from this list of exceptions in computing loss of earnings.

The opinion of the court advances two reasons for this result. First, most recoveries of this kind are paid by defendant's insurance companies who in turn increase their premium charges to the general public. These increased insurance rates cause the amount of such recoveries to be borne by the general public, and this is against public policy.\(^6\) Second, actual damages are not awarded to punish the wrongdoer; liability only accrues when the wrongdoer causes damage and this damage is all that should be recompensed.\(^7\)

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\(^7\) In a very learned discussion Diplock, L.J. says: "A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff. A defendant in an action for negligence is not a wrongdoer at large; he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff. Thus in relation to damages for negligence, to speak of the wrongdoer appropriating to himself the benefit of some fortuitous circumstance which has in fact reduced the loss which the plaintiff might otherwise have sustained as a result of the defendant's negligence involves what I respectfully think is an erroneous approach to the problem. Implicit in such a statement is the tacit assumption that there is some norm of damages which a defendant who has acted without reasonable care ought to pay for his careless act, even though owing to some circumstances for which the
In spite of the force of this reasoning, the majority of the American courts hold that pensions, whether being paid at present or anticipated in the future, should not be considered in assessing damages.\(^8\) Such holdings are based on the theory that the defendant should not benefit from a collateral income which the plaintiff receives, even if the total income after the injury exceeds income prior to the injury. The rule supported by this reasoning is called the "collateral source rule" and is stated as follows: "total or partial compensation for an injury received from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the responsible party."\(^9\) The "collateral source rule" grows directly from the punitive theory of damages which stresses the punishment of the defendant.\(^10\) Consequently there is a qualification of the rule that only those payments made wholly independent of the wrongdoer shall not mitigate. If the wrongdoer has contributed to the collateral funds then the amount of his liability will be reduced by the amount of his contribution. This reduction in liability is readily illustrated by the calculation of damages in suits against the United States government brought by its employees. Disability pensions paid by the government to servicemen are a mitigating factor since the government, as wrongdoer, has made the payments.\(^11\) The disability

\(^8\) E.g., Price v. United States, 179 F. Supp. 309 (E.D. Va. 1959); Hume v. Lacey, 112 Cal. App. 2d 147, 245 P.2d 672 (1952); Mullins v. Bolinger, 115 Ind. App. 167, 55 N.E.2d 381 (1944); Rusk v. Jefferies, 110 N.J.L. 307, 164 Atl. 313 (1933); Heath v. Seattle Taxi Cab Co., 73 Wash. 177, 131 Pac. 843 (1913). But see Brooks v. United States, 337 U.S. 49 (1949) where the Court concluded that payments through servicemen's disability pensions should be considered when the government is the defendant and will pay its liability under the Federal Tort Claims Act.


\(^10\) "There is, in addition to the compensatory aspect, a punitive one, a notion that the defendant's moral fault subjects him to liability. The theory of compensation stresses that the plaintiff must be paid; the punitive theory, that the defendant must pay. Such a view of civil damages gives them the function of criminal sanctions: to enforce adherence to set standards of conduct. But this function, although desirable, is not generally accepted as the primary purpose of the civil action. A consequence of the punitive aspect of damages is the 'collateral source rule.' Since liability for damages is often considered inherent in the wrong, any mitigation of those damages, it is said, would be a benefit to the defendant—a windfall. Therefore, courts generally refuse to reduce damages where the plaintiff's loss has been (or will be) compensated from some source collateral to the defendant's wrong." 63 HARV. L. REV. 330, 331 (1949).

\(^11\) See Tessier v. United States, 164 F. Supp. 779 (D.C. Mass.), aff'd, 269 F.2d 305 (1st Cir. 1959); Wuth v. United States, 161 F. Supp. 661 (E.D. Va. 1958). This mitigation has been granted where the pensions are merely...
benefits are not received from a source wholly independent of the wrongdoer and the collateral source doctrine does not apply. On the other hand, civil service benefits are not a mitigating factor between the employees and the government since the employees contribute to the funds from which benefits are paid. The benefits from these funds are wholly independent of the wrongdoer and therefore the "collateral source rule" applies.

It is obvious that the normal application of the collateral source doctrine results in a windfall to the plaintiff. And, if the reasoning of the English court is correct, how do the majority of American courts justify the rule that disability pensions will not go to mitigate a defendant's liability? The dissent in Browning expresses the predominant American conclusion that pensions, such as the one in the present case, are earned by the injured party's past services and therefore are analogous to insurance payments. These insurance payments (or pensions) having come from a collateral source wholly independent of the wrongdoer should be excluded from the computation of defendant's liability. It is also pointed out in Browning that disability pensions would be payable whether there was a tort or not. The single precedent to their payment is merely the occurrence of a disabling injury. Logic is conspicuous by its absence when such payments are considered as compensation for the loss of earnings inflicted by a tort.

In addition to the above reasoning there would seem to be another strong argument for refusing reduction of loss by disability pensions. In cases where these payments are being made, someone, either plaintiff or defendant, is going to profit from these collateral payments whether they be considered as gratuities, insurance, or earnings. Provided that the defendant is not in a position to pass the loss to other parties, it would seem to be the better reasoned

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4. Ibid.
5. Ibid.
6. It would seem that many potential defendants are in such a position. Most private persons are covered by insurance of some type, while large corporate defendants can pass on large payments to the public in the form of raised consumer prices.
judgment to allow the plaintiff and not the defendant to profit. The culpability of the defendant should bar his receiving a windfall— which on the other hand would go to an innocent party.

North Carolina, like England, feels that compensation from collateral sources should go to the mitigation of damages where it would be unjust or inequitable to hold otherwise. However, we have not reached the point of allowing receipt of pensions by the injured party to reduce the award of damages where the defendant was not paying that pension. In Bryant v. Woodlief the court, although dealing with the problem of damages for wrongful death and not personal injury, held that railroad retirement benefits which deceased was receiving at time of death should be considered in computing the damages for the wrongful death. In Bryant the court made statements to the effect that retirement pay and other income for life would be considered in an action for wrongful death. However, the court in wrongful death actions bases the damages upon the pecuniary loss to the estate of the decedent. This represents that amount which would have accrued to the estate of the deceased through his own efforts had he lived his normal life span. In personal injury actions the liability for lost earnings is based on compensating the plaintiff. These funds also should represent amounts which the plaintiff would have earned through his own efforts had he not been disabled. Perhaps, therefore, the analogy would be drawn to the effect that compensation for disability includes loss of future earnings which would have accrued to the estate of the de-

17 North Carolina is a compensation state as is seen from the language in Broadway v. Cope, 208 N.C. 85, 179 S.E. 452 (1935): "[A]ward no damages based upon speculation, or no damages based upon imagination; but you would be confined to the rule of law which the court gave you; that is, compensatory damages that actually flow, that proximately flow and are necessary for the results... of the wrong done the plaintiff by the defendant..." Id. at 89, 179 S.E. at 455.

19 In Lane v. Southern Ry., 192 N.C. 287, 134 S.E. 855 (1926) a nineteen year old soldier sued for injuries resulting in amputation of part of his hand. He was allowed damages of $15,000 which the court held were not excessive. The question of reduction of liability for loss of earning capacity due to government pension was not raised since disability provisions were not enacted until four years after the action by the amending act of July 3, 1930 (ch. 849, 46 Stat. 995). This act was a departure from the theory upon which past legislation was based in that it granted monetary benefits to veterans whose disabilities were not the result of service in actual combat.

19252 N.C. at 494, 114 S.E.2d at 246.
As stated earlier, the American courts allow pensions paid by the government to a serviceman to mitigate any recovery by the serviceman against the United States. One of these federal court decisions applied North Carolina law. In support of such a result, the Fourth Circuit Court of Appeals cited Holland v. Southern Public Util. Co., apparently relying on the following language of that decision: "we think the weight of both authority and reason is to the effect that any amount paid by anybody . . . . for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." This language may indicate that our court will accept disability benefits as an amount paid for and on account of an injury even though coming from a third party. Undoubtedly, the acceptance of disability pensions in reduction of damages in personal injury actions will find strong support in the North Carolina cases when the question in its purest form arises in this state.

It would seem highly inequitable to allow a tortfeasor to have a reduction in liability because of mere chance or plaintiff's foresight. But, it would appear that the plaintiff does not really "lose" those earnings which are, in effect, guaranteed by third parties. North Carolina has built a strong foundation for adopting the minority view in regards to the compensation theory of damages. Moreover, the court has indicated that it is not afraid to side with the minority to expand our compensation theory where good judgment demands it.

Regardless of which turn we take, when the question arises,
we may have to discard all analogies and decide the issue by looking to the equities of the case.\textsuperscript{26}

**ARNOLD T. WOOD**

**Dedication—Acceptance of Streets in Subdivision—Public User**

$X$, owner of a subdivision, sold lots therein by reference to a recorded map which showed the location of the lots and streets. $Y$ owned a lot outside the subdivision upon which he built a home. He then opened his driveway onto a street in the subdivision. Although this subdivision street, which connected two public highways, had been regularly used by $Y$ and other members of the general public for at least two years, it had never been accepted or maintained by public authority. When $X$ barricaded the street, cutting off access to $Y$'s driveway, $Y$ obtained a mandatory injunction for reopening the street. The North Carolina Supreme Court, in *Owens v. Elliot*,\textsuperscript{1} reversed. The court held that an effective dedication to the property owners within the subdivision had been made, but as to the general public there was only an offer of dedication, requiring formal acceptance by the proper public authorities before $Y$, as a member of the general public, acquired a right to use the street.

When streets are shown on a recorded plat or map of a subdivision two types of interests are created.\textsuperscript{2} First, purchasers of bills which had been paid by the defendant under automobile medical payments insurance. The defendant's comprehensive insurance policy also contained a liability clause for payment on behalf of defendant of any tort liability within policy limits. The medical payments clause called for payments directly to injured persons regardless of the insured's negligence. The court, after stating the majority view that recovery could be had under both clauses, refused to allow a double recovery on the theory that there should be but one recovery for one injury regardless of what the source of the compensation.

\textsuperscript{26} As stated by Lord Denning, M.R., in the principal case: "I prefer ... to discard ... analogies and ask myself the simple question: is it fair and just that, in assessing compensation, regard should be had to the fact that Sergeant Browning is already, as of right, in receipt of nearly half his pay? And my answer is, 'Yes.' He ought not receive compensation twice over. If he had remained in the Air Force, he would not have received both his pay and his pension. Nor should he do so now." [1963] 2 Weekly L.R. at 58.

\textsuperscript{1} 258 N.C. 314, 128 S.E.2d 583 (1962). This case was before the court on appeal in 257 N.C. 250, 125 S.E.2d 589 (1962), where a judgment for damages was reversed. It was remanded to determine the injunction issue in light of pertinent evidence.

\textsuperscript{2} See, e.g., Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950), where the court stated, in effect, that when an owner subdivides and sells in reference to a plat or map, he dedicates the streets to the public in general and the purchasers in particular. See generally 11 MCQUILLAN, MUNICIPAL COR-