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**The Impact Of Social Security Law On The  
Recovery In Tort Of Damages For Personal Injury  
In England And Wales**

*A Report For*

*The European Centre Of Tort And Insurance Law*

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# **The Impact Of Social Security Upon Recovery In Tort Of Damages For Personal Injury In England And Wales**

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## **I. General Questions**

*1.1. For the purposes of this questionnaire “social security law” and “social security systems agencies” are the regulations and bodies which are state dominated and are designed to protect against the consequences of any bodily injuries including illnesses. Please make clear whether this definition fits within the understanding of social security law and social systems/agencies in your country.*

1.1.1 These are definitions which are acceptable for the purposes of the present investigation. Social security law in Britain is understood as meaning the laws and regulations which govern the payment of cash benefits by the state to its citizens. State control is therefore a central feature. The state provides special benefits in the case of certain accidents and diseases. In particular, there is a special scheme of compensation for those who suffer an injury in the course of their employment.

1.1.2. However, the state’s benefits extend far beyond provision for bodily injury and, for example, offer support in the event of unemployment, retirement from work, or extreme financial need. It thus makes provision for the weakest in society whether or not their position results from accident or illness. In that sense

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social security has a much wider meaning in Britain from that suggested in the question.

*1.2. Is there, and can you define, a general dividing line between tort law and social security law as far as personal injuries are concerned? If so, what are the characteristics of that line?*

1.2.1. There is a clear dividing line between tort and social security.<sup>2</sup> Tort compensation is obtained by bringing a civil action in the courts, although in 98 per cent of cases the claim is settled before the case is set down for trial.<sup>3</sup> It is dependent upon the claimant establishing that another person or body is liable for the injury he has sustained, and this normally requires proof that the defendant is at fault. This means that only a minority of all accident victims are able to obtain tort damages.<sup>4</sup> The process is slow and costly. The rules have largely

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<sup>2</sup> For a comprehensive accounts see A. Ogus, E. Barendt, and N. Wikeley, *The Law Of Social Security* (4th ed 1995, Butterworths, London), W.V.H. Rogers, *Winfield and Jolowicz On Tort* (15th ed 1998, Sweet and Maxwell, London) or M. Jones, *Textbook on Tort* (6th ed 1998, Blackstone Press, London) or B. S. Markesinis and S. Deakin, *Tort Law* (4th ed 1999, Clarendon Press, Oxford).

<sup>3</sup> *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury*, Cmnd 7054 (1978) vol 2 table 12. Similarly P. Pleasence, *Personal Injury Litigation In Practice* (1998) p 12 reveals that only 5 out of the 762 cases studied went to trial. Even in cases involving substantial awards of damages - £150,000 or more paid by insurers in 1987 and 1988 - only ten per cent of payments were the result of formal court orders. See P. Cornes, *Coping With Catastrophic Injury* (1993) p 20.

<sup>4</sup> *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury*, Cmnd 7054 (1978) (The Pearson Commission) vol 1 table 5 reveals that only 6.5 per cent of all accident victims are compensated by the tort system: these comprise one in four road accident victims, one in ten injured at work and one in 67 hurt elsewhere. However, if only serious injuries are considered tort becomes more important. Where an accident causes incapacity for work for six months or more, almost a third of claimants receive tort damages. Nevertheless, these constitute few of those people seriously disabled from all causes because disabled people outnumber accident victims by ten to one. See vol 2 table 4.

been formed by judges on a case by case basis under the common law. The defendant can be required to compensate in full for both the pecuniary and non-pecuniary losses which result. A subjective assessment is made and any loss of earnings is replaced in full. In practice, 90 per cent of claims relate to motor or industrial accidents. In both of these areas it is compulsory that tort liability insurance be taken out, and as a result the system is largely administered and paid for by private insurance companies.<sup>5</sup>

1.2.2. By contrast, a claim for social security is brought against an administrative agency of the state. All cases are adjudicated and there is no settlement out of court. Entitlement does not depend upon establishing that the injury is the result of the fault of another. The procedure is relatively speedy, and the administrative cost is low. The rules are largely derived from statute rather than common law. The compensation makes no allowance at all for non-pecuniary losses such as pain and suffering. Nor is any account taken of any subjective financial loss. Instead entitlement is based upon objective criteria, with there being almost no earnings relationship in the amount paid. The payments are all funded and administered by the state; no private insurers are involved.

*1.3. Are there significant differences in function between tort law and social security law in the field of personal injuries? Which ones?*

1.3.1. Both tort and social security pursue the aim of awarding compensation to those injured by accident or disease, although tort is distinct in that it attempts to restore the injured person in so far as is possible to the pre-accident position. An emphasis upon this corrective, rather than distributive, form of justice of tort has been a feature of Anglo-American writings in recent years.

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<sup>5</sup> The Pearson Commission, *op cit* vol 2 para 509, estimated that insurers dealt with 88 per cent of tort claims and paid 94 per cent of the total damages. The remaining cases involve either Government bodies, or large organisations which are self-insurers. It is extremely rare for damages actually to be paid by an individual tortfeasor.

1.3.2. Although compensation is generally accepted by most commentators as the main aim of the law of tort, its functions have been said to go far beyond this and may include the following:

- deterring potential wrongdoers and reducing the incidence of risky behaviour, and thus accidents, in society:

There is a large literature dealing with the economic effect of tort law in directly affecting the actions of individuals, and indirectly doing so via the price mechanism. However, much of the deterrent force of tort is removed or undermined by the presence of insurance, and the operation of the criminal law.

- providing the injured person with satisfaction:

It has been suggested that the injured person is made to feel better by seeing the wrongdoer condemned as being at fault, even if, because of insurance he is not required to pay for his error. However, this public vindication of the injured person is rarely achieved in practice because most claims are settled out of court and the defendant is rarely exposed publicly as being to blame.

- providing a public forum for debate on matters of general public importance:

The tort system enables those with sufficient standing to bring matters to the public attention which they might otherwise not be able to do. In this way the tort system has been said to have an “ombudsman” like function. Again there are many limits to this function, not least being the deterrent effect of the costs involved in bringing a case.

## **II Social Security Protection For Personal Injuries**

*2.1. What percentage of the population in your country is protected by social security systems against the consequences of personal injuries? How far does private insurance step in?*

2.2. Which groups of the population (eg employees) are protected, and which are not? What are the reasons for the different protection?

2.4. How far does the social security protection cover injuries caused by others?

2.1.1. All of the population in Britain is protected to a greater or lesser extent by the state in respect of bodily injury or disease. Many of the benefits available are directly related to whether the claimant was in employment prior to the injury and/or whether he is now incapable of work. There is less provision for those not in work, or expected to work, at the time of their injury. One reason for this is that entitlement to some benefits depend upon an employee paying national insurance contributions in the course of their work (para 2.5.1.) For the overlap between tort and social security see para 2.10.2.

2.1.2. *To what extent does private insurance offer support?* - There are several different types of first party insurance that could be relevant to accident victims.<sup>6</sup> They may provide either continuing benefits and/or a lump sum in the event of lost earnings, disablement or death. The extent of cover offered by these differing policies varies:

- ρ The *event causing the loss* may be confined so that only injuries by accident are covered. Alternatively, it may be extended, as it is under a permanent health policy, to include the onset of disease or illness. If death occurs a claim could be made under a life insurance policy.
- ρ The *nature of the loss* covered also varies. In broad terms compensation can be confined to one or more of three types:-
  - 1) Money may be payable only if there is an interruption in earnings. The precise conditions and the amounts payable will depend on the terms of the specific policy. For example, the sum recoverable under a mortgage indemnity policy payable on interruption of earnings may be limited to

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<sup>6</sup> D. Harris et al, *Compensation And Support For Illness And Injury* (1984) chap 8.

the liability under the mortgage; and under a permanent health policy the beneficiary may be required to show that he is no longer able to follow his regular occupation.

2) The compensation may indemnify the policyholder for the costs arising from the injury, as in the case of a private medical insurance policy.

3) The compensation may be based upon disablement and not the financial losses directly caused by the injury so that entitlement arises irrespective of costs or earnings losses. A continuing loss of faculty may then suffice. An example of this is the relatively small sum payable under a comprehensive motor vehicle policy if there are major anatomical injuries to the policyholder such as loss of a leg.

2.1.3. *Life insurance*: Of all the first party policies relevant to personal injury claims, life insurance is by far the most common with almost two-thirds of households spending some money on cover.<sup>7</sup> Obviously it is only relevant to tort damages in the relatively few accident cases which result in fatality. More than one policy may then be applicable because it is common for there to be overlapping or duplicate insurance on the same life. This happens partly because life insurance is purchased not only to minimise financial loss in the event of death, but also as a form of saving and investment. It has been argued that this distinguishes life policies from the other first party insurances considered here, and reinforces the case for their proceeds to be left out of account when damages are being calculated.

2.1.4. *Accident and disability policies*: Although these remain relatively rare, they have increased in number especially since the 1980's. About 7 per cent of households spent some money on a personal accident policy in 1996-97.<sup>8</sup>

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<sup>7</sup> Association of British Insurers, *Insurance: Facts Figures And Trends* (1998) table 3.2.

<sup>8</sup> Ibid table 3.3.

2.1.5. *Permanent health policies*: These cover almost ten per cent of the working population: about 1.3 million people are covered by individual policies, and almost as many again are members of group schemes. Typically the beneficiaries are employed, male, and higher income earners.<sup>9</sup>

2.1.6. *Private medical insurance*: This also expanded dramatically in the 1980's although it has declined somewhat in recent years. The number of people covered fell slightly between 1990 and 1997 - from 6.6 to 6.1 million.<sup>10</sup> About 9 per cent of households spend money on private medical insurance, although more than half of all subscribers have their premiums paid by their employer.<sup>11</sup> There are marked differences in the extent of cover depending upon age, region, and socio-economic group: a third of middle aged professionals are covered but only one in fifty manual workers; and twenty per cent of people are covered in London compared to only four per cent in the North of England.<sup>12</sup>

#### 2.4.1. *The Extent Recipients Of Tort Damages Also Obtain Insurance Payments*

2.4.2. Although there is some empirical evidence of the extent that first party insurance overlaps with tort damages, much of the data is incomplete or dated. However, it does suggest that insurance is of relatively limited importance to accident victims in the UK. This is in sharp contrast to the USA where it has been

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<sup>9</sup> M. Howard and P. Thompson, *There May Be Trouble Ahead* (1995) p 17. The premiums for permanent health insurance have risen steeply in recent years and the sales of policies have declined. P. Fenn, "Sickness And Disability Insurance In Public And Private Sectors" in Association of British Insurers, *Risk And Welfare* (1995).

<sup>10</sup> Association of British Insurers, *Insurance Statistics Yearbook 1985-1997* table 71.

<sup>11</sup> Office For National Statistics, *Living In Britain: Results From the 1995 General Household Survey* p 122, and the Association of British Insurers, *Insurance: Facts, Figures And Trends* (1998) table 3.2 and p 28.

<sup>12</sup> Laing and Buisson, *Private Medical Insurance: Market Update* (1994) p 16.

suggested that in the case of road accident victims two thirds of their total recovery comes from sources other than the tortfeasor, these being predominantly from insurance.<sup>13</sup>

#### 2.4.3. *Personal Accident Insurance*

In 1994 the Law Commission found that, of those receiving tort damages, only about one in ten said that they also obtained some money from insurances against personal accident (although this excluded medical or life insurance payments).<sup>14</sup> About half of these people received lump sums, and half periodic payments which averaged £20 to £60 a week.<sup>15</sup>

#### 2.4.4. *Private Medical Insurance*

The Law Commission reported that there were four times as many accident victims who received private medical treatment as a result of their injury as opposed to the benefits of a private accident insurance policy: 43 per cent of recipients of damages said that they had been treated privately. However, the

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<sup>13</sup> J. O'Connell, *The Injury Industry* (1971) chapter 4 p 29. For much more detail on the North American figures see R. Lewis, *Deducting Benefits From Damages For Personal Injury* (1999) (Oxford University Press) para 6.08.

<sup>14</sup> Law Commission Report No 225, *Personal Injury Compensation: How Much Is Enough?* para 9.1. The survey was of 654 people who obtained damages. Harris *et al* similarly found that about 11 per cent of victims injured in accidents in 1975 reported that they had insurance cover, excluding medical cover. However, only 5 per cent actually received insurance payments. *Compensation And Support For Illness And Injury* (1984) table 8.1 and p 225. The Pearson Commission again found that only 7 per cent of victims obtained insurance payments. *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054) vol 1 para 154. The Civil Justice Review suggested that about a quarter of a million accident victims each year benefit from the proceeds of insurance. *Report Of The Review Body On Civil Justice* (1988, cm 394) para 391.

<sup>15</sup> Again for more detail see R. Lewis, *Deducting Benefits From Damages For Personal Injury* (1999) (Oxford University Press) para 6.09.

medical treatment received must have been very limited for the individual cost was generally low. Most of the payments made were for less than £500, although 7 per cent of those who were more seriously injured paid over £5000. There are difficulties in assessing the true extent that private treatment is sought because of the cover provided by insurance,<sup>16</sup> but at least it can be said that medical insurance is a much more important factor today than it was twenty years ago when only one accident victim in forty reported having private cover.

#### 2.4.5. *Life Insurance*

Although in non-fatal accidents only ten per cent of recipients of damages also received an insurance payment, the Law Commission found that if death resulted this figure increased to 67 per cent. In addition, the payments they received were much larger.<sup>17</sup> Therefore, in the case of more serious injuries which result in death it is much more likely that, in addition to any claim for damages, some insurance payment will be made, and this will be for a much more substantial sum than in non-fatal cases. The size and likelihood of receiving policy monies places dependants in a much more favourable position than accident victims themselves.

#### 2.5. *Who finances the social security protection?*

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<sup>16</sup> It seems that almost half of those in the survey made no payment themselves for their treatment, and this suggests that their medical costs were met directly either by first party insurance or by the defendant. However, of those who paid for their treatment, the majority claimed that they did so from their own funds and not from monies set aside from their settlement or from any medical insurance policy.

<sup>17</sup> Of those receiving insurance monies 44 per cent reported obtaining the proceeds of a life policy, 5 per cent the proceeds of a private pension and 30 per cent received endowment or mortgage protection payments. Only 2 per cent said that they benefited from a comprehensive motor vehicle policy. Almost all of the policies provided a lump sum only, with only 4 per cent offering periodic payments.

2.5.1. Social security protection is entirely financed by the state. The money is raised not only by taxation but also by requiring individuals to pay national insurance contributions. This insurance element can mean that some benefits are only available if an individual has paid sufficient national contributions. However, this insurance relationship has been progressively undermined so that today there is no separate accounting system for national insurance payments as opposed to payments funded from the state funds in the Exchequer. It is the state that directly funds all social security benefits.

### **III Relationship Between Tort Law And Social Security**

*3.1 and 3.2. Does social security law completely replace tort liability? If so, in which fields and under what conditions? What are the reasons for any such replacement?*

3.1.1. There is no formal rule of law preventing an action being brought in tort merely because of the claimant's entitlement to social security benefit. However, the value of the tort claim is affected by the claimant's receipt of such benefit. This indirectly has an effect by reducing the value of the claim and thus the incentive to bring a tort action.

*3.3. Are there significant differences between tort law and social security as far as core elements of compensation/protection are concerned, in particular as to fault, causation, pecuniary and non-pecuniary damage, and contributory negligence.*

3.3.1. There are very great differences. The main ones are as follows:

3.3.2. *Fault* - The tort system provides compensation for an injured person only where responsibility can be attributed to another person or organisation. The usual basis for attributing responsibility is that the defendant has been at fault, although in some areas strict liability exists (either as a formal rule of law or as a matter of practice). The fault basis of liability is also reflected in the rule that the claimant's compensation will be reduced if he himself is at fault.

3.3.3. By contrast, for the many different types of benefit in social security law there is no requirement to prove that injury has been caused by fault of another. In general terms, benefit entitlement is based on the claimant's needs and never involves ascribing blame to another. Nor, in general, are a claimant's benefits reduced because of his own contribution to the circumstances leading to his need for benefit.

3.3.4. *Cause* - Tort liability also requires that the defendant's fault be established as the cause of the injury. In practice this has meant that the tort system has focused overwhelmingly upon injuries caused by accidents. Injuries caused by disease or illness have been little recognised, although this is now an area of growing importance.

3.3.5. By contrast, the social security system compensates readily for sickness and disease. There are ten times as many people disabled from the effects of illness as compared to accidents, and of those injured by accident only a small proportion are successful in bringing a tort claim. The social security system is thus of far greater importance to those disabled from all causes. Although the level of benefit can sometimes depend on the type of illness, in general the social security system is more concerned with the extent of disablement rather than its cause.

3.3.6. *Pecuniary compensation* - The oft stated aim of the tort system is to restore the claimant to the position he was in before the accident occurred. This means that he is entitled to compensation in full for any financial losses suffered. These include any loss of earnings, and any expenses including the costs of care. Payment for private medical costs can be obtained even though there is an extensive National Health Service.

3.3.7. By contrast there is almost no earnings related element in the payment of social security benefit. Although limited care costs can sometimes be obtained, the welfare system is geared more to providing care directly rather than giving money for that care to be bought.

3.3.8. *Non-pecuniary compensation* - A distinctive feature of the tort system is that it offers compensation for pain and suffering, and for the loss of the amenities of life. It makes no difference that the injury has had no direct financial effect upon the claimant. This accounts for two-thirds of the damages awarded by the tort system.<sup>18</sup> By contrast, social security offers almost no such recognition of non-financial loss. (The one exception to this is disablement benefit for an industrial injury. This is paid according to a scale of disability and takes no account of whether the claimant has lost earnings, or whether he has incurred expenses, or even whether he needs the money).

3.4. *Are there differences in the amount of compensation normally granted by tort law or by social security law? If so, what are the problems which result from such differences and how are they resolved?*

As already emphasised, in so far as is possible, the tort system aims to return the claimant to the pre-accident position. The social security system does not attempt to do so. In brief, the tort system is distinct in that it -

- replaces in full any lost earnings,
- meets all the costs of private care, and
- compensates for pain, suffering and non-pecuniary loss, and
- generally compensates by paying a lump sum as opposed to a periodic payment.

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<sup>18</sup> *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054), chairman Lord Pearson, vol 2 table 107. However, table 108 revealed that the larger the claim, the lower the proportion that is paid for non-pecuniary loss. Of claims over £25,000 in 1973 the proportion paid for non-pecuniary loss dropped to 48 per cent.

*3.5. Does the social security agency which grants protection to the injured person have the right of recourse against the person who caused the injury? If so, under what conditions?*

3.5.1 The state had no right of recourse until a benefit recovery scheme was established by legislation in 1989.<sup>19</sup> This set up the Compensation Recovery Unit as a new social security agency which is able to claw back most of the benefits paid by the state to accident victims up to the date of the settlement of their damages claim. Such recovery can therefore only take place if liability in tort can be established and if damages are paid. In practice, the social security agency rarely needs to mount a separate recourse action to recover the benefit paid. This is because, in each case where damages for personal injury are to be paid, the compensator (usually an insurer) first has a duty to inquire into the benefits which have been paid to the claimant as a result of the accident, injury or disease. Then, on paying the damages, the compensator has a duty to repay the full amount of benefit to the Compensation Recovery Unit. This reimbursement has become part of the administrative process involved in disposing of every successful tort claim. Insurers now regard the procedure as routine. It is therefore only in rare cases that the social security agency actually resorts to using its powers to mount a separate recourse action against a compensator. A separate action is only required where the compensator fails to comply with the recovery procedures.

3.5.2. *Period of benefit recovery* - The compensator must repay to the state all benefits listed in the statute as being recoverable provided that they result from the accident or disease. The period during which these listed benefits can be recovered begins, in the case of an accident, on the day after it happened. In the case of a disease it begins on the day on which the first claim for benefit in respect of the disease was made.

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<sup>19</sup> Under the Social Security Act 1989. Major revisions were made eight years later, the current legislation being the Social Security (Recovery of Benefits) Act 1997.

The period of recovery ends -

- either five years after the recovery period began,
- or on the date when final compensation is paid, whichever is sooner.

3.5.3. In practice, this means that in the vast majority of cases the recovery period ends on the date of settlement of the case, for most claims are concluded well within the five year cut-off period (see notes to para 3.10.2.). The state cannot recover benefits which may be paid to the claimant in the future - after the settlement agreement or court order. This is an important limit to the compensator's liability to repay the state, and it is was devised partly to avoid the guesswork about the claimant's future entitlement to benefit that otherwise would be necessary. Injustice could be caused by making estimates of future benefit. However, this limit also means in some cases that the accident victim who continues to receive benefit for many years receives compensation from overlapping or duplicate sources.

3.5.4. *Reducing the claimant's damages to take account of the benefits paid*  
- Although the compensator has a duty to repay the benefits received in full, in most cases the cost of doing so is reduced because the compensator is allowed to set off the benefits against part of the damages due to the injured person. The amount of damages paid can therefore be reduced. As a result, in theory, the claimant then obtains no more than he has lost, the defendant pays in full, and the public purse avoids bearing the cost of financially supporting those injured by another's wrongdoing. The scheme is thus attractive because it appears to avoid not only subsidising the defendant but also over-compensating the accident victim, at least during the period before his damages claim is settled.

3.5.5. The compensator's ability to reduce damages places considerable pressure upon claimants to settle their cases as soon as possible. The incentive for claimants is "settle today and keep tomorrow's benefits; settle tomorrow and you will lose them." In some circumstances the time factor can also be used as a bargaining tactic to persuade the compensator to accept the terms offered. The

social security system thus has an effect not only upon the value of a tort claim but also the way in which it is administered and the speed with which it is settled.

3.5.6. Although the compensator can set off the benefit he must repay to the state against certain parts of the damages for which he is liable, he is limited in the extent that he can reduce the damages that must be paid to the claimant:-

- ☐ A compensator can only deduct a benefit from damages if there is a corresponding head of damage for which the claimant has received compensation in tort. This principle of equivalence means, for example, that a social security benefit listed as being paid in respect of lost earnings can only be deducted against damages specifically paid for lost earnings and not against damages paid for the cost of care.
- ☐ Damages for non-pecuniary loss - including pain, suffering and loss of amenity - are “ringfenced” so that no benefit at all can be deducted from them. The justification for this is said to be that pain and suffering damages do not overlap with benefits because state payments are not made for any forms of non-pecuniary loss. There is then no possibility of making a “like-for-like” deduction.
- ☐ Damages awarded for future loss are also not subject to benefit deduction or recovery. This is because benefits received after the date of final compensation cannot be recovered, whilst the past benefits, which can be recovered, can only be deducted against those corresponding parts of the damages award which relate to past losses.

3.5.7. These limits on the compensator’s ability to reduce the damages to be paid to the claimant do not affect its liability to reimburse the state for *all* the relevant benefit paid. The compensator must repay in full even if it is not able to set off that repayment against its damages bill. The different heads of the damages award thus have no effect upon the state’s ability to recover all of the listed benefits. (The actual amounts of benefit recovered by the state is considered in para 3.10.5.).

3.5.8. *Recovery of the costs of National Health Service treatment* - The benefit recovery scheme has recently been extended to enable the cost of hospital treatment provided under the National Health Service to be recovered.<sup>20</sup> Although at present this is limited to cases involving the treatment of road accident victims, it is anticipated that it will eventually be extended to all cases in which a compensator pays damages. The scheme is parasitic upon the benefit recovery scheme, and requires the repayment of costs to be made at the same time that tort damages are paid to the claimant. The costs payment is calculated by making a fixed charge depending upon the number of days spent in hospital up to a maximum of £10,000. The new scheme adds another substantial tier to the recovery of compensation cake. Recovery of NHS costs is expected to raise between £123 and £165 million a year, a sum which must be added to the £200 million of social security benefits currently being recovered.

*3.6. How is the recourse action dealt with when either the injured person, a member of the tortfeasor's family or a co-employee has contributed to the damage?*

These factors make no difference to the benefit recovery scheme described in 3.5. above. The compensator - whether a co-employee or relative - must repay to the state all the benefit which has been paid to the claimant as a result of the tort. Of course, in practice, almost without exception it is the insurance company of the employer or the road traffic insurer of the relative who actually makes the repayment of benefit at the same time as paying damages to the claimant.

*3.7. Do agreements between social security agencies and social or private insurers exist which regulate the distribution of damages between them? Do those agreements render recourse actions superfluous? Do those agreements influence tort law? If so, in which respect?*

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<sup>20</sup> Under the Road Traffic (NHS Charges) Act 1999. See R. Lewis, "Recovery Of NHS Accident Costs: Tort As A Vehicle For Raising Public Funds" (1999) 62 Modern Law Review 903.

3.7.1 In other countries providers of collateral benefits are given extensive subrogation rights to recover from the tortfeasor benefits paid to the claimant. However, they enforce these largely through bulk recovery agreements whereby liability insurers agree in advance to pay a percentage of all claims under a certain amount from particular collateral benefit providers. This avoids litigating individual cases and makes subrogation administratively workable and financially acceptable.<sup>21</sup> The Law Commission recognises that the conclusion of bulk agreements in the UK would be complicated and costly and lead to a myriad of arrangements between individual employers, first party insurers, and pension funds on the one hand, and liability insurers on the other.<sup>22</sup>

3.7.2. Bulk recovery agreements in respect of social security benefits do not exist in the UK because of the comprehensive benefit recovery system described above. Before that system was in place, the social security agency had no right to reclaim the benefits paid, and thus no recourse agreements existed. However, there are limited agreements between private insurers concerning the distribution of damages between them, although these are not concerned with the recovery of benefits already paid or with any social security aspects.<sup>23</sup>

*3.8. Which further problems are created by the interplay between tort and social security law in your country?*

3.8.1. *Fears of the administrative cost of benefit recovery* - A substantial bureaucratic organisation had to be set up in order to administer the benefit

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<sup>21</sup> See W. Pfennigstorf and D. Gifford, *A Comparative Study Of Liability Law And Compensation In Ten Countries And The USA* (1991) p 134.

<sup>22</sup> See the Law Commission Report No 262 *Damages for Personal Injury: Collateral Benefits* (1999) para 12.16.

<sup>23</sup> R. Lewis, "Insurers' Agreements Not To Enforce Strict Legal Rights: Bargaining With Government And In The Shadow Of The Law" (1985) 48 *Modern Law Review* 275.

recovery scheme. Before it was set up there were fears that recovery would impede the litigation process, and lead to delayed settlements and make the tort system even more expensive. These fears have proved to be without foundation. In particular, the Compensation Recovery Unit itself, which employs more than 400 staff, runs at a cost of less than 3 per cent of benefits recovered.<sup>24</sup> Against this it must be pointed that there are other, even cheaper, means of raising monies from insurers - such as increasing the tax on insurance premiums paid - but these are not wedded to the exact liabilities of each insurer under the tort system. But this leads on to another major criticism which is as follows:

3.8.2. *Entrenchment of discredited fault system* - The new benefit recovery system departs from notions of community responsibility for injury and entrenches the discredited tort liability system as a means of raising public revenue. The recoupment principle reasserts the primacy of the tort obligation with its attendant support for individualism and its rhetoric of punishing wrongdoers - no matter how difficult it may be to identify them or make them pay in practice. Irrespective of how expensive, irrational, or even grossly unfair the fault principle appears in practice each pound of cost is to be counted and allocated its "proper" place. It is insurers - or rather their policyholders and, indirectly, the community at large - who must pay. Although the resulting "stealth tax" is a convenient political method of raising public revenue, the recoupment principle as applied to benefits and health costs entrenches the tort system as a part of the means for raising public revenue. The wastefulness and inequities of the basic principle upon which that system is founded - the fault principle - are lost in the narrower focus and in the political expediencies of the moment.

3.9. *Can certain impacts either of social security law on tort or vice versa be identified?*

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<sup>24</sup> In 1997-98 it recovered £171 million at a cost of £4.2 million being 2.4 per cent of the total.

- It is clear that the more social security meets the immediate financial needs of the accident victim, the less likely it is that a tort claim will be made. The economic incentive to litigate is reduced.
- On the other hand, the receipt of benefit enables a claimant to fight his case for compensation harder than he otherwise would. (See para 3.10.2).
- The deduction of recoverable benefit from damages places pressures upon the parties - and especially the claimant - to settle a claim as quickly as possible. (See para 3.5.5.).

*3.10. Give figures which show the economic dimension of tort law compensation as opposed to social security protection. What figures are available as to the extent of recourse actions?*

3.10.1. Although only a small part of public expenditure upon welfare is paid to accident victims,<sup>25</sup> the amount greatly exceeds the total damages paid by the tort system. Tort is very much the junior partner of the social security system. Seven times as many accident victims receive social security payments as opposed to tort damages for their injuries, and the total benefit received by them is double the sum of all damages awarded.<sup>26</sup> Tort becomes even less significant if its importance is assessed not in relation to accident victims alone, but in relation to

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<sup>25</sup> The Pearson Commission roughly estimated that only about 6 per cent of public expenditure upon welfare was directed towards accident victims. This represented about 2 per cent of total public expenditure (welfare provision being a third of the total). The calculation took into account the cash benefits and costs of administration of the social security system and added to it the costs of hospital and medical services. *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmnd 7054) vol 1 para 87.

<sup>26</sup> The Pearson Commission, *op cit* vol 1 table 4, suggested that in 1977 there were about 215,000 recipients of damages totalling £200 million whereas the social security system paid out about £420 million to one and a half million people. By 1988 although more people were receiving tort damages, the relative importance of the schemes remained about the same. See the *Report Of The Review Body On Civil Justice* (1988, cm 394) para 391.

the ten times larger group of people who are disabled from all causes, these predominantly being illness and disease. For a variety of reasons this group is much less able to claim in tort than accident victims,<sup>27</sup> and common law damages plays an even more limited role in their compensation.

3.10.2. *The overlap between the systems:* The above figures must not be taken to imply that the tort and social security systems are mutually exclusive; in fact they are closely linked. The person who succeeds in his damages claim is more likely to be in receipt of a wider range of welfare benefits than the more typical accident victim who is unable to claim in tort. In a Law Commission survey nine out of ten recipients of damages of £20,000 or more also received on average three different social security benefits.<sup>28</sup> The existence of the welfare state has provided injured people with the basic sustenance needed to undergo the often lengthy process of pursuing a claim for damages at common law.<sup>29</sup> If

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<sup>27</sup> J. Stapleton, *Disease And The Compensation Debate* (1986).

<sup>28</sup> Law Commission Report No 225 (1994) *Personal Injury Compensation: How Much Is Enough?* Table 901.

<sup>29</sup> The Department of Social Security reported an average settlement period of 2.3 years for those tort cases where benefits were recouped from 1990 - 94, although in 28 per cent of cases the recoupment period lasted for between three and five years. See the DSS *Memorandum of Evidence to the Social Security Select Committee* (1995) HC 196 appendix B. Similarly, the median duration of a legally aided tort case where proceedings were issued was found to be 2.4 years by P. Pleasence, *Personal Injury Litigation In Practice* (1998) p 65 fig 4.21. The study noted that medical and work disease cases lasted substantially longer than road accident, tripping and occupier's liability cases. The mean time from accident to settlement was 19 months in the survey of 159 cases in D. Harris et al *Compensation For Illness And Injury* (1984) p 105. The Pearson Commission also found that 80 per cent of claims had been settled within two years of the injury. See *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054), vol 2 table 17. By contrast a Law Commission survey of 92 cases found that the mean settlement period was over 5 years. See table 1121 of the Law Commission Report No 225 (1994) *Personal Injury Compensation: How Much Is Enough?* In addition, another study discovered the median disposal period from first instruction to be 54 months in the 323 personal injury cases studied,

accident victims had not been able to obtain this immediate support from the benefit system it is unlikely that the action for common law damages - with all its delays, costs and complexity - would have survived long into the twentieth century. For that reason the tort system can be seen as parasitic upon the welfare state.

3.10.3. The extent of the overlap between the systems has become more apparent in recent times. The Compensation Recovery Unit was set up in 1989 to enable the social security agency to claw back most of the benefits paid by the state to accident victims up to the date of the settlement of their damages claim. At first it was thought that it would retrieve about £55 million a year. By 1994 - 95 it was recovering £110 million a year and by 1998 - 99 this had grown to £201 million. By then, in total, £925 million had been recovered. The overlap between benefits and damages has thus proven to be significant.

3.10.4. However, the importance of the overlap should not be over-emphasised. Within the larger picture the savings involved are not enormous. As a result of the 1989 changes the cost of employers liability insurance was forecast to rise by five per cent and motor insurance by only a half a per cent.<sup>30</sup> The motor insurance figures reflect the fact that insurance monies are largely paid for damage to vehicles where no liability may be involved rather than for tortiously caused personal injuries. Of course, no benefits are paid as a result of suffering only vehicle damage. In addition it should be noted that the vast majority

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and 61 months in the 206 medical negligence cases. See Lord Chancellor's Department, *Access To Justice: Final Report* (1996) annex 3.

It is at least true that the more serious the injury the longer it takes to settle. In a study of 153 cases where compensation of £150,000 or more was obtained in 1987 and 1988 the average time for settlement was 5 years 4 months. P. Cornes, *Coping With Catastrophic Injury* (1993) p 18.

<sup>30</sup> See Touche Ross, *Recovery Of Benefit In Tort Damages Awards* (1988) appendix 3.

of tort claims are for relatively small sums - averaging only about £2,500,<sup>31</sup> and again in these minor cases no benefits are claimed. In 70 per cent of the certificates issued in connection with the benefit recovery scheme there are no benefits to be repaid to the state.<sup>32</sup>

### 3.10.5. *The amounts and types of benefit recovered by the state*<sup>33</sup>

1993-94 - £ 81.9 million

1994-95 - £ 110.1 million

1995-96 - £ 135.1 million

1996-97 - £ 145.5 million

1997-98 - £ 170.9 million

1998-99 - £ 201.5 million

By April 1999 the total amount recovered since the scheme first came into operation in 1990 was £925 million. The main benefits recovered are as follows:

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<sup>31</sup> This is the median figure in the survey of 81,000 cases receiving legal aid and closed in 1996 - 97 in P. Pleasence, *Personal Injury Litigation In Practice* (1998) p 40 fig 3.17. Similarly in evidence to the Law Commission in March 1993 the Trades Union Council noted that the average sum obtained in the 150,000 union-backed cases in 1991 was under £2,000. See also the figures for various years in D. R. Harris et al, *Compensation For Illness And Injury* (1984) p 87.

<sup>32</sup> In the year to the end of September 1998 benefits were only recovered in 20 per cent of the 309,711 cases notified as being settled during that period. Where benefits were recovered the amount on average was about £3,000.

<sup>33</sup> Until 1997 there could be no recoupment at all if a case was based on an injury occurring before 1990. This means that the amount of benefit recovered in the earlier years under review was limited because of the delay between the date of accident and the payment of compensation. Some cases can take many years to settle. As the years have passed more and more cases from the earlier years have fallen within the scheme with the result that the statistics generally reflect an increase in the amount of benefit recovered. Thus in 1991 - 92 only £25 million was recovered but by 1998 - 99 this had risen to £201 million.

- About half of the benefit recovered relates to payments made for either short-term or long-term incapacity for work.
- 14 per cent relates to payments under the industrial injuries scheme.
- 14 per cent relates to payments in respect of care and mobility payments for those severely disabled.
- 16 per cent relates to payments of income support, which is the basic means-tested “safety-net” provision made for anyone in need.

*3.11. Are figures available on the transaction costs which compensation under tort law consumes as compared to those costs under social security schemes?*

3.11.1 It has been estimated that the cost of operating the tort system amounts to 85 per cent of the value of tort payments distributed to claimants.<sup>34</sup> That is, for every pound received by the claimant the greater part of another pound is consumed in costs. By contrast the corresponding figure for the cost of administering social security payments to those injured is only eleven per cent.

*3.12. Are there considerations for reform in your country which influence the relationship between tort law and social security?*

There are no major legislative changes expected which would radically affect the relationship of tort and social security. Tort law has been widely criticised as a slow, expensive and wasteful system which compensates only a minority of all accident victims. In spite of these criticisms, there has been opposition to suggestions that the role of tort law should be reduced or replaced by a welfare

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<sup>34</sup> *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054) vol 1 para 256. The Lord Chancellor’s *Civil Justice Review* ( Cm 394, 1986) estimated that the cost of the tort system consumed 50 to 70 per cent of the total compensation awarded in personal injury cases.

system offering benefits to a wider class. The objections have been based on the excessive cost and increased public expenditure in making such changes. In addition, there has been opposition to any undermining of the supposed deterrent effect of tort law, and it has been claimed that removal of tort liability would be politically undesirable because it provides “some safeguard against a system of total dependence on the state.”<sup>35</sup>

#### **IV Cases**

*4.1.a . A employed by employer X is injured by employee B, employed by employer Y, while working on a building site. B acted with slight negligence. From whom can A claim his costs for medical treatment and compensation for pain and suffering?*

4.1.a.1. A can claim in tort against B personally, and against Y as B’s employer. Employers are held vicariously liable for the torts of their employees committed in the course of their employment. In practice, it is compulsory for B to have insurance against this form of liability, and it will be B’s insurer who pays.

4.1.a.2. A has no tort claim against his own employer, X, unless he can establish that his employer was himself at fault in some way. Without suing in tort, A may be able to claim employment benefits privately negotiated and agreed with his employer. For a minority of workers these employment benefits may include private health care and disability protection, although pain and suffering is not included.

4.1.a.3. Without suing in tort or claiming from his employer, A can obtain medical treatment free of charge from the National Health Service, but for his pain and suffering alone he can claim no compensation from the state.

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<sup>35</sup> *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054) vol 1 para 1716.

*4.1.b Are the results the same when B acted with intent or gross negligence?*

4.1.b.1. The results are the same, except that if A is injured as a result of a crime of violence he may claim compensation under the criminal injuries compensation scheme. There is provision in this scheme to reduce the compensation to take account of any social security benefits or damages in tort which the claimant may also obtain.<sup>36</sup>

*4.1.c. Is there a difference when A and B are employed by the same employer?*

4.1.c.1. There is no difference, the liability remains with B's employer. It does not matter that the claimant is also employed by the same employer. There used to be a rule in the nineteenth century that if the claimant were in common employment with the negligent fellow worker there could be tort action against their joint employer. This rule fell into disuse and was eventually abolished in 1948.

*4.2. Employee A has been severely injured by cyclist B and is therefore ill for three weeks and is unable to work. Can A claim continued payment of wages from his employer C? In full or in part?*

4.2.1. A has no tort claim against his employer. Any right to continue to receive wages from his employer will depend upon the terms he has negotiated as part of his contract of employment. Some jobs may offer protection for many months absence from work and may replace in full the earnings that otherwise would be lost; others occupations will offer only limited repayment by allowing only a percentage of income to be recovered for a shorter period of time. In practice, the most generous protection is more commonly found as a part of the

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<sup>36</sup> Under the Criminal Injuries Compensation Act 1995. See D. Miers, *State Compensation For Criminal Injuries* (1997, Butterworths, London).

terms and conditions of work for those in middle class jobs; there is less support given to those in working class or manual jobs.

4.2.2. Almost nine out of ten full-time employees benefit from some kind of occupational sick pay scheme if their earnings are interrupted for a short time as a result of injury or, more commonly, illness.<sup>37</sup> However, this figure can be misleading.<sup>38</sup> Coverage is partial and excludes the self-employed and part-time workers. The more likely beneficiaries are the better paid and, in particular, those in white collar jobs in larger organisations. Those least likely to benefit, or to benefit for only a short period, are lower paid manual workers employed by small firms. If an employer operates a scheme, it is likely that up to ten per cent of employees will not qualify for payment from it. This is because they may not have worked long enough or they may have exhausted their entitlement.

4.2.3. How much money is received by those who are members of such schemes? Although one survey reported that over three quarters of those receiving sick pay had their full pay made up for at least a part of their absence, the Law Commission found that of those who returned to their pre-accident job only a third reported that they received full pay during their absence, and a quarter received no pay at all.<sup>39</sup>

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<sup>37</sup> An estimate in the DSS, *Inquiry Into Statutory Sick Pay* (1985). A figure of 80 per cent was given by the DHSS in its *Report On A Survey Of Occupational Sick Pay Schemes* (1977). By contrast Harris *op cit* p 213 found that in 1976 only 56 per cent of employees reported receiving such payments during their absence from work. The Pearson Commission *op cit* para 139, on advice from the DHSS, suggested that after an absence of six months only ten per cent of workers would remain entitled.

<sup>38</sup> R. Lewis, "The Privatisation Of Sickness Benefit" (1982) 11 *Industrial Law J* 245 at p 249.

<sup>39</sup> Report No 225, *Personal Injury Compensation: How Much Is Enough?* (1994) para 7.3. The position was worse for those who did not return to their pre-accident employment: a half received no sick pay. After six months absence only 12 per cent of employees receive their full basic salary according to M. Howard and P. Thompson, *There May Be Trouble Ahead* (1995) p 9.

*If in part, can A sue B for the rest?*

4.2.2. Yes. B remains fully liable to restore A to the position he was before the accident.

*If C is obliged to pay A's wages, does C have a recourse action against employer B?*

4.2.3. No. C has no action against either the cyclist or the cyclist's employer. However, this may not mean that C is out of pocket. The tort rules operate as follows:

- The claimant, A, is not able to claim damages in tort from B for loss of earnings if those earnings have actually continued to be paid by the employer, C.<sup>40</sup> In this situation the employer bears the wage loss alone.
- However, it is possible for the employer to state in the contract of employment that wages will continue to be paid during an absence from work, but that if the absence is caused by the tort of another, and that other is found liable to pay damages, the employee must repay to the employer the wages received.<sup>41</sup> If such a clause exists, the employee is able to claim his wages in full from the tortfeasor even though the wages have continued to be paid by his employer. This is because he is then under a duty to reimburse his employer. In this situation the overall result is that the wage loss is paid for entirely by the cyclist.

*4.3. Employee A is injured through the carelessness of his employer B. Can a claim compensation for his damage from B? Or from the social security*

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<sup>40</sup> *Turner v Ministry of Defence* (1969) Sol J 585, considered in detail in R. Lewis, *Deducting Benefits From Damages For Personal Injury* (1999) (Oxford University Press) para 8.19 *et seq.*

<sup>41</sup> *Browning v War Office* [1963] 1 QB 750.

*agency only? If the latter is the case, does the agency have a recourse action against employer B?*

4.3.1. Yes, tort damages can be obtained against one's own employer provided that liability can be established, as it would be if the employer were at fault. A tort claim is allowed even though the social security system also makes special provision for those injured by accidents and disease in the course of their employment. There is a state pension for disability resulting from an industrial injury and this is paid irrespective of whether the injury was the result of fault.

4.3.2. All social security received by the employee as a result of the accident will be recovered from the tortfeasor by the state in any case where tort damages are also paid. An administrative system has been set up which requires those paying damages to make inquiries as to what social security payments have been made as a result of the accident. See para 3.5.1. In each case they must then repay the state agency the full amount of benefit involved. In effect, via this administrative system, the state gains reimbursement of its benefits without having to begin a separate recourse action against the employer.

*4.4.a. Employee A has been negligently injured through co-employee B (employer C, a third person), but A himself also negligently contributed to his damage. To what extent, if any, does A's contributory negligence influence his compensation either from the social security agency or the tortfeasor?*

4.4.a.1. A's contributory negligence will have the effect of reducing his damages in tort in proportion to the extent of his responsibility for the injury involved.<sup>42</sup> An examination will be made of the extent of A was to blame for his

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<sup>42</sup> It is very difficult to analyse the effect of the defence in practice upon the overall system because the parties need not agree whether and to what extent contributory negligence is a factor in the final settlement. One study found liability to be admitted in only a third of cases, whereas it was in issue in another third, and it was difficult to determine its effect in the final

injury and how important a cause he was in bringing about the final result. The defence of contributory negligence is only a partial defence and cannot, by itself, bar A from gaining some damages. However, there are other defences or arguments which may do so, for example, that the claimant was entirely the cause of his own injury, or that the claimant freely consented to the running of the risk.

4.4.a.2. By contrast, the claimant's fault is not a concept which is directly employed by the social security system to deny benefit. Payments such as those for sickness, or for absence from work, or for the need for attendance, are generally made without reference to the causes which gave rise to the claim. Fault is therefore not relevant. Thus, as already mentioned, the state's industrial injury scheme pays benefit on a no-fault basis and there is no specific denial in whole or in part based on the claimant's own contributory negligence. However, even though there is no specific defence, this is the one benefit where in extreme cases it is possible for the claimant's own fault to lead to the denial of payment. This is because the claimant's fault may consist of doing something completely unauthorised by his employer. His contribution to the accident may then take him outside the "course of his employment" with the effect that the special benefits available under the industrial scheme will be denied.

*4.4.b. Does A's contributory negligence influence any recourse claim that the social security agency may have against the tortfeasor?*

4.4.b.1. No. The extent that the tortfeasor must make repayment to the state is unaffected by the fact that the claimant may have contributed to his injuries.

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third of cases. See P. Pleasence, *Personal Injury Litigation In Practice* (1998) p 52. Contributory negligence was thought to be the cause of the reduction in damages in a quarter of all settlements studied by D. Harris et al, *Compensation And Support For Illness And Injury* (1984) p 91. The Law Commission found at least 12 per cent of recipients of damages awards considered that the defence had been relevant in reducing their payments in their Report No 225, *Personal Injury Compensation: How Much Is Enough?* (1994) table 407.

Although the tort damages are reduced, there is no proportionate reduction the amount of benefit which must be repaid. This appears harsh. However, the explanation is that it has been feared that if the benefits were to be reduced in proportion to the contributory negligence, it would make it easier for claims to be manipulated: artificially high levels of contributory negligence could be agreed by the claimant and defendant merely in order to reduce the extent of benefit recovery. A second reason is that any requirement that the precise degree of contributory negligence should have to be agreed by the parties in each case would present a barrier to the speedy and efficient settlement of cases out of court.

4.4.b.2. The result, therefore, is that the full amount of recoverable benefit can be recovered from any compensator even if the compensation payment has already been reduced because of the claimant's fault. In addition, the compensator can take account of this liability to repay the state by reducing the damages for financial loss that is to be paid to the claimant. The claimant's damages therefore will not only be reduced for contributory negligence, but will also be reduced to take account of the benefits received.