

The benevolence exception: where does the law stand?

Laura Swaine reviews whether payments made by third parties can be offset in fatal accident claims



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In recent years there has been a growth in JustGiving pages and disaster funds being set up in the wake of tragic accidents, most notably funeral funds following the Croydon tram crash. These funds have been used to finance treatment, funerals and even to repatriate the deceased home, in some cases to the other side of the world. The payments are useful for the families of the deceased especially when the death is sudden as costs relating to the death of the relative are totally unexpected. The benevolence exception has therefore become more prevalent in fatal accidents.

What is the law concerning the benevolence exception?

Which payments fall within the remit of the exception and why are defendants trying to offset crowdfunding appeal funds from the damages claim?

What is the benevolence exception?

Benevolence exceptions are contributions made by a third party or as part of a disaster fund which cannot be deducted from personal injury settlements.

The concept of certain funds being exempt from deduction from settlement awards is not a new notion following the increase in JustGiving pages. In the case of *Bradburn v Great Western Railway Co* [1874], the claimant received a sum of money from a private insurer to compensate him for his lost income as a result of the accident caused by the defendant's negligence. The court held that the claimant was entitled to full damages from the defendant's insurer irrespective of this payout from his private insurer. The judge stated that as the claimant paid the premium set out in the contract:

... it ought not, upon any principle of justice, to be deducted from the amount of damages proved to have been sustained by him through the negligence of the defendant.

Case law

The principle of benevolence payments was set in *Parry v Cleaver* [1969]. It was held that where a claimant has received an insurance payout, or a payment from a third party by reason of 'benevolence', the sums will not be set off against the compensation award. These represent an exception to the general rule that tort law should only compensate the claimant for actual loss. The policy behind this 'thrill or gift' exception is that the defendant should not be able to benefit from the claimant's protection insurance, or from a third party's benevolence towards the claimant.

In *McCamley v Cammell Laird Shipbuilders Ltd* [1990], the claimant suffered an injury while at work. He had received a lump sum payment from a scheme set up to benefit employees injured at work. This scheme was set up by the defendant's parent company. The judge held that the payment did not fall within the insurance/benevolence exception since the plaintiff had not paid or contributed towards the payment of the premiums. The judge found that:

... the payment to the Plaintiff was a payment by way of benevolence, even though the insurance policy was required by all mechanics. The payment was a lump sum payable regardless of fault or whether the employers or anyone else were liable, and it was not a method of advancing sick pay covered by a contractual scheme.

'As the law stands any payment made to the claimant from a JustGiving or public fund set up in aid of the claimant falls within the benevolence exception and is not deducted from any personal injury settlement.'

In the case of *Redpath v Belfast and County Down Railway* [1947] a distress fund was set up and members of the public had contributed funds. The judge held that the gifts made by others to relieve the distress of the plaintiff were not to reduce the damages payable by the defendant.

In *Longden v British Coal Corporation* [1997], the claimant was injured while at work in one of the defendant's collieries. The case was appealed to the House of Lords to consider if pension payments should be deducted from damages awarded for personal injury.

The House of Lords held that a clear understanding of the nature of the loss was required before it could properly understand if the pension should be deducted. Periodical payments received on early retirement from a contributory pension scheme were not to be deducted from any later settlement from the defendant while a part of a lump sum paid on early retirement may be deductible. It is important to remember that the only recoverable loss the claimant can claim for is the net loss.

In *Hussain v New Taplow Paper Mills Ltd* [1998], the claimant was injured in an accident at work where his employer was found to be partially responsible. The claimant initially received 13 weeks of full sick pay as set out in his contract of employment before he received his pre-accident earnings under the permanent health insurance scheme paid for by the defendant.

The judge held that the amounts paid to the claimant under the permanent health insurance scheme were to be deducted from the settlement reached. The payments were indistinguishable in nature from the payment of wages and did not fall within the benevolence exception:

They are payable under a term of the employee's contract by the defendants to the employee qua employee as a partial substitute for earnings and are the very antithesis of a pension which is payable only after employment ceases. The fact that the defendants happen to have insured their liability to meet these contractual commitments as they arise cannot affect the issue in any way.

The defendant by making good a loss through either a contractual

payment or a voluntary payment mitigates their liability in damages.

In *Pirelli General plc v Gaca* [2004], the claimant was seriously injured at work. While he was off work and prior to his employment being terminated in March 2000, the claimant received sick pay and £34,167.18 under a group personal accident insurance policy for temporary total disablement. Upon termination of his contract the claimant received the following two payments which were paid by the defendant:

- £10,000 of an ill-health gratuity from the defendant; and
- £88,620 under the terms of the policy for 'permanent total disability'.

In the first instance, it was found that both these payments fell within the benevolence exception.

On appeal the judge found that *McCamley* was wrongly decided for the following two reasons:

- The payment in *McCamley* was not comparable to a payment within the typical benevolence exception. The exception applied to payments made to victims of accident by a third party out of sympathy.
- Payments made by employers to their employees do not normally fall within the exception even if made due to benevolence motives.

The claimant had not contributed to the premiums directly. Therefore, the insurance exception in *Bradburn* did not apply.

In the more recent case of *Arnup v MW White Ltd* [2008] Mr Arnup was killed during the course of his employment. Following his death, his wife received payment from a death in service benefit scheme and a payment under an employment benefit trust which covered the deceased. The judge at first instance held that the death in service benefit payment did not fall within the benevolence exception while the payment under the employment trust did fall within the exception. The Court of Appeal held that the benefits which did not result from death were equally to be disregarded because of that very lack of the relationship with the death. If the payments were not received as a result of the death they

were irrelevant to how the settlement was calculated.

The judge stated that all benefits which came to the claimant as a result of the death were to be disregarded because the wording as set out in s4 of the Fatal Accidents Act 1976, 'or otherwise as a result of death', was wide enough to cover payments made to the claimant as a result of the death.

Conclusion

In certain cases defendants are attempting to reduce the compensation paid to claimants by stating that the public funds raised paid for the deceased's funeral or repatriation. The law does not favour this argument. As the law stands any payment made to the claimant from a JustGiving or public fund set up in aid of the claimant falls within the benevolence exception and is not deducted from any personal injury settlement. The concept becomes a little more complicated when deducing what other benefits and payments fall within the exception.

Where a defendant makes either a contractual or voluntary payment to the claimant in good faith this will not fall within the benevolence exception as the court believes the defendant is mitigating its loss and assisting the claimant.

Where a claimant had not contributed to an insurance policy which would pay out a sum in the event of an injury, the payment will not fall within the benevolence exception. However, should the claimant contribute to this scheme and be aware of it, any payment made will not be deductible from any personal injury compensation award. ■

Arnup v MW White Ltd
[2008] EWCA Civ 447

Bradburn v Great Western Railway Co
(1874) LR 10 Ex 1

Hussain v New Taplow Paper Mills Ltd
[1998] AC 514

Longden v British Coal Corporation
[1997] UKHL 52

*McCamley v
Cammell Laird Shipbuilders Ltd*
[1990] 1 WLR 963

Parry v Cleaver
[1969] UKHL 2

Pirelli General plc & ors v Gaca
[2004] EWCA Civ 373

*Redpath v Belfast and
County Down Railway*
[1947] NI 167