this to cases where the ultimate damage was partially caused by some exceptional characteristic of the plaintiff. In this exceptional class of cases, the rule is that a tortfeasor takes his victim as he finds him. If *Smith's Case* is correct, this exceptional rule is absolute. If, however, the present view of the bearing of the *Liesbosch Case* on this matter is correct, the defendant should not be liable if the plaintiff's characteristic is so powerful (that is, so exceptionally exceptional) a cause as to reduce the defendant's negligent act merely to one of the circumstances in which the cause operates.

Thus the principles expressed in the *Morts Dock Case*, which in 1960 were regarded as reforming the whole law of remoteness of damage, must in 1963 be read subject to severe qualifications. *Chapman* v. *Hearse* has elaborated the "reasonable foreseeability" requirement by including within it any damage which is of the same general nature as reasonably foreseeable damage. *Smith* v. *Leech Brain & Co. Ltd.* has suggested how at least one field of the law of remoteness may be exempt (but to an extent which remains problematical in the respects above examined) from the *Morts Dock Case* test.

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ASSESSMENT OF DAMAGES FOR LOSS OF "AMENITIES" OF LIFE*

WISE v. *KAYE AND ANOTHER*

The problems of assessing damages in personal injuries cases are constantly being encountered by members of a legal profession practising in a system where such cases constitute a considerable proportion of those coming before the courts. This means that any decision of an appellate court which seeks to provide solutions to some of those problems by laying down principles on which the assessment is to be based, is worthy of careful study.

Wise v. *Kaye*[1] is a decision of the Court of Appeal and is primarily concerned with the assessment of damages under the head of loss of "amenities" of life. The plaintiff was a young woman who sustained injuries in a car accident as a result of which she remained in a state of unconsciousness from the time of the accident to the date of appeal. For all practical purposes the situation was likely to be a permanent one. She had no purposeful movements of the limbs. Though her eyes were open there was no evidence of recognition.

> She had apparently established some sort of sleeping and waking rhythm, but she had to be fed by a tube and was in every elementary way completely helpless and could do nothing for herself. Her life was described

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* Following preparation of this casenote an article appeared in a Sydney newspaper (*Daily Telegraph*, 10th January, 1963) stating that the defendants intended appealing to the House of Lords from the decision of the Court of Appeal. Then, on 28th May, 1963, the *London Times* reported an appeal, in the case of *H. West and Son Limited and anor.* v. *Shephard*, to the House of Lords. Lord Devlin is reported as saying that "in effect this was an appeal from *Wise* v. *Kaye*". Their Lordships (Lord Reid and Lord Devlin dissenting) dismissed the appeal. The inference would appear to be that the appeal in *Wise* v. *Kaye* will not be proceeded with because the House of Lords has in effect upheld the decision of the majority of the Court of Appeal. In England, therefore, it appears that the award of large figures in damages for loss of amenities to a person who never recovers consciousness and in fact dies shortly after the trial (as the *Daily Telegraph* reports that the plaintiff in *Wise* v. *Kaye* did) has been given its final seal of approval. In the present note some reasons will be suggested why this is an unsatisfactory state of affairs.

[1] (1962) 1 All E.R. 257.

> as a living death.[2] . . . Before the accident, the plaintiff, at that time aged twenty, was a normal attractive-looking girl . . . living in a happy home, interested in outdoor games, especially in hockey, enjoying all the amenities of life as a young person of good health and understanding and a happy background is entitled to enjoy them, engaged to be married, in a good position with prospects of further advancement.[3]

Liability had been admitted and the trial judge assessed her general damages, apart from damages for loss of probable future earnings and loss of expectation of life, at £15,000. The defendants' main argument on appeal was that the assessment of £15,000 general damages was, in all the circumstances of the case, much too high. The appellate Court decided by a majority of two to one that this assessment was not erroneous and ought not to be disturbed.

The judgments of the Court are characterised by a conflict between the majority and the dissentient as to the basic principles which are and should be applied in assessing damages. Diplock, L.J. who dissents, is of the opinion that damages for personal injuries are, as a general rule, assessed for the prospective loss of happiness suffered by the plaintiff as a result of his injuries. He expounds this view with particular reference to damages for loss of "amenities" of life:

> The tribunal awarding damages is, in the case of a judge, I think, consciously, seeking to compare the loss of pleasure, or happiness, in the future which similar physical disabilities are likely to cause to different individuals of different ages, temperaments or tastes, and it is, I believe, by the same yardstick, the extent to which a particular plaintiff is likely to be deprived of pleasure or happiness which, but for the disability, he would have been likely to have enjoyed, that a court, perhaps less consciously, arrives at the proportion which damages for one kind of permanent physical disability should bear to damages of another kind.[4]

With this view, Sellers and Upjohn, L.JJ. are in fundamental disagreement. Firstly, on philosophical grounds, they argue that it is unsatisfactory. "Damages are assessed not merely for the loss of the good or bright things of life, but for the disability which prevents the full living of life. . . . Life is worth living even when it involves hard and sometimes unrewarding work."[5] In any case "happiness of an individual is not . . . assessed as on a balance sheet".[6] Secondly, Sellers, L.J. expressly disagrees with Diplock, L.J. on the question whether the courts do, in practice, apply the "loss of happiness" principle. He states:

> I have not either at the Bar or on the Bench in dealing with such assessments had in mind the happiness or unhappiness of a claimant except in a most general way.[7]

Thirdly, it is said by Sellers, L.J. that he would be "reluctant" to apply this principle since its application would involve a subjective assessment—an investigation of the "inner feelings and outward manifestations of conduct of and affecting a claimant" an investigation of his "inner world" or "inner life".[8]

He therefore proceeds to state the principles on which, in his opinion, damages are assessed. "The first element or ingredient of damages is the physical injury itself", and damages are awarded according to its "extent,

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[2] *Id.* at 258.
[3] *Id.* at 259.
[4] *Id.* at 271.
[5] *Id.* at 269.
[6] *Id.* at 264.
[7] *Id.* at 262.
[8] *Id.* at 263.

gravity and duration".[9] When assessing these damages "consideration has also been given . . . to what has been called loss of amenities". That is, the inquiry seeks to ascertain "the limitations and variations which a physical injury has imposed, or may impose" on "the conduct of life, the manner or the extent of living".[10]

Diplock, L.J. does not deny that the factors listed by Sellers, L.J. are taken into consideration by the courts. What he says is that the courts, in taking them into consideration are, in some cases consciously, in other cases, less consciously, applying the "loss of happiness" principle. Otherwise, he argues, there would be no rational ground for saying an award for one type of injury should be greater or less than an award for another.[11]

It is submitted that the views propounded by Diplock, L.J. should have been accepted. None of the criticisms made by the other members of the Bench is so conclusive as to preclude acceptance of those views. While it is possibly true that courts rarely expressly base their assessments on the "loss of happiness" principle, that principle is not entirely without support in decided cases. Diplock, L.J. relied on the speech of Viscount Simon, L.C. in *Benham* v. *Gambling*.[12] That case primarily concerned damages for loss of expectation of life and it was held by Viscount Simon, L.C., with whom all their Lordships concurred, that assessments under this head should be reached by "fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness".[13] The bulk of the objections directed at the views of Diplock, L.J. on the question of assessment of damages for loss of "amenities", is just as applicable to assessments of damage for loss of expectation of life, but such objections must have been dismissed by the House in *Benham* v. *Gambling*. Apart from this point, certain dicta of Viscount Simon, L.C. would appear to favour the view that assessment of damages under other heads should be made on a similar basis to assessments for loss of expectation of life.[14] This, surely, is reasonable. One would expect that the same rationale should apply to assessments made under the various heads of general damage. There is nothing in the heads of pain and suffering, loss of "amenities" of life, loss of expectation of life, even loss of possible future earnings, which would suggest that assessments of pecuniary compensation for these losses are based on entirely different principles. Neither Sellers, L.J. nor Upjohn, L.J. refers to any previous case in which similar views to those put forward by Diplock, L.J. in the instant case, were considered and rejected.

In fact, it would seem that the judgments of the majority, particularly that of Sellers, L.J., are as much open to criticism as is the judgment of Diplock, L.J. Particular reference is made to Sellers, L.J. because he seems to indulge in overstatement and inconsistency in his attempt to answer the hedonistic arguments of Diplock, L.J.

For example, Sellers, L.J. says:

> Life is not spent on a drab plane. It has its depressions and its heights and their variety is as desirable as it is inevitable, for the joys are accentuated by the disappointments, and happiness of an individual is not, I think, assessed as on a balance sheet.[15]

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[9] *Ibid.*
[10] *Id.* at 264.
[11] *Id.* at 271.
[12] (1941) A.C. 157.
[13] *Id.* at 166.
[14] E.g. *per* Viscount Simon, L.C. at 168: "Damages which would be proper for a disabling injury may well be much greater than for deprivation of life". Though both Sellers, L.J. and Diplock, L.J. use this statement to support their contrary arguments, it would seem that the interpretation given it by the latter Lord Justice is to be preferred.
[15] *Wise* v. *Kaye*, *supra*, at 264.

If this is so, why not have an accident, for it will serve to accentuate the joys of life? Why not compensate for loss of a "depression" as well as for loss of a "height"? In any case, is it not difficult to give meaning to such terms as "height" and "depression" without taking happiness and unhappiness into account?

However, it is not this type of argument which causes most concern when considering the judgment of Sellers, L.J. Greater cause for anxiety is found in the meaning which he apparently gives to the head of damage known as pain and suffering.

As mentioned above, Sellers, L.J. maintains that damages are awarded for the physical injury according to "its extent gravity and duration". He does not say why this is so, but one would imagine the reason to be that these factors are normally indicative of the worry, anxiety, embarrassment, disappointment and mental anguish which the injury is likely to cause. But, elsewhere in his judgment, Sellers, L.J. speaks of the word "suffering" in the term "pain and suffering" as being used to describe "mental anguish and distress" and as "including worry and anxiety for the future and . . . embarrassment. . . ."[16]

Such views seem to have the effect of compensating the plaintiff twice over for the one injury, once under the head of pain and suffering and also under the heads of loss of "amenities" of life and loss of expectation of life. As one textwriter, McGregor, says: if the term "suffering" is taken in its widest connotation, it is possible for the head of damage known as loss of "amenities" of life to be subsumed under the head known as pain and suffering. However, he continues, the Courts today are showing a tendency to erect the former into a separate head of damage.[17]

This comment underlines the inconsistency in Sellers, L.J.'s approach, whereby he gives the term "suffering" an extended meaning and at the same time erects the loss of "amenities" of life into a separate head. It is an inconsistency, the acceptance of which by the courts in the future could have undesirable results regarding inflation of damages.

While the court discussed generally the question of the rationale for awards of damages for personal injuries, it concerned itself more particularly with two questions of principle raised in the case. The first was the question whether it was relevant to the assessment of damages for loss of amenities that the plaintiff was ignorant of the damage which she had sustained.

This question has been considered in several recent cases where plaintiffs have suffered brain injuries. In *Oliver* v. *Ashman*,[18] the plaintiff, a child of twenty months, had sustained serious injuries in a motor accident. The evidence was that he had no feeling or recollection, and if he felt pain, it was purely momentarily. It was unlikely that he would ever be able to speak or be educated. The trial judge, Lord Parker, C.J., held that the case was not "purely what I may call a *Benham* v. *Gambling* case". The child was entitled to something for what he had lost, regardless of whether he knew of that loss.[19] The action went on appeal[20] and this question was dealt with by several of the lords justices. They agreed that the plaintiff was entitled to something for what he had lost but stressed that the award of damages would have been greater had he been

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[16] *Id.* at 262.

[17] H. McGregor, *Mayne and McGregor on Damages* (12 ed. 1961) 784. The narrower use of the term "suffering" is impliedly favoured by David A. McI. Kemp and Margaret Sylvia Kemp, *The Quantum of Damages in Personal Injury Claims* (1954) 23, who say: "We confess we cannot draw any real distinction between pain on the one hand and suffering on the other unless it be said that suffering is less acute than pain and covers such matters as headaches and general malaise".

[18] (1961) 1 Q.B. 337.

[19] *Id.* at 344.

[20] (1962) 2 Q.B. 210.

capable of appreciating "his own disability and deprivation of the opportunity of leading and enjoying a normal and full life".[21]

With these conclusions the Court in *Wise* v. *Kaye* agreed. All three lords justices admitted that ignorance of a plaintiff of the damage done to him was relevant in considering the element of pain and suffering in the assessment of damages.[22] However, the majority, Sellers and Upjohn, L.JJ., would go no further than this. They rejected the submission that all the plaintiff had suffered was "loss of a measure of future happiness"—to use Viscount Simon, L.C.'s expression—and that the damages should accordingly be assessed on the principles laid down in *Benham* v. *Gambling*. They argued that to do this would be to treat a living person as if she were dead and that no authority supports such a course of action. Damages suffered by a living plaintiff are assessed on entirely different principles to the damages claimed by a dead man's estate. In the former case, ignorance of injury or damage is immaterial. Upjohn, L.J. referred to two Australian cases, *McGrath Trailer Equipment Pty. Ltd.* v. *Smith*[23] which was followed in *Hayman* v. *Pike*,[24] to support this view. The majority, therefore, felt that the award of £15,000 general damages should stand.

From this conclusion, Diplock, L.J. dissented. He put forward two methods of testing the correctness of the award made by the trial judge. Firstly, the plaintiff had been spared all pains and sorrows, as well as losing all joys and pleasures of life. He said a consideration such as this had led the House of Lords in *Benham* v. *Gambling* to hold that a modest level of damages was appropriate and that, by analogy, such a level of damages should be awarded in the instant case. Secondly, he argued that an award of the order of £15,000 to £20,000 for physical injuries would have been appropriate had these injuries not included the damage to the brain which rendered the plaintiff unconscious because "the great bulk of such a sum would be attributable to physical pain, the mental anguish of complete dependence on others for all bodily functions and the bitter consciousness, most acute in the earlier years, of all the pleasures of life which had been lost while susceptibility to many of its sorrows had remained".[25] Since the plaintiff was unconscious and was not suffering in this way, he substituted the figure of £1,500 for the damages to be awarded to the plaintiff in respect of her "loss of amenities of life".

Once again, it is submitted that the approach adopted by Diplock, L.J. is correct. Admittedly the two Australian cases supported the views of the majority but these decisions were not, of course, binding on the Court of Appeal, and would not be binding on a court in New South Wales. Against them, one can put the decision of the Court of Appeal in *Oliver* v. *Ashman*. That decision was not referred to in this connection by any of the three lords justices in *Wise* v. *Kaye*, but it would seem to favour the point of view of Diplock, L.J., particularly as regards his second "test".

The second question of principle considered in the case was whether it was relevant to the assessment of damages that the sum awarded could not be applied for the personal benefit of the plaintiff.

In *Oliver* v. *Ashman* this same question had been considered by the trial judge and the Court of Appeal, and some difference of opinion had arisen. Lord Parker, C.J., the trial judge, stated that it definitely was not a relevant circumstance.[26] With this view Holroyd Pearce, L.J. tentatively agreed.[27] On the

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[21] *Id.* at 242. See also Holroyd Pearce, L.J. at 231 and Willmer, L.J. at 236.
[22] See Sellers, L.J. at 265, Upjohn, L.J. at 268, and Diplock, L.J. at 277.
[23] (1956) V.L.R. 138.
[24] (1958) S.A.S.R. 72.
[25] *Wise* v. *Kaye*, *supra*, at 278.
[26] (1961) 1 Q.B. 337, 344.
[27] (1962) 2 Q.B. 210, 224.

other hand, Willmer, L.J. felt that, if the sum could not be applied for the benefit of the plaintiff, damages should be reduced accordingly.[28] Pearson, L.J. suggested that this was a consideration which could be left to the jury to be taken into account by them to such extent as they thought fit in the particular case.[29]

In *Wise* v. *Kaye* all three lords justices agreed that it was irrelevant to the assessment of damages that the sum awarded could not be applied for the personal benefit of the plaintiff.[30] Upjohn, L.J. pointed out that, once damages are proved and assessed at the proper figure, the sum of money becomes the absolute property of the plaintiff and "it matters not that the plaintiff is incapable of personal enjoyment of the money in the very vague and, as I think, indefinable sense of spending it on herself".[31]

The majority concluded that the award of £15,000 general damages by the trial judge should not be disturbed. Leaving aside the major questions of legal principle involved, this conclusion strikes one as being rather unusual. At the present time many people feel there is a need for the legislature to intervene to assimilate the position of the person injured in a road accident to that of the injured factory worker by placing the negligent party in the former case under much stricter, if not absolute, liability, for injuries he causes to others. However, the legislature can scarcely take this step as matters stand, for already third-party insurance premiums constitute a burden on the community and the rise in the level of these premiums, which would result from such a step being taken, would make that burden almost intolerable. The alternative method of achieving this aim would be to reduce the awards of damages being made in personal injuries cases. One would, therefore, expect the courts to be anxious to seize any opportunity to do this. This case presented such an opportunity to the Court of Appeal. In the particular circumstances it did not matter to the plaintiff whether a small or large sum was awarded to her for her general damages. As far as authority was concerned, there was no decision binding on the court and little authority directly in point at all. The court rejected the opportunity. It is submitted that, in doing so, it set an unforunate precedent.

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MISPRISION OF FELONY

SYKES v. *DIRECTOR OF PUBLIC PROSECUTIONS*

Having asserted in *Shaw* v. *D.P.P.*[1] that "there is in the court a residual power, where no statute has yet intervened to supersede the common law, to superintend offences which are prejudicial to the public welfare",[2] the House of Lords in *Sykes* v. *D.P.P.*[3] quickly used that power to affirm the continued existence in the law of what has generally been considered to be an obsolete offence.

Briefly, the facts of the case were as follows: certain persons stole firearms and ammunition from an armoury in Norfolk and took them to Manchester

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[28] *Id.* at 237.
[29] *Id.* at 243.
[30] *Supra*, at 264, 267, 275.
[31] *Id.* at 267.
[1] (1961) 2 W.L.R. 897.
[2] *Id.* at 917. Similar views were expressed by Lord Simons at 917 and Lord Hodson at 938.
[3] (1961) 3 W.L.R. 371.