B e f o r e Stuart-Smith LJ; Laws LJ; Mr Justice Jonathan Parker 28th May 1999.

Bajwa v British Airways Plc on appeal from Wandsworth CC CCRTF 98/0735/2 (Mr John Rogers QC) Sitting as a Deputy Judge of the High Court
Whitehouse v Smith on appeal from Middlesborough CC CCRTF 98/1519/2 (Mr Recorder Hallam)
Wilson v Mid Glamorgan Council & Sheppard on appeal from Cardiff CC CCRTF 98/1345/2 (His Honour Judge Gaskell)

JUDGMENT : LORD JUSTICE STUART-SMITH:

1. These three appeals illustrate the difficulties confronting defendants in personal injury actions who, faced with exorbitant claims, wish to protect themselves as to costs. In each case the defendants paid money into the court or made a **Calderbank** offer. At the time of the payment into court or offer the provisions of the Social Security Administration Act 1992 (the 1992 Act) were in force. If the cases had come on for trial during the currency of the 1992 Act, the plaintiffs would not have recovered more than the money in court (or, in **Whitehouse,** the **Calderbank** offer) after taking into account the amount payable to the Compensation Recovery Unit (CRU) by way of recoverable benefits. But after the change in the law effected by the Social Security (Recovery of Benefits) Act 1997 (the 1997 Act), which came into force on 6 October 1997, each of the claimants recovered more than she would have done if she had accepted the payment into court or offer unless the certificate was amended on appeal.

2. Each of the three cases have a number of common features:
   (a) The claimant suffered personal injury through the admitted fault of the defendant.
   (b) The issue in each case was the extent of the claimant's injuries and disabilities. The claimants claimed that they had suffered serious injuries with long- lasting effects, resulting amongst other things in very substantial special damages for loss of earnings and continuing loss of earnings. The defendants, on the other hand took the view that the injuries were relatively slight, the effects quickly cleared up, and such loss of earnings, if any, was very small.
   (c) In all three cases the judges at trial found in favour of the defendants on the only issues contested. In so doing they preferred the views of the defendants' medical experts and to a greater or lesser extent found the claimants' evidence untruthful or unreliable. The amount of the judgment was in line with the defendant's valuation of the case.
   (d) In two cases (**Bajwa** and **Wilson)** the defendants had paid money into court and in the third case (**Whitehouse**), they had made a written offer (Calderbank letter) purporting to follow the advice of this court in **McCaffery v Datta** [1997] 1 WLR 870, during the currency of the 1992 Act. Had the case come on for trial during that period, i.e. before 6 October 1997, the amount awarded to each claimant would have been less than the payment-in or offer.
   (e) The trials came on after 6 October 1997. No further payment-in or written offer was made by the defendants. No indication was given by the claimants that they were willing to accept the defendant's overall assessment of the value of the case, subject to readjustment of the amount payable to the CRU as a result of the change in the rules.
   (f) As a result of those changes in each case the claimant herself received more than she would have done if she had accepted the payment into court or offer.
   (g) In Bajwa and Wilson the judge awarded all the costs of the action to the claimants. He regarded the factor in paragraph (f) as decisive. In Whitehouse the judge appears to have taken into account the Calderbank letter and the fact that the defendant had succeeded on the contested issues and awarded the defendants the costs after the date of the letter.
   (h) The defendants in Bajwa and Wilson appeal the judges' orders for costs. The claimant in Whitehouse, appeals against the costs order in favour of the defendant. The appeals are brought with permission.

3. Before dealing with the relevant principles applicable to the exercise of the judicial discretion in awarding costs it is necessary to summarise the changes in the law effected by the 1992 and 1997 Acts.

4. **The position before 1989**
   Before 1 January 1989 a defendant was entitled to deduct from the damages payable in respect of loss of earnings one half of the benefits listed in the Law Reform (Personal Injuries) Act 1948, received or receivable during the period of 5 years from the accident. Benefits not listed in the statute could be deducted in full (**Hodgson v Trapp** [1998) 3 All ER 870) on the basis that the claimant had not suffered loss

where the state had already made compensation. Amounts paid by defendants were thus substantially reduced by those paid by the taxpayer. General damages for pain and suffering were not affected.

5. **The position after 1 January 1989**
The Social Security Act 1989 introduced the concept of recoupment by the state of benefits paid to victims of accidents and disease who receive a compensation payment from the tortfeasor. The provisions were re-enacted as Part IV of the 1992 Act and that Act with the earlier Social Security (Recoupment) Regulations 1990 (the 1990 Regs) which remained in force, contained the recoupment regime ("the old regime").

6. The old regime was replaced by the 1997 Act which came into force on 6 October 1997, together with two sets of regulations: the Social Security (Recovery of Benefits) Regulations 1997 (the 1997 Regs) and the Social Security (Recovery of Benefits)(Appeals) Regulations 1997 (the 1997 Appeal Regs) ("the new regime").

7. Both regimes provide for statements in the form of a certificate of recoverable benefit (s.4(1) of the 1997 Act), formerly a certificate of total benefit (s.81(1), 82(1)(a) and s.84 of 1992 Act) to be provided by the CRU which administers the scheme for the Secretary of State. The CRU certificate sets out the particular benefits listed in the legislation which have been paid or will be paid, in the CRU's view, during the currency of the certificate to a claimant in respect of the accident or disease in issue (1997 Act s.1(1)(b), 1(4)(c) and Schedule 2, Column 2. 1992 Act s.81(1)). The certificate must specify for each benefit the amount which has been or is likely to have been paid on or before a specified date, estimated if need be, but providing information as to the frequency and amount of further benefit payments (1997 Act s.5, 1992 Act s.84). From this the parties know what sum is recoupable to the CRU during the life of the certificate. The provisions concern only benefits paid or payable in the period of 5 years from the accident to the date of final compensation payment. The Act and regulations provide for the CRU to be notified by a defendant shortly after a claim is raised, supplying certain prescribed information to enable the CRU to identify the claimant, date and nature of the accident. The CRU itself has power to request certain information of a claimant and claimant's employer, including whether the accident resulted from the act or failure of another person, what sums by way of benefits and compensation have been received, and any changes in the medical diagnosis relating to the condition (1997 Act s.23(1), 1997 Regs 3-6, 1992 Act s.94, 1990 Regs 5-8).

8. Under both regimes the compensator (i.e. defendant) should not make a compensation payment until it has obtained a CRU certificate (1997 Act s.4(1), 1992 Act s.82(1)). When a certificate is supplied to the defendant, the claimant should be sent a copy by the CRU as well (1997 Act s.5(5), 1992 Act s.95(2)).

9. Under the old regime, compensators could deduct from a payment of compensation an amount equivalent to the recoverable (i.e. certificated) benefits paid to the victim. The claimant would receive a 'net' sum together with a 'certificate of deduction' and this would be effective payment discharging the liability to the victim (1992 Act s.82(1) and (2)). The net sum could be nil where, in effect, the benefits exceeded the value of the claim. The sum to be paid to the CRU was limited to the amount actually deducted. If judgment was given for £20,000 where the CRU figure was £25,000 the compensation payment to the claimant under the judgment after deduction would be nil and £20,000 would be payable to the CRU.

10. A small payments exception also allowed compensation payments of £2,500 or below to be made without requiring deduction of benefits or recoupment (1992 Act s.85 and 1990 Regs 3). Claims where the benefits exceeded the value of the claim with nil personal gain to a claimant, could be resolved by a payment of £2,500. Under the new regime, the small payments exception has been removed, though there remains a power to create a similar provision by regulation.

11. By s.8 of the 1997 Act there is provision for compensators to deduct from a payment of compensation an amount 'calculated in accordance with s.8'. The effect is deduction from the gross amount of the compensation payment on a like for like basis. Only certain benefits can be set off against certain heads of compensation (1997 Act ss 6, 8 9). Benefits for loss of earnings are set off against damages for loss of earnings, benefits for care are set off against damages for care, and benefits for loss of mobility are set off against damages for loss of mobility (1997 Act s.8 and Schedule 2). In this sense damages for pain and suffering are protected because there are no benefits that can be deducted from them. The amount attributable to a particular head of compensation may be reduced to nil (1997 Act s.8(3)-(5)).

12. The sum to be paid to the CRU is the figure on the certificate (1997 Act s.6(1)). In cases where the benefit exceeds the compensation for a particular head of damage, the compensator may well have to pay more than just the award of the court. It may seem unjust that a compensator has to pay more than he is liable to the claimant for. But this seems to be the policy of the Act and there are provisions for appeal.

13. **Payments into court**
A payment is defined as 'payment in money or money's worth'. Both regimes determine that a payment into court also counts as the making of a compensation payment (1997 Regs. 8(1)(a), 1992 Act s.93(2)). The old regime declared that where a compensator made a payment into court, it could withhold from the payment an amount equal to the relevant deduction, provide a certificate of the amount withheld and the amount paid in should be regarded as increased by the certified amount (1992 Act s.93(2)-(3)).

14. The 1997 regulations state that upon making a payment-in, a current CRU certificate shall be lodged and if there is any deduction (i.e. if the payment-in is subject to a s.8. calculation) the compensator should provide the plaintiff with information that the payment has been so calculated and the date for payment by reference to which the calculation has been made (1997 Regs. 8(1)(b)-(c), 1997 Act s.9(1)). By amendments that came into force on 28 September 1998, when a defendant makes a payment into court he is required to state the gross amount of the compensation, the name and amount of any benefit by which the gross amount is reduced in accordance with the 1997 Act s.8 and Schedule 2, and the net sum paid into court (RSC. S.I. 1998 No. 1898, Rule 2 of County court (Amendment) Rules 1998 S.I.. 1998 No. 1899). The effect of these rules have now been carried forward into the Civil Procedure Rules 1998 Part.36/23.3.

15. A payment-in made under the old regime which has not been accepted is treated under the transitional provisions as a payment-in under the 1997 regime. By the transitional provisions the requirements mentioned above in paragraph 14 do not apply to it (1997 Regs. 12(7)). All three of the present appeals fall to be considered under the transitional provisions.

16. **Assessment of damages by the court**
The task of the court in assessing damages is not affected. Both regimes require that the court disregards the amount of any benefits paid or likely to be paid (1997 Act s.17). However, except for consent orders, the court when now making an order for compensation must specify the amount for each head of compensation which is potentially open to benefit deduction (1997 Act s.15).

17. **Challenging the amount on the certificate**
The amount on the certificate affects the amount to be deducted and/or paid over to the CRU. The certificate may be challenged in two ways. Subject to a few changes the review and appeal provisions are the same under old and new regimes. The Secretary of State can be asked to review the certificate at any time by any party. If he (i.e. the CRU) is satisfied it was issued in ignorance of or based on a mistake as to a material fact or by a mistake in preparation can vary the certificate (1997 Act s.10, 1992 Act s.97). The figure on the certificate cannot be increased unless, since the 1997 Act, the CRU considers the error was due to the applicant supplying incorrect or insufficient information.

18. The second method is by appeal. An appeal has to wait until after the conclusion and final payment of a claim and must then be issued within 3 months of the payment. The grounds are now set out at s.11(1) 1997 Act:

> *"(a) any amount, rate or period specified in the certificate is incorrect, or*
> *(b) that listed benefits which have been...paid otherwise than in respect of the accident, injury or disease in question have been brought into account."*

There is a small change in the wording of the grounds from that in s.98 of the 1992 Act. viz. "benefit paid or payable otherwise than in consequence of the accident...has been brought into account.", but otherwise the wording of the grounds is identical.

19. An appeal may be brought by a defendant or, where there has been a deduction in the compensation payment calculated under s.8 by the plaintiff (1997 Act s.11(2)). That will be in any case where there has been any sum withheld against the plaintiff's claim. Under the 1992 law, where any relevant benefits meant a deduction, the defendant and claimant had a right to appeal (s.98(7)).

20. There is a change to the venue for appeals. Formerly, appeals concerning the amount, rate or period specified in the certificate would be referred to a social security appeal tribunal with any medical question first determined by a medical appeal tribunal (s.98(7)). Now appeals are to be referred to the medical appeal tribunal for all appeal questions including questions as to any amount, rate or period specified in the certificate. The medical appeal tribunal must take into account any decision of the court relating to the same or any similar issue arising in connection with the accident (1997 Act s.12(3), 1992 Act s.98(6)). Practice and procedure is laid down by the 1997 Appeals Regulations.

21. Under both regimes the CRU can deal with an appeal first of all by treating it as a review, regardless of grounds (1997 Appeal Regs 2 (18)). There are also provisions for the repayment of overpaid benefits and working out of payments consequent on the outcome of an appeal or review.

Principles applicable to the exercise of discretion on costs

22. The following principles appear to me to be applicable to the exercise of discretion on costs where there has been a payment into court. Costs are in the discretion of the court (s.51 Supreme Court Act 1981, RSC Order 62 r.2, CCR Order 38 r.1(2)). In the ordinary way costs follow the event except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or part of any costs (RSC Order 62 r.3(3), CCR Order r.1(3)). In exercising its discretion as to costs the court 'shall take into account:

"(i) any payment of money into Court and the amount of such payment;

*(ii) any written offer made under Order 22 rule 14 (**Calderbank** offer) provided that the Court shall not take such an offer into account if at the time it is made the party making it could have protected his position as to costs by means of a payment into Court." (RSC Order 62, r.9(1)(b) and (c).*

(Similar provisions are contained in CCR Order 11, rules 7 and 10). It should be noted that the court is merely required to 'take into account' the fact and amount of the payment-in. There is no absolute rule that if the payment-in is not exceeded, the defendant is entitled to costs after payment-in. Conversely, if the claimant beats the payment-in, there is no absolute rule that he will get all the costs of the action.

23. In the ordinary way a claimant who gets less than the payment into court is the unsuccessful party and the defendant is the successful party. In such a case the event turns on whether the payment into court is exceeded or not, **Findlay v Railway Executive** [1950] 2 All ER 969. The successful defendant will receive his costs after payment into court. In the ordinary way, in a personal injury action the defendant can protect himself against an extravagant claim by a payment into court. But that is not always so. In **McCaffery's** case this court considered what a defendant could do where under the old regime the defendant considered that a certificate of total benefit exceeded the value of the claim. In such a case he could not pay into court and the only way of obtaining protection was by writing a **Calderbank** offer. Moreover, there may be circumstances, such as those caused by a late amendment introducing a new and more modest claim where, if the defendant pays into court, the claimant, being entitled to tax his costs to date on acceptance of the money in court, would receive all his costs in the exorbitant claim, which is clearly unjust. In such circumstances the defendant cannot make a payment into court. Examples of this are **Lipkin Gorman v Karpnale** [1989] 1 WLR 1340 and **Beoco Ltd v Alfa Laval Co. Ltd** [1995] QB 137. In the course of his submissions on behalf of Mrs Bajwa, Mr Ritchie submitted that following the 6 October 1997, the defendant should have increased the payment into court to reflect what he called the devalued amount of the payment consequent upon the change in the law. Even if his premise is correct, in my judgment the defendant could not without serious prejudice, increase the payment-in because the plaintiff could straightaway take the money out and tax her costs (CCR Order 11, r.3(5)).

24. The general rule as to costs following the event does not cease to apply simply because the successful party raises issues or makes allegations on which he fails; but where that has caused a significant increase in the length or cost of the proceedings, he may be deprived of the whole or part of his costs. And where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs (see per Nourse LJ in **Re Elgindata No.2** [1992] 1 WLR 1207 at 1214). These principles are applicable to personal injuries cases where there is a payment into court.

25. There is a dispute in the Bajwa and Wilson cases as to the effect of a payment-in made under the old regime, where the trial takes place after 6 October 1997. Mr Ritchie and Mr Rees for the claimants in those cases submit that the effective sum is the net sum after making any s.8 reductions. Mr Serlin and Mr Harrison, on behalf of the respective defendants, contend that the effective sum is the gross sum, that is to say the aggregate of the sum payable to the claimant and that withheld for the benefit of the CRU.

26. The problem can be illustrated by the figures involved in the Bajwa case. On 23 April 1996 the defendant made a payment into court. The notice was expressed in the following terms:

"TAKE NOTICE that the Defendant has this day paid into Court the sum of £2,573.34 which together with the interim payment made on 17 April 1996 of £2,500 gives a total of £5,073.34 made in full and final satisfaction of all the plaintiff's causes of action herein.

AND FURTHER TAKE NOTICE that the Defendant has withheld from the payment into court the sum of £2,573.34 in accordance with paragraph 12(2)(a)(i) of Schedule 4 of the Social Security Act 1989."

This was a perfectly valid payment into court in accordance with s.93(2)(a)(ii) of the 1992 Act. That being so s.93(3) provides:

"Where a person making a payment into Court withholds an amount in accordance with subsection (2)(a)(i) above..... (b) the amount paid into Court shall be regarded as increased by the amount so certified."

That subsection makes it clear in my view that the payment into court is the gross amount of £5,073.34 and not the net figure of £2,500. By Regulation 12(7) of the 1997 Regs. *'where a payment into court made prior to the commencement day, remains in court on that day.....that payment into court shall be treated as a payment to which the 1997 Act applies'.* But there is no need to give the information required by Reg. 8(1)(b) & (c) (lodging of current certificate of recoverable benefits, which will already have been done in effect, or giving the information specified by s.9(1) of the Act). Accordingly in my judgment the payment into court after 6 October 1997 was £5,073.34, i.e. the gross figure. And I reject Mr Ritchie's submission that it was devalued to £2,500 plus what, as a result of the trial, turned out to be £448.83. That figure of £448.83 represented the extent of loss of earnings found by the judge, and was the limit of deductible benefits under s.8. If Mr Ritchie were right in his submission, the defendant would have needed to increase the net payment into court from £2,500 to £4,425.60 which together with the £484.83 would have equalled the judgment sum of £4,874.43.

27. Under the Civil Procedure Rules 1998, which came into force on 26 April 1999, guidance is given as to how the court's discretion should be exercised. CPR 44.3 provides:

"(4) In deciding what order (if any) to make about costs, the Court must have regard to all the circumstances, including:
(a) the conduct of the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into Court or admissible offer made by a party which is drawn to the Court's attention.

(5) The conduct of the parties includes:
(a) conduct before, as well as during, the proceedings;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

28. The new rules are clearly intended to give a wider discretion on costs than is to be found in the principles I have set out in paragraphs 22-24. But if, before the Civil Procedure Rules came into force, a judge had taken into account any of the matters in Part 44.3(4) or (5), it could have been regarded as a relevant consideration in the exercise of his discretion, even though not all such considerations have been expressly so stated in any rule or previous authority.

29. Finally, since the award of costs is a matter for the discretion of the trial judge, the Court of Appeal will not interfere with the exercise of that discretion unless the judge has erred in principle or is plainly wrong.

30. I must now turn to a consideration of the facts in the three individual cases.

Bajwa v British Airways plc

31. The claimant suffered an accident on 12 August 1993. The defendant did not dispute liability. Her case at trial was that she was still suffering severe symptoms including headaches and depression as a result of the accident and she was unable to work. Her Schedule of Loss claimed £190,000 for special damage and future loss of earnings. In his written opening Mr Ritchie claimed the case was worth about £135,000 plus interest. The defendant took a different view of the case. It was contended on its behalf that the symptoms had cleared up within three months of the accident, by which time the claimant was fit for work. Everything else was unconnected with the accident.

32. On 12 April 1996 the court ordered an interim payment of £2,500. On 23 April 1996 the defendant made a payment into court already set out in paragraph 26. The gross amount of the payment-in was £5073.34 of which £2,573.34 was payable to the CRU. In November 1996 the Bill for the 1997 Act was published. In February 1997 the case was listed for trial to start on 9 October for 3 or 4 days. The 1997 Act came into effect on 6 October and the trial started on 9 October and lasted four days. On 18 December 1997 the judge, Mr Rogers QC, sitting as a Deputy High Court Judge, gave judgment. He rejected much of the claimant's evidence; he said she was not a frank witness. He preferred the defendant's medical experts and accepted the defendant's case. He awarded the claimant £4,874.43 made up as follows:

General Damages -

pain and suffering	£3,500
interest	£145.60

Special Damages -

dental expenses	£500
care	£73.50
prescriptions and travel	£25
loss of earnings	£448.83
interest	£181.50

33. At the time of the judgment the certificate of recoverable benefits showed that a total of £3,933.82 was payable to the CRU. But only a maximum of £448.83 could be deducted under s.8 of the 1997 Act, with the result that the claimant received by way of judgment £4,425.60, i.e. £4,874.43 less £448.83.

34. The defendant was obliged to account to the CRU for the full £3,933.82. But it appealed and the appeal was eventually allowed. The amount payable was reduced to £142.80, which was in respect of statutory sick pay paid in the weeks following the accident. Other benefits which were only paid later, after the date the judge held that the claimant had recovered from the effects of the accident, were not attributable to it. It follows therefore that after the appeal, the defendant had to pay £142.80 to the CRU (the balance between that and £3,933.82 being refunded). And the claimant, instead of having a deduction of £448.83, would only suffer a reduction of £142.80, so that her net recovery was £4,731.63. This was more than the £2,500 which she would have received if she had taken the money out of court before 6 October 1997. On the other hand the total payable by the defendant, £4,731.63 + £142.80 = £4,874.43, was less than the gross payment-in of £5,073.34.

35. Mr Serlin, who appeared for the defendant in the court below as he does here, submitted that the defendant should have the costs of the action after the date of payment into court, or alternatively that there should be some more favourable order to the defendant, than that the claimant have all the costs of the action. The judge rejected this submission. The judge's reason for this decision is succinctly stated. He acknowledged that, but for the change in the law, the defendant would have been entitled to the costs. But he said that the defendant ought to have borne in mind the change brought about by the 1997 Act and that the payment into court in fact ought to have been increased as required by the transitional provisions. He held that the effective sum in court was £2,500 which was less than had been awarded to the claimant.

36. Mr Serlin submits that the judge was plainly in error. From an overall point of view it cannot be right that a claimant who claims over £135,000 but recovers less than £5,000, after a trial lasting four days in which she has lost virtually every issue and where, until four days before trial the payment-in was sufficient to satisfy her claim, should have all the costs, even if she did obtain more in her pocket at the end of the day than she would have done if she accepted the money in court. He submits it was not possible for the defendant to

increase the payment into court in the four days before trial, because by then most of the initial trial costs had been incurred and the claimant would have been entitled to take the increased money out of court and tax her costs, if the money had been taken out more than three days before the start of the trial (CCR Order 11, r.5) or if it had been taken out later with leave, the claimant could have applied for the costs to date.

37. Mr Ritchie submits that the judge was right and that in any event this court should not substitute its own discretion for that of the judge. He points out that Parliament had heralded the change in the law for a considerable time and certainly since November 1996 when the Bill was published. When the trial was fixed in February 1997 for 9 October it was known to the defendant that the new reforms would operate, and therefore the claimant would have more in her pocket than that offered in the payment-in. Accordingly, on or after the 6 October 1997, the defendant should have increased the payment into court or alternatively written a **Calderbank** letter stating how, in the light of the defendant's contentions as to loss of earnings, the new regime would have affected the existing money in court. Moreover, he submitted, as I have already indicated in paragraph 26, that the payment into court was effectively only £2948.83 (i.e. £2,500 plus the deductible benefits under s.8 of £448.83) and therefore the judge was right to consider the claimant had beaten the payment-in. He submitted that it was not for the claimant to approach the defendant on the effect of any new rules, but for the defendant to approach her. Further, Mr Ritchie submits that a claimant who, like this one, had contended for many years that her continuing disability was due to the accident and who had been paid social security benefits on that basis, would find it impossible or face great difficulty trying to appeal the CRU certificate on the grounds that her actual incapacity for work lasted only 13 weeks.

38. I have already given my reasons for rejecting Mr Ritchie's submission as to the effect of the payment-in. Was the judge's reason, namely that the claimant in fact recovered more than she would have done if she had accepted the money in court, sufficient to justify granting her all the costs? In my judgment it plainly was not. I accept that it was a consideration. But when set against all the other factors it seems to me to pale into insignificance. The defendant's assessment of the overall damages was right; the claimant's was extravagantly wrong; the claimant lost on every issue in the four day trial. The inevitable inference is that the claimant was not interested in the defendant's assessment of the value of the case. If she had been, she could have invited the defendant to recast the offer to accord with the new regime. This case is very different from the **McCaffery** case where the defendant had paid into court £2,500 hoping to tempt the claimant to an exempt settlement. Judgment was given of £22,373.33, which had to be paid to the CRU. This court held that the judge was wrong in giving the defendant the costs after payment-in. It was irrelevant that the judgment sum had to go into the pocket of the CRU rather than the claimant. At p.875E, in a judgment agreed by Aldous and Ward LJJ, I said:
"Although I can see some force in the submission that the plaintiff has not been successful, at least in obtaining any money for herself, I do not follow how a defendant, especially one who has denied liability, can be said to be successful when he incurs a liability, as a result of the judgment, to pay £22,373.33. Moreover, if the defendants' argument is correct it would apply just as much if there was not payment into court at all."

In the present case the judgment against the defendant was less than the gross payment-in; the defendant was truly successful.

39. I do not accept Mr Ritchie's submission as to the impossibility or difficulty facing a claimant who sought to appeal the CRU certificate after accepting the money offered. The very fact that a claimant on advice is prepared to accept a fraction of his claim, on the basis that the defendant's assessment is correct, should be a powerful reason why the appeal tribunal should accept that view as correct. Moreover, I cannot see that the claimant faces any more difficulty than the defendant is assessing the amount of deductible benefits under the new regime, since she will know the basis of the defendant's contention as to the duration of loss of earnings. These difficulties, which are inherent in the transitional provisions, no longer apply because of the information which has to be supplied (see paragraph 14).

40. I accept Mr Serlin's submissions. I have no doubt that the judge's order was quite wrong. In my judgment the defendant should have been awarded the costs after the date of the payment into court, namely 23 April 1996. I have considered whether some effect should be given to the judge's reasoning that the claimant recovered more than she would have done if she had accepted the money in court. I have come to

the conclusion that it should not. This is because the inevitable inference is that the claimant was not the least interested in settling at the defendant's assessment of the case. If she had been, any reasonable claimant would have sought to negotiate and redistribute the money available and would have sought the defendant's assistance in appealing the CRU certificate.

Whitehouse v Smith

41. The claimant sustained a road traffic accident on 15 August 1991. Liability was admitted. There was a medical dispute as to the effects of the accident. The claimant suffered from a pre-existing degenerative condition of the spine. The question was to what extent the accident exacerbated her condition and accelerated the onset of symptoms which would have occurred in due course. The claimant's Schedule of loss claimed loss of earnings to trial of £58,000 and continuing loss at £11,000 per year. The defendant considered that the effect was much less significant. On 20 May 1994 the defendant paid into court £8,160; the CRU certificate at that time was £840. The gross payment-in was therefore £9,000. The notice of payment-in stated that £840 was withheld as being payable to the CRU.

42. On 1 May 1996, on the defendant's application, the money in court was paid out to the defendant's solicitor. On 3 June 1996, £2,500 was paid into court. The CRU certificate was by now in the sum of £20,867. If the defendant's assessment of the case was correct, this would absorb the entire damages recoverable by the claimant, so that she would get nothing. The £2,500 was an exempt payment and was clearly made to tempt the claimant. It did not do so.

43. In December 1996 the decision of the court in **McCaffery** was published. The defendant's advisers realised in the light of that decision that the payment-in would not protect them. Accordingly, on 8 May 1997, they wrote a 'without prejudice' letter to the claimant's solicitors. The material part of the letter is in these terms:
*"In the light of the recent Court of Appeal decision in **McCaffery v Datta**, we are of the view that the Notice of Payment In no longer affords us the protection on costs that it was thought to do then. You will be aware that that decision suggests that instead a Calderbank offer should be made in these circumstances.*

We have discussed this matter with our insurance clients and they in turn instruct us to offer to your client even at this late state, the opportunity to settle this case by accepting the money in Court, together with the whole of her costs to date, and in full and final settlement of this claim. You will know that it is our case that the damages which your client is entitled to receive here are substantially short of the current amount due to be re-paid on the CRU Certificate and that if this matter does proceed to trial, the whole of any damages which she recovers will be paid over to the CRU and your client will receive nothing. You may of course recover your costs, but surely that is not the object of the exercise and we invite you to take your client's further instructions in the matter and let us know whether she is prepared to settle on that basis. This offer remains open for 7 days from today only and we have to tell you that if we have not received confirmation within that time that she is prepared to settle, then we shall serve upon you Notice under the Calderbank principle to obtain protection on costs at any subsequent trial. Given that we shall be calling 2 medical Experts and one non-medical Expert to this trial, the amount of costs that will be involved there are very substantial."

44. The offer was not accepted. On 16 May 1997 the defendant's solicitor sent a **Calderbank** letter. They pointed out that the CRU certificate was now in the sum of £22,186.43. The letter continues:
*"To acquire protection on costs therefore, we make an offer formally on behalf of the Defendant that damages of £20,000 will be payable to your client in this case and she is entitled to accept that offer to bring the matter to a conclusion. You will of course appreciate that upon acceptance of such an offer the whole of those monies will have to be paid to the CRU and your client will actually receive nothing and this letter is written with the express purpose of affording protection on costs for the Defendant at trial. A sealed copy of this letter will be placed upon the court file in time for the trial and will be referred to under the **Calderbank** principle on the question of costs as appropriate."*

45. The case came on for trial in July 1998. It lasted three days. The Recorder, Mr Hallam, accepted the defendant's case. The Recorder made no criticism of the evidence of the claimant, but he was not satisfied that she had established any loss of earnings due to the accident. He gave judgment for the sum of £8,613.

46. The claimant's counsel submitted to the Recorder that she should have the costs because the judgment was in excess of the sum in court of £2,500. The defendant's counsel submitted that the defendant was entitled to the costs after the date of the **Calderbank** letter. He also relied on the discrepancy between the amount

claimed and recovered, and the fact that the defendant had succeeded on all the factual disparities at trial. The Recorder rejected the claimant's argument and accepted that of the defendant. The claimant appeals.

47. Mr Finch, on her behalf relies on the decision in **McCaffery's** case. In that case the defendant had paid into court £2,500. Subsequently the defendant's solicitors wrote a **Calderbank** letter. The letter pointed out that the CRU certificate was then in the sum of £25,419.26; they invited the claimant to withdraw her claim on the basis that she would get nothing for herself; they concluded the letter by saying that they would be happy to 'discuss a suitable payment to the CRU'. In giving judgment at p.876B, I said:
*"What he [the defendant] cannot do, at least not so as to afford himself any protection as to costs, is to combine a payment into court of £2,500 or less with a **Calderbank** letter offering to pay the amount certified in the certificate of benefit to the Compensation Recovery Unit. Quite apart from the fact that this would defeat the object of the legislation, it would involve the defendant in making two inconsistent or alternative offers. Only one offer can be made at a time, though of course it can be increased subsequently. But the offer is made to the plaintiff and no one else, and is made in satisfaction of his cause of action. The fact that part of that satisfaction involves payment to a third party is irrelevant. If the defendant chooses to make a payment into court at all, he cannot rely on the **Calderbank** offer as well or in the alternative because ex hypothesi he could have, and has, made a payment in and therefore he falls foul of the proviso in Order 62, r.9(1)(d)."*

48. Mr Finch, who appeared on behalf of Mrs Whitehouse in the Court of Appeal but not in the court below, submitted that the defendant had fallen into the same error as the defendant in **McCaffery's** case. The defendant should, he submits, have applied to take the £2,500 out of court. At first sight that may appear to be so. But I am satisfied that it is not. A proper reading of the letter of 8 May 1997 indicates that the offer of £2,500 plus costs to date is only open for acceptance within 7 days. Since it was not accepted within that time, it was clearly withdrawn. The **Calderbank** offer of 16 May was not inconsistent or in the alternative. It clearly superseded the earlier offer. The claimant could not have applied successfully to the court to take the £2,500, at least without paying the costs after the date of payment-in. The **Calderbank** letter was therefore a valid offer. I agree that it might have been better if the defendant had applied to take the £2,500 out of court. But in the event that he did not, I do not think there can have been any confusion in the claimant's mind. The fact is that just like Mrs Bajwa, she was aiming at a much higher award.

49. Mr Finch further submits that since the defendant has to pay the amount shown on the certificate to the CRU together with the sum of £8,613 to the claimant, the amount for which the defendant is liable to pay exceeds the **Calderbank** offer of £20,000. While that is true, the court was told that the defendant has, as one would expect, appealed the CRU certificate. Since the Appeal Tribunal must take into account the findings of the court, there is no reason to suppose that the appeal will not be allowed and the liability reduced to nil.

50. Once again the claimant recovered more than she would have done if she had accepted either the £2,500 in court or the **Calderbank** offer, though not, be it noted, if she had accepted the original payment into court. Mr Finch therefore relied on the reasoning of the Deputy Judge in Mrs Bajwa's case and submits that that reason is sufficient for the court to allow the appeal. For the reasons I have given in that case I would reject this argument. The clear inference is that the claimant was not interested in the defendant's assessment of the value of the case; she was aiming at much more. She failed on every issue which was contested in the three day trial. The defendant's assessment of the value of the claimant's case was right. Although for the moment the defendant has had to pay more than the £20,000 offered, there is no reason to suppose that his ultimate liability will exceed the judgment sum. Accordingly, I would dismiss this appeal.

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51. On 18 August 1993 the claimant was involved in an accident while travelling as a passenger in a motorcar. Liability to her was not in dispute. Once again there was a dispute as to the effect upon her of the accident. Her case was that the constitutional condition of her spine had been exacerbated and symptoms accelerated by 5 years. The defendant's case was that the claimant had recovered from the effects of the accident within 6 months. Their case was supported by evidence of a video film covertly taken. The claimant's Schedule of damage claimed £49,767.98, the bulk of which was for her loss of earnings.

52. On 25 July 1997 the defendant paid into court £15,000, but of that sum withheld £8,805.82, being the amount of the CRU certificate. The trial had been fixed for 12 August 1997 but was adjourned till 5 January 1998. The money in court was not accepted.

53. At trial, the judge, H.H. Judge Gaskell, effectively preferred the defendant's case. He held that the claimant was a poor historian and her evidence was inconsistent with the video. He concluded that the effect of the accident was limited to 12 months. He assessed general damages at £3,000. Cost of care was £1,800 and the loss of earnings was £2,019.64. The total amount of the judgment was £7,846.47. On 6 January 1998, when the judge made his principle findings, it was not possible to reach a final figure on the damages. The matter had to be adjourned. In fact it did not come before the judge again until 15 June 1998, by which time the plaintiff had appealed the CRU certificate successfully and the figure was reduced to nil. There were therefore no deductions from the judgment sum of £7,846.47.

54. On 16 June there were submissions on costs. Defendant's counsel advanced similar arguments to those advanced on behalf of the defendant in the Bajwa case. The claimant's counsel submitted that she had done better than if she had accepted the offer contained in the payment into court. The judge acceded to the claimant's submissions. He said at p.6G:
"It would appear that in the light of the Compensation Recovery Scheme, the defendants have to assess their potential litigation risk with care to ensure that both the reserved amount (representing monies to be paid to the Compensation Recovery Unit) and the net figure (that is the amount to be received by the plaintiff) are accurately calculated. It is clear that the defendants thought that they were vulnerable to damages reflecting loss of earnings up to 25 July 1997. If that be correct, then they under-assessed the claim for general damages for pain and suffering and loss of amenity, damages for care and other special damages. Had they done so, had they correctly assessed the damages that would have been awarded on the basis that the injury was causative of the loss of earnings up until that date, then they would of course have beaten the judgment sum."

55. He also declined to disallow any of the claimant's costs. He said at p.8D:
"I have considered whether or not I should make an order for a portion of the plaintiff's costs, but have come to the view that if I did that, it would be on a purely pragmatic basis and it could not be rooted in any principle. The general principle is that if a plaintiff in a personal injury action does recover more than is offered by the payment-in, then she is entitled to her costs. On the facts of this particular case she has recovered for herself more than the defendants paid into court for payment to her."

56. In my judgment the essential facts of this case are indistinguishable from those in the Bajwa case. By a similar process of reasoning I consider that the judge was plainly wrong. If the claimant had applied to take the money out of court and appealed the certificate, she would have recovered nearly twice as much as she in fact did. The defendant ought, in my judgment, to have been awarded the costs after the date of the payment into court. My reasons are the same as those in the Bajwa case.

LORD JUSTICE LAWS: I agree.

MR JUSTICE JONATHAN PARKER: I also agree.

Order:
Bajwa v. BA : Appeal allowed with costs; costs be payable from 23.4.96; costs be assessed if not agreed; application for permission to appeal to the House of Lords refused;
Whitehouse v. Smith : Appeal dismissed with costs; costs be payable from 25.7.97; costs be assessed if not agreed; application for permission to appeal to the House of Lords refused.
Wilson v. Mid Glamorgan CC : Appeal dismissed with costs.

A P P E A R A N C E S
BAJWA v. BRITISH AIRWAYS PLC
MR RICHARD SERLIN (instructed by Messrs Davies Arnold Cooper, London EC4Y 8DD) appeared on behalf of the Appellant (Defendant).
MR ANDREW RITCHIE (instructed by Messrs Rowley Ashworth, London SW19 1SE) appeared on behalf of the Respondent (Claimant).

WHITEHOUSE v. SMITH
MR THOMAS FINCH (instructed by Messrs McArdle Cardwell & Mitchell, Darlington) appeared on behalf of the Appellant (Claimant).
MR BARRY COULTER (instructed by Messrs Harvey & Marron, Newcastle upon Tyne) appeared on behalf of the Respondent (Defendant).
WILSON v. MID GLAMORGAN CC AND ANOTHER
MR ROBERT HARRISON (instructed by Messrs Dolmans, Cardiff) appeared on behalf of the Appellant (Defendant).
MR PHILIP REES (instructed by Messrs Hugh James, Talbot Green) appeared on behalf of the Respondent (Claimant).