THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC - CP15 -1999)

CONSULTATION PAPER

ON

SECTION 2 OF THE CIVIL LIABILITY (AMENDMENT) ACT, 1964: THE DEDUCTIBILITY OF COLLATERAL BENEFITS FROM AWARDS OF DAMAGES

IRELAND
The Law Reform Commission
I.P.C. House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4

First Published
August 1999

ISSN 1393 - 3140

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975.*

The Commission's Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in January, 1977. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published fifty-nine Reports containing proposals for reform of the law; eleven Working Papers; fourteen Consultation Papers; a number of specialised Papers for limited circulation; and nineteen Reports in accordance with Section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Consultation Paper.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

President	The Hon. Mr Justice Vivian Lavan, High Court,
Full-time Commissioner	Mr Arthur F Plunkett, Barrister-at-Law,
Part-time Commissioners	Dr Hilary A Delany, B.L., Lecturer in Law, Trinity College, Dublin;
	Ms Patricia T Rickard-Clarke, Solicitor, Partner - McCann FitzGerald Solicitors;

The Secretary to the Commission is John Quirke

Research Staff

Director of Research:	(Professor) David Gwynn Morgan, LL.M. (Lond.), Ph.D. (N.U.I.).
Legal Researchers:	Ms Lia O'Hegarty, B.C.L., LL.M. (Michigan), LL.M. (Harvard), Barrister-at-Law;
	Ms Róisín Pillay, LL.B., LL.M (Cantab.), Barrister-at-Law;
	Ms Leesha O'Driscoll, B.C.L., LL.M., Barrister-at-Law.
Legal Information Manager:	Ms Helen Bradley, B.A., M.Phil., M.L.I.S
Library Assistant:	Ms Marina Greer, B.A.

Clerical Staff

Ms Deborah McAdams, Private Secretary to the President,

Research Team on this Project

Hilary Delaney, Commissioner; Dr Gerard Quinn, B.A., LL.B., LL.M, S.J.D. (Harvard), B.L., former Director of Research; Jason Stewart LL.B., B.C.L. (Oxon), former researcher; Leesha O'Driscoll, researcher.

Contact Details

Further information can be obtained from:

The Secretary
The Law Reform Commission
IPC House
35-39 Shelbourne Road
Ballsbridge
Dublin 4

Telephone:	***(01) 6377600.***
Fax No:	***(01) 6377601***
Email:	***info@lawreform.ie***

Table of Contents

Table of Contents

PART I

INTRODUCTION

The Reference of the Attorney-General

1. On 12th December 1997, pursuant to section 4(2)(c) of *the Law Reform Commission Act, 1975,* the then Attorney-General, Mr David Byrne, SC, requested the Law Reform Commission to review section 2 of the *Civil Liability (Amendment) Act, 1964*, which provides as follows:

> "In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of:
>
> (a) any sum payable in respect of the injury under any contract of insurance,
>
> (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury."

Under the terms of the Reference, the Commission was asked to address the question of repealing or amending this provision "with a view to ensuring that a plaintiff does not receive double compensation in respect of the same loss", and to submit to the Attorney-General such proposals for reform as the Commission thinks appropriate.

2. In essence, section 2 lays down the rule that certain payments which individuals may receive in connection with personal injury (e.g., insurance payments) shall not be deducted from any subsequent award of damages that they may receive as plaintiff in a civil suit from the defendant-tortfeasor. These external payments have come to be termed "collateral benefits". The general rule of non-deductibility contained in section 2 means that these collateral benefits are additional to an award of damages. It is in this sense that it may be said that a plaintiff is allowed to "cumulate his remedies". To the extent that these collateral benefits compensate for the loss met by awards of damages in tort they lead to double compensation for the same loss. For reasons elaborated later in this Consultation Paper a system which permits double compensation is contrary to the public interest since it is objectionable in principle as

well as wasteful and inefficient[1] It is therefore a matter of some considerable importance to identify where double compensation occurs and to eliminate it as much as possible from the system.

3. At issue in this reference are five related questions to be explored in depth in this Consultation Paper.

(i) What constitutes a collateral benefit? This question of definition is important since some benefits may not be considered collateral. If not, then the whole question of double compensation cannot by definition arise.

(ii) Under what circumstances may it be said that a collateral benefit compensates for a loss that is compensable under tort law? It is only those collateral benefits that perform a compensatory role similar to that of an award of damages (and hence give rise to double compensation) that are the subject of this Consultation Paper.

(iii) With respect to collateral benefits that compensate and thus perform a role similar to one of the heads of compensatory damages, then what is the appropriate departure point of the law as a matter of principle; deductibility as at present under section 2 or non-deductibility?

(iv) If a move away from non-deductibility to deductibility is contemplated then what kinds of public interest exceptions, if any, are justified? To which collateral benefits would these exceptions apply? If such exceptions are contemplated then we should be as clear as possible as to their precise rationale, for this, in turn, helps determine the outer limit of these exceptions.

(v) In light of the above what refinement and amendment of section 2 would be appropriate?

The Law Reform Options

4. Four general law reform options arise in the context of section 2 as follows:

*1. **Retain Non-Deductibility as the General Rule***

The first option is to maintain, or even broaden further, the general rule of non-deductibility as contained in section 2. Bearing in mind principally the need to curtail the possibility of double compensation, this option does not appear to us to be in the public interest.

---

[1] See particularly chap.1.

2. Move to a General and Strict Rule of Non-Deductibility

The second option entails moving away from a general rule of non-deductibility to a general rule of deductibility for all collateral benefits with no exceptions, and suggesting an appropriate amendment to section 2 to reflect this. This option does not appear to us to be in the public interest since it is not sufficiently sensitive to the extent to which certain collateral benefits may not in fact be compensatory, nor does it appear sufficiently sensitive to the wider functions sometimes served by certain collateral benefits which may justify their exception from a deductibility rule on the grounds of public policy. Such public policy exceptions may arise even in cases where the benefit is admittedly compensatory.

3. Move to a General Rule of Non-Deductibility Subject to Public Interest Exceptions

A third option entails adopting a general rule of deductibility for all collateral
benefits (as per option 2 above) but with certain carefully defined exceptions which are justified in the public interest and to suggest an appropriate amendment to section 2 refining its scope to reflect this. This option is the one provisionally favoured by the Law Reform Commission.

4. Move to a General Rule of Deductibility with a Right of Reimbursement for the Provider of the Collateral Benefit

A fourth option entails adopting a general rule of deductibility subject to certain carefully defined and justified exceptions (as per option 3 above) but with a right of reimbursement for the provider of the collateral benefit against either the defendant, where the benefit has been deducted from an award of damages, or the injured plaintiff where there has been no such deduction. This would require an amendment to section 2 of the 1964 Act to reflect this and indeed wider changes in Irish law to facilitate such reimbursement. However attractive in principle, this option does not appear to us to be practicable at this point in time in Ireland.[2]

5. The Law Reform Commission provisionally recommends that there should be a move away from a general principle of non-deduction toward a principle of deduction of those collateral benefits which serve to compensate for the same loss for which damages are awarded, subject to certain well defined exceptions (as per option 3 above) and that section 2 should be amended accordingly.

6. In advocating a move from the current norm of non-deductibility to one of deductibility, the Commission attaches considerable importance to simplicity, clarity

---

[2] An evaluation of the different policy options is discussed in chap. 8.

and certainty in the rules governing the assessment of damages in claims for personal injury. This is essential in order to obviate the litigation of additional issues, extraneous to the accident, arising from the source or nature of the collateral benefit. The extensive role of settlements in the personal injury system is also recognised and a concurrent wish not to unduly complicate this is expressed.

Outline of this Consultation Paper

7. This Consultation Paper is divided into four parts.

- Part I (introduction and chapter 1) situates the debate about damages and collateral benefits into a broader framework of reference concerning the primacy of tort law as a mechanism of compensating for loss. The relationship between collateral benefits and awards of damages is a matter of considerable importance not only because our system of compensation relies so heavily on tort law, but also in the light of the proliferation of a variety of collateral benefits. This proliferation is occurring because of increased prosperity which enables people to make better financial arrangements to cover their future contingencies and also because of the general growth in social security provision. This debate is conducted quite differently in legal systems that do not rely so heavily on the traditional role of tort law in the redistribution of loss.

- Part II (chapters 2-5) examines the treatment afforded to collateral benefits in England. The relevant law in England is based on the common law, there being no English equivalent to section 2. However, given that section 2 was only enacted in 1964, before which the common law governed the position in Ireland, it is helpful to consider the position obtaining in England under the common law. This Part looks at the origins of the rule of deductibility, at the exceptions which have traditionally been regarded as legitimate and at the various rationales provided by the English courts for non-deduction. It also notes the recent provisional recommendations of the Law Commission of England and Wales to the effect that the deductibility principle should be reaffirmed and made clearer and that the various items of non-deductibility should be further narrowed.

- Part III (chapter 6) looks at the various approaches adopted in common and civil law jurisdictions around the world. As will be seen, even in common law systems the overall trend is towards a general regime of deductibility subject to certain well defined exceptions. The issue does not arise to the same extent in civil law jurisdictions as the increased role of social insurance in protecting individuals against the consequences of injury is accompanied by less reliance on the compensatory function of damages through tort law.

- Part IV (chapters 7-10) examines the treatment of collateral benefits in Irish law. Section 2 of the *Civil Liability (Amendment) Act, 1964* provides for a

wide rule of non-deductibility which arguably leads to double compensation in certain cases. The background of the section and its effects, including the possibility of unjustified double compensation are examined in chapter 7. Chapter 8 outlines the various general options in the field. As will be seen, the Commission favours a move toward the principle of deduction. In light of this general shift from non- deductibility to deduction, chapter 9 proceeds to analyse particular collateral benefits with a view to establishing whether the Commission finds any public policy argument justifying their non-deduction and, if so, to what extent. Finally, chapter 10 summarises the Law Reform Commission's provisional recommendations.

The Consultation Process

8. The Law Reform Commission acknowledges that its provisional recommendations would reverse the general rule encapsulated in section 2. It is therefore keen to obtain submissions on the main question of principle: whether such a reversal of presumption serves the public interest. It also seeks submissions as to which exceptions may be justified in the public interest and to what extent. Following this consultation process the Commission will make recommendations in its Final Report on the topic. **In order to ensure that the Commission's final recommendations can be made as soon as possible those who wish to make submissions are invited to so in writing no later than 17 December 1999.**

CHAPTER 1 TERMS OF THE DEBATE

1.01 The debate about the fate of collateral benefits does not occur in a vacuum. It is in fact implicated in much broader debates which are worthy subjects in their own right. This chapter foregrounds those broader discussions in the interests of clarifying the issues at stake as well as the various law reform choices open to the Oireachtas. We do not attempt to resolve these higher order debates here; they are articulated in order to give greater structure and meaning to the more immediate question concerning collateral benefits.

The Inevitability of Accidents and the Need to Compensate for Loss

1.02 Accidents are inevitable. Modern society implicitly recognises that they will happen and accepts the omnipresent risk of accidents as an inherent element of progress and daily activity. For example, the sanctioning of the motor car entails an acknowledgement that some people will suffer as human error and mechanical failure cannot always be avoided. On balance, societies make judgments about the social and economic utility of allowing or even encouraging certain behaviour notwithstanding the inevitability of accidents.

1.03 To assert the above is not to relieve society of responsibility to take measures to reduce the incidence of accidents to the absolute minimum. Rather it is to assert that an implicit social calculus is at play according to which a balance is determined between encouraging and facilitating the occurrence of generally beneficial economic activity on the one hand and a realisation on the other hand that any such calculus is accompanied by a certain level of predictable risks.

1.04 The recognition that accidents are inevitable gives rise to the need for an adequate and comprehensive mechanism for compensating for loss when it occurs. It is important to realise that the victims of loss are often not only victims of identifiable tortfeasors but are also in a real, albeit indirect, sense the victims of a system that implicitly endorses a certain level of risk as socially acceptable. This particular higher order debate is relevant to the issue of where the burden of the losses caused by accidents legitimately lies. For example, a frequent objection to deductibility is that it relieves the tortfeasor of some of the consequences of his or her actions.[1] However if one considers that society by making a car legal, recognises that some people will cause accidents and others will be injured, then society as a whole must bear some of the responsibility for the accident, hence the objection to the tortfeasors immediate

---

[1] See particularly the discussion of the Collateral Source Rule in the US at paras. 6.26-6.31. See also paras. 3.05-3.16 for a discussion of the punitive /deterrent theory of tort liability.

burden being lightened carries less weight. It can also be argued that if one recognises that society as a whole bears some of the responsibility then all of society has a duty to protect against loss. The prevalence of extensive social insurance is just one manifestation of this collective mechanism for addressing the consequences of contingent events.

Two Systems of Compensating for Loss: Fault and Non-Fault Based

1.05 There are quite pronounced differences in the way various legal systems regulate the relationship between collateral benefits and awards of damages. While all legal systems provide for some mechanism that compensates for loss they do not do so in a uniform way. In the context of this debate the differences can be seen as tending to reflect different decisions as to who should bear the brunt of the losses caused by accidents - society or the individual implicated.

1.06 The tort system which we have inherited from our common law tradition is fault-based. It rests on the implicit assumption that the individual is normally to be considered morally responsible for his or her behaviour as well as risk taking and ought therefore be affixed with full legal liability to compensate for any ensuing loss. This is so notwithstanding the reality that the community generally accepts a certain level of risk taking as socially acceptable. Indeed, it is so notwithstanding the fact that social mechanisms for handling the results of accidents such as health insurance and social welfare have developed alongside the tort system and perform at least some of the functions formerly handled exclusively by it. It follows that the main mechanism for providing for loss is focused on the culpability of individual behaviour and is routed through the adversarial process provided by the courts. One clear implication of direct relevance to this paper follows: if individuals are assessed on the basis of fault and if their primary liability is to compensate for actual loss then any collateral benefit that also plays a compensatory role should be automatically deducted. Logic alone points to a principle of deductibility in a tort-based system.

1.07 An important caveat needs to be entered with respect to the above characterisation; in reality much of the costs of accidents are met by means that exist outside the traditional tort system. A considerable amount of potential liability to cover the costs of accidents is insured either as a matter of prudence or as required by law. Although our traditional tort law requires the finding of fault by an individual, in reality it is more often than not the insurance company who pays. While it can be countered that the individual tortfeasor will pay in the form of higher insurance premia, the costs of accidents are more likely to be borne by the insured population through higher insurance costs. Likewise, a considerable amount of the cost of accidents is financed by the social welfare system. There is, in other words, a considerable gap between the myth-system of tort that sees tort as central and the operations-system which in reality depends heavily on these collateral sources. Clearly both the tort system and the alternative mechanisms of providing for loss need to be brought into a closer alignment to, primarily for our purposes, avoid any possibility of double compensation, but also bearing in mind the wider context of loss redistribution and the public interest in the optimum use of resources.

1.08 Some legal systems - most notably those of continental Europe - have moved away from the primacy of the fault-based system of traditional tort law. This is an inevitable progression given the prevalence of wide networks of social insurance which fulfil a lot of the functions of tort law. The social insurance network encompasses mechanisms which protect the individual against the adverse consequences of accidents at a more immediate level than tort law, so by the time a tort case reaches the courtroom the losses that a plaintiff has actually suffered are considerably decreased or indeed eliminated. Once the plaintiff is compensated, any further payments result in a so-called "windfall". The cost of this is ultimately borne by all of society which is deprived of the benefits to be gained by a more optimal use of resources and must pay higher insurance premiums as a consequence of the higher costs of accidents. On this view these higher costs are artificial not being the true measure of the losses incurred.

1.09 There are several important factors relevant to the debate about collateral benefits and its interplay with the higher order debate of loss redistribution which emerge more clearly when looking at some of the continental systems.

- Social insurance networks require that those who can afford to contribute, (i.e. the employed) to the collective mechanisms for protecting citizens against future contingencies in life such as injury, unemployment, old age, must do so.

- The foregoing assertion implicitly recognises that each individual bears some collective responsibility because they profit from society; this is confirmed by the fact they can afford to pay. Specific illustrations of this theory can be found in the imposition of strict liability for accidents in certain spheres of activity. Thus the manufacturer of a product is liable where it is defective without the plaintiff consumer having to show fault as the manufacturer profits most from that activity and this stronger position carries with it more responsibility.[2]

- While the assumption of a portion of the collective responsibility relieves the particular tortfeasor of some liability and hence the role of tort is marginalised, individuals can bear moral responsibility for undertaking risks that go beyond what society is prepared to live with or fund. Thus for example in Germany and France a tort action is only brought against employers where the accident was caused by an intentional act.[3] The persistence of the "fault" concept is evidenced by the existence of subrogation rights i.e. the provider of the collateral benefit has a right to sue the defendant for the amount he has paid to the plaintiff. Moreover the statutory compensation schemes do not cover all losses so that in order to recover for pain and suffering, for example, tort law remains the only option.[4]

---

2 *Liability for Defective Products Act, 1991* enacted Directive No. 85/374/EEC of 25 July 1985.

3 See paras.6.43 and 6.48.

4 See paras.6.45-6.49.

1.10 Some Scandinavian countries follow through more consistently with the logic of social provision by eliminating or severely constricting the right to pursue a claim through tort law. One clear implication in Scandinavia is that the deductibility of collateral benefits is not as important or urgent a question since compensation is provided generally through social mechanisms. In effect, what is considered collateral here becomes central in such systems.

Further Tensions within the Tort System

1.11 The contrast between the civil and common law systems in this respect is worthy of consideration in its own right and is background to the debate concerning collateral benefits and awards of damages. The deductibility or otherwise of collateral benefits becomes much less of an issue if the focus of liability for loss is society rather than a defendant who must compensate for actual loss.

1.12 For the foreseeable future one might reasonably assume that the tort system will retain its primacy as the dominant means of compensating for loss in Ireland. This is so despite the fact that, rhetoric to one side, liability is heavily insured and the defendant seldom pays in full. In the eyes of some it may well appear that the differences between the actual operation of the Irish legal order and those of continental Europe are sufficiently few to permit the adoption of similar solutions to the problem of collateral benefits i.e. avoid double compensation by affixing, depending on the sphere in which the accident occurs, society as a whole or the class of defendant (via insurers) with the cost. This 'pull' toward continental Europe further augments the argument for a principle of deductibility under Irish law.

1.13 Interestingly, there is a further tension within traditional tort theory between the principles of liability in tort and the function of compensatory damages which is relevant to the debate over collateral damages.

1.14 Liability in tort is predicated on personal fault. A focus on the underlying moral basis of tort law – namely the fault or moral culpability of the defendant – sets the initial departure point. Many who feel uneasy about a principle of deductibility on the basis that it lets the defendant off unduly lightly are apt to rest their argument on notions of fault and just deserts. The danger of double or over compensation is considered more palatable than providing the defendant with a windfall or with a degree of liability that does not adequately match his moral culpability. This does not address the reality that, as in a system heavily reliant on insurance, it is not the actual defendant who benefits. If, on the other hand, one looks to the function of compensatory damages in tort law then the initial point of departure in the debate is altered. The function of such damages is, perforce, to compensate for actual loss. It follows that the defendant is only liable to the extent that loss actually occurs. If the normal spread of loss is reduced by a collateral benefit then it is logical to assume that the defendant is only liable for the reduced amount. That is, a principle of deduction of collateral benefits would appear to apply. This ensures that the defendant's liability

is neatly and exactly matched to actual loss. It also ensures that the plaintiff does not receive double-compensation. The fact that the defendant ends up paying less becomes irrelevant if the focus is on the actual loss and the plaintiff is compensated for it.

1.15 For our part, we are inclined to the view that an understanding of the function of compensatory damages is most important. Thus our terms of departure in the debate about collateral benefits inclines us to adopt a general principle of deduction subject to whatever exceptions may be justified in the public interest.

The Common Law Approach: A Principle of Deduction of Benefits subject to Exceptions

1.16 It is important to emphasise that the main, if not the sole, aim of damages in tort law is to compensate the plaintiff for his loss by placing him in the position that he would have been in had the tort not occurred.[5] The corollary of this principle is that damages must only compensate the plaintiff for the actual loss he has suffered. It follows that if a collateral benefit compensates for loss then it must be taken into account in determining the actual level of compensation required through an award of damages. Hence, one might expect that the general rule under the common law would be one of full deductibility of any collateral benefit that has the aim or effect of compensating for a loss. Indeed, this has been consistently stated as the bedrock principle of the common law courts.

1.17 However, the attitude of the common law has been somewhat more nuanced: in particular two categories of exception have been carved out from the general rule of deduction. First, insurance payments were deemed non-deductible on a variety of grounds including a notional sense of the moral and or contractual entitlement of the plaintiff, a desire to encourage people to anticipate and prepare for future contingencies and an unwillingness or uneasiness to allow defendants (persons deemed by the legal order to be morally responsible and legally liable) to reap the benefit of the plaintiff's foresight. It may be said therefore that the functional approach has been qualified by sound social policy, which seeks to encourage self-reliance and thrift on the part of the plaintiff as well as recognising an element of fault and moral liability on the part of the defendant.

1.18 Second, charitable gifts were deemed non-deductible by the courts on a variety of grounds including the need to encourage public giving as an expression of spontaneous social solidarity and sympathy coupled with a desire not to allow defendants to escape with a reduced amount of liability because of such donations.

1.19 The attitude of the common law courts to collateral benefits beyond the above two categories has developed in an *ad hoc* manner. Declarations of non-deductibility were generally made, if at all, on the basis of analogy with the rationales

---

[5] See generally Law Reform Commission Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages* (1998).

justifying the two main exceptional categories above. This position was summarised by Lord Wilberforce in the House of Lords in *Parry v Cleaver*[6] as follows:

> "The injured plaintiff .... may be protected by an elaborate structure of social welfare arrangements entitling him to industrial injuries benefit, unemployment pay, sickness benefit and other payments of constantly changing nature and amount. Apart from any private insurance he may have taken out, he may be covered by an 'insurance' scheme in his employment. This may be voluntary or compulsory, contributory or non-contributory; it may be partly transferred from a previous employment and may be transferable to a future employment; the true element of insurance in the arrangements may be considerable or very slight. If he is injured in a large scale catastrophe, and sometimes even when he is not, a fund may be raised by public subscription out of which he may receive very large sums indeed. He may receive help from private benefaction .... In many cases even now, and possibly in most cases in the future, the whole of his loss, so far as measurable in money terms, may be covered, independently of any claim against the 'wrongdoer'." [7]

1.20 The English courts have shown no great enthusiasm for extending the range of items of non-deductibility. Indeed, the Law Commission for England and Wales has provisionally recommended that the common law categories be narrowed even further.[8]

The Public Interest in a General Principle of Deductibility subject to Exceptions

1.21 The Law Reform Commission is of the provisional view that the overriding public interest at stake in the context of this Reference is to provide a mechanism to compensate for loss that is adequate and effective and eliminates double compensation and the accompanying unjustifiable windfalls for the plaintiff. Such a system would remove the adverse effects of double compensation on legitimate economic activity and therefore serve the public interest. At present and for the foreseeable future the tort system with its focus on individual fault and liability is likely to remain the main mechanism of providing for loss. Tort law must be brought into meaningful alignment with other existing mechanisms for compensating for loss. What this means in effect is that any amount payable by way of damages should be adjusted by reference to the amount of collateral benefits payable where such benefits compensate for the same loss. Hence, the Law Reform Commission is provisionally of the view that a move toward a general principle of deductibility is warranted in the public interest.

1.22 In our view the purpose of the collateral benefit may not be decisive in trying to determine whether it actually compensates for a loss. The ostensible purpose of a collateral benefit may well be non-compensatory yet it nevertheless has the effect

---

6 [1980] AC 1

7 *Ibid.* at pp.38-39.

8 See chap. 5.

(whether intended or otherwise) of compensating for a loss. If so, then it follows that the quantum of the collateral benefit in question should be deducted from the award of damages which compensates for the same loss unless there are overriding public policy exceptions for not doing so.

1.23 There may be some collateral benefits which neither intend to or in fact have the effect of compensating for a loss for which damages may be awarded. If so the collateral benefit in question should be deemed non-deductible as it does not give rise to the possibility of double compensation. Where a collateral benefit has the effect (if not the purpose) of compensating for a loss there may nevertheless be sound public policy arguments which justify its exception from the general rule. A threshold question of procedure arises in this context. Should courts, on the one hand, be afforded statutory discretion to interpret the public interest as they see fit and adjudge particular collateral benefits accordingly or should statute law provide explicitly for the items of non-deductibility deemed legitimate in the public interest? We provisionally favour the latter approach since it fosters certainty and predictability in the development of the law.

1.24 As to the substance of any possible public interest exception, we envisage at least two headings. First, it is surely in the public interest to encourage individuals to provide for their own future contingencies through private insurance; we therefore support treating such collateral benefits as non-deductible. Second, the maintenance and encouragement of social solidarity is of such importance that charitable payments should also be deemed non-deductible.

The Practicability of a Principle of Deduction with Reimbursement of the Collateral Benefit

1.25 Subject to the permitted exceptions, a move to a general principle of deductibility means that a defendant will only be required to compensate for actual loss which is the full loss less any collateral benefit that has a compensatory aim or effect. This may appear to shift the windfall gain from the plaintiff (who under a rule of non-deductibility may be doubly compensated) to the defendant who is financially liable to pay less where collateral benefits are deducted. In a system such as ours, that is still premised on individual fault as the basis of liability, this may appear to burden the defendant with less liability than his degree of moral fault might otherwise indicate. To meet this objection some systems have introduced mechanisms which allow the provider of the collateral benefit recoup the value of the benefit. Where same has been deducted the collateral benefit provider is subrogated to the injured party's claim i.e. he has a legal right to sue the defendant for the amount paid out by way of collateral benefit.

1.26 The exercise of subrogation rights entails the further transfer of the costs consequent on an accident from the source which immediately absorbed them, the provider of the benefit, to the defendant. In practice it requires complex cost-sharing arrangements between commercial insurance companies and social insurance providers if additional court cases are to be avoided. Such arrangements do not exist

in Ireland, at least on the scale provided elsewhere (especially in Continental Europe) and on the scale needed to make subrogation work. Therefore, although attractive in the abstract, the concept of subrogation in this context might not work in Ireland and it is for that practical reason that the Law Reform Commission does not presently favour this variant on the option of deductibility.[9]

---

[9] The practical objections to a recommendation of widespread subrogation rights as the solution to double compensation are considered at paras.8.51 *et seq.*

PART II

CHAPTER 2 THE RELATIONSHIP BETWEEN DAMAGES AND COLLATERAL BENEFITS IN ENGLISH LAW[1]

The Compensatory Function of Damages Points to a Principle of Deductibility

2.01 It is well established under the common law that damages are intended to be mainly if not solely compensatory in nature, restoring the injured plaintiff to the position that he enjoyed prior to the accident occurring.[2] Even if the law of damages encompasses aims that are non-compensatory (e.g., exemplary, punitive or aggravated damages awards), it can still be maintained that the core aim of damages is to compensate for loss. The compensatory function of damages was clearly expounded by the courts in the House of Lords' decision in *British Transport Commission v Gourley*[3]:

> "The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained his injuries." [4]

2.02 This has been endorsed time and again both by the House of Lords and by courts in other jurisdictions. Therefore, if an injured plaintiff receives collateral compensation which meets the same loss as his award of damages, this results in double compensation contrary to the above well-established principle. In effect, such a collateral payment defeats the purpose of damages, rendering the award superfluous to the extent that compensation from another source has already restored the plaintiff to the position he was in prior to the accident. While it would seem to be a straightforward matter of deducting any such collateral benefit from a plaintiff's compensatory damages, the English courts have often refused to do so.

---

1 See generally the English Law Commission Consultation Paper No. 147, *Damages For Personal Injury: Collateral Benefits*, (1997) pp.9-45; MCGREGOR ON DAMAGES, (16th ed. 1997), paras.1616-1652.

2 This is without prejudice to the other categories of damages which have been recognised by the courts; see generally our Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages* (1998).

3 [1956] AC 185

4 *Ibid.* at p.197 *per* Earl Jowitt.

Two Traditional Common Law Exceptions: Insurance Payments and Charity

2.03 In the seminal collateral compensation case of *Parry v Cleaver,*[5] the majority of the House of Lords distinguished *Gourley* on the basis that it only reaffirmed the rule that a plaintiff cannot recover more than he has lost, but did not deal with the issue of payments which came to the plaintiff as a result of the accident, and which he would not have received but for the accident. Lord Reid explained as follows:

"Two questions can arise. First, what did the plaintiff lose as a result of the accident? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damage. *British Transport Commission v Gourley* did two things. With regard to the first question it made clear, if it had not been clear before, that it is a universal rule that the plaintiff cannot recover more than he has lost.... But *Gourley's* case had nothing whatever to do with the second question. It did not arise. Before *Gourley's* case it was well established that there was no universal rule with regard to sums which came to the plaintiff as a result of the accident but which would not have come to him but for the accident. In two large classes of case such sums were disregarded – the proceeds of insurance and sums coming to him by reason of benevolence. If *Gourley's* case had any bearing on this matter it must have impinged on these classes. But no one suggests that it had any effect as regards sums coming to the plaintiff by reason of benevolence, and I see no reason why it should have made any difference as regards insurance."[6]

2.04 Therefore, the majority reasoned that, as there remained two classes of collateral payment which the common law had consistently excluded from account when assessing damages, the principle expounded in *Gourley* could not be of relevance to any collateral benefit which the plaintiff may receive. In effect, the courts attempted to build on the two exceptions a general rule of non-deductibility of much broader application.

2.05 This interpretation of *Gourley* has, however, been criticised on the ground that the House of Lords failed to sufficiently analyse the problem before them. Atiyah comments that to classify the *Gourley* decision as being concerned with defining the plaintiff's loss and that in *Parry* as being concerned with what a plaintiff gains as a result of his injury is to ignore the fact that the elimination or reduction of a liability is as much of a benefit as the actual receipt of a cash payment. [7]

---

5 [1970] AC 1

6 [1970] AC 1 at 13.

7 See Patrick Atiyah, *Collateral Benefits Again*, (1969) 32 MLR 397 at p.398. While suggesting that the majority was wrong in holding that *Gourley* was irrelevant to the matter at hand he does say that it need not necessarily follow that sound policy distinctions cannot be drawn between the benefits in question on the basis of their nature or purpose for example.

2.06 However, since *Parry* the House of Lords has seemed to place more reliance on the principle expounded in *Gourley* in the context of collateral benefits. In *Hussain v New Taplow Paper Mills Ltd*[8] Lord Bridge quoted the above passage from the judgment of Lord Reid in *Parry* and reiterated the general rule. He then added a cautionary note:

> "This dichotomy, however, must not be allowed to obscure the rule that *prima facie* the only recoverable loss is the net loss. Financial gains accruing to the plaintiff which he would not have received but for the event which constitutes the plaintiff's cause of action are *prima facie* to be taken into account in mitigation of losses which that event occasions to him.... But to the *prima facie* rule there are two well established exceptions. First, where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the tortfeasor.... Second, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, the amount received is again to be disregarded."[9]

2.07 Hence, Lord Bridge accepted the two categories of benefit, recognised by Lord Reid in *Parry*, that have been consistently ignored by the common law in the assessment of damages: insurance payments financed by the plaintiff himself and charitable payments. Although Lord Bridge admitted that this amounts to sanctioning double recovery, he felt that the common sense of these two exceptions was obvious: The defendant should not benefit from either the premiums which the plaintiff has paid to insure himself against some contingency or money donated by a third party with the sole intention of benefiting the injured plaintiff.

2.08 In *Hodgson v Trapp*[10] Lord Bridge elucidated the nature of these exceptions to the general rule of deductibility by commenting:

> "To the basic rule there are, of course, certain well-established, though not always precisely defined and delineated, exceptions. But the courts are, I think, sometimes in danger, in seeking to explore the rationale of the exceptions, of forgetting that they are exceptions. It is the rule which is fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such."[11]

2.09 After having stated the two "classic heads of exception" outlined above, Lord Bridge expressed the opinion that the courts have justified the non-deduction of collateral benefits which exist outside of the two established categories by employing

---

8 [1988] AC 514

9 *Ibid.* at p.527.

10 [1989] AC 807

11 *Ibid.* at p.819. This was recently endorsed in the House of Lords by Lord Hope of Craighead in *Longden v British Coal Corporation* [1998] 1 All ER 289, 294.

arguments based on the same common sense rationale as that outlined above. With this in mind, it is necessary to ascertain if there is a general rule governing the treatment of collateral benefits in English law.

Is a General Rule Governing the Treatment of Collateral Benefits Discernible?

2.10 There is no legislative equivalent in English Law to s.2 of the *Civil Liability (Amendment) Act, 1964.* Thus the position has developed under the common law.[12] There is no discernible universal principle as to the deductibility, or otherwise, of collateral benefits at common law. Whilst various benefits accruing to an injured victim have been taken into account in the assessment of damages, certain others have been ignored by the courts, prompting the English Law Commission to comment that in the absence of a single principled test for determining whether a collateral benefit is to be deducted or not it is necessary to look separately at the treatment afforded to each type of collateral benefit.[13]

2.11 The *ad hoc* approach that has developed under the common law has been expressly recognised and endorsed by the House of Lords. In *Parry v Cleaver,*[14] Lord Wilberforce commented that:

> "it is impossible to devise a principle so general as to be capable of covering the great variety of benefits from one source or another which may come to an injured man after, or because, he has met with an accident."[15]

In that case Lord Reid, referring to the fact that there was no universal rule, commented that the common law has treated this matter as one depending on justice, reasonableness and public policy.[16] That this is a somewhat nebulous test has been admitted by the House of Lords in subsequent decisions. In *Hussain v New Taplow Paper Mills Ltd.*[17] Lord Bridge said:

> "Given the inevitable divergencies of judicial opinion as to what justice, reasonableness and public policy require, it is not surprising that courts in

---

12 Save where the legislature has provided for the deduction of social welfare payments in the assessment of damages; see paras.4.43– 4.45.

13 CP No. 147 *op. cit.* fn.1 at para.2.5.

14 *Parry v Cleaver* [1970] AC 1

15 *Ibid.* at pp.41-42; Lord Bridge in *Hodgson v Trapp* [1989] AC 807 at 820 commented that "The difficulty, which has been widely recognised, is to articulate a single precise jurisprudential principle by which to distinguish the deductible from the non-deductible receipt." The courts in Australia have similarly discredited the attempt to propound a general rule as to deductibility: see Windeyer J in *National Insurance Co. of New Zealand Ltd. v Espagne* (1961) 105 CLR 569 at 597.

16 *Ibid.* at p.13.

17 [1988] AC 514 at 528.

different common law jurisdictions should sometimes have solved similar problems in this field in different ways, nor that, in the leading case of *Parry v Cleaver* itself, this House should have reversed the Court of Appeal by a majority of three to two..."[18]

2.12 Essentially, in interpreting what is dictated by "justice, reasonableness and public policy," the courts have employed a variety of rationales to justify decisions as to whether the collateral benefits outside of the two "classic heads" of exception are deductible or not. These general rationales are considered in the next chapter.

---

[18] *Ibid.* at p.528.

CHAPTER 3 RATIONALES EMPLOYED BY THE ENGLISH COURTS TO JUSTIFY NON-DEDUCTIBILITY

3.01 If the law of damages remains the main method of compensating for loss and if the initial departure point is one of deductibility of any collateral benefit that compensates for or otherwise meets a loss then on what basis can non-deductibility be justified and to what extent? One complicating factor is the language used by the courts to address the issue. Lewis comments that instead of looking squarely to the policy considerations that lie behind the treatment of collateral benefits, the courts have tended to analyse the matter in a formulaic way. The error of legal formalism has always been that it tends to mask the true ground of decision and the policy rationale or rationales that underpin the same from full view. Hence it is sometimes unsafe to rely completely on the stated ground in the case law. Lewis states that the courts

> "... have frequently merely reformulated the problem of whether or not to deduct benefit by using the language of causation, or by focusing upon the meaning of the word 'collateral,' or simply by asking what is fair, just and reasonable. They have preferred to apply principle rather than policy. That is, they have preferred the formal language of legal rules and concepts to discussion of more pragmatic considerations. This has hindered rational discussion of the subject." [1]

3.02 Such systematic analysis as there has been has emanated from academic commentary rather than from the courts. Ogus has detected and systematised four justifications based on principle which have been employed by the courts to justify the non-deduction of various collateral benefits. [2] These are as follows:

- *The Punitive/Deterrent Theory*: This rationale concentrates on what the defendant should pay rather than on what the plaintiff should receive. It looks to the moral culpability of the plaintiff rather than to the loss of the defendant that requires compensation. On this rationale the fact that there may be double compensation is not relevant.

- *The Causation Theory*: This rationale looks to the (separate) causes of collateral benefits and awards of damages. It is used where a court considers there is an

---

1 Richard Lewis, *Deducting Collateral Benefits From Damages: Principle and Policy* 18 vol.1 Legal Studies 15 at pp.17-18.

2 A I OGUS, LAW OF DAMAGES, (Butterworths, 1973) pp.225–230. Ogus also recognises the policy considerations which have indirectly influenced the courts.

insufficient causal nexus between the tortious action of the defendant and the collateral benefit received by the plaintiff: by this reckoning the collateral benefit is deemed to have been triggered separately. This rationale is also impervious to the double compensation argument since it ignores the effect of the collateral benefit.

- *The Source of the Benefit Theory*: This rationale looks to the source of the benefit and justifies treating the relevant collateral benefit as non-deductible on that basis. If, for example, the source of the benefit was the plaintiff himself (i.e., the benefit was paid for or earned by the plaintiff) then it is considered that he should not be deprived of the fruits of his own thrift and foresight. This rationale effectively looks to theories of moral entitlement as well as the public policy interest in encouraging thrift and investment on the part of the plaintiff. In support of the rationale is a general uneasiness about allowing defendants to enjoy the benefits of the plaintiff's prudence. But this uneasiness alone does not fully account for the 'source of the benefit' theory.

- *The Purpose of the Benefit Theory*: According to this rationale, if the purpose of the collateral payment was either expressly or impliedly to benefit the plaintiff in addition to any right of action he may have against the tortfeasor, then a court should ignore it in assessing the award of damages. By focusing on the purpose, or stated purpose or a fairly imputed purpose of the collateral benefit, the effect of same is deemed largely irrelevant or at least outweighed by the purpose. An example might be a charitable donation toward the victims of a disaster.

3.03 These theories converge and diverge in the caselaw. They are extremely important since if one is to allow exceptional items of non-deduction one ought to be clear as to their underlying justification. Furthermore, such clarity is vitally necessary when it comes to identifying which collateral benefits are to be deemed non-deductible and, just as important, to what extent.

3.04 It is helpful to examine and critically evaluate the basis and coherence of the various rationales in further detail. In what follows, reference is made to the views of the commentators on each of the theories adumbrated above.

1 The Punitive/Deterrent Theory of Non-Deductibility[3]

3.05 Implicit in the rationale for ignoring certain collateral benefits is the belief that the civil law has a role to play in the punishment and deterrence of tortious acts. The emphasis is on the liability of the defendant which should not be alleviated by a fortuitous payment which the plaintiff may receive. To allow the defendant to benefit from the existence of collateral payments would be to reduce the deterrent effect

---

[3] See generally Ogus *ibid.* p.225; John Fleming, *Collateral Benefits*, International Encyclopaedia of Comparative Law, Vol. XI, (1983) chap. 11; Harvey McGregor, *Compensation Versus Punishment in Damages Awards*, (1965) 28 MLR 629. See our Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages* (1998).

which an award of damages has on the future conduct of potential tortfeasors, and also to lessen the punishment which is due to the defendant as the natural consequence of his actions.

3.06 This reasoning is well illustrated in *Redpath v Belfast and County Down Railway*[4] in the context of benevolent payments:

> "Why, one may well ask, should the defendants' burden be lightened by the generosity of the public? It is for the party who is in default to pay for such damage as he has caused and which is directly occasioned by his negligence without bringing into the account in reduction of his liability any moneys which may be received by the injured party without legal right from a fund voluntarily subscribed from charitable motives by third parties after the damage has accrued."[5]

3.07 Ogus has commented, however, that this reasoning "cannot survive closer examination and has been abandoned in the more recent decisions" such as *British Transport Commissioners v Gourley.*[6] That is, if the function of damages is just to restore the plaintiff to his pre-accident position, then any mitigating collateral payment must be taken into account. Consequently, compensatory damages cannot have a punitive function due to the possibility that the plaintiff's loss could be met *in toto* from such a collateral source. McGregor argues, following *Gourley*, that there should be a general rule of deduction of collateral benefits.[7]

3.08 In the Court of Appeal in *Browning v War Office,*[8] Diplock LJ discredited the existence of any punitive function in an award of damages. Referring to actions for negligence, he posed the following question:

> "...whether the policy of the common law in these types of actions is to provide restitution for the plaintiff or to visit retribution on the defendant?"[9]

In answering this, Diplock LJ employed careful terminology, preferring to use the word 'defendant' to that of 'wrongdoer' or 'tortfeasor'. He considered that,

> "...the emotions with which these latter expressions are charged tend, I think, to obscure not only the realities of the situation in the modern world but also the principle of law involved in actions of these types.... A person who acts without reasonable care does no wrong in law; he commits no

---

4 [1947] NI 167.

5 *Ibid.* at p.175 *per* Andrews LJ.

6 [1956] AC 185.

7 McGregor, *op. cit.* fn.3 at p.633 *et seq.*

8 [1962] 3 All ER 1089.

9 *Ibid.* at p.1094.

tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff."[10]

3.09 His Lordship said that to view a defendant as appropriating to himself, or benefiting from, a fortuitous circumstance which accrues to the plaintiff and which reduces the injury he suffers is an erroneous approach to this problem:

> "Implicit in such a statement is the tacit assumption that there is some norm of damages which a defendant who has acted without reasonable care ought to pay for his careless act, even though, owing to some circumstance for which the defendant is not directly responsible (*res inter alios acta*), the plaintiff has not in fact suffered a loss corresponding to the norm."[11]

3.10 This reasoning is faithful to the compensatory function of damages, in that a defendant is only liable for the loss actually sustained by the plaintiff as a consequence of the negligent act or omission of the former. Moreover it supports the view that in the discussion of the deductibility of collateral benefits from awards of damages, there is no 'windfall' as the defendant is only liable from the outset for the net loss suffered by the plaintiff.

3.11 McGregor has also discredited the punitive theory of compensatory damages. He argues that a defendant is entitled to be lucky and have his damages reduced by a fortuitous circumstance which lessens the plaintiff's loss. For example, if the defendant injures the plaintiff as a result of a tort, he may be fortunate to only slightly injure him, or injure a " man with an iron constitution rather than an egg-shell skull, a well dressed pauper rather than a shabby millionaire." [12] Moreover, following an accident, the plaintiff may be fortuitous in having his injuries treated by a brilliant surgeon who cures him, whereas the absence of such skill would have left him with serious disabilities. Therefore, in such circumstances, the defendant is not liable for the injury which the plaintiff would have suffered had he not been treated by the specialist, but only for the actual damage he caused.[13] This argument is developed by Fleming who comments that the award of damages made against the defendant does not correlate with his guilt. Rather, his liability extends only to the amount of damage done.[14]

---

10 *Ibid.* at p.1095.

11 *Ibid.*

12 McGregor, *op. cit.* fn.3 at p.633.

13 This example was given by Diplock LJ in *Browning v War Office* [1962] 3 All ER 1089 at p.1095. McGregor notes Lord Devlin's comments in *West v Shephard* [1964] AC 326 at p.363 to the effect that "the barest negligence can cause the gravest injury and the most culpable little or none at all."

14 There is, however, scope for the court to award exemplary or aggravated damages, but these are a separate head to compensatory damages with which this Paper is concerned. See our Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages*, (1998).

3.12 Fleming advances four criticisms of the deterrent aspect of damages.[15] First, the tortious act of the defendant was probably the result of a momentary inadvertence so that the prospect of legal sanctions would have made little, if any, difference. This point has been further developed by Lewis who argues that certain accidents occur in circumstances where the tortfeasor is not even aware that he is involved in a risky activity.[16] In such circumstances no deterrent purpose could be served. Consequently, as it is difficult to characterise the wrongdoing as morally bad, it would not seem fair to 'punish' the tortfeasor through civil liability.

3.13 Second, even if one were to accept that damages did serve a deterrent function, the deduction of a collateral benefit from the award would hardly reduce their deterrent effect - the receipt of the benefit is too speculative to affect an advance judgment on the part of the defendant as to whether the risk is worth taking.

3.14 Third, any deterrent aspect of damages that there may be is rendered completely ineffective by the widespread use of liability insurance: the Pearson Commission have estimated that insurers deal with 88% of all tort claims and pay 94% of the total damages.[17] It may be argued, however, that this deterrent aspect is still encountered by defendants through the effect that their negligence may have on their future liability insurance premiums. However, Atiyah has commented that future premiums are, in fact, unlikely to be affected by a defendant's negligence. This is due to the manner in which they are calculated; employers' premiums are assessed by grouping them into categories according to the particular activity they carry out, and not according to their previous accident rate.[18] Lewis further discredits the punitive/deterrent rationale on the basis that even where the defendant is financially burdened with the cost of an award of damages, it does not actually have a deterrent effect. Rather,

> "People take care to avoid causing injury not because of fear of civil liability, but because they wish to reduce the risk of injuring themselves, their property or other people. Self-preservation and a natural concern for the safety of others are the important motivating factors." [19]

3.15 Finally, as the liability of the tortfeasor is entirely dependent on causing an injury to the plaintiff, and not on the fault of the defendant, the unpredictability of this, as with the speculative nature of a collateral benefit, renders the deterrent function of damages obsolete.

---

15 Fleming, *op. cit.* fn.3 at s.5.

16 Lewis, *op. cit.* fn.1 at p.37. See the comments of Diplock LJ in *Browning v War Office* [1962] 3 All ER 1089 at p.1094, where he declined to use the term wrongdoer to describe the defendant. This is considered *supra* at para.3.08.

17 Report of the Royal Commission on *Civil Liability and Compensation For Personal Injury* (1978) Cmnd. 7054, Vol.2, para.509.

18 P S ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW, (3rd ed. 1980) at p.574. See particularly his analysis of accident prevention via insurance at pp.568-576.

19 Lewis, *op. cit.* fn.1.

3.16 The English Law Commission argue that empirical evidence illustrates that there is no deterrent function in compensatory damages. [20] They cite the discussion by Harris of research carried out into medical injuries and malpractice in the State of New York. [21] Harris commented that:

> "The signal sent by tort law to the medical profession is that occasionally, in a symbolic way, they may be held liable for negligence, but that 94% of the instances of negligence will not lead to liability."[22]

Moreover, the following findings of the survey, as quoted by the Law Commission, are relevant in refuting the deterrent function of compensatory damages: [23]

- the doctors surveyed did not consider the tort system to be an influence on the manner in which they treated their patients, rather, they considered it to be a distraction;
- the doctors surveyed did not modify their practices following a malpractice suit;
- nor did they believe that the tort system could play a role in preventing medical mishaps.

2 The Causation Theory of Non-Deductibility

3.17 This theory is premised on the assumption that the accident was not the cause of the payment, rather some other collateral event. It is of no moment that the collateral benefit may in effect compensate (or indeed doubly compensate) for a loss. A variety of terminology has been employed by the courts: the accident was the "occasion rather than the cause"[24] of the payment; the *"causa sine qua non"* rather than the *"causa causans"*[25] of the payment; the payment was *"res inter alios acta"* or "completely collateral;"[26] the payment was just "too remote."[27] Although this rationale

---

20 Consultation Paper No. 147, *Damages for Personal Injury: Collateral Benefits*, (1997) paras. 4.13-4.14.

21 *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990), discussed by D Harris, *Evaluating the Goals of Personal Injury Law: Some Empirical Evidence* in ESSAYS FOR PATRICK ATIYAH (1991). The Law Commission comment that the fact that this survey was carried out on "presumably one of the most deterrable groups of potential tortfeasors may be significant."

22 *Ibid.* at p. 301.

23 CP No. 147 *op. cit.* fn.20 at para.4.14.

24 Menzies J in *National Insurance Co. of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at p.580.

25 Cohen LJ in *Payne v Railway Executive* [1952] 1 KB 26 at p.36.

26 Pearson LJ in *Parsons v BNM Laboratories* [1964] 1 QB 95 at p.141.

was one of the first to be used by the courts in justifying the non-deductibility of benefits, such as insurance payments,[28] it has been largely discredited in recent times. Cooper notes that even prior to *Parry* the old causal arguments had already been much criticised.[29] In *Parry v Cleaver* all of the Law Lords, with the exception of Lord Pearson, rejected this approach.[30]

3.18 The existence of a causal link between the accident and the receipt of the collateral payment is however relevant to whether account is to be taken of the benefit in the assessment of damages. It is necessary that some causal link must exist for the benefit to be a collateral benefit within the meaning of the term, i.e. there must be factual causation. For example, should the plaintiff win the lottery after sustaining an injury through the tortious action of the defendant, there is obviously no factual causation between the two occurrences thus the question of deduction does not arise.[31] This is clearly stated in the Irish legislation whereby only those payments which arise 'in consequence of an injury' fall to be considered.[32]

3.19 Thus, however strong the causation arguments may be, remoteness in the sense of forseeability is not at issue, i.e. legal causation is of no assistance in determining the deductibility of a collateral benefit. Lord Reid made this point clear in *Parry* where he said:

> "Remoteness from the defendant's point of view is a familiar conception in connection with damages. He pays damages for loss of a kind which he might have foreseen but not for loss of a kind which was not foreseeable by him. But here we are not dealing with that kind of remoteness. No one has ever suggested that the defendant gets the benefit of receipts by the plaintiff after his accident if they are of a kind which he could have foreseen, but not if they are of a kind which he could not have foreseen, or vice versa."[33]

---

27 Lord Pearson in *Parry v Cleaver* [1969] AC 1 at p.50; see Lord Pearson's discussion of the authorities for this rationale pp.48 *et seq*. Also the comments of Andrews LJ in *Redpath v Belfast and County Down Railway* [1947] NI 167, 175.

28 The cause of the payment is considered to be the contract of insurance rather than the accident: see paras. 4.02-4.08.

29 K D Cooper, *A Collateral Benefits Principle*, (1971) 49 Can B Rev 501 at p.503. He cites Ganz, *Mitigation of Damages by Damages Received*, (1962) 25 MLR 559 and McGregor, *op. cit.* fn. 3.

30 [1970] AC 1. "... I think that the explanation that this is too remote is artificial and unreal" per Lord Reid at p.14; Lord Pearce at p.34 said "Strict causation seems to provide no satisfactory line of demarcation." See also the judgments of Lord Wilberforce at pp. 40-43 and Lord Morris at pp. 30-31.

31 Lewis, *op. cit.* fn.1 at p.20 comments: "Cause in fact, therefore, is relevant in determining whether the necessary conditions are present for there to be further consideration of whether benefits would be deducted from tort damages." That consideration is dependent upon the policy solution adopted.

32 See chapter 7.

33 *Parry v Cleaver* [1970] AC 1 at p.15.

3.20 Furthermore, Atiyah has commented that "the attempt to answer the legal or policy question in causal terms is clearly doomed to failure."[34] The distinction between *causa sine qua non* and *causa causans* does not rest on a logical basis and Ogus argues that it is so vague as to hardly justify the different treatment afforded to sick-pay and pensions.[35] Finally, McGregor is of the opinion that resort to considerations of causation conceals what are basically policy decisions.[36]

3 The 'Source of the Benefit' Theory of Non-Deductibility

3.21 The essence of this rationale is that as the plaintiff has either financed, or earned, the collateral payment, he should not be deprived of the fruits of his own thrift and foresight. Furthermore, it could be argued that the plaintiff had a reasonable expectation of receiving the collateral payment in addition to his damages. Ogus has commented that this is the "most popular" justification advanced by the courts for ignoring collateral benefits and, traditionally, this reasoning was employed in cases concerning the receipt of payments under an insurance policy for which the plaintiff had paid the premiums, or where his employer has paid the premiums in lieu of a higher wage. [37] This reasoning has also been extended by the House of Lords to apply to pension schemes; an analogy was drawn in *Parry v Cleaver*[38] between insurance and pensions in order to justify the non-deduction of the latter from the plaintiff's damages.[39]

3.22 The theory can however, be criticised. First, it is incapable of being applied to other types of collateral benefit. For example, it provides no rationale for the non-deduction of charitable payments received from a third party.[40]

3.23 Moreover, the argument may lose much of its force when one looks for the existence of thrift on the part of the plaintiff only to find this element lacking.

---

34 Patrick Atiyah, *Collateral Benefits Again*, (1969) 32 MLR 397 at p.401.

35 Ogus, *op. cit.* fn.2 at p.225 *et seq.*

36 McGregor, *op. cit.* fn.3 at p.632. Also, Lewis *op. cit.* fn.1 at p.18 has written that there is no inherent meaning in the word "collateral" to enable it to be used as a litmus paper test to solve the problem.

37 Ogus, *op. cit.* fn2 at p.226. Evidence of this reasoning can be found in s.2(1) of the *Law Reform (Personal Injuries) Act, 1948*: see para.4.43 *infra.*

38 [1970] AC 1

39 See paras.4.17 – 4.27

40 Ogus, *op. cit.* fn.2. Although the comment of Lord Wilberforce in *Parry v Cleaver* [1970] AC 1at p.42 may offer some explanation:

> "Moreover, I regret that I cannot agree that it is easy to reason from one type of benefit to another. One cannot argue from non-deductibility of gifts to non-deductibility of the proceeds of insurance, nor from the non-deductibility of insurance to the non-deductibility of pensions."

- The premiums for the policy under which the plaintiff receives the collateral payment may have been financed by a third party. Lewis gives the example of employers arranging medical or disablement insurance for their employees. However, in such a case the employee may argue that he has received the insurance protection in lieu of a higher wage, and has therefore 'paid for' the premiums indirectly through his work – although Lewis considers this to be a weaker justification than if he had actually paid the premiums himself.[41]

- Participation in the insurance scheme may have been compulsory for the plaintiff. Here Lewis gives the example of a plaintiff taking out compulsory accident insurance as part of a holiday package – any payments that he may receive thereunder pursuant to an accident could hardly be said to be the result of prudent planning on his part. However, as against this it could be argued that the plaintiff had nevertheless paid the insurance premium and, therefore, should not be deprived of his own investment. Indeed, this seems to be implied from the decision in *Parry*.

- The Law Commission of England and Wales have commented that the purchase of insurance does not necessarily indicate thrift on the part of the plaintiff. Rather, prudence would dictate the contrary if the policy did not represent value for money. [42]

3.24 Furthermore, Lewis contends that the foresight element of this rationale may also be lacking in certain cases. Although the motive for purchasing the insurance will be the desirability of protection in the event of a contingency occurring, the plaintiff would not have been gambling on the prospect of double-recovery should the accident also be the result of a tort.[43]

3.25 Ogus[44] argues that if payments received under pension schemes are not deductible, as under *Parry*, then why should wages and sick-pay not be similarly ignored as the same argument can be applied to them – the employee earns them through his work just as with a contributory or non-contributory pension.

3.26 McGregor argues that this rationale cannot justify the non-deduction of payments under an accident insurance policy.[45] In the case of property insurance it has never been sustained: any payment which a plaintiff receives is solely due to his thrift and foresight, yet the insured is always held to an indemnity and no more. Lewis adds to this argument the fact that the receipt of insurance monies can affect the entitlement of the plaintiff to welfare benefits and payments under another contract of insurance.

---

41 Lewis, *op. cit.* fn.1 at p.22

42 CP No. 147, *op. cit.* fn.20 at para.4.42.

43 See also McGregor, *op. cit.* fn.3 at p.636.

44 Ogus, *op. cit.* fn.2 at p.227.

45 McGregor, *op. cit.* fn.3 at p.635. He observes that while the thrift and foresight argument is strong with regard to this type of insurance "it is still not a good enough reason for over compensating the plaintiff and flying in the face of the cardinal principle of damages."

Therefore, why should the receipt of such a collateral benefit not affect the plaintiff's 'right' to tort damages? McGregor further points out that even if the insurance payment is deducted, the plaintiff's thrift and foresight shall not have been in vain:

- the insurance company shall have been on risk at all times;
- the insurance policy may cover numerous accidents not caused by a tort;
- the tortfeasor may be insolvent, uninsured and therefore unable to meet an award of damages;
- the plaintiff may prefer to simply keep the insurance payment rather than to proceed with all the trouble and expense that is entailed with litigation against the tortfeasor;
- regardless of whether a tort action is instituted, the immediate payment of insurance monies can be used to meet medical and other expenses incurred following the accident. [46]

3.27 Atiyah states that what is at issue in this context is the quantum of damages and not the plaintiff's right to the collateral benefit. The question to be determined by the court is how much more tort damages should the plaintiff receive in addition to the collateral benefit? For one to argue that the plaintiff has "paid for" his insurance monies is irrelevant when it is not the quantum of the insurance monies which are at issue. Indeed, it might be more correct to ask whether the plaintiff has "paid for" his right to commence an action in tort, to which Atiyah says there can be only one answer. [47]

4 The 'Purpose of the Benefit' Theory of Non-Deductibility

3.28 According to this theory, the benefit conferred on the plaintiff by a third party is to be deducted unless its purpose, express or implied, is to provide the plaintiff with assistance in addition to any claim which he may have against the tortfeasor. The High Court of Australia in *National Insurance Company of New Zealand v Espagne*[48] has held that the intention behind the benefit is of paramount importance in determining whether benefits should be deducted. Windeyer J explained that when assessing damages for personal injuries, the benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss where: (a) they emanate from a pre-accident contract and were

---

[46] *Ibid.* See also Atiyah, *op. cit.* fn.34 at p.403 who observes that one might as well argue that if the plaintiff was never injured at all he would have wasted his premiums. Moreover, Lewis writes that "...to consider these rights as worthless only because the insurance payments are later set off against the damages award is to fail to appreciate why such contracts are taken out in the first place" *op. cit.* fn.1 at p.24.

[47] *Ibid.*

[48] (1961) 105 CLR 569

intended to be provided regardless of any rights of action the plaintiff might have; or (b) they are the product of benevolence again intended to be enjoyed in addition to damages. The test to apply in the determination was stated as follows:

> "In both cases the decisive consideration is not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause."[49]

3.29 Hence, it has often been employed by the courts to justify the disregarding of charitable donations received by a plaintiff in the assessment of his damages. On the grounds that the donor intended to convey his sympathy and condolences to the plaintiff rather than to compensate him for any actual pecuniary loss.

3.30 Once again, however, this rationale may be criticised. First, it may be hard to ascertain the exact intention of the collateral benefit provider.[50] Indeed, when the court invokes this justification, it is often hard to resist the conclusion that it is a cloak for unstated policy considerations. Second, and most importantly, it can be argued that it is not the intention behind the benefit that is relevant, but rather its effect. After all, what is at issue is the receipt by the plaintiff of monies which have the effect of compensating the pecuniary loss he has sustained. Clearly, in such a case, the intention of the payer is irrelevant.[51] However, as against this criticism it can be argued that the effect of a benefit may be unascertainable as the plaintiff is unlikely to earmark the moneys received from one particular source and spend them specifically on relieving a particular loss. Furthermore, it should be remembered that the court in assessing damages does so according to particular heads which it intends to be compensated.

3.31 McGregor also criticises this justification on the ground that, although the third party did intend to come to the aid of the plaintiff, it can hardly be asserted that he intended him to receive double compensation. His arguments as to the benefits accruing from an insurance policy notwithstanding its deduction set out at paragraph 3.26 *supra* are also apposite here.

Conclusion

3.32 In order to evaluate further the cogency and coherency of the above arguments for, or theories of, non-deductibility, it is necessary to move from the level

---

49 *Ibid.* at pp.599-600. See also para.6.19 *infra.* Ogus describes this theory as the most convincing explanation of the rules exempting certain benefits. *Op. cit.* fn.2 at p.228.

50 In *Hodgson v Trapp* [1989] AC 807 at p.822 Lord Bridge said he found "...the concept of 'the intent of the person conferring the benefit' a somewhat elusive one."

51 In any event, it could be argued that, by donating money to the charitable cause, the payer was intending to ease his own conscience, thus, illustrating the irrelevance of the concept of intention in this context.

of theory to the realm of practice by looking at how they have been applied by the courts and to what effect. Thus, the various items that are considered non-deductible by the courts on account of the above rationales (or a mix of the same) are examined in detail in the next chapter. There then follows in chapter 5 a brief overview of the provisional recommendations of the Law Commission of England and Wales which propose a return to the first principle of deduction and a consequent narrowing of the availability of non-deductibility under English law.

CHAPTER 4 A CLOSER LOOK AT THE DIFFERENT COLLATERAL BENEFITS UNDER ENGLISH LAW

4.01 In the previous chapter we looked at four common rationales used by the English courts to justify the non-deductibility of certain collateral benefits. In this chapter we take a closer look at how the various collateral benefits are in fact treated by the English courts. In particular we consider the following:

- the treatment of the two traditional categories of non-deductibility – namely, insurance payments and charitable payments;
- the treatment of other collateral benefits by analogy with insurance and charity;
- the treatment of social security benefits.

The Traditional Categories of Non-Deductibility

1 Insurance[1]

4.02 In *Bradburn v Great Western Railway Company*[2] it was held that payments under an accident insurance policy were to be ignored in the assessment of damages for personal injury. Pigott B said:

> "The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it."[3]

4.03 In *Shearman v Folland*[4] Asquith LJ commented that the reason for the decision in Bradburn was:

---

1 See also paras.2.03-2.09 *supra.*

2 (1874) LR 10 Exch 1. Lord Wilberforce commented in *Parry v Cleaver* [1970] AC 1 at p.38 that this decision provided a "foretaste of complications to come..."

3 *Ibid.* at p.3.

4 [1950] 1 All ER 976

> "If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself."[5]

4.04 The rationale for the decision was, therefore, two-fold: First, although the plaintiff may be doubly compensated, he had paid the insurance premiums himself and the defendant should not reap the rewards of the plaintiff's thrift and foresight, i.e the source of the benefit justification. Second, the cause of the payment was not the accident but the contract with the insurance company, i.e. the causation argument.[6] This decision has been upheld by the House of Lords in a number of subsequent cases[7] and McGregor has commented that "[t]he matter is clearly now incontrovertible."[8]

4.05 The law is not, however, clear where the plaintiff has not actually paid the insurance premiums himself. In *Parry v Cleaver* Lord Reid stated the "real and substantial" reason for not deducting the insurance payments in *Bradburn* as follows:

> "that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he had prudently spent on premiums and the benefit from it should inure to the benefit of the tortfeasor."

4.06 However, Lord Reid considered this rule to be of a general nature, applicable even where the plaintiff had not paid the premiums. His Lordship gave the following example to illustrate this:

> "... where a man and his employer agree that he shall have a wage of £20 per week to take home... and that between them they will put aside £4 per week... it cannot matter whether the man's nominal wage is £21 per week so that, of the £4, £1 comes from his 'wage' and £3 comes from the employer, or the man's nominal 'wage' is £23 per week, so that, of the £4, £3 comes from his wage.... His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought to be regarded as having earned that sum per week."[9]

---

5 *Ibid.* at p.978.

6 In *Deducting Collateral Benefits From Damages: Principle and Policy,* 18 vol.1 Legal Studies 15 at p.19 Lewis criticises the application of the causation argument to this issue on the ground that it is the statement of a conclusion rather than a rational argument made in support of it.

7 For example: *Parry v Cleaver* [1970] AC 1, not only by the majority of the House relying on it by analogy at p.38, but also by the minority who distinguished it at pp.31 and 49; *Hussain v New Taplow Paper Mills* [1988] AC 514 at p.527 *per* Lord Bridge; *Hodgson v Trapp* [1989] AC 807; *Smoker v London Fire Authority* [1991] 2 AC 502, 539B-F *per* Lord Templeman.

8 HARVEY MCGREGOR, MCGREGOR ON DAMAGES, (16th ed., 1997) at para.1617.

9 *Op. cit.* fn.7 at p.16.

This broad interpretation of *Bradburn* has been followed in several decisions. In *Cunningham v Harrison*[10] Lord Denning MR in the Court of Appeal said:

> "It is an established principle of our law that the damages awarded to an injured person are not to be reduced by reason of any insurance moneys received by the injured person."[11]

4.07 In *Cunningham*, Lord Denning held that a voluntary *ex gratia* pension paid and payable by the employer to the plaintiff was not to be deducted from the award of damages, i.e. the fact that the plaintiff had not contributed to the pension was in his view irrelevant. [12]

4.08 On the other hand, however, there is considerable authority which suggests the contrary, i.e. that in order for a payment under a policy of insurance to be deducted, the plaintiff must have paid the contributions himself. In *Hussain v New Taplow Paper Mills Ltd*[13] Lord Bridge referred to the well established exceptions of insurance and benevolent payments.[14]

4.09 An indication therefore as to why the law is unclear in this area is gleaned from the use of different rationales by the Law Lords to justify the non-deduction of insurance payments. Those who advocate a general rule of non-deduction, irrespective of whether or not the plaintiff has actually paid the premiums himself, justify it on the broader punitive consideration that the benefit from the collateral source should not enure to the defendant. However, proponents of the 'source of the benefit' argument, such as Lord Bridge, would only permit the non-deduction of insurance payments on the narrow ground that the plaintiff should reap the fruits of his own foresight and thrift, which thus necessitates the latter having paid the premiums himself.

2 Charitable Payments

4.10 Following the decision of *Redpath v Belfast and County Down Railway*[15] charitable payments are deemed non-deductible in the assessment of damages. The salient facts of the case were that following a railway disaster a public fund was set up to provide assistance to the victims and dependants of the deceased. Andrews

---

10 [1973] 3 All ER 463

11 *Ibid.* at p.468.

12 See also the judgment of Lord Templeman in *Smoker v LFCDA* [1991] 2 All ER 449.

13 [1988] AC 514 at p.524. See also para.2.06 *supra.*

14 Again in *Hodgson v Trapp* [1989] AC 807 at p.820 he refers to the "classic heads of exception." See also *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 WLR 963; and *Page v Sheerness Steel PLC* [1997] 1 WLR 652.

15 [1947] NI 167.

LJ's rationale for not deducting these charitable donations from the plaintiff's damages was three-fold.

- First, he stated that the generosity of the subscribers acted as a *novus actus interveniens* and it was this benevolence which led to the payment and not the tort.[16] This reasoning reflects the causation theory.

- Moreover, he said that the payments were made "purely as a compassionate allowance to mitigate distress" and there was "no evidence to show that they were paid solely in respect of or to satisfy *pro tanto*" the plaintiff's loss of earnings. Consideration of the purpose of the benefit and the intentions of the providers of the benevolence was therefore relevant.

- Finally, Andrews LJ stated that it would be startling to subscribers if they discovered that their donations were really made for the benefit of the wrongdoer and felt that the inevitable consequence of deduction in such a case would be the drying up of the "springs of private charity." Therefore, both the punitive effect of the award of damages and the public policy in encouraging such benevolence on the part of the general public were taken into consideration. Andrews LJ concluded that deduction of charitable payments in such circumstances would be contrary to "common sense and natural justice."[17]

4.11 Gratuitous benefits in kind have also been held to be non-deductible. In *Liffen v Watson*[18] the plaintiff, injured by the negligence of the defendant, suffered pecuniary loss in the form of wages and board and lodgings which had been provided by her employer. The Court of Appeal held that damages ought to include a sum in respect of the loss of board and lodgings regardless of the fact that the plaintiff had, since the accident, been in receipt of same from her father. The Law Commission have commented that although this case was decided on the basis that the defendant should be liable for all the damage which naturally flows from his wrongdoing, irrespective of whether a collateral source has fully compensated the damage, it is consistent with the common law rule that charitable payments should be ignored in the assessment of damages.[19]

4.12 *Ex gratia* payments from employers have similarly been ignored by the courts in assessing the plaintiff's damages. In *Cunningham v Harrison*[20] Lord Denning in the Court of Appeal said:

---

16 *Ibid.* at p.172. In his discussion of the authorities at p.175 he noted that in the present case there could have been no expectation at the time of the accident as the fund only came into existence after the disaster.

17 *Ibid.* at p. 170.

18 [1940] 1 KB 556.

19 Law Commission Consultation Paper No. 147, *Damages for Personal Injury: Collateral Benefits*, para. 2.11.

20 [1973] 3 All ER 463.

> "...a voluntary *ex gratia* pension paid and payable by the employer is not to be taken into account. It is an uncovenanted benefit coming to the plaintiff over and above the compensation recoverable at law."[21]

It seems that Lord Denning based his decision on considerations of policy as he said that:

> "I can find no sound principle for saying what matters should or should not be taken into account in reduction of damages. As each new point comes up, it is decided by the courts according to what is considered the best policy to adopt; and thenceforward it governs subsequent cases."[22]

4.13 The law is not clear, however, where the provider of the charitable payment is the defendant tortfeasor. In contrast to the cases outlined in the preceding paragraphs, the Court of Appeal in *Hussain v New Taplow Paper Mills Ltd*[23] held that public policy dictated that employer-defendants should be encouraged to make such *ex gratia* payments and deduction from the award of damages would serve to promote this practice.[24]

Benefits other than the Traditional Non-Deductible Exceptions

1 Pensions

4.14 McGregor has commented that between insurance monies which are non-deductible and salaries which are deductible, fall pensions.[25] This area of the law can be divided into three sections:

a) deduction of a disability pension from damages for loss of earnings

b) deduction of a retirement pension from damages for loss of earnings

c) deduction of either a disability or a retirement pension from damages for loss of retirement pension, i.e. due to incapacity, an injured plaintiff may receive a pension earlier than planned with the result that by reason of paying less contributions the retirement pension he eventually receives is diminished.

---

21 *Ibid.* at p.468. See also *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514; *Hodgson v Trapp* [1989] AC 807 at p.819 *et seq.* Note that this is in contrast to contractual wages and sick pay which are deducted from damages: see paras.4.32-4.36 *infra.*

22 *Ibid.*

23 [1987] 1 All ER 417. This decision of the Court of Appeal was affirmed in the House of Lords on different grounds.

24 The Court of Appeal decision seems to have been followed in *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 WLR 963. The English Law Commission, however, state that this case is a difficult one and conclude that the law in this area is not clear. CP No. 147 *op. cit.* fn.19 at para.2.14.

25 McGregor, *op. cit.*, fn.8 at para.1621.

a) Deduction of a Disability Pension from Damages for Loss of Earnings

4.15 Until the House of Lords considered the matter in *Parry v Cleaver*[26] this area of English Law was in a state of confusion following a series of earlier Court of Appeal decisions.

4.16 In *Payne v Railway Executive*[27] the Court of Appeal held that the plaintiff's disability pension was not deductible. Two different reasonings, however, were expounded by the Court. Cohen LJ stated that the pension was indistinguishable from insurance monies paid to the victim of an injury as it was funded by the plaintiff's work, i.e. the plaintiff received the pension in lieu of a higher wage. Although Singleton LJ was prepared to adopt this reasoning, he preferred to ground his decision on the fact that the pension could cease at some stage in the future. Hence, the uncertain nature of the pension rendered it non-deductible. The third judge, Birkett LJ, said that he agreed with both judgments.

4.17 This uncertainty as regards the *ratio decidendi* of *Payne* permitted the Court of Appeal in *Browning v War Office*[28] to disregard it as a binding precedent and hold a disability pension deductible.[29] Diplock LJ was of the opinion that the ratio of *Payne* was to be found in Cohen LJ's judgment but as it was inconsistent with the subsequent decision of the House of Lords in *British Transport Commission v Gourley*[30] he considered it was not binding on the Court. Lord Denning, however, favoured the reasoning of Singleton LJ and consequently was able to distinguish it on the basis that the disability pension in *Browning* was an entitlement under United States legislation and could not be reduced (except within certain limits) or stopped under any circumstances. Accordingly, following *Browning*, voluntary disability pensions were non-deductible, whereas disability pensions receivable as of right were deductible.[31]

4.18 However, pursuant to the decision of the House of Lords in *Parry v Cleaver*,[32] a policy of non-deduction was revived. The plaintiff policeman had been injured at work due to the defendant's negligence. He was subsequently discharged from work, received a police ill-health pension and commenced other employment at a lower wage. The majority of the House, by drawing an analogy to payments under a private insurance policy, were able to bring the pension within this

---

26 [1970] AC 1

27 [1952] 1 KB 26.

28 [1962] 3 All ER 1089

29 See generally Gerald Dworkin, *Damages, Collateral Benefits and Precedent*, (1963) 26 MLR 315 for an analysis of this case.

30 [1956] AC 185, where it had been held that damages in the law of tort are compensatory rather than punitive and, consequently, an award of damages should not place the plaintiff in a better position than before the accident, i.e. the House discredited any form of overcompensation.

31 Donovan LJ dissented. He felt that the *ratio* in Payne covered the case and saw no reason to treat pensions differently from insurance payments.

32 [1970] AC 1

established exception thereby rendering it non-deductible.[33] Thus the reasoning of the Court of Appeal in *Payne* was favoured over the decision in *Browning*.[34]

4.19 Lord Reid, after expressly recognising that charitable payments and private insurance payments were the traditional classes of benefit ignored in the assessment of damages, gave three reasons for holding that a pension is equivalent to a form of insurance. First, in the case of a contributory pension, where an employer agrees to pay an employee a certain sum each week to obtain his services, he ought to be regarded as having earned that sum. Any money paid out of this sum to the pension fund constitutes delayed remuneration for current work, i.e. payments under a pension are wages for work already done. Second, under a pension, the employee does not necessarily receive the accumulated sum. Rather, like other forms of insurance, what he gets back depends on how events turn out, i.e. he may never suffer an injury or may die before normal retirement age and, consequently, never reap the rewards of his investment. Third, a pension is intrinsically different from a wage which is "a reward for contemporaneous work." A pension, on the other hand, is "the fruit, through insurance, of all the money which was set aside in the past in respect of past work".[35] Lord Reid also found support for his reasoning in the English *Fatal Accident Acts*. He considered that if public policy as interpreted by Parliament required all pensions to be disregarded in cases of fatal accidents, then they could not possibly be deducted in common law actions for non-fatal injury.

4.20 Lord Wilberforce reasoned that as the plaintiff's disability pension was payable even if he were to secure other employment and irrespective of his income from such employment, it could not be designed to compensate him for loss of earnings. [36]

4.21 Lord Pearce felt that one must start with the firm basis that *Bradburn v Great Western Railway Co*[37] was correctly decided and that benefits from a private insurance policy received by the plaintiff are not to be taken into account. Consequently, he considered that there was no justification to except from this principle pensions which are derived from a man's contract with his employer.

---

33 Lord Reid, Lord Wilberforce and Lord Pearce (Lord Morris and Lord Pearson dissented).

34 They considered *Browning* to have been decided under the pressure of some "hard figures" (*per* Lord Wilberforce). Lord Reid commented that in *Browning* where "the sums involved were very large the law took a new turn." *op. cit.* fn. 32 at p.18. However, the majority disagreed with the reasoning of Singleton LJ on the basis that to ignore voluntary pensions whilst deducting those receivable as of right is illogical. Lord Reid pointed out that the plaintiff in *Payne* would, in any event, have received the voluntary pension between the date of the injury and the date of the trial.

35 *Op. cit.* fn.32 at p.16.

36 However, the income from this other employment would be taken into consideration in assessing the extent of his loss of earnings.

37 (1874) LR 10 Exch 1.

"These, whether contributory or non-contributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums."[38]

4.22 As with Lord Wilberforce, Lord Pearce considered that the nature of the policeman's pension supported this reasoning, i.e. that it was not intended to be a substitute for the capacity to earn. Lord Pearce concluded that the plaintiff's pension was, therefore, a personal benefit in addition to anything he may be able to earn by way of wages.

4.23 Finally, Lord Pearce echoed the reasoning of Lord Reid when he considered that the provisions of the *Fatal Accidents Act, 1959* by implication supported his decision. He said:

"...Parliament excluded the taking into account of pensions because it thought that the principle of exclusion laid down in common law cases was fairer and more in accordance with public policy and that, therefore, cases under Lord Campbell's Act should be brought into line with it."[39]

4.24 Lord Morris dissented. He emphasised that in calculating monetary loss an injured person should receive the amount of money required to put him in the same position as he would have been in had he not suffered the injuries.[40] He commented as follows:

"As money is the reward of work the relevant comparison of like with like involves taking, on the one hand, the money that the appellant would in respect of his work have received had he remained in the police force and, on the other hand, the money that he has received and will receive in respect of his work in the period since he left the police force."[41]

After setting out the payments at issue in detail, he continued:

"Where what is being ascertained is the amount of a loss which has been caused, this means that the net loss is to be ascertained. If, instead of a monetary income called pay, there is substituted a monetary income called pension, then normally and unless there is some statutory provision the amount of the loss is the difference between the two figures."[42]

---

38 *Op. cit.* fn.32 at p.37.

39 *Ibid.* at p.38.

40 He relied on the compensatory nature of damages as expressed by the House of Lords in *British Transport Commission v Gourley* [1956] AC 185.

41 *Op. cit.* fn.32 at p.23.

42 *Ibid.* at pp.26-27.

4.25 Lord Pearson also dissented on the basis that the pension was not "too remote" to be ignored in the assessment of damages. He considered the concept of causation to be an important factor in determining whether an item is too remote or not, although he did accept that aspects of fairness and public policy also have a bearing.

4.26 It should be noted that contributions to the pension scheme from the employee's pay are not a requirement for non-deductibility. The House made this clear in *Parry* where Lord Pearce spoke of how it "would be unreal" to draw a dividing line between contributory and non-contributory pensions.[43]

4.27 The principle of non-deductibility of disability pensions in the assessment of damages has since been affirmed by the House of Lords in *Smoker v London Fire and Civil Defence Authority.*[44] Lord Templeman however, extended this principle to situations where the employer was also the tortfeasor, despite the *dicta* of Lord Pearce in *Parry* to the contrary.[45] Lord Templeman considered this triple position of the defendant as employer, tortfeasor and insurer to be irrelevant as the plaintiff had still paid for the pension himself.

4.28 In light of this case-law, the Law Commission of England and Wales has concluded that, under English law, a disablement pension is ignored in the assessment of damages for loss of earnings, irrespective of whether it is paid by the tortfeasor or a third party. [46]

b) Deduction of a Retirement Pension from Damages for Loss of Earnings

4.29 Following *Hewson v Downs*[47]and *Hopkins v Norcos PLC*[48] retirement pensions are not deductible under English law from a plaintiff's damages for loss of

---

43 *Ibid.* at p.36. Lord Pearce discredited the "tempting" approach to pensions adopted in the Saskatchewan case of *Smith v Canadian Pacific Railway Company* (1964) 41 DLR (2d) 249 where the court deducted the amount of the pension attributable to the employer's contribution while ignoring that which was attributable to the employee's own contributions. His Lordship commented that "...the employer's contributions are earned by the employee's service just as much as those which the employee himself contributes, and I see no justification for a difference in principle between the two contributions."

44 [1991] 2 All ER 449 at p.458. Lord Templeman said: "I can find nothing in the authorities which casts doubt over the effect or logic of this House in *Parry v Cleaver.*"

45 *Parry v Cleaver* [1970] AC 1 at p.37:

> "Throughout the whole subject as there set out, run equitable considerations. It seems to me possible that on these grounds there might be some difference of approach where it is the employer himself who is the defendant tortfeasor, and the pension rights in question come from an insurance arrangement which he himself has made with the plaintiff as his employee."

46 CP No.147, *op. cit.* fn.19 at para.2.40.

47 [1970] 1 QB 73.

48 [1994] ICR 11.

earnings. In *Hopkins*, Staughton LJ cited the decisions in *Parry v Cleaver*[49] and *Smoker v LFCDA*[50] as authority for this principle. The Law Commission have commented that it is implicit from Staughton LJ's judgment that he considered that a retirement pension should be treated in the same way as a disablement pension, i.e. the plaintiff had paid for the pension himself and it should not, therefore, be deducted from his award of damages.[51]

c) Deduction of Disability or Retirement Pensions from Damages for Loss of a Retirement Pension

4.30 In *Parry v Cleaver*[52] the majority of the House of Lords held that the disability pension should be deducted from the damages awarded for the plaintiff's lost retirement pension. The rationale expounded by the Law Lords was that the pension could not be deducted from damages for loss of earnings as this was not to compare like with like; however, the disability pension could be deducted from the plaintiff's damages for loss of retirement pension as this was to compare like with like. Lord Reid explained as follows:

> "...in the earlier period we are not comparing like with like. He lost wages but gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind."[53]

4.31 The issue came to be considered again in *Longden v British Coal Corporation*.[54] The plaintiff had received a lump sum and annual incapacity pension as a result of an accident in the defendants' employment. The defendants contended that in assessing loss of pension rights the Court ought to take into account the lump sum and all the annual payments received and receivable in the future. This argument failed at both trial and the Court of Appeal. In the House of Lords it was agreed that after normal retirement age his claim for loss of pension could be no greater than his net loss of pension arrived at after setting off the incapacity pension against the normal retirement pension he would have received. The issue to be decided was whether in calculating the net loss the total of the pension benefits received and receivable were to be taken into account.

---

49 [1970] AC 1

50 [1991] 2 All ER 449

51 CP No 147, *op. cit.* fn.19 at para.2.43

52 [1970] AC 1

53 *Ibid.* at pp.20-21.

54 [1998] 1 All ER 289

4.32 Lord Hope reiterated the general compensatory function of damages and quoted the dicta of Lord Bridge in *Hussain v New Taplow Paper Mills*[55] and *Hodgson v Trapp*[56] to that effect. In relation to *Parry v Cleaver* he found that the particular issue at hand had not been argued in that case and he therefore went back to the nature of the loss being claimed in order to decide the matter. His analysis of this is worth quoting as it sheds much needed light on a complex area:

> "Although the incapacity pension is not an indemnity against the disabled man's wage loss, its purpose is to provide him with a source of income which he can use to support himself and his family during the period of his disability. The same may be said of the retirement pension in regard to the period after his normal retirement age. What the plaintiff is seeking in his claim for pension loss is a sum of money to recompense him for the loss of the retirement pension which would otherwise have been available to enable him to support himself and his family after his normal retirement age. It is of no help to him to be told that the money to compensate him for this loss is already being paid to him and that it will continue to be paid to him during the period when he is unable to earn wages because of his disability. He cannot reasonably be expected to set aside the sums received as incapacity pension during this period in order to make good his loss of pension after his normal retirement age."[57]

4.33 Essentially, to take the pre- normal retirement age payments into account would extinguish compensation for this loss. It is also of note that his Lordship was of the opinion that it was irrelevant whether the pensions at issue were derived from the same scheme or not.

2 Sick Pay

4.34 Sick pay arises where an employer by virtue of the terms of a subsisting contract of employment with the plaintiff is obliged to pay the whole or part of the plaintiff's salary or wages of such employment during a period of incapacity due to illness or injury.[58] McGregor notes:

> "...it is fully accepted today that, where an injured plaintiff continues to be paid his wages by his employer as of right, or part of his wages, and whether under the name of sick pay or otherwise, these sums fall to be deducted from the damages for loss of earnings."[59]

---

55 [1988] AC 514

56 [1989] AC 807

57 *Op. cit.* fn.54 at p.300.

58 JOHN WHITE, THE IRISH LAW OF DAMAGES, (Butterworths, 1989), para.4.10.09.

59 MCGREGOR ON DAMAGES, 16th ed. (1997), para.1619.

4.35 This proposition is borne out in the English case-law. In *Turner v Ministry of Defence*[60] Lord Denning clearly endorsed this principle and, more recently, the issue was considered by the House of Lords in *Hussain v New Taplow Paper Mills*.[61] In that case the defendant-employers had insured against their liability to pay sick pay to their employees after thirteen weeks of incapacitation. Lord Bridge found these payments to be indistinguishable from those made in the first thirteen weeks and held that the payments were to be deducted on the following basis:

> "...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."[62]

4.36 The plaintiff argued that the payments he received from his employer should be ignored as they were insured against by his employer's scheme and therefore should come within the "classic head of exception" of insurance payments and were non-deductible. This submission was premised on the argument that the plaintiff had indirectly paid for the premiums by taking a lower wage. This is an extension of the 'source of the benefit' argument outlined above and is also called the social wage theory.[63] Lord Bridge, however, rejected this argument on the ground that there was no evidence to suggest that the plaintiff's wage would have been higher if the insurance scheme did not exist.

4.37 *Hussain* was followed at both first instance and in the Court of Appeal in *Page v Sheerness Steel Plc*.[64] The plaintiff was entitled to half-pay for life under a sick pay insurance scheme taken out by the defendant-employers and contended that the payments fell within the insurance exception. Dyson J in the trial court rejected this argument holding that the facts were indistinguishable from *Hussain*. It was the benefits which were insured and not the plaintiff: the existence of the policy in fact made no difference to the nature of the payments. Furthermore he held that the plaintiff had made no contribution to the insurance premiums and thus an essential requirement of the insurance exception was lacking.

4.38 The difficulty which can arise in relation to the treatment of sick pay stems from the different forms which such pay can take, hence the frequent attempts to argue that payments are non-deductible by analogy with the insurance exception. This line of reasoning has enjoyed success in Canada.[65] The case law to date does

---

60 (1969) 113 SJ 585.

61 [1988] AC 514

62 *Ibid.* at p.530.

63 See generally paras.3.18-3.24 *supra*.

64 [1996] PIQR Q26 (first instance) and [1997] 1 WLR 652 (CA). Although the House of Lords, [1998] 3 All ER 481, reversed the decision of the Court of Appeal on different grounds, Lord Lloyd of Berwick (with whom the other Law Lords agreed) said that the trial judge was correct in deducting the payments received by the plaintiff. See p.500.

65 See paras.6.13-6.17 below.

not necessarily indicate how for example a lump sum insurance payment designed to cover incapacity during illness would be treated. In *McCamley v Cammell Laird Shipbuilders Ltd*[66] a lump sum payable to the injured plaintiff was not deductible. It was held to be a benevolent payment, although the means used to effect it were an insurance policy taken out by the defendant employers for the benefit of their employees. The Law Commission have commented that the position in relation to payments other than traditional sick pay may arguably be open to different treatment, but that to ignore sick pay in any form would be virtually irreconcilable with *Hussain* which as a House of Lords decision takes precedence.[67]

3 Redundancy Payments

4.39 An employee receives a redundancy payment on the termination of his employment. In order to qualify for such a payment, his employment must have ceased to exist and the statutory requirements must be satisfied. It can be argued that in practice redundancy payments fulfil a number of functions. They not only compensate for lost earnings consequent on losing a settled job, but are a reward for past services and compensation for the trauma and stress of being left without employment. However, in determining whether a redundancy payment is deductible from an award of damages obviously the function attributed to the payment is of the utmost relevance.

4.40 In *Wilson v National Coal Board*[68] the House of Lords held that a redundancy payment is not compensation for a loss of future earnings but rather for the loss of a settled job.[69] The fact that the payment is unaffected by a person immediately obtaining another job was considered pertinent. Accordingly, the House held that normally a redundancy payment should not be deducted from the plaintiff's damages for loss of earnings. In effect, a redundancy payment would not fall to be deducted at all as loss of a settled job would not be a usual head of damages in a personal injuries claim.[70] However, the law lords considered in the instant case, where it was common ground that if the accident for which the plaintiff was claiming damages had not occurred the plaintiff would not have been made redundant, the payment was deductible. Essentially the payment which in the ordinary course would not arise for consideration in the assessment of damages as it was not a collateral benefit implicitly became one as it was a direct consequence of the accident. In the absence of the application of considerations which justify exception from the general rule of deductibility, as with disability pensions and charitable payments, the redundancy payment fell to be deducted. Not only were

---

66 [1990] 1 WLR 963. See also *Cunningham v Harrision* [1973] 3 All ER 463.

67 Law Commission Consultation Paper 147, *Damages For Personal Injury: Collateral Benefits*, (1997) para.2.27.

68 [1981] SLT 67 (HL(SC)). See the comments of Lord Scarman at p. 73.

69 *Hindle v Percival Boats Ltd.* [1969] 1 WLR 174.

70 Unless the loss of a job was caused by the accident in which case the redundancy payment also arose on account of the accident and will fall to be considered.

there no policy reasons to justify non-deductibility, but the House found that public policy dictated that deduction was warranted; the reason being that to deduct in such circumstances would actually encourage employers to make redundancy payments to injured employees rather than just dismiss them on the grounds of ill-health. This policy is evidently only referable to situations where the employer is the defendant tortfeasor.

4.41 *Wilson* involved somewhat "peculiar and exceptional circumstances". In a later Court of Appeal decision in *Colledge v Bass Mitchells & Butlers Ltd*[71] the redundancy payment also fell to be deducted as it was found on the facts that the plaintiff would have been unlikely to have been made redundant but for the accident. Therefore, according to Sir Donaldson MR, it fell into the category of sums received as a result of the accident described by Lord Reid in *Parry v Cleaver.*[72] Sir Donaldson's judgment illustrates the difficulty in relating the function of redundancy payments to the issue of deductibility. If one considers the plaintiff suffered a head of damages described as "loss of a job" and the redundancy payment exclusively compensated for this, it would then follow that every workman who loses his job in consequence of an accident but is not made redundant should receive compensation for "loss of a job". This is not the case. Sir Donaldson concluded however that the only foreseeable instance where the payment would not be deductible would be where the plaintiff would have been made redundant regardless of the accident.[73]

4.42 In effect then, where a redundancy is caused by an accident it will be deductible from damages for loss of earnings, and therefore is implicitly deemed to compensate for this, notwithstanding that it may serve to compensate for other losses when it is not received as a consequence of an accident. This is not as inconsistent as it may first appear if one considers that a plaintiff made redundant due to an accident will be less likely to obtain another job or at least equivalent one, than someone who has simply been made redundant.

The Special Treatment Afforded to Social Security Benefits

1 Statute Law

4.43 In English law, the deductibility of most social security benefits is currently governed by statute. Following the report of the Monckton Committee in 1946, s.2(1) of the *Law Reform (Personal Injuries) Act, 1948* was enacted. This provided that half of certain social security benefits paid or likely to be paid in the five years from when the cause of action accrued should be deducted from damages for loss of earnings.[74] Other payments, which were not listed as deductible, fell to

---

[71] [1988] 1 All ER 536.

[72] [1970] AC 1 at p.13.

[73] [1988] 1 All ER 536 at p.540.

[74] This section was, in effect, a compromise, as the Monckton Committee had recommended that all social security payments, past and future, should be deducted. The proposition, however,

be considered by the common law with the possibility of either being ignored or deducted in full from the damages. This was the position of English law until 1989.[75] The enactment of the *Social Security Act, 1989* resulted in a fundamental change in the treatment of social security benefits paid after that date. The relevant provisions of this Act are now contained in the *Social Security Administration Act, 1992* and the *Social Security (Recovery of Benefits) Act, 1997* which made important changes to the former.

4.44 The 1992 Act provided for the same five year limit for the deduction of the benefits, but stated that the payments were to be deducted in full from the damages. In addition the value of the benefit paid to the plaintiff was to be reimbursed to the State by the tortfeasor. The application of this statutory scheme was subject to two limitations. First, in order to be deductible, the particular benefit had to be included in the list of "relevant benefits"[76] set out in paragraph 2(1) of the *Social Security (Recoupment) Regulations 1990.*[77] Second, the total benefits had to have a value in excess of £2,500.[78] The maximum period of deduction under the 1992 Act is five years, running from the date of accrual of the cause of the action. However, if damages are paid before the period has elapsed, then only those benefits actually paid before the granting of the award of damages shall be deducted.

4.45 *The Social Security (Recovery of Benefits) Act, 1997* repealed Part IV of the 1992 Act including the small payments limit and the stipulation that benefits be deducted from damages in general.[79] Under the 1997 Act damages for pain and suffering are ring-fenced and Schedule 2 lists the various heads of compensation and the types of benefits which may be deducted from them. The new list of benefits is much wider than that which existed under the 1948 statutory scheme.[80] This reflects the growth in the range of social security benefits now available to the victims of injury. However, the deductibility of any benefit not included as a "relevant benefit" still falls to be determined by the common law.[81]

---

encountered severe opposition from the trade unions and, consequently, this 'half-way house' was enacted.

75 Section 2(1) of the 1948 Act was amended by para.4 of Sch.4 to the *Social Security Pensions Act, 1975* and by para.1 of Sch.4 to the *Health and Social Security Act, 1984.*

76 Section 81(2) of the *Social Security Administration Act, 1992.*

77 SI 1990 No 322.

78 Section 2 (1) of the *Law Reform (Personal Injuries) Act, 1948* was amended to apply to awards of less than £2,500. However McGregor commented that the minimum amount was apparently influencing settlements as parties sought to avoid any recoupment by the State. *op. cit.* fn.63 at para.1650. The small payments limit was subsequently abolished by the *Social Security (Recovery of Benefits) Act, 1997.*

79 The Act does however state that a small payments limit can be provided for by regulation, but this has not yet happened.

80 SI 2205/1997 and 2237/1997 set out further details in relation to the operation of the 1997 Act. For further information see also the legal update in the Law Society Gazette vol 94 No 29 p.30 and vol. 94 No. 42 p.33.

81 See paras. 4.46-4.70 *infra.*

2 *Common Law*

4.46 As mentioned above, the treatment of those social security payments not listed in the legislation is governed by the common law. Like the situation in Irish law, it is difficult to envisage how any other benefits such as widow's payment, or statutory maternity pay, for example, would fall to be considered in a claim for damages. State retirement pensions are not included in the list and have been dealt with at paragraph 4.29 above. As regards any other benefits which may fall to be considered, the Law Commission opined in their Consultation Paper that *Hodgson* v *Trapp* [82] provides a clear indication as to how this issue should be approached. [83]

4.47 That case concerned the plaintiff's receipt of attendance and mobility allowances under the *Social Security Act, 1975* and whether they were deductible from the award of damages for past and future expenses.[84] Lord Bridge, after emphasising the compensatory nature of damages, restated the two "classic heads of exception" to the general rule of deduction of collateral benefits and stated that other exceptions were usually based on analogy with the reasons sought to justify the primary exceptions.[85]

4.48 Consequently, Lord Bridge considered that the House had to examine whether it was appropriate to treat statutory benefits as analogous to private benevolence, thus bringing them within the 'classic heads of exception' and rendering them non-deductible from the plaintiff's damages. In this regard, his Lordship was of the opinion that the main support for the contention that the welfare payments in question constituted a form of 'public benevolence' was the judgment of Lord Reid in *Parry v Cleaver*[86] where he stated in relation to why private benevolent payments are not deducted:

> "We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer."[87]

4.49 Lord Bridge then referred to the fact that such benefits are invariably funded by the taxpayer and provided for by legislation with a view to mitigating the severity of the unfortunate circumstances of the disadvantaged regardless of how

---

82 [1989] AC 807

83 CP No.147 *op. cit.*, fn.70 at paras.2.76-2.83.

84 These allowances are now 'listed benefits' for the purposes of the statutory recoupment scheme. *Supra* para.4.43. and schedule 2 of the *Social Security (Recovery of Benefits) Act, 1997.*

85 [1989] AC 807 at p.820

86 [1970] AC 1

87 *Ibid.* at p.14.

these circumstances came about. He pointed out that that Parliament could always provide that certain benefits be discounted in the assessment of damages as it had done in the case of section 2 of the *Law Reform (Personal Injuries) Act, 1948* and where no such provision is made he could see no principle in support of the aforementioned opinion of Lord Reid. He then came to the following conclusion:

> "In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of their impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as the 'benevolent donor', intends to benefit 'the wrongdoer', as represented by policy holders, seems to me entirely artificial. To allow double recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground. It could only add to the enormous disparity, to which the advocates of a 'no-fault' system of compensation constantly draw attention, between the position of those who are able to establish a third party's fault as the cause of their injury and the position of those who are not."[88]

4.50 Therefore, it seems that any social security benefits not listed in the legislation would nevertheless fall to be deducted from a plaintiff's damages under the common law.

---

[88] *Ibid.* at p.823.

CHAPTER 5 PROPOSALS FOR REFORM IN ENGLAND AND WALES: LAW COMMISSION CONSULTATION PAPER

5.01 The rather *ad hoc* manner in which the treatment of collateral benefits in English law has developed has prompted discussion of reform of the law in that jurisdiction. The English Law Commission published a Consultation Paper on this issue in July 1997 and it is proposed to summarise the options for reform which they set out in this Chapter.[1] These are as follows:

- deduction of all collateral benefits;
- deduction of all collateral benefits except charitable payments;
- a general rule of deduction with an exception for benefits intended to be in addition to the plaintiff's damages;
- no change except for the law relating to disablement pensions;
- a blanket rule of non-deductibility;
- no change whatsoever.

5.02 The Law Commission links options 1 and 2 and states that they flow from the "proposition underpinning the deduction options" which is that unless the collateral benefit provider has a right to recover the value of the benefit, collateral benefits which meet the same loss as damages should be deductible; collateral benefits which compensate a different loss than the plaintiff's award of damages should not be deducted. This proposition is based on the conclusions that

> "the 'compensatory principle' dictated by 'corrective justice' dictates deduction, that empirical evidence of the workings of the tort system can be seen as supporting deduction, and that it is open for debate whether the policy arguments put for non-deduction of some collateral benefits withstand close scrutiny..."[2]

---

1 Consultation Paper No. 147, *Damages For Personal Injury: Collateral Benefits*. See particularly Part IV. For details of their proposals on the rights of collateral benefit providers see Part V.

2 *Ibid.* at para.4.5. The Law Commission prefer not to express which option they favour prior to the consultation process. However they do observe that there is a case for accepting the proposition as set out on the basis of the summary of the arguments given above and analysed in

It is envisaged that the remaining four options will only be of appeal to those who reject the aforementioned proposition underpinning options 1 and 2.

Option 1: Deduction of All Collateral Benefits

5.03 Under this option all collateral benefits which a plaintiff receives consequent to an injury should be deducted from his damages. Insurance payments and charitable payments would be deducted from the total award of damages while the other collateral benefits (sick-pay, pensions, redundancy pay) should be deducted from the plaintiff's damages for loss of earnings. This option is subject to two provisos:

- where the collateral benefit is expressed to be on account of a particular loss, it should only be deducted from damages for that loss;

- where the provider of the collateral benefit has a right of recoupment (either against the plaintiff or against the defendant) in the form of subrogation, the collateral benefit should not be deducted from the plaintiff's damages as over-compensation is unlikely in such a situation.

5.04 The enactment of this option would entail changing English law to provide that the full amount of personal accident insurance is deducted and also that all social security benefits are deducted without time limits. The Law Commission asks for views on the approach of the American Law Institute which suggests that insurance payments should be deducted net of the premiums which had been paid during the two years prior to the accident. Indemnity insurance would still be ignored as this would come under the second proviso outlined above. Under this option charitable payments would be deducted from the plaintiff's damages.

Option 2: Deduction of All Collateral Benefits Except Charitable Payments

5.05 Under this option, charitable payments would continue to be ignored in the assessment of damages. The justification for maintaining this exception is that charitable payments do not meet the same loss as an award of damages, or at least that sometimes they do not and, therefore, to avoid attempting to ascertain the intentions of the individual benefactors, it would be preferable to assume that all charitable payments do not meet the same loss as damages and thus should be ignored.

5.06 In favour of option 2 it is noteworthy that the policy of non-deduction of charitable payments and other gifts is "practically universal" in other jurisdictions. This is the case even in France and Germany, where double-recovery is generally rigorously avoided.[3]

---

detail at paras.4.5-4.50 of the paper.

[3] CP No. 147 *op. cit.* fn.1 at para.4.86.

5.07 Adoption of this approach would however necessitate the Court having to ascertain exactly what constitutes a charitable payment which may be difficult in the context of payments from employers. Moreover, it remains a "matter of debate" whether charitable payments from the defendant tortfeasor should be deducted by the Court. If charitable payments are deemed not to meet the same loss as damages, then all such payments should be ignored; against this one can argue that defendants should be encouraged to make charitable donations and that deduction would promote this practice.[4]

Option 3: A General Rule of Deduction with an Exception for Benefits Intended to be in Addition to the Plaintiff's Damages

5.08 The Law Commission comments that apart from this option facilitating the double recovery of the plaintiff, should the provider of the collateral benefit intend him to receive it in addition to his tort damages, it may leave the law in an uncertain state as it would involve the court in the arguably artificial exercise of trying to identify the intention of each provider of collateral compensation where it is not expressed.

5.09 However, the Commission accepts the possibility of employing one of two rebuttable presumptions in order to avoid this uncertainty: either that with regard to certain types of collateral benefit, the provider always intends them to be received by the plaintiff in addition to his damages or always intends them to be received instead of the damages.

Option 4: No Change Except for the Law Relating to Disablement Pensions

5.10 Under this option disablement pensions would be deducted from damages for loss of earnings save for the two provisos as outlined above in option 1. The Law Commission comments that the main advantage of this change is that the most serious anomaly in English law is resolved, i.e. that although sick-pay and disablement pension compensate for the same loss, the former is currently deducted while the latter is not.

Option 5: A Blanket Rule of Non-Deductibility

5.11 Option 5 entails no deduction whatsoever of any collateral benefit received by the plaintiff from his award of damages i.e. it allows for the cumulation of the plaintiff's remedies. The Law Commission comments that this has the advantage of bringing consistency and certainty to the law. However, cumulation is contrary to the

---

4 *Ibid.* at para.4.88.

compensatory aim of damages in tort law and the Commission provisionally recommends that this option should be rejected.[5]

Option 6: No Change Whatsoever

5.12 This option is self explanatory and would entail the acceptance of the courts as the appropriate forum to continue developing this difficult area of the law in a case by case fashion which has the advantage of flexibility. It may be however, the Law Commission notes, that the resolution of the complex policy issues involved are best dealt with by way of statutory reform which is consistent with their aim to render the law cheaper, simpler and fairer.

---

[5] Obviously this is apart from other types of damages which exist in tort law such as aggravated or exemplary damages on which see our consultation paper on *Aggravated, Exemplary and Restitutionary Damages*, (1998).

PART III

CHAPTER 6 COLLATERAL BENEFITS IN COMPARATIVE LAW

6.01 The purpose of this chapter is to examine some of the alternative treatments of collateral benefits in tort law which prevail in a sample of other common law and some civil law jurisdictions. In order to identify the distinctive fundamental approaches, the various countries examined have been grouped according to the general system of law they subscribe to, although there is of course inevitable diversity. Where relevant, additional information as to the rules and practice of a regime is given to complete the picture indicating priorities of allocation and control of expenses. The jurisdictions which are grouped together in approximate categories are as follows:

- Common Law Variations:

    1. Tort Law System of Compensation with a General Rule of Deduction (subject to exceptions of varying breadth founded on public policy): Scotland, Canada,[1] Australia.

    2. Tort Law System of Compensation with a General Rule of Non-Deductibility: The collateral source rule - a principle of non-deductibility in the United States.

    3. Non-Tort Law System of Compensation: No-Fault Liability regime in New Zealand.

Civil Law Systems – Deductibility with Subrogation: The Western European countries of Germany, France and Belgium which subscribe to a general social compensatory theory, the practical application of which is facilitated by a strong social security system supported by private insurance and extensive subrogation rights.

- Scandinavian Law Systems – Social Compensation: The jurisdictions in Scandinavia demonstrate a system which has substantially reworked the function

---

[1] With the exception of Quebec which has a civil code similar to that of France

of tort law and rules of tort liability in response to the increased role of public and private insurance.

Common Law Variations: Countries which Subscribe to the Rule of Deduction

Scotland

6.02 Subsequent to a Law Commission report recommending reform of the law on collateral benefits, the *Administration Act, 1982* was passed, section 10 of which applies subject to any agreement to the contrary.[2] The common law still applies to those situations not covered by statute and the general experience of same is one of deductibility. The underlying principle of the law is that damages are intended to be compensatory and double recovery unacceptable. This theory is subject to the exceptions of insurance and charitable donations as already discussed in relation to England and which obtain in most common law jurisdictions with the notable exception of New Zealand.

Insurance

6.03 Section 10(a) provides that no contractual pension or benefit will be deductible; this encompasses payments from private insurance policies. Apart from indemnity insurance, subrogation rights will only exist where specifically provided for in the contract. Essentially all private sources of collateral benefits are treated alike.[3]

Charitable Benefits

6.04 Charitable payments to the injured person or any of his relatives are not deductible except where they are received directly from the tortfeasor. The justification (accepted only after the memorandum stage by the Law Commission) for the express exception of payments from the tortfeasor from the general rule of non-deductibility, was the danger of discouraging those who feared they might be liable from making any payments prior to an award of damages.[4] The rationale for a general rule of non-deduction with regard to such payments is the widely

---

2 Scottish Law Commission No 51 Damages for Personal Injuries: Report on (1) Admissibility of Claims for Services; (2) Admissible Deductions (1978) As the enactment of the statute was pursuant to the Law Commission's recommendations reference is made to the report where appropriate.

3 The Law Commission was of the view that "on analysis, similar principles might be considered to be applicable to all benefits privately contracted for and not arising out of state schemes for social security."

Ibid. at para.65.

4 Section 10(f) of the 1982 Act provides for non-deduction subject to the exception in subsection (iv) with regard to the tortfeasor.

accepted one of not wishing to discourage philanthropy, influenced to a degree by the arguments in *National Insurance Company of New Zealand v Espagne.*[5]

Pensions

6.05 Contractual pensions are not deductible, therefore a disablement pension payable pursuant to an occupational scheme will be non-deductible, notwithstanding that the employee has not made direct contributions.[6] Furthermore, s.10(b) provides that any pension from public funds is not to be taken into account. An analogy with the insurance exception was felt to be applicable, the Law Commission commenting that:

> "even if the person did not obtain the benefit by virtue of a contract in which he himself assumed obligations, his entitlement to the pension depended ultimately on his own work and his participation in the pension scheme."[7]

Another relevant factor was that rarely would a state retirement pension accrue as a consequence of an accident giving rise to a claim for damages. In practice however, pension payments received are taken into account in the calculation of damages for the loss of pension rights.[8]

Sick Pay

6.06 Sick pay is deducted on the basis that the employee cannot be regarded as having suffered a loss when he is in receipt of such payments. The exception however, recommended by the Commission and enacted in section 10(e), is where the employee is under an obligation to repay the monies, in which case no account is taken of them. The rationale for the exception is the clear 'social advantage' in not discouraging employers from providing interim benefits for employees.[9]

Redundancy Payments

6.07 Redundancy payments are not deductible pursuant to section 10(d). However, severance pay was not considered to be equivalent to redundancy pay in

---

5 (1961) 105 CLR 569. See also paras.3.28-3.31 and 4.10-4.13.

6 Lewicki v Brown & Root Wimpey Highland Fabricators Ltd 1996 SLT 145

7 Scot Law Com *op. cit.* fn.2 at para.74. Section 10(b) specifically excepts any pension or benefit to which section 2(1) of the *Law Reform (Personal Injuries) Act, 1948* applies from its scope.

8 English Law Commission Consultation Paper No.147, *Damages for Personal Injury: Collateral Benefits*, (1997) at paras.3.14-3.15.

9 Scot Law Com *op.cit.* fn.2 at para.63.

the case of Duncan v Glacier Metal Co Ltd[10] and therefore it was not specifically excluded from deduction. In making this recommendation the Law Commission was of the opinion that as the amount of a redundancy payment is calculated according to the length of service and the age of the employee, the rationale for the general exclusion of payments arising from private means was applicable:

> "... namely that what is to be compensated is what is lost as a result of the accident, and the fact of the redundancy for a different reason neither increases nor decreases that loss."[11]

Thus the Commission did not see the payments as being for loss of earnings.

Social Security Payments

6.08 Under the terms of section 10(c) (iii) of the 1982 Act, any social security benefits payable after the award are not deductible but benefits received before the date of the award will be deducted. The Law Commission in its report rejected the option of providing subrogation rights for social security benefits on the grounds of the expense attached to their administration.[12] The Commission preferred the solution that "where possible, there should be no overlap between the compensation provided by delict and by social security." The report further recommended that if section 2(1) of the *Law Reform (Personal Injuries) Act, 1948* was to remain, then it should be amended to the effect that only those benefits accrued or likely to accrue during the period of loss of earnings should be deducted. This was in order to rectify an anomaly within the section which resulted in the value of benefits over five years being taken into account in *Bond v British Railways Board*,[13] although the accident only resulted in loss of earnings over five months.[14]

Canada

6.09 The governing theory is compensatory, subject to the usual exceptions of charitable benefits and private non-indemnity insurance. As has been the case in varying degrees in other common law jurisdictions, the rationale upon which the exceptions are based has been used to justify the non-deductibility of other benefits.

---

10 1988 SLT 479

11 Scot Law Com *op. cit.* fn.2 at para.85.

12 *Ibid.* paras.88-89. This conclusion had also been reached by the Departmental Committee on Alternative Remedies (the Monckton Committee) and by the Royal Commission which cited the introduction of an element of fault to schemes originally intended to dispense with it as one of the reasons for rejecting subrogation of the fund to the injured person's claim.

13 1970 SLT (Notes) 44

14 Scot Law Com *op. cit.* fn.2 at paras.90-91.

In 1987, the Ontario Law Reform Commission issued a report on *Compensation for Personal Injuries and Death* in which they made the following recommendations:

a) where the injured party is indemnified for a particular pecuniary loss, then the damages in respect of same ought to be held on trust for the collateral benefit provider;

b) the tortfeasor should be entitled to pay such damages directly to the collateral source and be discharged of liability to that degree;

c) neither a or b should apply until the injured party's entire loss has been fully indemnified.[15]

These recommendations followed on the conclusions that the fundamental principles of tort law required full compensation but not double compensation. Further "the goal of deterrence, as well as a general sense of justice and fairness," was advanced by holding the tortfeasor liable for the entire cost of his negligence. The recommendations were also aimed at facilitating the process of subrogation which the Commission found was not widely exercised due to, *inter alia*, cost, inconvenience and negative implications for labour relations.[16] It would seem that none of the recommendations of the Commission were implemented.

Insurance

6.10 Private non-indemnity insurance payments will be ignored unless the contract specifically provides for a right of subrogation.[17] Within the field of insurance, one area is treated differently from the norm described above: section 267(1) of the *Insurance Act, R.S.O.* 1990, provides that damages awarded to a person for loss arising out of an automobile accident are to be reduced by all payments that the person has received or that were or are available in respect of statutory accident benefits or any payments for loss of income including payments under an income continuation benefit plan or sick leave plan. Some recent cases, however, indicate a restrictive interpretation of this provision.[18] Waddams remarks that although the legislation is contrary to the trend of common law developments and most social security legislation, it is justified on the ground that the same

---

15 Ontario Law Reform Commission, *Compensation for Personal Injuries and Death*, (1987) chap. 6 at p.194.

16 *Ibid.* at pp. 190-191.

17 The minority in *Cunningham v Wheeler* (1994) 113 DLR (4th) 1 were of the opinion that only non-indemnity insurance payments should not be deducted. See para.6.15 *infra.*

18 *Chrappa v Ohm et al.* 159 DLR (4th) 215; *Bannon et al. v McNeely* et al. 159 DLR (4th) 223; *Cugliari v White et al* 159 DLR (4th) 254

insurers carry both first party accident and third party liability insurance, so subrogation would simply shift the costs from one insurer to another. While he does not mention the additional factor of the administrative costs involved in applying subrogation this was undoubtedly a guiding consideration.[19] The following rationale is offered:

> "Reduction of liability, rather than subrogation, may be regarded as having been accepted by the Legislature as an economical method of resolving disputes within the insurance industry. In either case the defendant's activity (automobile driving) still bears the full cost of the accidents."[20]

Charitable Benefits

6.11 In treating charitable benefits the courts have followed the reasoning in *Redpath v Belfast & County Down Railway*[21] and such benefits are generally non-deductible with the exception of those made before the award by the tortfeasor. Voluntary payments of salary will also be deducted. Waddams observes that acceptance of the reasoning in *Redpath* does not necessarily resolve the position between the donor and donee, so in order to prevent overcompensation where the terms of the benefit do not require that the donor be reimbursed, the court may imply reasonable terms requiring at least that the donor be offered repayment depending on the circumstances.[22] In Canada, an accepted method of preventing overcompensation is the requirement that the reimbursement be held on trust for the provider. The case of *Thornton v Prince George School Board*[23] expressly followed *Cunningham v Harrison*[24] where Lord Denning imposed such a trust. Alternatively, depending on the circumstances, the Court may oblige the plaintiff to repay the benefit provider as in *Rawson v Kasman* where the plaintiff was directed to reimburse her son who had paid her medical costs.[25]

Pensions

6.12 Pension schemes are treated as analogous to insurance and therefore an exception to the general rule of non-cumulation applies.[26] Furthermore, disability

---

19 S.M. WADDAMS, THE LAW OF DAMAGES (3rd ed., 1997) at para.3.1770. This type of legislation is more popular in some civil law jurisdictions considered at paras.6.36 *et seq.*

20 *Ibid.* at para.3.1770.

21 [1947] NI 167

22 Waddams *op. cit.* fn.19 at paras.3.1550, 6.510; See also *Armstrong v Baker* (1992) 111 NSR (2d) 239.

23 [1978] 2 SCR 267, 83 DLR (3d) 480

24 [1973] QB 942 (CA)

25 (1956) 3 DLR (2d) 376

26 This was held by the Supreme Court of Canada in *Guy v Trizec Equities Ltd.* [1979] 2 SCR 756, 99 DLR (3d) 243.

payments are included among the state benefits which have been classified as gratuitous under statute, so any disability retirement pension would be non-deductible on this basis.[27]

Sick Pay

6.13 One would expect the application of the compensatory theory to lead to the deduction of sick pay as, to the extent that it has replaced earnings, the plaintiff cannot claim a loss, however the Canadian approach has been somewhat more generous to the injured employee than the other common law countries examined. In *Chan v Butcher* [28] the British Columbia Court of Appeal classified payments from an employer's fund as insurance as opposed to wages and therefore non-deductible. However in *Ratych v Bloomer*[29] the attempt to apply the same analogy failed, on the basis that unless the plaintiff could prove loss of earnings he was not entitled to damages for same i.e. the indemnity principle was strictly applied. The analogy with insurance was dependent upon proof of contributions made by the plaintiff to a fund failing which he could not claim the payments were non-deductible. The limitations on benefits falling within the insurance exception applied in this case were however virtually abrogated in *Cunningham v Wheeler.* [30]

6.14 In *Cunningham v Wheeler* the majority held that the insurance exception applied to disability benefits paid by the employer pursuant to a collective bargaining agreement; the lack of direct contribution was not decisive. Cory J. explained that the disability payments,

> "were bargained for and obtained as a result of a reduction in the hourly rate of pay. These benefits were therefore obtained and paid for by the plaintiff just as much as if he had bought and privately paid for a policy of disability insurance."[31]

The learned judge opined that to draw a distinction between private insurance where actual premiums are paid to an insurance company and schemes established in a different manner for example, a collective bargaining agreement would create 'barriers that are unfair and artificial'.[32] The decision in *Ratych* was explained on the basis that no evidence that the plaintiff had paid for the disability benefits was adduced.

---

27 See para.6.18 *infra.*

28 [1984] 4 WWR 363

29 (1990) 69 DLR (4th) 25

30 (1994) 113 DLR (4th) 1

31 *Ibid.* at p12.

32 *Ibid.* at p.13. Iacobucci, Major and Sopinka JJ. concurred with Cory J.

6.15 However McLachlin J disagreed with this extension of the insurance exception on the grounds that the terms of *Bradburn v Great Western Rail Co.* [33] applied to non-indemnity insurance benefits exclusively; thus as the payments in the instant case were of an indemnitory nature, the plaintiff could not prove actual loss. This interpretation strictly adheres to the compensatory theory. McLachlin J noted that the rule in common law countries was one of deductibility subject only to the exceptions of charity and non-indemnifying personal insurance and that the Canadian court had followed suit in *Ratych,* which she interpreted as affirming the rule against double recovery and only allowing a claim for damages where the plaintiff can demonstrate actual loss.[34]

6.16 The majority decision represents the *status quo* which permits the plaintiff to retain the benefits without deduction where he satisfies the evidentiary requirements in *Cunningham* which in essence simply require that the benefits formed part of the collective bargaining process.[35] Where evidence is adduced that the plaintiff directly or indirectly contributed to the fund from whence the payments emanate, any employment benefits received will be deducted from damages for loss of earnings, unless the provider of the payments is entitled to be reimbursed. The criterion for deciding whether to impose a trust or obligation to reimburse is whether the judge is satisfied that this is both necessary and appropriate in the interests of justice.[36]

6.17 Where the plaintiff does not fall within the perimeters of the *Cunningham* exception, the injured party who has been paid while on sick leave will not be able to prove loss of earnings. However, they will have used up all or part of their entitlement to a certain amount of paid sick leave per annum. In Canada and also in Australia where this leave is not used up the employee can cumulate it and sometimes it can be claimed as a lump sum upon leaving an employment; to this extent the plaintiff will have suffered a loss which requires compensation.[37] The practical application of this was recently illustrated in *Robert v Earthy.*[38] In this case the Supreme Court of British Columbia held that the injured person was entitled to recover the value of cumulated sick leave which was calculated on the basis that until the end of his employment the injured person would use approximately 75% of the accumulated days; thus he was awarded 75% of the cost of replacing those days placing him in as close a position as possible to the pre-accident situation. This was deemed to fit into the second exception to the non-cumulation of benefits rule i.e. that where an employee can establish that he or she continued to receive

---

33 (1874) LR 10 Ex 1 where the exception was first recognised.

34 (1994) 69 DLR (4th) 1 at p.30 *et seq.* La Forest and Heureux-Dubé JJ. concurred with McLachlin J.

35 Waddams *op. cit.* fn.19 at para.3.1635.

36 *Ratych v Bloomer* (1990) 69 DLR (4th) 25 at p.54.

37 K.D. Cooper, *A Collateral Benefits Principle* 49 Canadian Bar Review (1971) 501 at 506-507. See also the Australian case of *Graham v Baker*(1961) 106 CLR 340; *Lavigne v Doucet* (1976) 14 NBR (2d) 700 SC App. Div.

38 Unreported, 9 May 1995, No. B925131, 5 ELLR No. 10 118

wages while off work and at the same time had to give up something to receive those wages, that is compensable.

Social Security

6.18 Welfare payments payable under statute are not deducted as they are considered to be independent of the cause of action, the purpose of the payments being to assist people in need and not to benefit the wrongdoer.[39] Most regional workers' compensation legislation provides a right of subrogation for the compensation tribunal. Additional to the usual exception of charitable benefits certain state benefits have been categorised as gratuitous under statute rendering them non-deductible; these include Canada Pension Plan disability payments, survivor payments and Health and Welfare payments.

Australia

6.19 In Australia the general principle governing damages in tort is compensatory. Two main exceptions to this principle apply and were explained by Windeyer J. in the authoritative case of National Insurance Company of New Zealand Ltd. v Espagne[40] as follows:

> "In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of a contract they were to be provided notwithstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages.... In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause."[41]

In *National Insurance Company of New Zealand v Espagne* an invalid pension for permanent blindness under the *Social Services Act, 1947* was disregarded in the assessment of damages. This case has been applied many times and in *Redding v*

---

39 *Per* Dubin J.A. in *Boarelli v Flannigan* (1973), (3d) 4 at p.8. Nor are unemployment benefits deductible, the position having been clarified by the Supreme Court in *Jorgenson v Jack Cewe* [1980] I SCR 812, 111 DLR (3d) 577.

40 (1961) 105 CLR 569

41 *Ibid.* at pp.599-600.

Lee[42] Gibbs C.J. in the High Court of Australia commented with regard to the test that despite its lack of precision:

> "it is difficult to suggest a more exact criterion once it is accepted, as it must be, that justice requires that certain benefits must be disregarded in the assessment of damages notwithstanding that they would not have been received but for the injuries for which the plaintiff sues and notwithstanding that in fact they have mitigated the plaintiff's loss."

Insurance and Pensions

6.20 Following the above statements insurance proceeds are not deductible, although indemnity contracts will usually contain subrogation rights. Disability pensions from an employer insurance fund are not deductible by reason of an analogous treatment with insurance.[43] Likewise, retirement pensions are non-deductible regardless of the contributor.[44]

Charitable Benefits

6.21 Charitable benefits fall within Windeyer J's second category of exceptions, with the possible exception of when they emanate from a defendant employer in which case the position is somewhat ambiguous, although it has been suggested that they ought to be deducted.[45] Support for this assumption can be found in the passage quoted above as the learned judge describes the type of benefits to be excepted as emanating from "any source other than the defendant".[46] Moreover, since the test of whether to deduct a payment or not from an award of damages is the purpose of the payment, the courts are open to the suggestion that the defendant's purpose is to mitigate liability.[47]

Sick Pay

---

42 (1983) 47 ALR 241; 57 ALJR 393

43 *National Insurance Company v Espagne* (1961) 105 CLR 569; *Redding v Lee* (1983) 47 ALR 241.

44 *Watson v Ramsay* [1960] NSWR 462,463 *per* Brereton J; see also comments of Windeyer J in *National Insurance Company v Espagne, ibid.* at p.598.

45 See H. Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed. 1990) paras.8.3.18-8.3.19. In *Volpato v Zachory* [1971] SASR 166 benevolent payments made by an employer were held to be non-deductible.

46 *Op. cit.* fn.40 at pp.599-600.

47 See the discussion by Young CJ and Menhenitt J in *Wellington v State Electricity Commission of Victoria* [1980] VR 91.

6.22 Contractual sick pay is deducted unless it is paid on the condition that it be repaid upon recovery of damages.[48] Where it is deductible the plaintiff may still recover for the loss of cumulated sick leave.[49]

Redundancy Payments

6.23 In *Clay v Freda*[50] a redundancy payment which was not a consequence of the plaintiff's accident was held non-deductible. King CJ interpreted the payments as being "in consequence of an entitlement under the award arising from his years of service." In *Black v Brimbank City Council,*[51] a case in the Federal Court of Australia, Moore J said that the principle in *Clay* was applicable to "any case where there is a payment which is apparently based on past service and which does not fetter the plaintiff's entitlement to seek alternative employment forthwith"[52]

6.24 The nature of the payments in *Black* were different however and provide some guidance as to the position where redundancy payments are directly related to the incident for which damages are being claimed. The plaintiff's claim was for damages for breach of his employment contract due to its premature termination. The severance entitlements that he had already received were clearly compensation for the loss of his job which arose due to the employer's conduct; they were therefore deductible. The learned judge stated that to hold otherwise would be inconsistent with the purpose of compensatory damages. From the terms of the decision it would seem that this principle is also applicable to personal injuries cases.

Social Security

6.25 Social security benefits are either deducted or there is a right to subrogation under the *Social Security Act, 1991* and similar legislation also provides for the recovery of medical payments from those who recover damages.[53] The specific question of unemployment benefits was addressed in *Evans v Muller*[54] where the High Court of Australia held that unemployment benefits have a character of a partial substitute for wages and were therefore deductible.

---

48 Juranovich v McMahon [1961] NSWR 190

49 Graham vBaker (1961) 106 CLR 340; See para.6.17 *supra.*

50 (1988) 144 LSJS 224; see also Crowden v Pickands Mather and Co International Trading as Savage River Mines, Unreported, SC (Tas) 4 July 1996, Wright J.

51 (1998) 152 ALR 491

52 *Ibid* at p.8 Lexis transcript.

53 The Health and Other Services (Compensation) Act, 1995 as amended in 1996.

54 47 ALR 214

Common Law Variations: A Rule of Non-Deduction

United States of America

6.26 In the United States, collateral benefits are not deducted from the damages awarded to the plaintiff although they may cover all or part of the harm for which the tortfeasor is liable.[55] As personal injuries are still dealt with by juries, evidence about such benefits is therefore inadmissible.[56] This doctrine of non-deductibility is known as the collateral source rule and essentially encompasses any benefit from a collateral source which is 'wholly independent of the wrongdoer'.[57] Sick pay or disability benefits, any charitable benefits or gratuitous provision of services and insurance payments received by the injured party even where he or she did not pay the premiums are not allowed to mitigate the damages which the plaintiff can claim against the tortfeasor. The breadth of benefits encompassed by the rule mean that only payments by the defendant's insurer to the plaintiff have a chance of escaping it. There are of course variations between States with regard to the treatment of different types of benefit but an analysis of such diversity is beyond the scope of this chapter. What follows, therefore, is a brief overview.[58]

General Observations

6.27 It is immediately apparent from the collateral source rule that deterrent and punitive considerations are part of the underlying considerations. The Restatement of Torts states the 'purposes for which actions of tort are maintainable' as follows:

(a) to give compensation, indemnity or restitution for harms;
(b) to determine rights;
(c) to punish wrongdoers and deter wrongful conduct; and
(d) to vindicate parties and deter retaliation of violent and unlawful self-help.[59]

---

55 Restatement (Second) of Torts §920A (2) 1977

56 Apart from the obvious effects which are considered below, this also creates evidentiary problems where for example the receipt of a particular collateral benefit may be relevant to an entirely separate fact in issue and yet may be excluded on the grounds that its prejudicial effect outweighs its probative value. See *Unreason in the Law of Damages: The Collateral Source Rule*, 77 Harv. LR 741.

57 R Ben Hogan, The Collateral Source Rule: Its Justification and Its Defence, February 1983, Trial, 58

58 For example, Alabama does not subscribe to the Collateral Source Rule - see *Jones v Keith*, 223 Ala.36, 134 So. (1931); BL Erdreich, *Damages – Collateral Source Doctrine*, (1961)14 Ala L Rev. 148. No- fault rules for certain types of accidents have also encroached on the rule, for example Florida's Motor Vehicle No-Fault Law – see Robert Henderson and Patrick Maroney, *Collateral Sources of Indemnity*, Florida State University Law Review (1993) vol.21, 571. Other States have considered reforming aspects of it. See paras.6.29-6.31 *infra*.

59 Restatement, Torts §901 (1977); See also S.M. Romano & A.J.Winters, *Collision of*

The purported equitable basis of the doctrine is frequently framed in the following terms:

> "If there must be a windfall, certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing... [T]he best interests of society as well as the purposes of the parties are likely to be better served if the injured person benefits rather than the wrongdoer benefiting."[60]

Other rationales that have been offered by way of explanation are those which have been employed by the courts in other common law jurisdictions to justify the non-deductibility of certain benefits, usually insurance and charitable payments. They essentially emphasise that the plaintiff has paid for the benefit and that legal compensation does not fully compensate.[61] The additional factor to consider with regard to the United States is the method of payment of legal fees which requires the successful party to pay his or her own legal costs. According to one commentator this can reduce the damages which the plaintiff will receive by between 25% to 40% and explains to some degree what may appear to be extravagant awards by juries as they desire to leave the plaintiff with an amount which reflects the required compensation.[62]

6.28 Application of the collateral source rule is not however uniform. Workmen's compensation, regulated by statute, usually falls outside the rule in that the providers of same have a right of subrogation. Medical care providers can also have a right of subrogation as illustrated by the spate of tobacco litigation in the United States brought by plaintiffs such as Medicaid and Medicare in recent years.[63] Fleming identified 'an incipient tendency to exclude the collateral source rule from claims against public entities' on the grounds that the punitive effect of the rule is borne by the taxpayer.[64] This was later rejected in *Helfend v Southern California Rapid Transit.*[65] Nonetheless, a variety of methods exist for thwarting the practical application of the rule in those jurisdictions where it still applies.

Contribution with Collateral Sources, Texas Bar Journal March 1991, 226 at 228.

60 *Grayson v Williams*, 256 F 2d. 61 at 65 (10th Cir. [Wyo.] 1958). See also Hogan *supra* and note in 77 Harv. LR 741.

61 See generally chap. 3 for a discussion of the various rationales used to justify non-deductibility.

62 Fleming, *Collateral Benefits*: Int. Enc. Comp. L XI Torts (1983) ch.11 s.8. See also American Law Institute, *Enterprise Responsibility for Personal Injuries Volume II: Approaches to Legal and Institutional Change* (1991) pp. 164-5 citing figures of between 25-50% of damages being expended on legal costs; Romano and Winters *op. cit.* fn.59.

63 See generally Cliff Sherrill, Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution, 19 U. Ark. Little Rock LJ 497.; Geraint Howells, Tobacco Litigation in the US , Its Impact in the United Kingdom, 22 S. Ill. ULJ 693.

64 *Ibid.* at s.9 referring to *City of Salinas v Souza & McCue Construction Co.*, 66 Cal. 2d. 217, 424 P. 2d 921 (1967).

65 2 Cal. 3d 1 (1970)

Others have abandoned the concept as outmoded given the proclivity towards liability insurance which implies that the defendant does not suffer the 'punitive' or 'deterrent' effect of the rule anyway. Illustrations of the former include the practice of setting off collateral benefits in negotiation settlements and in trials. It is thought that most juries discount suspected benefits, causing Fleming to conclude:

> "In both respects therefore American practice is in fact much more aligned with the generally prevailing sentiment against cumulation than would appear from the letter of the law."[66]

Proposals for Reform

6.29 Thus it is not surprising that recent reports on the subject have all advocated reform or abolition of the rule, perhaps prompted to a degree by the crisis regarding the lack of availability of insurance in the eighties. A Department of Justice report in 1986 recommended the preclusion of double recovery by abolishing the rule.[67] The report found that as the tendency towards plaintiff funded collateral sources has waned, so too has the justification for the rule, to the extent that its contemporary role has been reduced to that of providing a windfall to the plaintiff. This is particularly inexpedient in the case of publicly funded benefits. They recommended deduction of collateral sources except where the benefit provider was subrogated to the plaintiff's claim.

6.30 A report by the New York State Advisory Commission on Liability Insurance came to a similar conclusion.[68] The rule had been abolished in respect of certain areas of tort liability such as medical/dental malpractice and personal and fatal injury claims by employees of public bodies. The Commission concluded that the co-existence of the collateral source rule with common liability insurance which concentrates on spreading risks on a no-fault basis 'results in the most expensive liability system: compensation to more plaintiffs and double payment when compensation is paid'.[69] Society was the ultimate loser in this system as it led to higher liability insurance premiums and the elevated awards of damages inhibited socially productive activities by defendants. As a result the rule survives in New York only to the extent that the plaintiff can claim credit for insurance premiums paid for the two years previous to the injury and the future costs of maintaining it.[70]

---

66 Fleming *op. cit.* fn.62 at s.9

67 US Department of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986)

68 Insuring Our Future (April 1986)

69 *Ibid.* at p.135.

70 See generally D.A. Goldsmith, A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation (1988) 53 J Air Law & Commerce 799, 813

6.31 The American Law Institute in its Project on *Enterprise Responsibility for Personal Injury* also examined the topic and recommended the deduction of all collateral benefits, except life insurance, with no subrogation or rights to reimbursement. This was coupled with a recommendation that successful parties be entitled to their costs which they reasoned would counteract any diminution in deterrence.[71]

Common Law Variations: No-Fault Liability

New Zealand

6.32 At the far end of the common law spectrum is New Zealand which, in 1972, with the establishment of a comprehensive no-fault accident compensation scheme, moved further from traditional tort liability than any other country.[72] While the existence of the scheme, which abolishes tort actions for personal injuries which fall within it, necessarily avoids the issue of collateral benefits, a brief overview is instructive given that the rationale behind the scheme was that the 'abolition of fault-finding would lead to large savings on administrative expenses'.[73]

6.33 The scheme consists of three compensation funds and provides that no claim either at common law or under a statute may be brought for damages arising out of personal injury or death suffered by accident in New Zealand. The schemes under which compensation is claimed are the Earners' Compensation Fund, the Motor Vehicle Fund and the Supplementary Compensation Fund which covers those not covered by the other schemes. The three funds are financed by different sources and intended to be financially self-contained. In essence they are financed by switching the contributions from all the existing sources of funds such as employers' liability insurance, workers compensation and compulsory motor insurance. The establishment of the scheme has to be considered in the context of the relatively small population of the country and the existence of a very extensive social security system.

6.34 The *Accident Rehabilitation and Compensation Insurance Act, 1992* amended the operation of the regime in response to rising costs in its implementation.[74] The definition of accident has been narrowed by the new

---

71 American Law Institute, *op .cit.* fn.62 at p.179

72 *Accident Compensation Act, 1972.* Amendments in 1974, 1980 and 1982 successively extended the scope of the original scheme. See generally TODD, BURROWS, CHAMBERS, MULGAN AND VENNELL, THE LAW OF TORTS IN NEW ZEALAND, (1991) chap.2.

73 D R Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MLR (4) 1974, 361 at p.368. The Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand,* Woodhouse Report, (December 1967) provided the blueprint for the scheme. Civil actions to recover exemplary or punitive damages are still possible.

74 Richard Mahoney, *New Zealand's Accident Compensation Scheme: A Reassessment* [1992] 40 Am J Comp. L 159 at 160 citing Accident Compensation Corporation, AR 1991, at 3 cites cost increases averaging 25% per annum between 1985-1990. The new legislation resulted from a

legislation, and recoverable losses restricted to the losses directly resulting from the injury.[75] One commentator notes that probably the most far reaching and controversial change is the abolition of lump sums for non-economic losses such as pain and suffering and loss of amenity in favour of an allowance of a limited amount per week in proportion to a claimant's degree of disability and care costs.[76] This can be seen as reflecting a move away from the original founding philosophy of a social insurance scheme to one of accident compensation.

> "The elimination of these non-economic losses moves the scheme away from its historical roots as a substitute for the civil tort action."[77]

6.35 The Common Law still applies to personal injuries which are not covered by the Act and while the number of such claims is small, it remains to be seen whether this will change in the light of the new legislation. Miller however sees one positive aspect to the reforms in the introduction of experience rating which reasserts accountability and implicitly recognises the deterrence factor which can exist in the allocation of the costs of accidents:

> "the former Act significantly undermined deterrence of accidents by externalising accident costs and by eliminating from public consciousness the concept of negligence or fault with regard to personal injuries."[78]

It may be that the New Zealand experience provides a better illustration of this role of damages awards than all the United States reasoning for non-deductibility of collateral benefits.

Civil Law Jurisdictions: Deductibility with Subrogation

Germany, France, Belgium

6.36 These countries subscribe to the compensatory theory which seeks to avoid double recovery.[79] Non-cumulation of benefits is achieved largely by subrogation

---

request to the Law Commission to examine the 1982 statute. See Law Commission, *Personal Injury Prevention and Recovery* (Report No. 4, 1988).

75 The section 4(1) definition excludes recovery for mental distress, which is not connected to any physical injury for which the person is seeking to recover.

76 Richard Miller, An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme, (1993) 52 Md. L. Rev. 1070 at p. 1074.

77 *Ibid.* at p.1075.

78 *Ibid.* at p.1086. See also Margaret Vennell, *Beyond Compensation*, 15 Hawaii L. Rev. 568 who notes at p.571, " a comprehensive compensation scheme that concentrates on compensation rather than causes may not necessarily provide incentives for the prevention of accidents."

79 In Germany §823 of the *Bürgerliches Gesetzbuch* (the German Civil Code) states, "A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom." Article

which serves to facilitate the underlying compensatory principle without losing what is perceived as the deterrent element in tort liability by ensuring that the tortfeasor does not escape the full economic consequences of his actions. The extensive use of subrogation is made possible due to the existence of wide networks of social security supported by both public and private insurance. The collateral benefit providers may exercise their rights either through an independent action or, more often, through bulk loss sharing arrangements. No-fault compensation schemes especially in areas such as automobile insurance are on the increase, effectively marginalising the traditional role of tort law.

6.37 Comprehensive social security and insurance cover means that most of the victim's needs are catered for before any tort action and the social security carrier or the private insurance company are subrogated to the claim against the tortfeasor.[80] Markesinis makes the following observation which provides an insight into the general principles of the German approach:

> "In such circumstances, compensation for the victim can no longer be the prime purpose of the compensation rules. Rather, they have come to form a part of the intricate complex of rules which help allocate risks or, in some cases, seek to promote deterrence."[81]

The idea behind this is to put the cost of the accident back on the shoulders of the wrongdoer or his insurer. Markesinis notes then that in practice tort actions by injured victims against tortfeasors only take place whenever the social insurance scheme has not fully covered the actual loss: for example, social security benefits will not allow recovery for pain and suffering. [82]

Insurance

6.38 In Germany and France loss insurers have statutory subrogation rights, while in the case of personal injury or non-indemnity insurance, only 'conventional' subrogation is envisaged i.e. the right of subrogation depends upon whether the insurance contract expressly provides for the assignment of liability claims.[83] Private insurance payments are not deducted from damages.

1382 of the Napoleanic Code provides for *reparation integrale* (full compensation) of the injured person.

80 B.S. MARKESINIS, THE GERMAN LAW OF TORTS, A COMPARATIVE INTRODUCTION. (3rd ed.) (1994) p..909 . Note the usual designation of the claimant as *die Klägerin*, feminine, referring to either *die Kasse* (social security organisation) or *die Gesellschaft* (the private insurance carrier).

81 Ibid.

82 Ibid.

83 In Germany the *Insurance Act, 1908* governs the position of loss insurers which includes indemnity insurance. In France, an amendment to the code in 1992 allows for the reimbursement of payments of an indemnitory nature under insurance of persons, which practice had previously been proscribed: Article L 131-2.

6.39 In France, the *Loi Badinter* of 05 July 1985 provides for automatic indemnification of the victims of land vehicle accidents, apart from the driver, except if they have committed an inexcusable fault which was the exclusive cause of the accident.[84] Recourse is directly against the insurer. In Belgium a type of insurance based on similar lines was introduced in 1989 under which any benefits already received are taken into account.[85] While a role for fault is still possible due to the 'inexcusable fault' provision, these are essentially no fault schemes which seek to eliminate the need for resort to the courts by providing for strict time limits within which the insurer is to make an offer to the victim.[86]

Charitable Benefits

6.40 Charitable benefits are not deductible even where they are donated by the tortfeasor.[87] Subrogation for the donor will only take place where it is specifically provided for under the terms of the charitable benefit.

Pensions

6.41 Disability and retirement pensions provided by social security and also those financed through private means are non-deductible. The social security provider will however take over any tort action that the injured party has in this regard.

Sick Pay

6.42 In Germany §616 BGB originally provided for the payment of sick pay by employers for a period of six weeks; while this specific period has been repealed, collective agreements will usually provide for a similar length of time. The employer then has subrogation rights against the tortfeasor. The French Sickness Insurance Fund pays a salary for seven days, which expense it can recover from the tortfeasor. Sometimes collective agreements will provide for payment of sick pay by the employer in which case he will be reimbursed either by the Fund or the liability insurer carrier. The employer has a personal right of recourse with regard to the cost of continued salary payments. A corollary to this is that the tortfeasor is allowed to set-off against the injured employee. French regulations also provide for

---

84 Loi No. 85-677 du 5 juillet 1985 tendant à la amélioration de la situation des victimes d'accidents de la circulation et à l'acceleration des procedures d'indemnisation, J.O. du 6 juillet 1985.

85 WERNER PFENNIGSTORF, PERSONAL INJURY COMPENSATION, (The Geneva Association, 1993) at p.19. Article 45 of Act of 30 March 1994 was originally supposed to be based on the Loi Badinter but only in fact applies to victims not in the vehicle.

86 See generally DAVID POLLARD, SOURCEBOOK ON FRENCH LAW (1996, Cavendish Publishing) at p.245 et seq.

87 Fleming, *Collateral Benefits*: Int. Enc. Comp. L XI Torts (1983) ch.11 at ss.15-17

subrogation rights for public enterprises for certain benefits. In Belgium, unlike in France, outside the statutory regulation and contractual provision there is no possibility of a claim in tort and set-off to recover the cost of disability and other contractual fringe benefits and to this extent an amount of cumulation is allowed.[88]

Social Security

6.43 Social security systems in the civil law countries examined provide comprehensive cover for the economic consequences of accidents. Both Germany and France have in place workers compensation schemes. In Germany there are a number of separate institutes, under the general supervision of the Minister of Labour and Social Security, for different industries funded by the employers compulsory contributions. No action lies against the employer in tort by an insured employee unless the accident was caused either by the employer's intentional act or that of a fellow employee. The compensation institute may bring an action against the employer to recover expenses where the latter has been grossly negligent. Similarly in France no tort action may be brought against an employer unless an intentional act by the employer or another employee caused the accident. This can be seen as an accepted element of fault in what are otherwise no-fault insurance schemes for industrial injuries with risk related contributions for employers.

6.44 The employer and social insurance carrier have a right of recourse against the liability insurer in the amount of economic loss; this includes medical, hospital including regular daily costs which would have been incurred anyway, temporary total incapacity including perhaps salary, occupational loss and the help of a third person where this is required.

General Observations

6.45 The approach of Germany and France can be seen as broadly typical of Western European countries with the exception of Scandinavia which is discussed below.[89] Essentially the striking difference between these civil law countries and the common law ones examined is the assignment of subrogation rights to the social security carriers who effectively exercise them. As the social security system attempts to cater for all of the economic consequences of accidents and the social carriers are reimbursed by the tortfeasors' insurers, double recovery is virtually removed from the compensation system.

---

88 *Ibid.* at s.39.

89 J. Holyoak & D.K. Allen, *Alternative Accident Compensation Strategies* in ALLEN, BOURN AND HOLYOAK, ACCIDENT COMPENSATION AFTER PEARSON (Sweet & Maxwell, 1979) at p.222.

6.46 In practice, subrogation rights are exercised via extensive loss-sharing and bulk recoupment agreements between social security providers and liability insurers, usually in the case of smaller claims on a standard percentage basis and individually with regard to larger claims. In Belgium recourse is on a case by case basis: The social carriers claim is joined to the victims claim although usually they are represented by different lawyers which results in additional expense. There have been proposals for a system of standardised reimbursements in order to make the system more cost efficient. Pfennigstorf notes the impact of the Belgian system on the costs incurred by insurers:

> "We are not aware of statistics of the amounts reimbursed by liability insurers to social security organisations, but they are said to be very large. Subrogation thus results in a significant augmentation of the accident costs to be borne by liability insurers, one which does not occur in those countries where social security carriers have no right of recourse, like in Sweden."[90]

6.47 It is estimated that subrogation costs represent at least 50% of the total costs of personal injury in Belgium,[91] prompting Pfennigstorf to describe the cost of accidents to be met by liability insurers as one of the highest in Europe. This cannot, however, be wholly attributed to the cost of exercising subrogation rights as the comprehensiveness of the social security system in Belgium entitles the victims to receive more from social security than in other countries.[92] In Germany for example a more restrictive approach is taken to indemnification in general by *inter alia* proportionate reduction for contributory negligence especially with regard to strict liability, restriction of damages for non-pecuniary loss to those situations provided by the civil code i.e. intentional or negligent bodily injuries. Pain and suffering claims are outside the statutory compensation scheme and an action must be brought in tort. Thus by way of illustration the only losses which can be recovered in the case of death are burial costs and loss of support to which surviving relatives had a legal entitlement.[93]

6.48 The prevalence of subrogation is premised on the imputation of a deterrent effect to tort law. This is reflected in the availability of a tort action to an employee, notwithstanding the existence of the compensation scheme, where the accident was caused either by an intentional act of the employer or another of his employees. This has been described as the introduction of a punitive element in an area normally regarded as having essentially a compensatory function.[94]

---

90 Werner Pfennigstorf, Personal Injury Compensation, (The Geneva Association, 1993) at para. 2.2.

91 Ibid.

92 *Ibid.* at para. 2.7, citing J. Boon, *Rapport belge au colloque de Gand du 25 avril 1990 in BULLETIN DES ASSURANCES*, (1991) p.454. Other figures listed for the cost of traffic accidents are Greece, 24; Portugal, 25; Spain, 58; Italy, 59; Netherlands, 61; United Kingdom, 76; France, 100; Ireland, 108; Belgium, 127.

93 Pfennigstorf *op.cit.*fn.90 at paras.1.2-1.3

94 Holyoak and Allen, *op.cit.*fn.89 at p.200; For a discussion of the position relating to the role or

Furthermore in both Germany and France the premiums paid by employers are calculated by reference to individual risk thus tort liability principles are carried through to a degree even where tort actions are largely barred.

6.49 However, given the extensive use of bulk loss sharing agreements between insurers and social carriers, especially in Germany and France, it can be argued that the punitive and deterrent effects are minimal as tortfeasors do not discharge liability from their own pockets, being rather mere "conduits for passing it on and spreading it among all those who hold insurance and pay premiums against the same risk."[95] In Germany, for example, loss sharing agreements whereby the liability insurer automatically pays 55% of the security carriers cost are widely practised.[96] This is an implicit consideration in the very limited use of subrogation rights in Scandinavian countries which approach we now examine.

Scandinavian Law System: Social Compensation with Limited Role for Subrogation

6.50 The Scandinavian experience is interesting as their legal system, although always open to influence from both, belongs neither to the common law or the civil law, forming a legal system *sui generis*. Their jurisprudence is instructive in that they began looking at the substitution of insurance law for some of the functions of tort law in the early twentieth century.[97] Kruse explains the concept as follows:

> "The fundamental idea was that since all citizens contribute, according to their means, to the social security systems, it would be reasonable to let everybody benefit from them, including the tortfeasors. At the same time it would be possible to avoid a number of lawsuits, especially those concerning the recourse claims from the social security systems against the tortfeasors."[98]

6.51 Section 25 of the *Insurance Contracts Acts, 1930,* which is essentially uniform among the four Scandinavian countries, provides that the payment of non-indemnity insurance is not taken into account when assessing the tortfeasor's financial liability. With regard to losses covered by indemnity insurance, the insurer is subrogated to the right of the insured as against the person liable to pay compensation. However, where first party insurance covers the loss, the courts are

---

lack of other types of damages in Germany and France see Aggravated, Exemplary and Restitutionary Damages, LRC Consultation Paper (April 1998) at pp.50-52.

95 Fleming, *op.cit.*fn.87 at s.68.

96 Pfennigstorf, *op.cit.*fn.90 at para. 2.10.

97 For discussion of the history of this aspect of Scandinavian law see generally Stig Jørgenson, The *Decline and Fall of the Law of Torts*, 18 Am. J. Comp. Law 39.

98 Anders Vinding Kruse, The Scandinavian Law of Torts, Theory and Practice in the Twentieth Century 18 Am. J. Comp. Law 58 at p.76.

authorised to reduce or completely annul the liability to pay compensation where the injury was due to negligence not amounting to gross negligence. Thus the actual role of subrogation has been minimised. This restriction on the role of subrogation has not, however, been applied to the same extent in Denmark, where the argument for the deterrent effect in subrogation suits still subsists.[99] Apart from this aberration, the regimes in these countries essentially demonstrate the redistribution of losses by collective social insurance schemes as opposed to the traditional methods of allocation in accordance with fault under tort liability principles. As Jørgenson succinctly observes:

> "By payment of a premium, one obtains compensation for loss. Thus insurance performs the same restorative function performed by the law of torts, with several advantages from the viewpoint of the injury victim. The compensation will be paid regardless of whether anybody is or can be proved responsible, and regardless of whether the tortfeasor (if any) is able to pay."[100]

6.52 The issue of collateral benefits and the consequent experience of double compensation originates in the proliferation of different insurance and social security benefits in response to the perceived inadequacies of tort law. At a simplistic level these inadequacies arose due to increased industrial activity and more hazardous social activities which resulted in more severe costs and consequences of accidents. As such reliance on a wrongdoer to pay from his own pocket became unrealistic. The Scandinavian countries examined below illustrate one method of avoiding double compensation by redressing the balance between tort liability and insurance, both social and private, to make the two more compatible and less wasteful of what are accepted to be common resources.

Sweden

6.53 Sweden has a highly developed general social insurance system and the available benefits cover most economic losses arising from accidents. These are in turn deducted from tort damages and there is no recourse against the tortfeasor. The effect, Hellner notes, is to remove the losses which the insurance covers entirely from the sphere of tort liability.[101] The Swedish system only allows compensation for real loss; therefore all benefits received will reduce compensation including employment benefit, sickness benefits, pensions or annuities from any health or occupational insurance.[102] Where the employer pays sick pay or a

---

99 Jørgenson, *op. cit.* fn.97 at p.50 calls this aberration 'inexplicable' and the argument 'flimsy'; Kruse *ibid.* at p.73.

100 *Ibid.* at p.47

101 Jan Hellner, Compensation for Personal Injury: The Swedish Alternative, 34 Am. J. Comp. Law. 613

102 MAURICE SHERIDAN AND JAMES CAMERON, EFTA LEGAL SYSTEMS: AN INTRODUCTORY GUIDE, (Butterworths, 1993) at Sweden-35. As noted above private policies are not taken into account, however indemnity rules apply to expenses for hospital and medical costs.

disability pension, he is entitled to be subrogated to the employees claim for these costs.[103]

6.54 Certain insurance schemes have been introduced to replace tort liability, giving the injured party a contractual right to receive compensation directly from the insurer in fields which would otherwise be major areas of tort liability. These are Security Insurance for Work related injuries, Patient Insurance, Pharmaceutical Insurance, and Traffic Insurance. Under these schemes, the victim is compensated without having to prove fault or negligence. The majority of compensation payments under tort law rules are now based on these schemes which cover losses not covered by social insurance or supplementary means.[104] The rationale behind the Swedish system is best explained by reference to the objectives of the schemes which are the following:

- to facilitate the possibilities for an injured person to receive compensation without having to rely on the lengthy and complicated processes of proving fault;
- to eliminate as effectively as possible tort law responsibility in areas where tort liability is comparatively common and could cause considerable costs for investigations and law court proceedings as well as bad consumer publicity;
- to allow faster, more rational and cheaper claims handling than possible under tort law.[105]

The prerequisite to entitlement to benefits under a scheme is that the injury must have occurred within an insured activity. The patient insurance and the pharmaceutical insurance schemes are voluntary, allowing the injured party to choose between the scheme or conventional tort law which would necessitate proving negligence.

6.55 The result of this comprehensive coverage is that the traditional tort action is really the last resort where a person's injury has not already been compensated. Yet tort principles still have a role. The situation is explained by Hellner as follows:

> "Tort rules have become largely a means of linking the right to indemnity to an insurance taken out by a tortfeasor. Conversely, tort liability has developed into a duty, or a compulsion, to pay premiums for an insurance that covers injuries and losses. The result is paradoxical. The general rules of tort liability are framed as if damages are paid by a negligent person or his employer, whereas they are normally paid by an insurer."[106]

---

103 Jan Hellner, Damages for Personal Injury and the Victim's Private Insurance, 18 Am. J. Comp. Law, 126 at p.132.

104 Pfennigstorf, *op. cit.* fn.90 at para. 2.1.

105 *Ibid.* See also Guido Calabresi, *Policy Goals of the "Swedish Alternative"*, 34 Am. J. Comp. Law. 657.

106 Hellner, *op. cit.* fn.101 at p.617.

Norway

6.56 Norwegian law adds another possible method of preventing double recovery, which has been touched on in some other jurisdictions, to a limited degree; this entails the discretionary reduction of damages on the grounds of receipt of other benefits. Such discretion can be applied to private insurance in the calculation of damages for permanent disability and fatal injuries. Hellner cites the example of a Norwegian Supreme Court decision whereby a widow was refused damages for wrongful death as the Court, taking into account all the economic circumstances, decided that the widow was already provided for to an extent only enjoyed by few in society.[107] In Sweden, the Act on Damages *Skadeständslag SFS 1972:207* Chapter 6 allows for the possible reduction of damages having regard to *inter alia* contributory negligence, the negligence in question and the respective financial positions of the parties; thus a discretionary element is found here also.[108]

6.57 In Norway, the injured party has a direct claim against the insurer in the case of traffic accidents, industrial injuries and workers compensation and thus the role of traditional tort law is substituted by insurance in these areas. Awards for pain and suffering and other non-economic harm are not covered by traffic accident insurance. The general principle is one of deductibility so that benefits such as sickness or permanent pensions, which replace income, whether from public or private sources, are deducted from compensation. Selmer notes that " it is strongly embedded in Norwegian legal tradition that the victim shall not be compensated more than once for his loss of income."[109]

General Observations

6.58 While still largely using tort principles as the criteria for compensation, the trend in Scandinavia is towards the use of insurance schemes as the primary method of administering compensation, eliminating the courtroom stage which is such an integral part of common law systems. A move away from the traditional role of fault in tort liability is illustrated by the limited role of subrogation and proliferation of no-fault compensation schemes implying a conscious decision that society, or at

---

107 1950 Retstidende 573; See also Selmer, *Limitation of Damages According to the circumstances of the 'Average Citizen'*: Scand Stud.L 5 (1961) 133,143 for information as to the discretion vested in the courts to reduce damages with regard to 'equity' or the 'property status of the plaintiff'.

108 Sheridan and Cameron, *op. cit.* fn.102 at Sweden – 36; In the Netherlands 6.1.9.5 of *Ontwerp voor enn Nieuw Burgelijk Wetboek* provides the general rule that advantages be taken into account in reduction of damages in so far as this is deemed equitable: Fleming, *Collateral Benefits*: Int. Enc. Comp. L XI Torts (1983) ch.11 at s.3.

109 Kurt S. Selmer, Interactions between Insurance and Tort Law Theories in the Norwegian Law of Personal Injuries, 18 Am. J. Comp. Law 145 at p.155.

least all those who carry out certain activities within it ought to be responsible for the resultant damages.

6.59 In order to fund a system heavily reliant on social insurance it is essential that costs are controlled. This is largely achieved by statutory regulation of the amount and nature of damages which can be recovered. For example in Denmark, Act No. 9 of 1986 on damages (*Erstatnings-ansvarloven*) as amended is not only the basis for assessing damages and the effect of any insurance coverage, it also sets fixed amounts of compensation for pain and suffering, permanent incapacity, and a cap for damages for loss of capacity to work.[110] Such amounts are linked to an index and while jurisdictions such as Ireland would arguably achieve a similar level of uniformity by virtue of the publication of decisions, our system lacks the same degree of rigidity. Thus it has been commented that "damages awarded by the courts would by international standards be considered as rather low."[111]

Summary

Common Law Variations

(1) Scotland, Canada and Australia subscribe to the compensatory theory of damages, thus a general rule of deduction of collateral benefits applies. Non-indemnity insurance, pensions and charitable benefits are not deductible, there being socially desirable justifications for excepting them from the general rule.

(2) Variations on these exceptions exist. Thus in Scotland retirement pension payments will be taken into account in the calculation of loss of retirement rights as there is a direct correlation between the payment and the head of damages. In relation to charitable payments all countries have decreed that the encouragement of benevolence is best served by deducting such payments when they emanate from the tortfeasor, or that there is a presumption that the purpose is to compensate. A requirement to reimburse the donor may on occasion be imposed.[112]

(3) The picture is less uniform in relation to other collateral benefits. In Scotland and Australia sick pay is deducted unless there is an obligation to repay: in the case of the latter, recovery of cumulated sick leave entitlement is acceptable. In Canada in certain circumstances it is possible to draw an analogy between sickness benefit and insurance rendering the former non-deductible.

---

110 Maurice Sheridan and James Cameron (Eds), EC Legal Systems, An Introductory Guide, (1992) Denmark -35

111 *Ibid.* at p.36.

112 In Canada, the courts may impose such a term in order to avoid overcompensation where there is a reasonable correlation between the payment and a head of damages is identifiable e.g. rendering of gratuitous services. *supra* para.6.11.

(4) Canadian legislation also diverges from the general rule of deduction in respect of social security benefits, many of which have been categorised as gratuitous. In the two other countries such benefits are either deductible or subrogation rights apply. In Scotland pre-award benefits are deducted.

(5) The United States of America adheres to the collateral source rule, a general rule of non-deduction. One of the justifications for this acceptance of cumulation of benefits is an explicit recognition of a punitive/ deterrent element in tort law. Subrogation rights exist however in relation to workers compensation and health insurance. Some states have reformed aspects of the rule or abrogated it entirely.

(6) The establishment of a no-fault compensation scheme in New Zealand has largely removed the issues of fault, collateral benefits, subrogation and deductibility from consideration. Issues which can arise tend to be centred on cost control, which may entail a restriction on heads of claim, and a loss of the perceived deterrent effect of traditional tort liability. The latest amendments have introduced a level of accountability through the means of experience rating for premiums.

Civil Law Systems

(1) Germany, France and Belgium adhere closely to a strictly compensatory approach to damages. The only true exceptions to the rule of deductibility are non-indemnity insurance and charitable payments. Social security carriers cover most of the economic consequences of accidents and they have extensive subrogation rights which are exercised. There is a discernible trend towards the establishment of no fault compensation schemes in those areas where accidents are most likely to occur such as industry and motor vehicles.

(2) The endorsement of a deterrent function of tort law is illustrated by the use of subrogation rights and the possibility of tort actions outside the workers compensation schemes where an injury is due to an intentional act or the employer was grossly negligent.

(3) The real role of fault and arguably any deterrent effect is depleted however due to the practical application of subrogation rights through bulk loss sharing agreements between insurers and social security providers.

Scandinavia

(1) The Scandinavian countries have moved further still in the widespread use of direct rights of compensation with a very limited role for subrogation. No fault compensation schemes are prevalent. Social insurance is the primary means of compensating for accidents to the extent that one can say the traditional role of tort law has been marginalised.

General Observations on the Treatment of Collateral Benefits in Comparative Law

6.60 What these systems illustrate for our purposes is that the role of traditional tort law and indeed the element of fault within that law is changing. Essentially this is due to the proliferation of other means of compensation and protection from the losses caused by accidents by social security and public and private insurance i.e. the collateral benefits. The existence of these benefits has necessarily displaced the traditional role of tort once a compensatory theory is recognised; the injured party must not be allowed cumulate and where he is allowed to retain benefits in addition to compensation it is ostensibly because of the acceptance of another purpose or effect of such benefits which justify its exemption. There then inevitably follows a choice as to how to deal with the remainder of the payments: (a) deduction without any recourse for the collateral benefit provider (b) subrogation (or some form of recoupment or reimbursement). The choice made follows logically and unavoidably from the regime's interpretation of the functions of tort law. However even where the system seeks to hold the tortfeasor responsible for all loss, the universal use of insurance demonstrates that in reality this is happening less in practice. The results of these choices is explained by Magnus as follows:

> "Finally the essential importance of the fault principle has been reduced by the development of the modern law of social security and insurance law. Social security law and/or private insurance provide a basic or even complete protection against risks of any kind for most people. The mechanisms of social security and insurance law have the regular effect that the legal relation between individual tortfeasor and individual victim becomes an indirect one or is abolished at all like in many countries in case of workmen's compensation. Nevertheless the provisions of tort law remain the governing rules for any redress the loss bearer (social security agency or private insurance company) has against a tortfeasor." [113]

---

[113] Ulrich Magnus, *European Perspectives of Tort Liability*, (1995) European Review of Private Law, 427 at p.431.

PART IV

CHAPTER 7 THE GENERAL PRINCIPLE OF DEDUCTIBILITY UNDER IRISH LAW

7.01 The default setting of the English common law is one of deduction of collateral benefits. Problems arise in identifying where exceptions might arise and to what extent. But this factor should not hide the reality that the main departure point is one of deduction. Irish law, to the contrary, inverts this presumption. Section 2 of the *Civil Liability (Amendment) Act, 1964* enacts a broad rule of non-deduction. Non-deductibility is therefore the main departure point under Irish law.

7.02 This chapter looks at the legislative history of section 2 and the current law in Ireland pertaining to collateral benefits. The focus is inevitably on the effects of section 2 on the various benefits as the wide terminology of the section encompasses virtually all those collateral benefits which could possibly arise as a result of an accident.

7.03 It should be noted that there is at least one respect in which section 2 is narrower than the position under English common law. Notwithstanding the broad terminology of the section, it is probably correct to say that charitable benefits in kind do not come within its scope.[1] The position as to whether social assistance payments are included in section 2 is also the subject of some division of opinion and this is considered below at paragraphs 7.59-7.62. Where a benefit does not fall to be considered under section 2, its treatment is determined by the common law.[2]

The Legislative History of Section 2

7.04 Section 2 of the 1964 Act deals with the non-deductibility of collateral benefits from damages for *non-fatal* personal injury. Before the enactment of legislation, the deductibility or otherwise of collateral benefits for both fatal and non-fatal personal injury was governed by the common law. The treatment afforded to the two categories of injury was not however uniform. The separate development of each is considered below before returning to section 2.

---

1 See para.7.36

2 Note Geoghegan J's warning in *Greene v Hughes Haulage Ltd.* [1998] ILRM 34 at p.41 that the English case law has to be approached with great caution because in England the question of deductibility in a given case has always been governed by the common law and not by statute.

Backdrop to Section 2 – The Evolution of a Principle of Non-Deductibility with Respect to Damages for Fatal Personal Injuries[3]

7.05 Prior to 1846, the death of a human being could not constitute a cause of action in a civil court as no person had a legally protected interest in the life of another.[4] However, following the *Fatal Accidents Acts, 1846 and 1864*[5] (generally known as Lord Campbell's Act) certain relations of the deceased could, through a personal representative, bring an action for damages in respect of the injury they suffered as a result of the death.[6] However, in *Grand Trunk Railway Company of Canada v Jennings*[7] the Privy Council interpreted Lord Campbell's Act as having the effect that only the net pecuniary benefit accruing to the dependants of the deceased was recoverable; any collateral benefits accruing to the dependants on the death of the deceased were to be taken into account.[8] Consequently, a general rule of deduction developed at common law in assessing damages for fatal injuries.

7.06 Gradually, however, statutory inroads were made upon this general rule of deduction, the first being the *Fatal Accidents (Damages) Act, 1908*. This provided for the non-deductibility of any sums payable on death under a contract of insurance. Section 5 of the *Fatal Injuries Act, 1956* replaced section 1 of the 1908 Act and provided that, in addition to payments under contracts of insurance, no account was to be taken of pensions, gratuities and other like benefits payable in consequence of the death. Section 5 was re-enacted in section 50 of the *Civil Liability Act, 1961* and is in similar terms to section 2 with regard the benefits which are not to be taken into account in the assessment of damages. This represents the current state of Irish law as regards the deductibility of collateral benefits from damages for fatal injuries.

Development of the Law Relating to Damages for Non-Fatal Personal Injuries

7.07 The common law experience in relation to the deductibility of collateral benefits for non-fatal personal injuries was however quite different from that relating

---

3 See generally HARVEY MCGREGOR, MCGREGOR ON DAMAGES, (16th ed. 1997), paras.1816-1818. See also JOHN WHITE, IRISH LAW OF DAMAGES paras.9.4.01-9.4.27.

4 As illustrated in *Baker v Bolton* (1908) 1 Camp. 493. A sole exception to this rule existed in Ireland following the *Grand Juries Act, 1836*. This provided for compensation to be awarded by the old County Court to the personal representative of a Magistrate, or other Peace Officer, or of any deceased who had been killed for giving information or evidence against a person charged with any offence contrary to the public peace. The amount awarded was raised from local rates.

5 To be read together as one Act.

6 The legislation was enacted in response to the great increase in the number of fatal accidents following the growth of railway communications.

7 (1888) 13 App Cas 800

8 The Privy Council held that life insurance payments which the dependants of the deceased had received were to be deducted from the defendant's damages. See also *Pym v Great Northern Railway Company* (1863) 4 B& S 396; *Baker v Dalgleish Steam Shipping Company* [1922] 1 KB 361.

to fatal injuries. In the seminal case of *Bradburn v Great Western Railway*[9] the House of Lords held that, under the common law, payments made pursuant to an accident insurance policy were not deductible from an award of damages for non-fatal personal injuries.

7.08 The rule of non-deductibility contained in section 50 of the 1961 Act only deals with damages awarded for fatal injuries. This was due to the general belief in Ireland at the time of its enactment that the non-deductibility provision contained in section 50 was already the law applicable to non-fatal cases, therefore there was no need to make specific statutory provision for it. [10] This assumption was upset by a line of decisions in the United Kingdom Court of Appeal which created uncertainty in the matter and, in response, the Oireachtas enacted section 2 of the 1964 Act.[11] The basis for the enactment of section 2 is reflected in the comments of the then Minister for Justice when he stated that:

> "To remove any doubt in the matter, section 2 of the Bill proposes to state clearly that our law in non-fatal cases is the same as in fatal cases."[12]

7.09 The dicta of Geoghegan J in the High Court in *Greene v Hughes Haulage Ltd.*[13] supports this view of the impetus behind the enactment of the provision:

> "The 1964 Act was a short Act of what might be described as a tidying up nature covering relevant matters not already provided for or inadequately provided for in the *Civil Liability Act, 1961*.... It may well have been because of the uncertainty of the common law at that time [following the decisions of the English Court of Appeal in *Payne, Browning* and *Parsons*] that the Oireachtas decided to enact section 2 of the *Civil Liability (Amendment) Act, 1964* simplifying the position and in effect applying to personal injury actions the same rules as to non-deductibility as already applied to fatal injury actions under section 50 of the *Civil Liability Act 1961*."[14]

7.10 In light of the foregoing, the judicial interpretation of section 50 of the 1961 Act may also be instructive when considering section 2 of the 1964 Act. In

---

9 (1874) LR 10 Ex 1

10 Mr Charles J Haughey, the then Minister for Justice, said that, in relation to section 50 of the 1961 Act: "I am quite satisfied that there is no necessity to provide in this Bill that pensions are not to be taken into account in non-fatal cases as that is the existing law." Dáil Debates Vol. 211 para.2367 (1st August 1961).

11 *Payne v Railway Executive* [1952] 1 KB 26, *Browning v The War Office* [1963] 1 QB 750 and *Parsons v B.N.B. Laboratories Ltd.* [1964] 1 QB 95. See paras.4.15–4.17 above.

12 Dáil Debates Vol. 211, Paragraph 583 (23rd June 1964)

13 [1998] 1 ILRM 34

14 *Ibid.*, at pp.41, 43-44

the succeeding paragraphs reference shall be made to case-law concerning the scope of section 50 where this is relevant to our discussion.

The Scope of Section 2

7.11 Section 2 of the *Civil Liability (Amendment) Act, 1964*, provides:

> "In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of:
>
> (a) any sum payable in respect of the injury under any contract of insurance,
>
> (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury."

7.12 The conditions which a payment must satisfy in order to fall within section 2 determine to a large extent the benefits with which we are concerned in this debate. In order to ascertain whether a payment is a collateral benefit which may give rise to double compensation two questions must be asked:

(i) is the benefit payable in consequence of injuries sustained in an accident?[15]
(ii) does the benefit have the effect of compensating the plaintiff for the same loss as a head of damages?

7.13 There are a wide variety of collateral benefits with differing purposes, financing mechanisms and effects (whether intended or unintended). By virtue of both sections 2 of the 1964 Act and the case law on this matter, the term 'collateral benefit' includes in practice:

- payments received under private insurance policies;
- charitable benefits (gratuities);
- payments received under pension schemes (both statutory & non-statutory);
- sick-pay;
- social welfare benefits.

The *Redundancy Payments Act, 1967* provides that dismissal by reason of redundancy is taken to occur where an employer has ceased or intends to cease to carry on the business for the purposes for which the employee was employed by him, or where the requirements of that business which gave rise to the employee's job have ceased or diminished or are expected to cease or diminish. Redundancy will also be deemed to occur where the place of business or the carrying out of the functions relevant to the plaintiff's job change.[16] While certain commentators and indeed the common law in

---

[15] Section 2 refers to "damages in respect of a wrongful act (including a crime) resulting in personal injury". Throughout this paper we use the example of a tort accident while recognising that it is but one instance of a "wrongful act".

[16] Redundancy Payments Act, 1967, section 7(2)

England have regarded redundancy payments as capable of being a collateral benefit, the Commission believes that true redundancy is referable to the circumstances of a particular job as opposed to the employee and therefore is not a collateral benefit.[17]

7.15 With regard to the scope of section 2, White has made the following preliminary observations.[18]

(1) The section is more narrowly cast than the English common law in that it probably only applies to money payments. This proposition is based on the fact that the words 'pension' and 'gratuity' are satisfied only by money payments. While it is admitted that this may appear unduly restrictive, White argues that the word 'payable' is clearly inappropriate to describe the provision of goods and services and thus must be interpreted as applicable only to payments of money. It follows that 'other like benefits' must be construed in the light of the preceding words and therefore limited to money payments.

(2) Although section 2 is confined to money payments, the use of the word 'gratuity' clearly prevents its scope from being limited to payments receivable by the plaintiff as of right. Consequently, charitable payments of money received by a plaintiff clearly come within the ambit of section 2.

(3) Any enquiry into the source of the benefit is irrelevant for the purposes of section 2; the sole criterion in order for the section to apply is that the benefit is payable *in consequence of an injury*. Therefore, it can be concluded that the section applies to those benefits within its scope irrespective of their source.

(4) Where a benefit comes within the scope of section 2 then, by virtue of the words '*account shall not be taken of*', no account whatsoever is to be taken of the benefit in assessing damages. Hence, section 2 provides blanket exclusion for those benefits which come within its scope.

7.16 The effects of section 2 on the various types of collateral benefit which may accrue to an injured person are examined below. As will be seen, the main effect is not so much to add to the categories of non-deductibility but to extend them beyond the point sustained under the common law. However this expansive approach has

---

[17] See paras.4.39-4.42 *supra*. JOHN WHITE, IRISH LAW OF DAMAGES at para.4.10.26 comments that a redundancy payment will arise for consideration as a collateral benefit where it:

> "(i) has accrued in consequence of the injuries; and (ii) is capable of being regarded as compensation for one or more of the elements of damages in respect of which recovery is sought..."

[18] *Ibid.* at 4.10.05-4.10.06

been tempered by later statutory encroachments on the general rule of non-deductibility.

The Effect of Section 2 on Particular Collateral Benefits

Section 2 and Insurance Payments

7.17 It has long been established at common law that benefits received by a plaintiff under a contract of insurance shall not be taken into consideration by a court in the assessment of damages. This principle was encapsulated in statutory form by paragraph (a) of section 2 of the 1964 Act.

7.18 However, the position of Irish law in relation to payments received by a plaintiff under a policy of insurance to which he was not a party, or for which he had not paid the premiums, was uncertain until recently. White argues that, in such circumstances, payments are still non-deductible under section 2.[19] He bases this argument on an analogy with two decisions of the English Court of Appeal which dealt with the same issue in the context of fatal injuries, as provided for under section 1 of the *Fatal Accidents (Damages) Act, 1908.*

7.19 In *Bowskill v Dawson*[20] the insured-deceased was not a party to the contract of insurance which had been taken out by his employers. However, as the proceeds of the policy were to be held on trust for the deceased's estate, the English Court of Appeal held that this equitable right of enforcement brought the payment within the scope of section 1 of the 1908 Act.

7.20 In *Green v Russell,*[21] although the deceased's estate had no equitable right of enforcement, the English Court of Appeal nevertheless held the payments to be non-deductible under section 1. The policy on the life of the deceased had been taken out by his employer and although the proceeds became the sole property of the employer, they were paid over to the deceased's estate. Romer LJ, with whom Hodson J concurred, held that as the intention to benefit the estate of the deceased was expressly mentioned in the policy, the payments came within the scope of section 1 of the 1908 Act and were consequently non-deductible.

7.21 Thus, White contends that, by analogy with section 1 of the 1908 Act, where either the plaintiff has an equitable right of enforcement with regard to the proceeds of the insurance policy, or where the policy is expressed to be for the benefit of the plaintiff, any payments received by him thereunder are non-deductible in this jurisdiction under section 2 of the 1964 Act.

7.22 Even without making the analogy, it seems clear that on a literal interpretation of section 2, all insurance monies payable in consequence of an

---

19 White, *op. cit.*fn.17 at para.4.10.07

20 [1955] 1 QB 13

21 [1959] 2 QB 226

injury are encompassed within the rule of non-deductibility: the phrase '*any sum payable....under any contract of insurance*' is unambiguous. On this view paragraph (a) of section 2 is 'merely descriptive of the insurance monies themselves.'[22] Thus it seems that, so long as the monies in question can be identified as the proceeds of a policy of insurance payable in consequence of an injury, the payments fall within the scope of section 2. The following then becomes irrelevant:

- the path by which the monies reached the plaintiff;
- the absence of any right of enforcement by the plaintiff in respect of the monies;
- that the payee under the policy is not the plaintiff;
- that the policy is not expressly for the benefit of the plaintiff.

7.23 The interpretation afforded by the English Court of Appeal to section 1 of the *Fatal Accidents (Damages) Act, 1908* in *Green v Russell*[23] is consistent with this reading of the statute. In that case Pearce LJ, the third member of the Court, declined to rest his decision on the narrow ground of the wording of the particular policy.[24] Rather, he accepted the construction of section 1 which was adopted by the trial judge, Ashworth J, who was influenced by the double use of the word 'any'. Pearce LJ said:

> "It is obvious that in each case there must be an assured or insured person and a payer and a payee. It would have been possible to insert in the Act detailed provisions dealing with these matters. But the Act, deliberately as I think, dealt with the matter on broad lines as the original Act of [1846] had done. It was excluding a certain type of consideration from the broad and difficult task which the jury had to achieve in each case. The legislature contented itself with describing the nature of the monies that were not to be taken into account, without seeking to limit the exact path of those monies or specifying from whom and by whom they had to be received...."[25]

7.24 This question whether insurance payments can be considered non-deductible under section 2 in circumstances where the premiums have not been paid by the plaintiff recently came before Geoghegan J in the High Court in *Greene v Hughes Haulage Ltd.*[26] The plaintiff had been in receipt of payments under an insurance policy, the premiums for which had been paid by her employer. She sought to have the benefits ignored under section 2 of the 1964 Act. Geoghegan J held that section 2 was intended by the Oireachtas to be interpreted in a manner similar to section 50 of the *Civil Liability Act, 1961*, which provided for equivalent

---

22 White, *op. cit.*fn. 17 at para.4.10.07

23 [1959] 2 QB 226

24 As had the other two members of the Court. *Supra* para.7.20.

25 *Op. cit.* fn.23 at p.248.

26 [1998] 1 ILRM 34

non-deductions in fatal injury claims. As section 50 is largely a re-enactment of earlier statutory provisions which have been interpreted by the courts as not requiring the deceased to be a party to the contract of insurance or to have paid premiums, this interpretation was equally applicable to section 2. Geoghegan J cited both *Bowskill v Dawson*[27] and *Green v Russell*[28] as authority for the manner in which the fatal injury legislation has been interpreted, and concluded that the benefits in question fell within the general rule of non-deductibility in section 2:

> "In each case the expression 'under any contract of insurance' is used and I therefore see no reason why the broad interpretation which has always been given to that expression in the fatal injury cases should not now be applied to personal injury actions."[29]

7.25 The type of payments with which the court was concerned in *Greene v Hughes Haulage*[30] arose by virtue of an employee benefit plan, specifically a disability benefit plan contracted for by the plaintiff's employer. Under this plan the plaintiff was entitled to an income equal to 75% of her basic salary upon being totally disabled for a period of six months after the accident. Counsel for the defendant, relying on the decision of Hamilton P, as he then was, in *Dennehy v Nordic Cold Storage Ltd.*,[31] argued that the insurance policy in *Greene* was not of the kind contemplated in section 2 as the plaintiff's employer had paid for the premiums.

7.26 In *Dennehy* the employer had a contract of indemnity for income continuance payments, and he therefore continued to pay the injured employee and was indemnified pursuant to this contract. The employee in his claim for loss of earnings, argued that by virtue of section 2 the monies received on foot of this contract ought not be taken into account. Hamilton P rejected this contention and held that the payments fell outside the section and were therefore deductible.[32]

7.27 Geoghegan J, while agreeing with the decision in *Dennehy,* distinguished the case on the basis that it concerned 'simply a contract indemnifying the employer against a liability which the employer himself took on ...'[33] The insurance policy with which the court was concerned in *Greene* had been taken out by the employer for the benefit of such people as the plaintiff. He later opines that

---

27 [1955] 1 QB 13

28 [1959] 2 QB 226

29 [1998] 1 ILRM 34 at p.44.

30 [1998] 1 ILRM 34

31 Unreported High Court, 8 May 1991

32 In the absence of a written judgment in this case, Geoghegan J and counsel for the defendant were relying on a note by ANTHONY KERR in THE CIVIL LIABILITY ACTS, 1961 AND 1964 (Roundhall Press, 1993) at p.134. Geoghegan J however does not agree with Kerr's analysis of the basis of the ruling. See *Greene* at p.40.

33 *Ibid.*at p.41.

a simple indemnity policy indemnifying the employer against some contractual undertaking by it to continue making salary payments to an employee who had become incapacitated would not come within section 2.[34] While this comment is strictly *obiter*, it is consistent with the *ratio* in *Dennehy*.

7.28 In that case, after quoting section 2, Hamilton P expresses his opinion as to the intention behind the provision as follows:

> "It is my view that the intention was if the plaintiff himself effected a contract of insurance, and as a result of which he had been entitled to receive benefits, that was purely a matter for him..... I am satisfied it was never intended by the legislator that when an employer effects a policy of insurance to provide for certain eventualities and that the injured person benefits from that, that he should recover the benefit of that in addition to the loss of wages."[35]

7.29 It is therefore possible that not all insurance payments fall within the scope of section 2(a). Both the court in *Dennehy* and Geoghegan J in his interpretation of the decision may have been influenced by the fact that the defendant was also the plaintiff's employer and therefore to ignore the collateral payments made by him to the plaintiff may have seemed unjust. The fact that the plaintiff had not made any contributions to the scheme in *Dennehy* and was not required to do so under the terms of the policy was material. Geoghegan J referred to such a scenario in *Greene* when he said:

> "It could be said than an anomalous injustice could occur if the defendant was himself the employer. In that case it might be argued that there was no third party claiming advantage from the plaintiff's own insurance benefits."[36]

However, the learned judge proceeded to reject such an argument:

> "But I do not think that the interpretation of the clear words of the section should be governed by such considerations. In most cases the benefit policy will form part of the total remuneration and the employee will therefore be indirectly contributing to the premiums. In other cases it may be possible to imply a term permitting deductibility in the contract of employment."[37]

7.30 Counsel for the defendant in *Greene* also referred to the position of the English common law in support of the argument that the insurance payments should

---

34 *Ibid.*

35 *Dennehy v Nordic Cold Storage*, Unreported, High Court, 8 May 1991, Hamilton P. p.2 of Irish Stenographers Ltd. record of the judgment.

36 [1998] 1 ILRM 34 at p.44.

37 *Ibid.*

be deducted.[38] The common law approach was however considered to be irrelevant as the collateral payments in question clearly fell within the scope of section 2. Moreover, Geoghegan J said that even if the decision in *Hussain v New Taplow Paper Mill Ltd.*[39] was relevant it could be distinguished on its facts.[40]

7.31 Therefore, to summarise, by virtue of section 2, insurance payments received by a plaintiff in consequence of an injury are not deductible even where the plaintiff has not paid the premiums or is not a party to the insurance contract. It can however be argued on the basis of *Dennehy* and the *obiter dicta* in *Greene* that where an employer takes out a separate contract of insurance to indemnify him or herself in respect of certain losses, monies paid pursuant to such a contract are outside the scope of section 2.

7.32 Quite apart from section 2 it would appear that the common law in Ireland is more favourable to the plaintiff than the English common law. Geoghegan J commented in *Greene* that, although the plaintiff had not paid the premiums, the insurance arrangements were part of her remuneration package with her employer, thus implying that payment of the premiums could be attributed to her through other terms of her contract.[41] Furthermore, Geoghegan J commented that notwithstanding the benefit under the contract of insurance was calculated by reference to salary, he considered it to be a disability benefit which even if the common law position pertained would be non-deductible.

Charitable Benefits

7.33 The first point which must be made is that section 2 probably only applies to money payments.[42] If this is correct then the deductibility of charitable benefits in kind falls to be determined by the common law. Even if benefits in kind do fall within section 2, there does not seem to be any valid reason for treating them differently from monetary payments. This is considered below.

7.34 Charitable gifts of money to a plaintiff clearly come within the ambit of section 2(b) by reason of the reference therein to 'gratuities,' and are consequently

---

38 *Supra* paras.4.02-4.08.

39 [1988] AC 514

40 Geoghegan J at p.44 reasoned that,

> "in the *Hussain* case the employers had assumed a direct contractual liability to the plaintiff to pay partial salary in the event of incapacity and it was held that the fact that the defendants happened to have insured their liability to meet those contractual commitments as they arose did not affect the issue in any way."

In the instance case the insurance arrangements were part of the plaintiff's remuneration package.

41 This so called 'social wage theory' was rejected by Lord Bridge in *Hussain v New Taplow Paper Mills Ltd.* [1988] AC 514.

42 *Supra* para.7.15

to be ignored *in toto* in the assessment of the plaintiff's damages. In this regard, section 2 is consistent with the position at common law.[43] However, the comprehensive terminology of section 2 entails the disregard of a collateral benefit irrespective of its source, and thus the charitable payment is non-deductible even where the donor is the defendant. At common law, the position is not so clear, largely due to the existence of the view that the rationale behind the non-deductibility of charitable benefits in general *viz.*, the encouragement of social solidarity and benevolent behaviour, when applied to charitable payments by the defendant tortfeasor, logically leads to the contrary result, i.e. the deduction of such payments from damages awards serves to encourage the defendant to make *ex gratia* payments to the plaintiff.

7.35 It has been argued, however, that the public interest is not necessarily best served by allowing the court to take into consideration gifts of money which the plaintiff receives from the defendant.[44] The defendant may genuinely wish to assist the plaintiff, in addition to paying him damages, without enabling his insurers to reap the benefit of his actions: due to widespread liability insurance it can be argued that the only party who would benefit from a reduction in the defendant's liability is his insurance company. Moreover, in the context of an employer-employee relationship, where the latter is injured in the workplace, it is open to the employer to provide in the contract of employment for such charitable payments to be made on the condition that they are to be treated as compensation for the injuries sustained should the employer be held liable.

7.36 On a literal interpretation, the deductibility of charitable benefits in kind would seem to be outside the scope of section 2 and therefore fall to be determined by the common law. In *Ryan v Compensation Tribunal,*[45] Costello P clearly accepts that benefits in kind, in this case the provision of services, are non-deductible.[46] Moreover given the non-deductibility of charitable money payments and the general policy of non-deduction of collateral benefits enshrined in section 2, a different rule for benefits in kind would not only be without justification, it would also be anomalous. The rationale which justifies the non-deductibility of charitable payments is equally applicable to benefits in kind. It therefore becomes irrelevant whether benefits in kind are included within the terms of section 2 as they are non-deductible regardless. In considering the desirability of this particular exception, for the same reasons just stated and to maintain consistency, we do not differentiate between monetary charitable benefits and benefits in kind.

---

43 *Supra* paras.4.10-4.13

44 JOHN WHITE, IRISH LAW OF DAMAGES, (Butterworths, 1989) at para.4.10.13.

45 [1997] ILRM 194

46 *Ibid.* at p.202. Although the instant case was distinguishable the cases of *Doherty v Wallboard Mills Ltd.* [1968] IR 277 and *Cooke v Walsh* [1984] ILRM 208 are cited and support the proposition. See also *Basmajian v Haire*, Unreported, High Court, 2 April 1993, Barr J.

Pensions

7.37 Section 2(b) provides that 'any pension' shall be ignored in the assessment of the plaintiff's damages. There are a number of different types and sources of pension. Essentially they can be categorised as arising from the public (social welfare) or the private sector. Within the social welfare system the following are relevant: retirement pensions, old age (contributory) pensions, disablement pensions, disability pensions.[47] Under the auspices of the private sector the following are relevant: occupational, personal and company pensions.[48] The term occupational pension scheme, defined in section 2 of the *Pensions Act, 1990*, is generally used to distinguish job related pension schemes from state social welfare schemes.[49]

7.38 Along with the traditionally accepted exceptions of insurance and charitable payments, pensions have been treated as non-deductible on the basis of an analogy with insurance payments.[50] The basic element of setting monies aside to provide for a future contingency are common to insurance and pensions, it may therefore be argued that the latter fall within the insurance exception. We are not concerned with all pensions but only with those which may become payable in consequence of an injury and therefore fall within the scope of section 2.

7.39 Social insurance retirement pensions or old age (contributory) pensions become payable automatically upon reaching the ages of 65 and 66 years respectively. Entitlement is to these pensions is therefore entirely separate from any losses arising from an injury.[51] Likewise, the payment of a normal occupational retirement pension is entirely unrelated to the consequences of an accident. Therefore it is only where a person who is in receipt of pension payments claims for loss of earnings that the pension is a potential collateral benefit. If the reason the person took retirement is due to the injuries sustained in an accident, then the pension payments fulfil the necessary criteria to be a collateral benefit. The type of pension in question includes state disability pensions and in the private sector the ill health early retirement pension or any pension taken earlier than envisaged on account of injuries for which damages are claimed. We use the term early pension payments below to mean those retirement pension payments which fulfil the necessary criteria of a collateral benefit.

---

47 Pensions under the assistance scheme are considered *infra* at paras.7.59-7.62 in the context of the discussion of social welfare in general. Since they are non-contributory they do not possess the element of investment, thrift etc. which gives rise to the traditional non-deductibility of pensions. Generally the type of pensions available under assistance mirror those under social insurance.

48 A detailed examination of the law of pensions in the private sector is beyond the scope of this paper. See further the *Pensions Act, 1967*; PAUL KENNY, UNDERSTANDING PENSIONS, THE FRIENDLY GUIDE TO PENSION SCHEMES (1994); KEVIN FINUCANE AND BRIAN BUGGY, IRISH PENSIONS LAW AND PRACTICE, (OAK TREE PRESS, 1996)

49 Kenny, *op. cit.*fn.48 at p.59.

50 See paras.4.14-4.33 above.

51 Under the Social Welfare Legislation a person who is injured may be entitled to a disability pension if injured before the normal State retirement age.

7.40 Where an injured plaintiff had contracted to receive a retirement pension at the age of 65 years and because of injuries sustained he takes ill health early retirement at the age of 55 years, only the payments over the ten years are in consequence of the injury and thus fall within section 2. After age 65 the pension payments are no longer collateral benefits, as a pension would have been payable even if the accident had not occurred. However if those payments are less due to the accumulation of less years of service, then a loss is also suffered in the amount of the difference.

7.41 At this point it is appropriate to note that there are two main types of occupational pension scheme: defined benefit schemes and defined contribution schemes. A defined contribution scheme is one which provides long service benefit, the rate or amount of which is directly determined by the amount of contributions paid by, or in respect of, the member and includes a scheme the contributions under which are used directly or indirectly to provide benefits other than long service benefit. A defined benefit scheme provides a pension at retirement calculated by reference to service completed and salary at or near the date of retirement.[52]

7.42 In a defined contribution scheme, regardless of when a person takes their pension, the member will only receive the sum total of the contributions already made and the investment earned by those contributions. Such schemes typically do not confer any extra benefit on account of ill health. Defined benefit schemes are more likely to provide for an enhanced pension in the event of early retirement due to ill health or disability although not every defined benefit scheme will do so.[53] The cost of any such enhancement is directly borne by the employer and the enhancement itself represents a payment over and above the plaintiff's accrued interest in the pension scheme. Under section 2 none of these payments currently fall to be deducted from damages for loss of earnings.[54]

7.43 A person who takes retirement earlier than originally envisaged due to an accident, receives a certain number of extra payments which compensate for loss of earnings. By reason of taking retirement earlier, however, he or she will have made less contributions and therefore suffers a commensurate loss of pension rights. A measure of this loss can be calculated by deducting the value of the payments which will be received after normal retirement age from the value of payments which would have been received had the accident not occurred.[55] The pension payments received

---

52 *Pensions Act, 1990* s.2; Finucane and Buggy, *op. cit.* fn.48 at paras.2.3 *et seq.*

53 Due to steep increases in the premiums payable for prolonged disability insurance in recent years, many employers prefer the route of an enhanced early retirement pension as a means of dealing with disablement.

54 Where the pension is payable under a statutory scheme, however, it may be reduced in consideration of the damages award *State (Thornhill) v Minister for Defence* [1986] IR 1; *Breen v Minister for Defence* [1988] IR 242; *O'Loughlin v Minister for the Public Service* [1985] IR 631. See also Finucane and Buggy, *op. cit.* fn.48 at para.5.50.

55 The term normal retirement or pensionable age is used to refer to earliest age at which a member of a pension scheme has an unqualified right to receive immediate retirement benefit under that scheme. Finucane and Buggy, *op. cit.*fn.48 at para.2.22; *Pensions Act, 1990*, s.2(1).

prior to normal retirement age should not enter into the calculation of loss of pension rights, as prior to that age the pension payments fulfil a different function, and therefore it is not to compare like with like.[56] Under the general rule of non-deduction in section 2, it would seem that no such payments are taken into account.

7.44 With regard to a state disability pension, section 237 of the *Social Welfare (Consolidation) Act, 1993* provides for the deduction of any payments payable for the period of five years from the date of the accident from an award of damages in the case of personal injury relating to the use of a mechanically propelled vehicle. A private ill health early retirement pension remains non-deductible in this situation.

7.45 The origins of this section are to be found in the 1982 Prices Advisory Committee Report which examined potential ways of containing costs within the insurance industry. Chapter 8 of the report notes that a person in insurable employment may be entitled to disability and pay related benefits which can result in up to 180% of lost earnings being replaced. The Committee suggested that this placed an unreasonable burden on contributors to the system.[57] Pay related benefits were later abolished: the difference in treatment between the private and statutory schemes remains however in relation to motor vehicle accidents. Furthermore section 237 provides that the deduction be made from damages and is not restricted to damages for loss of earnings.[58]

7.46 Thus under the current law, only State disability pensions are deductible from damages and only in the circumstances outlined in section 237 of the 1993 Act. This can give rise to double compensation where a person, who is in receipt of payments which serve to compensate for loss of earnings, is awarded damages for the same loss.

Sick Pay

7.47 White has commented that:

> "Sick-pay is properly regarded not as a 'compensating benefit' received by the plaintiff in consequence of his injuries but rather as part of the plaintiff's earning capacity which has remained unaffected by the injuries thereby diminishing the weekly or annual loss which would have been sustained by the plaintiff had his contract of employment not entitled him to receive such sick-pay." [59]

---

[56] See paras.4.29-4.31 *infra* and particularly the quotation from Lord Reid's judgment in *Parry v Cleaver* [1970] AC 1 at pp.20-21.

[57] Note that the later abolition of pay related benefit means that the percentage lost income which can be replaced would be considerably less now. The Committee's recommendation was implemented by the *Social Welfare Act, 1984* which inserted s.306A into the 1981 Consolidation Act.

[58] This particular aspect is addressed at para.9.22.

[59] White, *op. cit.* fn.44 at para.4.10.09.

If this interpretation of the function of sick pay is accepted, then to the extent that the injured plaintiff has received sick pay, he or she has not suffered a loss of earnings and therefore can only claim as a true loss whatever difference there may be between the amount of sick pay received and what [he] would have earned but for the accident. On this view sick pay is clearly considered to compensate for loss of earnings; this is consistent with the position at common law.[60]

7.48 Where a person is absent from work due to illness, the payment of sick pay can arise in a number of different ways: the contract of employment may provide for sick pay; the employer may voluntarily pay the plaintiff while he or she is incapacitated and there is no contractual obligation; the plaintiff may be entitled under statute to a certain amount of payment due to past social insurance contributions.

7.49 Section 75 of the *Social Welfare (Consolidation) Act, 1993* provides that, notwithstanding section 2 of the 1961 Act, the value of any rights which have accrued or will probably accrue to an injured plaintiff in respect of injury benefit or disablement benefit for the five years beginning with the time when the cause of action accrued shall be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries. Injury benefit is a weekly benefit payable where a person is unfit for work due to an accident at work or an occupational disease.[61] Disablement benefit is payable to a person who suffers a loss of physical or mental faculty as a result of an occupational injury/disease while in insurable employment.[62] These benefits fulfil the same function as sick pay.

7.50 Section 237 of the 1993 Act provides that in assessing damages in any action in respect of liability for personal injuries incurred in automobile accidents, any disability benefit or invalidity pension payable for the period of five years beginning with the time when the cause of action accrued, shall be taken into account in the assessment of damages.[63] A person is entitled to sickness benefit or disability pension upon payment of the requisite number of social insurance contributions.

7.51 That these type of benefits were envisaged to come within the terms of section 2 of the 1964 Act is demonstrated by their express exclusion from its effect. These payments are all payable under statute in consequence of an injury. As section 2(b) states 'benefit payable under statute or otherwise', it is arguable that voluntary and contractual sick pay also fall within the terms of the section.

---

60 See paras.4.35-4.37 with regard to the position in England and paras.6.06 and 6.22 for comparative examples.

61 Guide to Social Welfare Services, SW 4 (1998), p.124.

62 *Ibid.* at p.126

63 Disability benefit and invalidity pension are now known as sickness benefit and disability pension respectively by virtue of s.17 of the *Social Welfare Act, 1997.*

7.52 The situation is, however, less clear with regard to non-statutory forms of sick pay. Where the employer continues to pay the plaintiff while the latter is incapacitated on condition that he or she return the money on receipt of damages, then these payments are non-deductible. According to Lavery J in *McElroy v Aldritt,*[64]

> "It is impossible for the defendant as the wrongdoer to mitigate the damages for which he is responsible by relying on voluntary payments made by a third person to provide for the support of the plaintiff on an arrangement that he should be recouped if and when the plaintiff was in a position to do so and it can make no difference that that person was the employer of the plaintiff."[65]

Thus where the payments are made conditionally it seems clear that they will not be deducted.

7.53 Apart from this, White maintains that the Irish courts have adopted the same approach as the English courts so that the payment of sick pay precludes the plaintiff claiming for loss of earnings to the extent that he or she has not suffered a loss. However he also argues that where the payments are voluntary they have the character of gratuities and are non-deductible under section 2, he does not cite any Irish cases in support of this view which is not easily reconciled with another unreported case of *Honan v Syntex (Ireland) Ltd.*[66]

7.54 In *Honan* Lynch J interpreted the words 'or otherwise' in section 2(b) as having the same general sense as the preceding words and meaning,

> "an obligation imposed upon an employer, whether he likes it or not, that is to say, compulsory obligation as distinct from an obligation undertaken freely and voluntarily by an employer."[67]

He therefore held that the amount paid to the plaintiff by way of disablement benefit, in lieu of wages, while the plaintiff was still in employment was deductible from the damages awarded for loss of earnings. It is noteworthy that the issue was dealt with on the basis of section 2(b), counsel for the plaintiff having abandoned the claim that the payments fell under subsection (a). The payments in *Dennehy v Nordic Cold Storage,*[68] which fulfilled the function of sick pay, were payable under an insurance policy taken out by the employer and were held not to fall within the scope of section 2(a). Lynch J's interpretation of subsection (b) would seem to indicate that contractual sick pay falls within the scope of the general rule of non-deductibility.

---

64 Unreported, Supreme Court, 11 June 1955 (5-1953)

65 *Ibid.* pp.1-2.

66 Unreported, High Court 22 October 1990, unofficial transcript of a decision of Lynch J. (Doyle Court Reporters)

67 *Ibid.* at p.4 of transcript.

68 Unreported, High Court, 8 May 1991, Hamilton P.

7.55 An anomaly however becomes apparent by virtue of the selective exclusion from the general rule of non-deductibility in sections 75 and 237. While statutory occupational benefits will fall to be deducted in an accident in the workplace, the equivalent private ones may not be. Likewise, statutory sickness benefit is deductible in the case of an accident involving a mechanically propelled vehicle, but a private one is not.

7.56 Section 75 originated as section 39 of the *Social Welfare (Occupational Injuries) Act, 1966* and was influenced by the analogous English provision which provided for the deduction of half of the value of certain social security benefits paid or likely to be paid up to five years from the date of the accrual of the cause of action.[69] The justification put forward for the Irish provision was that the occupational injuries scheme was entirely financed by the employer, and therefore not to take the payments into account would essentially result in a double charge on employers; furthermore, the worker is obliged to give credit for the payments as he has not purchased the benefits by direct contributions. Of note in the Minister for Social Welfare's explanation is the statement that, 'if the workers have to pay a contribution, naturally the amount of the benefit that should be taken into account in the reduction of common law damages would be less.'[70]

Social Welfare Benefits

7.57 The term 'social welfare' in Ireland is usually understood to refer to the range of income support payments administered by the Department of Social Welfare.[71] Although some jurisdictions refer collectively to these type of payments as social security, in this paper we use the term social welfare to cover all the payments which the Department administers.[72] These payments can then be further sub-divided as follows:

- *Social insurance benefits:* Eligibility for this type of payment is dependent on the beneficiary having made social insurance contributions in the form of Pay Related Social Insurance (PRSI). These are compulsorily paid by employers and employees into the Social Insurance Fund (SIF). Upon payment of the requisite number of contributions, the individual becomes entitled to receive a variety of benefits irrespective of any other income they may have.[73] Social Insurance

---

69 Law Reform (Personal Injuries) Act, 1948, s.2(1)

70 Dáil Debates, Vol.220 col.1108

71 MEL COUSINS, THE IRISH SOCIAL WELFARE SYSTEM, (Round Hall Press, 1995 p.11). Some payments are still in fact administered by regional health boards although this does not affect our discussion. For analysis of the different benefits see generally JOHN CURRY, IRISH SOCIAL SERVICES, (2nd ed., 1993), Department of Social Welfare, Guide to Social Welfare Services, SW4 (1998).

72 Notwithstanding that regional health boards still administer some benefits.

73 The range and length of entitlement to benefits is governed by an individuals' PRSI class and period over which contributions have been made.

benefits are financed by 'current income financing', also known as 'Pay As You Go' (PAYG). This essentially means that the contributions made in a given year are applied to making payments to beneficiaries in that year.[74] The cost of the payments is funded by the contributions received and any deficit is met by the Exchequer. At present the Exchequer contribution is negligible due to *inter alia* the inclusion of the self-employed in the scheme from 1988, and demographics which mean that at present there are more people contributing than receiving benefits. This however will alter with the ageing of the population. The method of financing is important with regard to whether social insurance benefits are sufficiently similar to private insurance to merit the same treatment. This is considered in chapter 9. This type of social welfare payment is referred to as *contributory.*

- *Social assistance payments:* Eligibility for assistance is determined by a means assessment; an individual qualifies for assistance payments once their income is below a certain threshold level. Generally, the recipients of social assistance will have either insufficient or no social insurance contributions to qualify for social insurance benefits. Hence, social assistance payments are financed by general taxation and are *non-contributory.*

- *Universal payments:* These are payable to all who fulfil the specified criteria regardless of income. Examples are child benefit and free travel for pensioners.

7.58 As noted above, section 75 of the *Social Welfare (Consolidation) Act, 1993* provides for the deduction of injury benefit or disablement benefit for the five years beginning with the time when the cause of action accrued. The section is expressed to apply notwithstanding section 2 of the *Civil Liability Act, 1964:* clearly, social welfare payments are included within the broad description of payments in section 2, as otherwise section 75 would be otiose. However, there is some difference of opinion as to whether social assistance payments are included in the section.

Social Assistance Payments

7.59 The actual wording of section 2 refers to 'benefit'. White contends that the word is used in the section in its ordinary and natural sense: i.e. to mean advantage. Thus 'benefit payable under statute' is broad enough to encompass every kind of social welfare payment, and social assistance payments are therefore included in the scope of the section.[75] In the *State (Hayes) v The Criminal Injuries Compensation Tribunal*[76] Finlay P dealt with an application for judicial review of an assessment of damages for fatal injuries by the Tribunal. The compensation scheme provided that the Civil Liability Acts would apply to damages under the scheme subject to the

---

74 Social Welfare (Consolidation) Act, 1993, ss.6-8; Department of Social Welfare, Social Insurance in Ireland, (October 1996), para.2.3 and in general.

75 JOHN WHITE, IRISH LAW OF DAMAGES, (Butterworths, 1989) at para.4.10.15.

76 [1982] ILRM 210

limitations provided elsewhere in the scheme. One such limitation provided for deduction of social welfare benefits payable as a result of the injury. Finlay P, in his interpretation of section 50 of the *Civil Liability Act, 1961,* said the provision clearly excluded the deduction of 'any social welfare benefit payable to a dependant' from an award of damages.[77]

7.60 It is interesting to note in this context that Finlay P accepted the logic of deducting the social welfare payments on the basis that the compensation was funded by the Government as were the welfare payments, therefore to hold otherwise would entail the Government paying doubly.[78] However, only social assistance payments are entirely funded by the Exchequer, benefits being largely funded by contributions.

7.61 In practice it seems likely that social assistance payments are not part of the discussion as to the deductibility of collateral benefits due to the use of a means test in order to determine entitlement. Once the plaintiff receives damages, it may be that they will no longer satisfy the means test criteria, in which case assistance payments would be stopped.[79] If, subsequent to the receipt of damages, the injured party still satisfies a means test, this is presumably due to circumstances obtaining prior to the accident (as the damages award will theoretically have placed the injured party in the same position, insofar as that is possible, as before the accident). In these circumstances a strong argument can be made that the assistance payments are not in consequence of the accident. Clark, who believes that social assistance payments are not covered by section 2, enunciates the crux of the issue succinctly:

> "Problems of dual compensation in social assistance cases are more apparent than real, because the statutory disregard provisions have no applicability in cases where a means test is involved."[80]

7.62 Essentially, whether courts have the power to deduct or not is irrelevant as the administrative agencies have both the legislative authority and the discretionary power to prevent overlapping.[81] The following discussion focuses on social welfare benefits in the belief that social assistance payments are outside the scope of this paper in so far as they do not lead to double compensation.

Social Insurance Benefits

---

77 *Ibid.* at p.212.

78 *Ibid.* at p.213.

79 In the case of eligibility for social assistance payments a set formula is used to attribute a notional income to any sums of money or investments the claimant may have and this income is then taken into account for the purposes of the means test. The formula varies depending upon the payment. For further details on this point see *Guide to Social Welfare Services op. cit.* fn.73.

80 Robert Clark, *Damages and the Social Welfare 'Overlap'*, (1984) Ir. Jur vol.19 part 1, 40 at 57.

81 *Ibid.* at p.58; See also Harvey v Minister for Social Welfare [1990] 2 IR 232; McHugh v Minister for Social Welfare [1994] 2 IR 139.

7.63 The position in respect of injury and disablement benefits (arising when the injury is traceable to insurable employment) has been considered above, as have sickness benefit and disability pensions. Furthermore, it has been noted that State retirement pensions or old age (contributory) pensions will not arise in consequence of an accident.[82] As section 2 is limited to those payments which arise in consequence of an accident, it is submitted that the effect of this is to render the remainder of social welfare payments beyond the scope of the section: i.e. the statutory exclusion of certain social welfare payments from the general rule of non-deductibility is the conclusive statement of the current law with regard to social welfare payments. Those social welfare payments which fall outside the scope of section 2 do not arise in consequence of an injury and are not therefore relevant to the discussion of what benefits are or are not deductible from an award of damages.

7.64 The decision of Costello P in *Ryan v Compensation Tribunal*[83] illustrates this. The appellant challenged the Tribunal's award for loss of future earnings on the basis that two social welfare payments which were payable to her, namely single parent's allowance and deserted wives allowance, fell within section 2 and ought not have been deducted. The President said that those payments were not payable in consequence of an accident but rather because the plaintiff was treated as a single parent and deserted wife within the meaning of the social welfare legislation. Consequently the Tribunal did not err in deducting the payments from the plaintiff's gross income in order to award damages on the basis of loss of net income.[84]

7.65 Under current law, then, social welfare payments are already an exception to the general rule of non-deductibility from awards of damages, at least for a period of five years from the date of the accident.

The Five Year Rule

7.66 There are considerable practical difficulties with the deduction of social welfare payments due to a variety of factors: inflation, social welfare increases, changes in eligibility for payments due to changes in the nature of the injury, statutory regulations and even government policy.[85] It is presumably with these factors in mind, and with an eye on the analogous English provisions, that the period of five years deductibility was enacted.[86] In practice the application of sections 75 and 237

---

82 *Supra* para.7.39.

83 [1997] 1 ILRM 194

84 *Ibid.* at p.205 *et seq.* These allowances have now been replaced by one-parent family payments, *Guide to Social Welfare Services*, *op. cit.* fn.73 at p.72.

85 See Clark *op. cit.* fn.87 for a discussion of some of the objections to the statutory exceptions to the general rule of non-deductibility.

86 Section 2(1) of the *Law Reform (Personal Injuries) Act, 1948* provided for the deduction of half of the value of certain social security benefits paid or likely to be payable up to five years from the date of the accrual of the cause of action.

requires a decision by the judge as to the likelihood of the plaintiff returning to work before the expiry of five years from the date of the accident. If he or she holds that the plaintiff will probably be able to return to work in year four then only future loss of earnings up to then will be awarded. It follows that if the plaintiff is being imputed with an ability to work in year four then he or she will not be expected to be receiving any further social welfare payments in consequence of the injury, hence only four years benefits are deducted and not five. This interpretation is made possible by the wording of the statutory exceptions to the rule of non-deductibility which states that:

> "the value of any rights which have accrued or will probably accrue to him therefrom in respect of [the benefit in question]...for the five years beginning with the time the cause of action accrued."

7.67 In *O'Loughlin v Teeling*[87] MacKenzie J, who was not enamoured of the provision, reasoned somewhat differently. He said that the jury in making the award for future loss of earnings was making a finding about the plaintiff's future prospects of work and was considering him to be capable of employment within a short period of time. If the Department of Social Welfare were confronted with that evidence they could cut off the plaintiff's disability benefit. Therefore, the judge could not say with any probability that the plaintiff would still be in receipt of the benefit in the near future and so he would not deduct possible future benefits from the award.[88]

7.68 A later case, *O'Sullivan v Iarnrod Eireann,*[89] reflects a stricter interpretation of the current statutory provision. In response to the plaintiff's argument that only benefits accrued prior to the date of the action fell to be deducted under section 75 because of the uncertainty in respect of future disablement benefits, the judge held that the onus was on the plaintiff to show that the Department of Social Welfare intended to alter the *status quo*. He found that there was no indication of any such intention on the part of the Department to do so and therefore deducted an amount for future as well as past benefits.[90] It is submitted that the latter view is an accurate interpretation of Irish law as it stands at present.

The Problem with Section 2

7.69 The nature of damages as primarily (if not solely) compensatory under English law has already been discussed.[91] It is submitted that compensatory damages in Irish law serve to restore the injured plaintiff to his pre-accident position and no more. White comments that:

> "Compensatory damages are assessed on the basis of awarding the plaintiff such sum of money as will put him in the same position, so far as money

---

87 [1988] ILRM 617

88 *Ibid.* at p.619. An appeal to the Supreme Court was settled.

89 Unreported, High Court, 14 March 1994, Morris J

90 *Ibid.* at pp13-14.

91 See paras.1.13-1.15 and 2.01-2.02.

> can do, as he would have been in had the wrong not been committed. The objective of an award of such damages is reparation or *restitutio in integrum* in respect of the plaintiff's past and prospective losses occasioned by the wrong."[92]

In *Foley v Thermocement Products Ltd*[93] O'Dalaigh CJ referred to *restitutio in integrum* as "the underlying principle by which courts are guided in awarding damages."[94]

7.70 Section 2 provides for a wide rule of non-deductibility. In comparison to the position obtaining in other jurisdictions, the current Irish legislation sanctions a considerable amount of double compensation, with the consequent adverse effects on the costs of accidents and consequently insurance and industry, and indeed intangible disadvantages incurred by society as a whole by reason of the inefficient use of resources. It is our provisional recommendation that this situation be reformed. Before setting out the details of these recommendations however, we discuss the general options for reform in chapter 8. The arguments for and against the deductibility of the various collateral benefits which serve to compensate for some of the same losses as awards of damages are then considered in chapter 9.

---

92 White, *op. cit.* fn.75 at para.1.2.01. See generally MCMAHON AND BINCHY, THE IRISH LAW OF TORTS (2nd ed., 1990) chap.44.

93 90 ILTR 92

94 *Ibid.* at p.98.

CHAPTER 8 POLICY OPTIONS FOR REFORM

8.01 The previous three Parts of this Paper have outlined the approaches taken to the issue of collateral benefits both in this jurisdiction and in other common law and civil law countries. It is clear that, by virtue of section 2 of the 1964 Act, a victim of a non-fatal injury in Ireland enjoys, in addition to his damages, extensive rights to collateral compensatory benefits. It is necessary to examine the possible policy options that are open when dealing with collateral benefits in order to ascertain whether the approach which has been adopted in Ireland is in fact the most appropriate. This process necessarily entails some repetition of the justifications which have been employed by the courts, and the criticism thereof, in disregarding collateral benefits under the common law. The reader is referred to the discussion of the various rationales, which have been used to justify non-deductibility in chapter three.

8.02 It is submitted that the following three broad options are open to the legislature in dealing with collateral benefits:

- non-deduction of collateral benefits and cumulation of remedies;
- deduction of all collateral benefits;
- deduction with reimbursement to the provider of the collateral benefit.

Option 1: Non-Deductibility and Cumulation of Remedies

8.03 In essence, this option involves the total disregard of compensating collateral benefits in the assessment of the plaintiff's damages. Hence, the plaintiff receives in full both his award of damages to compensate him for the injury he has sustained and any collateral compensation that may come his way.[1] Under this option there is no provision for the reimbursement of the collateral payment to its provider. The obvious advantage of this approach, from the perspective of the injured plaintiff, is that he receives an abundance of financial assistance. However, it is exactly this over-compensation that prompts a review of section 2 in the first place.

Arguments in Favour of Option 1

8.04 First, it may be argued that an award of damages never sufficiently compensates a plaintiff for the losses suffered as a result of an accident. In such a

---

[1] This is termed the Collateral Source Rule in the United States. See paras.6.26-6.31 *supra*.

case, one of the main criticisms of the policy of cumulation is thereby answered, i.e. the double-recovery of the plaintiff. Consequently, it may be argued that he should not be denied the benefit of any extra collateral compensation that may come his way. The Law Commission of England and Wales has found that two out of every five plaintiffs consider that their awards of damages for loss of earnings are insufficient.[2] Lewis' explanation of the reasons why a plaintiff may feel so aggrieved are set out below. [3]

- Reduction of damages due to contributory negligence may mean that the damages are insufficient to meet the plaintiff's loss of future earnings. Although there is no precise empirical data, it has been estimated that the defence of contributory negligence reduces damages in about a quarter of all settlements.[4]

- The manner in which damages are calculated by the courts may lead to insufficient compensation. Lewis argues that judges have refused to apply actuarial principles when assessing future losses and, as a result, have made deductions in excess of that which an actuarial analysis would have recommended. Furthermore, the crystal ball element inherent in any calculation of future losses means the exercise will always lack precision.

- The argument in favour of cumulation is strong where the parties have settled the claim outside of court. In such a case, the plaintiff often accepts a lesser quantum of damages than that which he would have received had his claim proceeded to court. The plaintiff may prefer to receive an insufficient award at an earlier date then endure the cost, delay, stress and risk associated with litigation in the hope of a more substantial sum. The result is the under-compensation of the plaintiff.

- No sum of money can ever fully indemnify a plaintiff for non-pecuniary loss such as pain and suffering. Consequently, it may be argued that damages will never fully compensate a plaintiff, so he or she can never be over-compensated.

- The argument frequently aired in the United States to justify a policy of cumulation is based on the cost of litigation, which the plaintiff must incur. The concept of the 'contingency fee' means that the plaintiff's lawyer could receive up to one third of his client's award of damages, resulting in insufficient compensation for the latter.[5] In Ireland, this argument does not have the same force, as costs invariably follow the action unless the judge exercises his discretion to hold otherwise.

---

2 Law Commission Report No. 225, *Personal Injury Compensation: How Much is Enough?* (1994) para.11.1 and Table 1102.

3 Richard Lewis, *Deducting Collateral Benefits From Damages: Principle and Policy* 18 Vol. 1 Legal Studies 15 at p.29.

4 DONALD HARRIS *ET AL*, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY, (1984) p. 91.

5 D.A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation* (1988) 53 J. Air. L. 799, 802. See also para.6.27 *supra*.

8.05 An additional justification offered in the United States is that it is better that the injured plaintiff should reap the benefit of collateral compensation rather than the defendant-wrongdoer in the form of a reduction in his damages. This argument is premised on the attribution of a certain punitive and or deterrent element in the award of damages.[6]

8.06 It may also be argued that there should be a policy of cumulation where the plaintiff has paid for the collateral benefit, either by making direct financial contributions towards the benefit or indirectly by his work. The oft-quoted question is 'why should the defendant be the one to benefit from the thrift and foresight of the plaintiff?' The focus of this argument is on the source of the collateral benefit. [7]

8.07 Moreover, if it is the intention of the provider of the collateral benefit that the plaintiff should enjoy the benefit in addition to any claim he has against the tortfeasor, then a policy of cumulation may seem justified. To do otherwise would be to frustrate that intention, resulting in the arguably undesirable reduction of the defendant's liability.[8]

8.08 Finally, cumulation may be preferred to the other two options where:

a) the transaction cost of facilitating the reimbursement of the collateral payment to its provider is too high; and

b) the moral argument against reducing the defendant's liability dictates that deduction of the collateral benefit from the plaintiff's damages should be avoided.

Arguments against Option 1

8.09 It has been stated that compensatory damages do not actually compensate the plaintiff for a variety of reasons. However, it is to be remembered that a court, when awarding damages, considers them to be sufficient to compensate the plaintiff, Lewis has commented that within the tort system, the plaintiff would not be allowed to recover more. Moreover, as the receipt of collateral benefits is, to a certain extent, a random, unpredictable exercise, it is submitted that if there are deficiencies in tort damages then that problem should be addressed directly rather than correcting it in a haphazard way by the addition of collateral benefits.[9] As Luntz states:

---

6 See paras.3.05-3.16 and para.6.27.

7 See paras.3.21-3.27. and paras.4.02-4.09 in relation to the insurance exception.

8 See paras.3.28-3.31.

9 See Lewis, *op.cit.*fn.3 at p.30. The English Law Commission also agrees with this criticism of the use of collateral benefits to bolster insufficient awards of damages: Consultation Paper No. 147, *Damages for Personal Injury: Collateral Benefits*, (1997) para.4.10.

"The remedy for underestimation of the loss is to make the estimating process more scientific, not to adopt a swings and roundabouts approach which offsets a loss suffered by many plaintiffs with fortuitous gains to some."[10]

8.10 The second justification advanced above for a policy of cumulation is that the plaintiff has in some way financed the collateral payment himself and therefore should not be deprived of the benefit of his own thrift and foresight. Although this has already been considered in detail at paragraphs 3.21-3.27, a brief summary of the criticisms of this rationale here is useful.

- This reasoning is incapable of being applied across the board to justify the cumulation of all types of collateral benefit, e.g. it cannot justify the non-deduction of charitable payments received from a third party. Similarly, if payments received under a pension scheme or insurance policy are not deductible by virtue of this rationale, then why should sick pay and wages which a plaintiff receives not also be ignored in the assessment of his damages – he 'pays for' these in just the same way.

- Often where this argument is invoked by a plaintiff, the element of thrift and investment on his part is actually missing: for example, where the collateral payment is received under a compulsory insurance scheme or was financed by a third party. This is especially pertinent in Ireland where Pay Related Social Insurance contributions are compulsory and finance a large amount of collateral benefits.

- The foresight element may also be lacking: for example, although the plaintiff intends to protect himself against the occurrence of a certain contingency, he would not have been gambling on the prospect of double recovery should the accident also be the result of a tort.

- There is no reason why this rationale should apply to personal accident insurance and not to property insurance. In both cases the plaintiff, through his thrift and foresight, has 'paid for' the insurance cover himself, yet in the latter case subrogation will operate to prevent double compensation.

- Even if the collateral benefit, which the plaintiff has 'paid for' himself, is deducted from his damages, he has benefited from the investment nonetheless by virtue of the security and peace of mind of knowing that such contingencies are protected against and also receiving the immediate payments from the benefit provider before the court action.

- Fundamentally, the question of whether the plaintiff has paid for the collateral benefit is irrelevant – he shall receive it regardless of whether he commences an

---

[10] HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH (3rd ed 1990)., para. 8.1.10.

action against his wrongdoer. The essential issue, therefore, is how the court should treat his award of damages.

8.11 In response to the purported justification that where the intention of the collateral benefit provider is to benefit the plaintiff, in addition to any claim against the tortfeasor, several criticisms have already been noted.[11] In summary:

- it is generally hard to ascertain what the intention of the provider of the collateral benefit is;
- it is not the intention of the provider, but rather the effect of the benefit that is relevant;
- although the third party intended to help the injured plaintiff, it is arguable that he did not intend him to receive over-compensation through double-recovery;
- even if the benefit is deducted, the financial assistance which the plaintiff received from the third party would not have been in vain as he would have had the advantage of the benefit immediately after the accident when it was most needed.

8.12 Cumulation facilitates the over-compensation of the plaintiff. The compensatory nature of damages has already been discussed and it is obvious that allowing a plaintiff to cumulate his remedies is contrary to this basic, well-established principle.[12] Compensatory damages are intended to restore a plaintiff to his pre-accident position, and no more. The Law Commission of England and Wales have developed this argument by highlighting that the category of exemplary damages would be superfluous if compensatory damages had a punitive function:

> "That there is a category of tort damages, namely exemplary damages, which are intended to punish the tortfeasor bolsters this conclusion. The existence of exemplary damages would be strange if the general tort measure of damages was designed to punish. Furthermore the jurisprudence concerning when such damages should be available would be incomprehensible."[13]

8.13 Overcompensation is contrary to the principles of economic efficiency, which should underpin any system of compensation ultimately funded by the general public: this argument entails viewing the issue from the perspective of loss distribution and reallocation. In other words, as both tort damages and collateral benefits are largely funded, not by individuals, but by 'risk pools' or 'risk communities' which are comprised of large sections of the public, the contributors to such pools may object to the accident victim receiving compensation from both sources. Cumulation

---

11 See paras.3.25-3.27

12 See paras.1.13-1.15 and paras.2.01-2.02

13 CP No. 147, *op.cit.*fn.9 at para.4.6.

necessitates that both the defendant and the collateral source must shoulder the financial burden of the plaintiff's compensation, while the latter receives assistance in excess of that which he actually requires. [14] In short, cumulation is an unnecessary waste of resources.

8.14 It follows from the above that a policy of cumulation results in the accident compensation system being unduly expensive to operate. As the system is ultimately financed by the public as a whole through their insurance premiums, the unnecessary repetition of the plaintiff's compensation inevitably increases the cost of insurance.

8.15 Option 1 results in the unequal treatment of accident victims. Those who suffer an injury through the tort of another and have access to collateral compensation may receive an abundance of financial assistance, whereas others who only have recourse to social welfare receive comparatively paltry compensation. As Lewis has commented:

> "It appears very unfair that the few accident victims able to succeed in tort should be able to claim so much more for the same losses."[15]

Evaluation of the Arguments on Non-Deductibility Option

8.16 The Law Reform Commission is provisionally of the view, in light of the above criticisms, that this option is not in the public interest. The broad scope of section 2 of the *Civil Liability (Amendment) Act, 1964*, has already been examined, and since the inevitable consequence of section 2 is the cumulation of the plaintiff's remedies, the Commission is also provisionally of the view that the treatment afforded to collateral benefits under section 2 is not in the public interest.[16]

Option 2: A General Rule of Deduction

8.17 This option requires that any form of mitigating collateral compensation a plaintiff receives is offset against his award of damages. Once again, however, there is no provision for the recoupment of the collateral payment by its provider. A policy of deduction transfers the plaintiff's loss from the defendant to the collateral source. Obviously this option is the most favourable to the defendant-wrongdoer, as his liability shall be reduced to the extent of any compensating collateral benefit which the plaintiff may receive. Lewis has commented:

---

14 See Ontario Law Commission, *Report on Compensation for Personal Injuries and Death*, (1987) p.188. Furthermore, where the provider of the collateral benefit is also the defendant the inequitable nature of cumulation is evident.

15 Lewis *op.cit.*fn.3 at p.20.

16 See generally chap.7 with regard to the current law under section 2 and chap.9 for an evaluation of the different reform options.

"On the surface, this solution seems the least attractive of the three. It appears to subsidise the wrongdoer at the expense of the Good Samaritan and thus offends our sense of morality."[17]

8.18 The policy of deduction entails the reduction by the court of the plaintiff's damages to the extent that the latter has already received, or shall receive in the future, collateral compensation which either:

a) is designed to meet the same loss as the award of damages in question, or

b) has the effect that it meets the same loss as the award of damages in question.

A choice between these two alternatives is required should a policy of deduction be desired.

a) Benefits Designed to meet the same Loss as Damages

8.19 Cooper has commented that:

"The basic principle which emerges is that there should be deduction when, and only when, the benefit received by the plaintiff is intended to compensate him for a specific pecuniary loss, a loss in respect of which, in the absence of the benefit, he would have a claim against the defendant."[18]

It follows from this that where the benefit is intended to compensate the plaintiff for a loss in respect of which his award of damages does not compensate or for a non-pecuniary loss then there should be no reduction of the plaintiff's damages. What is ostensibly cumulation is arguably justified on the ground that there is no over-compensation of the plaintiff.

8.20 Losses not covered by damages may be either pecuniary or non-pecuniary. For example, the distress of the victim's relatives is a non-pecuniary loss, which invariably goes uncompensated. Certain small pecuniary losses may also go uncompensated, for example; the injured party was in the habit of driving to a particular supermarket to cut the shopping costs and as a result of the accident he is now unable to do so. On this view, where the plaintiff receives collateral benefits, which are intended to compensate for such losses, they should be ignored by the court in its assessment of damages. In such cases, it is impossible for the plaintiff to receive over-compensation. Cooper argues that this approach is consistent with the common law rule of the non-deductibility of insurance payments, charitable benefits and payments received under pension schemes: i.e. they provide compensation for losses which are not met by the plaintiff's award of damages.

---

[17] Lewis, *op. cit.* fn.3 at p.36.

[18] KD Cooper, *A Collateral Benefits Principle*, (1971) 49 Canadian Bar Review 501 at p.503.

8.21 It has often been argued that there is no non-pecuniary loss capable of exact financial compensation. Therefore, if the plaintiff receives a collateral benefit, which is intended to meet such a loss, his damages should not be reduced proportionately; he will receive fuller compensation, but will never make a profit. Cooper maintains that the only occasion where a plaintiff would be overcompensated would be where it is confidently believed that his award of damages for non-pecuniary loss is adequate to restore him to his pre-accident position; however, he argues that even the courts agree that damages are arbitrarily calculated. Against this argument it can be said that the under-compensation of the plaintiff should not be remedied by relying on the *ad hoc* receipt of collateral benefits. However, Cooper submits that there are several reasons why the law cannot extend its boundaries of compensation, such as its reluctance to entertain a plethora of actions for pecuniary loss by the relatives of the accident victim and the impossibility of ascertaining accurate financial compensation for non-pecuniary loss; while these inadequacies remain "there is no reason to disallow further recovery where it is provided for by a benefit."[19]

8.22 It can also be argued that insurance payments and charitable payments, if not paid to the plaintiff with the intention of compensating him for a loss which is not met by his award of damages, are normally paid with the intention of compensating for a non-pecuniary loss and therefore ought be disregarded nevertheless.

8.23 In conclusion, this approach of purpose rather than effect is strongly advocated by Cooper, and he has advanced the following arguments in support of it:

- one must look to the purpose rather than the effect of a collateral benefit as the latter is unascertainable: the plaintiff is unlikely to earmark monies received by him from one particular source and then spend them specifically on relieving a particular loss;

- the courts, in awarding damages, assess them according to particular heads which they intend to be compensated;

- this is the approach, which has been adopted by the High Court of Australia. In *National Insurance Company of New Zealand v Espagne*[20] Windeyer J said:

> "...the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character; and that is determined, in the one case by what under his contract the plaintiff had paid for [where the benefit is contractual]..., and in the other by the

---

19 *Ibid* at pp.517-518. It is interesting to note Atiyah's criticism of this approach. He argues that it could not be justifiable to give compensation several times over to a particular plaintiff on this ground while denying any compensation for loss of faculty to many others who are similarly afflicted. See Patrick Atiyah, *Collateral Benefits Again* (1969) 32 MLR 397 at p.404.

20 (1961) 105 CLR 569

intent of the person conferring the benefit [where the benefit is benevolent or statutory]. The test is by purpose rather than by cause."[21]

b) Benefits which have the Effect of meeting the same Loss as Damages

8.24 This argument is based on the proposition that the purpose of the compensating collateral benefit is irrelevant. Rather, one must look to the effect of the compensation. and examine whether it serves to mitigate the plaintiff's loss.

8.25 In *Hodgson v Trapp*[22] Lord Bridge seemed to advocate a general rule of deduction of collateral benefits from damages for pecuniary loss, save for the two well-established exceptions:

> "My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, *prima facie*, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of damages."[23]

8.26 Moreover, Lord Bridge was inclined to view the issue from the wider perspective of loss redistribution. His Lordship considered that as the collateral benefit (in this case, social welfare) and the award of damages were both being financed by the public as a whole, "[t]o allow double recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground." [24]

8.27 Essentially, such an approach dictates that any collateral compensation that a plaintiff receives should be deducted from his award of damages for pecuniary loss. As the plaintiff has suffered a financial loss due to the negligence of the defendant and as a result, receives a financial gain in the form of a collateral benefit, the latter must

---

21 *Ibid* at pp.599-600

22 [1989] AC 807

23 *Ibid* at p. 819

24 *Ibid* at p.823. The collateral benefit being financed through National Insurance contributions and general taxation, and the damages through insurance premiums payable by motorists, employers, occupiers of property, professionals and many others.

necessarily reduce the extent of the financial loss which he sustained. The court in calculating an award of damages seeks to compensate the plaintiff for his net financial loss.

8.28 The Commission prefers the "effect" test of a collateral benefit over the "purpose" one in its provisional recommendation. The effect test addresses the economic reality of the different benefits. The Commission adopts the principle that only benefits which have the effect of compensating for a particular loss should be deducted from an award of damages compensating for that loss. It is to be noted that the application of this principle eliminates the possibility that the value of a benefit could be deducted from general damages. This is currently the case under section 237 of the *Social Welfare (Consolidation) Act, 1993*[25]

Arguments in Favour of Option 2

8.29 The main argument in favour of this option is that based on cost efficiency: a policy of deduction avoids both the transaction costs associated with reimbursing the collateral source and the wasteful duplication of compensation, which is the consequence of cumulation.[26] Furthermore, this option is consistent with the function of compensatory damages being to compensate and no more. The plaintiff is returned to the position he enjoyed prior to the accident occurring, without making a profit or receiving double compensation.

8.30 Cooper argues that the provider of the collateral benefit will normally be in a better position to spread the loss than the defendant. While tortfeasors are not selected by the plaintiff because of their loss spreading ability, collateral sources in the private sphere invariably are. Moreover, statutory benefits are usually financed by the community at large. Therefore, if the loss suffered by the plaintiff is absorbed by the collateral source, it is unlikely to be noticed by anyone whereas, without deduction from the plaintiff's damages, the entire loss falls to be paid by the defendant who may be unable (in the absence of liability insurance) to meet the cost.[27]

8.31 Cooper advocates a policy of deduction for all collateral benefits but without a mechanism for their reimbursement to the collateral source.[28] He reasons that where

---

25 MacKenzie J had cause to comment on a previous incarnation of this section in *O'Loughlin v Teeling*.[1988] ILRM 617 With regard to section 12(1) of the *Social Welfare Act, 1984* he noted that:

> "the Act made a very substantial and dramatic alteration in that not only does disability come from what has already been paid in the past but from which may probably be paid in the future, and not only in relation to loss of profits and earnings but in respect of general damages. This appears to me to such a dramatic and such an unfair piece of legislation as to be contrary to natural justice that is my opinion."

26 See generally Richard Lewis, *Deducting Collateral Benefits From Damages: Principle and Policy* 18 Vol. 1 Legal Studies 15 at p. 36.

27 Cooper, *op.cit.*fn.18 at pp.530-531

28 Save for charitable benefits which should be recouped by their provider.

the collateral benefit is provided under legal obligation, the third party benefactor obligation to confer the benefit is greater than the defendant's obligation to pay the damages. Hence, he argues that the collateral source should bear the burden of the compensation, with the tortfeasor only fulfilling the role of an indemnifier. In his opinion, the operating costs of running any compensation system are already heavy; therefore, to employ two systems in the process of compensating a single pecuniary loss is economically wasteful.

8.32 Furthermore, shifting the burden of the loss to the defendant does not effectively alter the burden of those who ultimately finance the plaintiff's compensation by much. Reimbursement means that the cost of third party liability insurance (which pays the defendant's damages) is marginally raised and the various forms of first party insurance (which finances the collateral compensation schemes) are reduced. However, since most people contribute in one way or another to both, such a readjustment of the loss is arguably unnecessary. Cooper comments:

> "The ordinary man carries plaintiff insurance through sick-pay and pension schemes; through the National Health Service; and through social security benefits. All these he pays for by some means. He carries third party liability insurance on his motor car and increasingly as an additional item attached to a householder's contents policy; his union or employer may carry third party liability protection for him in respect of any liability he incurs during the course of his employment; and, in any event, his employer is likely to be sued in respect of his tortious actions while at work, and he will in some way contribute to the insurance his employer carries. A retransfer of the loss from the first category of the plaintiff to the second of defendant protection will probably make no financial difference to him at all." [29]

Arguments against Option 2

8.33 The arguments against a policy of deduction are inevitably the same as those in favour of a policy of non-deduction considered above at paragraphs 8.04-8.08. In short the main concern with a policy of non-deduction seems to be that the defendant is relieved of liability at the expense of the collateral benefit provider. Cooper points out that as the law would have burdened the defendant with the loss if there had been no collateral benefit, the financers of the collateral benefit appear to have paid needlessly:

> "Their finances, it appears, have been applied to purchase something which the law would otherwise have provided at the expense of the tortfeasor. There is an even greater appearance of injustice where the plaintiff himself is one of the financers of the benefit."[30]

---

[29] Cooper, *op.cit.*fn.18 at p.532.

[30] Cooper, *op.cit.*fn.18 at p.521

8.34 The corollary of a reduction of the defendant's liability is that the punitive and deterrent function of compensatory damages (should such a function exist) would be decreased. This issue has already been discussed in detail.[31]

Evaluation of the Arguments on a Policy of Deduction

8.35 A policy of deduction avoids double compensation and all its disadvantages and wasteful effects. On the other hand it abrogates any deterrent punitive effect which an award of damages against a tortfeasor may have. The Commission has stated previously that the function of compensatory damages in tort law is to compensate; the categories of exemplary, punitive and aggravated damages insofar as they exist in Irish law fulfil any other required function.[32] To incorporate an express element of punishment into compensatory damages would be to distort the role of damages. This is not to deny that public morality might justifiably recoil from allowing the tortfeasor benefit, albeit inadvertently, from certain collateral benefits which the injured party either earned or was given by way of third party benevolence. Therefore, it must be considered whether this option would be in the public interest; is it desirable that the financial burden of providing all of the plaintiff's compensation could fall on the collateral source?

8.36 The Law Reform Commission is provisionally of the view that the option of deduction is least wasteful of society's resources and is therefore the preferred method of avoiding double compensation. The Commission however recognises that there are compelling reasons which may justify the exception of certain benefits from a general policy of deduction, for example insurance and charitable benefits. It is for this reason that the Commission provisionally recommends a general policy of deduction subject to certain exceptions, which are justified in the public interest.

Option 3: Deductibility with Reimbursement of the Collateral Benefit Provider

8.37 With reimbursement, the disadvantages associated with the policies of cumulation and deduction are avoided, *viz.* the overcompensation of the plaintiff or the reduction of the defendant's liability. The source of the benefit provider's reimbursement will depend on whether the collateral benefit is deducted from the plaintiff's damages. Where this is the case the benefit provider would recoup his losses against the defendant. Where there is no deduction, the plaintiff repays the collateral source. On the face of it, this option seems to be the most favourable as regards public policy. It is, however, necessary to ascertain the existing mechanisms in Irish law, which would facilitate the operation of such a policy.

---

31 See paras.3.05-3.16 above.

32 See Law Reform Commission Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages* (1998). See also paras. 1.05- 1.15 above.

1 Repayment of the Collateral Benefit by the Plaintiff

8.38 Where no deduction from the plaintiff's damages takes place there are a number of potential mechanisms which may be employed to oblige the plaintiff to repay the collateral benefit provider such as, where there is a contractual obligation; or where the payment was made on a condition and that condition is fulfilled; or where the court demands an undertaking from the plaintiff.

a) Contractual Obligation

8.39 Where the plaintiff is contractually bound to reimburse the collateral source, the latter may commence an action for breach of contract if the plaintiff does not fulfil his obligations. Hence, it is possible for most providers of collateral benefits to stipulate in a contract with the injured plaintiff that, where the latter receives an award of damages from the tortfeasor, he must repay the collateral benefits, which he has received. This is a viable option for employers as there is already a contractual relationship, it is doubtful, however, whether this is a real option for the providers of charitable assistance.

8.40 The legitimacy of a contractual obligation to repay has been recognised by the Supreme Court in *McElroy v Aldritt*.[33] The plaintiff, after sustaining an injury through the negligence of the defendant, continued to receive his wages from his employer despite being unable to work. The defendant, therefore, claimed that the court, in assessing the plaintiff's loss of earnings, should take into account the income, which he continued to receive from his employer. However, the plaintiff's employer had made these payments on the condition that if the plaintiff succeeded in tort against his wrongdoer then he would repay the wages to his employer. Lavery J, for the Supreme Court, upheld the trial judge's direction to the jury to ignore the wages which the plaintiff received on the basis that,

> "It is impossible for the defendant as the wrongdoer to mitigate the damage for which he is responsible by relying on voluntary payments made by a third person to provide for the support of the plaintiff on an arrangement that he should be recouped if and when the plaintiff was in a position to do so and it can make no difference that that person was the employer of the plaintiff."[34]

b) Payment on a Condition which Subsequently Fails

8.41 It may be that where the payment was made on condition, for example, that the plaintiff does not receive damages, where the condition fails the collateral benefit provider has a claim in restitution on the basis of 'failure of consideration.' The

---

[33] Unreported, Supreme Court, 11 June 1953.

[34] *Ibid.*

relevance of the law of restitution in this regard is uncertain; the habitual terminology is not easily reconciled with a claim by the benefit provider against the plaintiff. From the outset one does well to bear in mind O'Dell's warning against permitting an overlap in the usage of the words 'restitution' and 'compensation', or the use of 'unjust enrichment' to mean something like 'undeserved windfall'.[35] Restitution is the imposition of a requirement to return money or other property to its rightful owner where its retention would be unjust. It has been described as "a distinctive legal concept, separate from both contract and tort".[36]

8.42 For restitution to apply four conditions must be satisfied. In *Dublin Corporation v Building and Allied Trade Union*[37] Keane J explained that there must be (i) an enrichment to the defendant; (ii) at the expense of the plaintiff; (iii) in circumstances in which the law will require restitution; (iv) where there is no reason why restitution should be denied. For the purposes of the collateral benefits debate (i) and (ii) do not pose any problems – the benefit in question is easily identifiable as emanating from the benefit provider who would become the plaintiff in a restitution action. The third condition is the enquiry as to the 'unjust' element. In *Dublin Corporation* Keane J lists possible instances as where money is paid under duress, as a result of a mistake or where there is failure of consideration. The word 'consideration' in the law of restitution is understood to mean the performance of a promise.[38] The application of the concept of unjust enrichment to facilitate reimbursement of the benefit provider by the plaintiff would entail interpreting the receipt by the injured party of damages as failure of an implicit condition that he would not receive damages. This failure of the condition then renders the retention by the injured plaintiff of the collateral benefit unjust.

8.43 The use of the word 'unjust' may be misleading. O'Dell notes that the three instances noted by Keane J all have in common the idea that the payor of the benefit did not intend to 'enrich' the payee. He notes Professor Birks explanation that the word identifies "a general way those factors which according to the cases themselves, called for the enrichment to be undone."[39] This interpretation is more easily reconciled with the situation with which we are concerned. There remains however the fact that the provider of the benefit does so usually either voluntarily as in the case of charitable benefits or pursuant to an obligation. Goff and Jones comment that "In principle the fact that a benefit has been conferred as a valid gift should always

---

35 Eoin O'Dell on *Restitution* in WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 1997, at pp.607-608.

36 *Corporation of Dublin v Building and Allied Trade Union* [1996] IR 468 at p.483 *per* Keane J referring to words of Deane J in the High Court of Australia in *Pavey & Matthews Proprietary Ltd. v Paul* (1987) 162 CLR 221. A detailed discussion of the law of restitution is beyond the scope of this reference, for such analysis see GOFF AND JONES, THE LAW OF RESTITUTION (5th ed) (1998). see also Eoin O'Dell, *The Principle Against Unjust Enrichment* [1993] vol. 15 DULJ 27.

37 [1996] 1 IR 468

38 The definition is borrowed from Lord Simon in *Fibrosa v Fairburn* [1943] AC 32,47.

39 Eoin O'Dell on *Restitution* in WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 1996 at p.518 citing Birks, AN INTRODUCTION TO THE LAW OF RESTITUTION (Oxford rev. ed., 1989) at p19.

preclude restitution".[40] The authors similarly note that where there was a common law, statutory or equitable obligation to confer the benefit, a claim in restitution will fail.[41] O'Dell concludes that a plaintiff seeking restitution where there has been a contract must first demonstrate that the contract is ineffective.[42]

8.44 The English Law Commission considered the possible relevance of the law of restitution in the context of collateral benefits.[43] They were of the opinion that where a collateral source confers a benefit on the plaintiff either voluntarily (e.g. charitable assistance) or under a legal obligation by virtue of a contract, or perhaps legislation (e.g. insurance payments or pensions), the provider has no restitutionary claim to recover the value of the benefit. The only possible use of restitutionary principles would be where the benefit is conferred on the plaintiff under a condition which 'fails': this would facilitate a restitutionary claim for the provider of the benefit on the basis of a 'failure of consideration.' In order for the conferring of a collateral benefit to ground a restitutionary claim, the Commission states that the condition must have been made express – in order to prevent those who merely change their minds about giving a plaintiff a gift from having a restitutionary claim.

8.45 In view of the foregoing, it is likely that the law of restitution in its current state does not provide a method by which an injured plaintiff can be required to reimburse a collateral benefit provider. If the only relevance of restitution is where there is an express condition, this is as easily catered for under the law of contract.

c) Repayment Pursuant to an Undertaking demanded by the Court

8.46 Where there is no legal obligation to repay, as under (a) above, this mechanism may be employed by the court provided that there is a moral obligation on the part of the plaintiff to repay the collateral source. The court may award damages on the condition that the plaintiff reimburses the collateral source with the value of the benefit, which he had received. Cooper has noted that the English and Canadian courts have employed this mechanism where a moral obligation existed.[44] The Australian courts, however, have refused to demand an undertaking from the plaintiff, but nevertheless awarded full damages on the understanding that there would be reimbursement.

8.47 Cooper argues that this device of 'conditional damages' could be extended by the courts to cover any case where it was considered that deduction, without a form

---

40 Goff and Jones *op.cit.*fn.35 at p.47.

41 *Ibid* at p.48.

42 O'Dell *op.cit.*.fn.38 at p.527.

43 Law Commission Consultation Paper No. 147, *Damages For Personal Injury: Collateral Benefits*, (1997) at paras. 2.84-2.88.

44 KD Cooper, *A Collateral Benefits Principle*, (1971) 49 Canadian Bar Review 501 at p.524. *Dennis v IPTB* [1948] 1 All ER 779; *Schneider v Eisovitch* [1960] 2 QB 430; *Myers & City of Guelph v Hoffman* (1956) 1 DLR (2d) 272 (Ont.). See also para.6.11 above.

of reimbursement, would unjustly burden the collateral source to the effective relief of the tortfeasor.

8.48 The downside however, is that the imposition of an undertaking is obviously at the discretion of the court in each individual case and does not, therefore, bring certainty into the law. This also means that it is impossible to guarantee that the plaintiff shall not be over-compensated. The advantage, however, is the inherent flexibility of this method, which permits reimbursement of the collateral source where it is considered necessary. Moreover, further legal actions by the collateral source seeking repayment of the benefit are avoided.

8.49 McGregor comments that, although it may be difficult to identify the precise grounds on which the court is entitled to make a judgment conditional in this way, "the procedure has such utility that it should not be subjected to too technical a questioning."[45] McGregor considers that this option would not be appropriate in those cases where it is difficult to identify a moral obligation on the part of the plaintiff to repay.

2 Recoupment of the Collateral Benefit from the Defendant

8.50 Where the value of the collateral benefit is deducted from a plaintiff's damages it is the defendant who putatively gains. Thus the various mechanisms which may be employed to return the value of the collateral benefit from the defendant to its source are now considered.

a) Subrogation

8.51 Subrogation has been described as,

> "the right of an insurer which has discharged its obligations to an insured to be put in the place of the insured so that it can take advantage of any rights available to the insured to diminish or discharge the loss for which the insured has been indemnified." [46]

The right of subrogation is only available to indemnity insurers. In the case of such insurance, the insured is indemnified to the extent of the loss sustained and no more. Subrogation is not available in respect of non-indemnity policies such as personal accident or health insurance, the essential difference between the two types of policy being that in the latter case the insurance cannot effect exact restoration for the insured.

---

45 Harvey McGregor, *Compensation Versus Punishment* (1965) 28 MLR 629 at p.638.

46 CORRIGAN AND CAMPBELL, CASEBOOK OF IRISH INSURANCE LAW (1995) at p.57. Although the indemnity insurer's right of subrogation arises by operation of law, almost all modern policies make specific provision for it.

8.52 The basis for the differential treatment of indemnity and non-indemnity insurance policies has been criticised as arising from tradition as opposed to any current justification. Certain non-indemnity policies, whilst not facilitating the operation of subrogation, are often intended to indemnify the insured for a particular loss. Examples include accident policies, which provide for payments to be made on an indemnity basis, and life policies taken out by creditors on the lives of their debtors. [47] Indeed, Mitchell comments that:

> "More fundamentally, it seems highly questionable whether it is a sensible principle which gives an insured the right to accumulate recoveries from his insurer and third parties where he has lost an arm, for example, but denies it to him where he has lost a piece of property, even though the loss of both results in economic loss to the insured."[48]

8.53 It may be argued that the principle of subrogation should also operate in the context of what are traditionally regarded as non-indemnity policies. Subrogation by the collateral provider has the added advantage of avoiding the necessity for two sets of proceedings against the defendant – the provider of the collateral benefit merely 'steps into the shoes' of the plaintiff. In Germany conventional subrogation allows insurers to provide for the assignment of liability claims in the contract of insurance.[49]

8.54 The English Law Commission points out that in order to operate effectively to prevent overcompensation subrogation is dependant on the insurer actually exercising his rights. In this regard, the Commission cites empirical evidence to illustrate how infrequently subrogation is exercised in practice. [50]

8.55 As the terms of this Attorney-General's reference are concerned with ensuring that there be no double compensation in respect of the same loss, the extension of the doctrine of subrogation to this area would arguably not achieve this aim if insurers do not avail of their rights. Moreover, as an insurer may provide contractually for the refund of insurance payments from the plaintiff, there would

---

47 See generally: Atiyah, *Collateral Benefits Again* (1969) 32 MLR 387, 403-406; Kimball and Davis, *The Extension of Insurance Subrogation* (1962) 60 Michigan LR 841; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law,* (1966) California LR 1478, 1499-1501; English Law Commission Consultation Paper No. 147, *Damages For Personal Injury: Collateral Benefits* paras. 2.110-2.113; MITCHELL, THE LAW OF SUBROGATION (1994) at p.74.

48 *Ibid* at p.75.

49 See para.6.38 above.

50 Law Com CP No.147 *op.cit.*fn.48 at paras.2.89-2.90 referring to James J Meyers, *Subrogation rights and recoveries arising out of first party contracts*, (1973) 9 The Forum 83, 84-85. Meyers estimated that in the USA in 1972, only 8.5% of payments made under motor vehicle insurance policies were recovered by subrogation, and only 0.8% of that paid under homeowners' property insurance was recovered. See also the Law Commission's comments at paras.5.27-5.29.

arguably be little merit in extending the doctrine unless it provides some extra incentive to insurers to use subrogation rights.

8.56 In this regard the experience of some of the continental countries is indicative of the sort of mechanisms required to reap any rewards from the doctrine of subrogation. Subrogation is widely used by social insurance carriers in France, Germany and Belgium.[51] In practice, the rights are exercised by bulk loss sharing and recoupment arrangements between the private insurers and the social insurance carriers thus obviating the costly process of individually seeking to enforce rights. The Belgian experience is an exception to this method and the costs of accidents are also more expensive in that country.

b) Restitution

8.57 The discussion of the relevance of the law of restitution to this debate above at paragraphs 8.41-8.45 is equally applicable to the case where there has been deduction of the collateral benefits from the injured party's damages. One could argue instead of the failure of basis, that the benefit provider was compelled to pay the injured party but as the collateral source did not intend for the defendant tortfeasor to be enriched an action lies. Again, however, either the contractual or the voluntary elements may preclude the use of restitution to reimburse the benefit provider. The dicta of Kingsmill-Moore in *Attorney General v Ryan's Car Hire Ltd*[52] provides an insight into the current law in Ireland in this regard.[53]

8.58 *Attorney General v Ryan's Car Hire Ltd*[54] concerned a claim by the Minister for Defence in respect of expenses it had incurred by reason of the defendant's negligence towards a sergeant in the defence forces. The plaintiffs sought to recover on the grounds of an action *per quod servitium amisit*, and alternatively under restitutionary principles. In dealing with the latter 'novel' claim Kingsmill-Moore J referred to the English authorities on the subject which essentially offer two views.

8.59 The first as enunciated by Atkinson J in *Receiver for the Metropolitan Police District v Tatum.*[55] is that "where A is compelled to pay money which B is legally liable to pay, A can recover from B, on whom the real liability rests". In this context

---

51 See paras.6.43-6.49 above. See also W PFENNINGSTORF AND D GIFFORD, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION IN TEN COUNTRIES AND THE USA (Oak Brook, Illinois: Insurance Research Council, 1991).

52 [1965] IR 642

53 Although the case is admittedly not modern it is one of the few illustrations of an attempt to use restitutionary principles in the situation with which we are concerned in this paper.

54 [1965] IR 642

55 [1948] 2 KB 68 at p.73 summarizing the principle as stated by Lord Wright in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at p.545 to which Kingsmill-Moore J referred at p.665 *ibid.*

B is the defendant tortfeasor who is considered to be legally liable for the payment because his negligence was the cause of A being compelled to pay. However in *Monmouthshire County Council v Smith*[56] Lynskey J confronted by a similar situation found that the defendant was not liable to pay any damages for loss of wages as he had not in fact lost any. This was the preferred view of the Court of Appeal.

8.60 Having reviewed the authorities, Kingsmill-Moore J said that the tortfeasor is only liable for the direct injuries which he has caused to the injured plaintiff and not for indirect injuries to a third party who suffers indirectly as a result of an injury to the plaintiff with the exception of the common law actions of *per quod servitium amisit* and *per quod servitium consortium amisit.* He also expressed the view that to accede to the plaintiff's claim on restitution "would be making a new and undesirable extension of the law".[57]

8.61 At present the Commission is of the opinion that the scenario of a collateral benefit provider suing a defendant tortfeasor does not fit into the hitherto recognised categories of claims in restitution in this country.

b) An action in the tort of negligence for economic loss against the tortfeasor by the collateral source

8.62 The neighbour principle as enunciated by Lord Atkin in *Donoghue v Stevenson,*[58] which outlines the type of relations which may give rise to a duty of care, is of such a wide breadth that not surprisingly it has always been necessary to ascertain the limits barring recovery so as to preclude "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[59] One of the casualties of this cautionary approach has been the right to recover for pure economic loss in an action for negligence. Historically the right was rejected.[60] However, with regard to negligent misstatement it is now well established. In *Murphy v Brentwood District Council,*[61] the House of Lords proclaimed a broad bar on the recovery of economic loss beyond the already clearly defined perimeters. In Ireland however the cases show that the same criteria applies to all actions in negligence without distinction on the basis of the nature of the loss.

8.63 In *Ward v McMaster*[62] McCarthy J. declined to dilute the words of Lord Wilberforce and expressed the duty of care as arising from the proximity of the

---

56 [1956] 1 W.L.R. 113

57 *Supra* at p.666.

58 [1932] AC 562

59 *Per* Cardozo J. in *Ultramares Corporation v Touche Niven & Co.* (1931), 174 N.E. 441 at p.444.

60 MCMAHON AND BINCHY, THE IRISH LAW OF TORTS, (2nd ed. Butterworths, 1990), chap.10

61 [1991] AC 398. Those situations being where the plaintiff had suffered physical damage or in the reliance situation of *Hedley Byrne v Heller* [1964] AC 465.

62 [1988] IR 337

parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy.[63] This standard test appears to be equally applicable to an action for economic loss. In *Sweeny v Duggan*[64] Barron J, after reiterating McCarthy J's test stated as follows:

> "The nature of the loss is not material. Liability in negligence extends to both personal injury and economic loss suffered by reason of the defendant's wrong...Proximity must mean the existence of a duty of care such that if the person owing the duty is careless there is likelihood that damage will be caused to the person to whom it is owed."[65]

8.64 More recently in *McShane Wholesale Fruit and Vegetables Ltd. v Johnston Haulage Co. Ltd.*[66] Flood J, who had to decide the particular issue of whether damages are recoverable in respect of economic loss consequent on a negligent act, explained the situation as follows:

> "The quality of the damage does not arise. It can be damage to property, to the person, financial or economic....The question as to whether the damage (of whatever type) is recoverable is dependent on proximity and foreseeability subject to the caveat of compelling exemption on public policy....the fact that the damage is economic is not in itself a bar to recovery where the other elements above stated are present."[67]

8.65 In the context with which we are concerned a collateral benefit provider would be seeking to claim for economic loss occasioned by injury sustained by a third party i.e. relational economic loss.[68] The Irish judiciary have not had much opportunity to consider this but in the absence of a bar on such an action then the success of a collateral benefit providers claim would be dependent on proving the above factors and that there were no policy considerations which precluded recovery.[69]

---

63 While the scope of the latter factor was considerably narrowed by McCarthy J. in *Ward* it nevertheless remains and could be called into use to defeat a claim for damages for pure economic loss in the context of a collateral benefit provider against the tortfeasor that is if the proximity issue were not enough to defeat such a claim.

64 [1991] 2 IR 274

65 *Ibid* at p.283

66 [1997] ILRM 86

67 *Ibid* at pp.88-89

68 For a discussion of relational economic losses see JOHN FLEMING, THE LAW OF TORTS, (7th ed.) pp.162-168. See also *Norsk Pacific Steamship Company v Canadian National Railway Company* (1992) 137 N.R. 241 especially the dissenting judgment of La Forest J.

69 See ROGERS, WINFIELD AND JOLOWICZ ON TORT, 14th ed. (1994, Sweet and Maxwell) at p.93 *et seq* where the author notes that while nearly all the cases are about property damage the same approach prevails in relation to personal injury.

8.66 In this context in Canada, where they also chose not to step back from the principles outlined in *Anns v Merton London Borough Council,*[70] these factors, particularly that of proximity, have been considered in more detail with regard to recovery for economic loss. In *Norsk Pacific Steamship Co. v Canadian National Railway Co.*[71] McLachlin J, for the majority, offered a proximity test in order to ascertain when damages were recoverable:

> "Proximity may be established by a variety of factors, depending on the nature of the case....In determining whether liability should be extended to a new situation courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection."[72]

The test however did not have the backing of the complete majority as Stevenson J, recognising the policy considerations which required clear limits as to the categories of prospective plaintiffs, preferred the 'known plaintiff test' i.e. recovery ought be restricted to specific individuals whom a defendant could have reasonably foreseen would be likely to suffer economic loss.[73]

8.67 The arguments of the minority, and also of various academic writers, against recovery are also very persuasive. La Forest J quotes extensively from Lord Fraser in *Candlewood Navigation Corporation v Mitsui OSK Lines Ltd*[74] with regard to the development of the rule against recovery for economic loss in England, and one particular example he gives is apposite here.

> "An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety.....Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be numerous and novel." [75]

---

70 [1978] AC 728

71 (1992) 91 DLR (4th) 289. The case provides a valuable source of common and civil law authorities on the subject of recovery for economic loss including academic sources. For comments on the case: Mitchell McInnes, *Contractual Relational Economic Loss*, vol. 52 [1993] CLJ part 1 p.12; B.S.Markesinis, *Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views,* 109 LQR [1993] p.5. See also the *D'Amato v Badger* (1996) 137 DLR 4th 129.

72 *Ibid* at pp.369-370.

73 *Ibid* at pp.386-391.

74 [1986] AC 1 at pp.15-17.

75 La Forest J *op.cit.*fn.73 at p.306 on the policy considerations. La Forest J felt that the loss bearing ability of the parties was a critical factor in the allocation of liability. See also

d) An action grounded in per quod servitium amisit

8.68 The action *per quod servitium amisit* is a relic of the old master and servant relationship, the former being considered to have a proprietary interest in the services of the latter. The action has been much restricted in recent times and is rarely invoked. Nevertheless it remains a potential action where a person commits a tort against the servant thereby depriving the master of his services. In modern terms an employer could bring an action to recover the economic consequences sustained from the defendant's actions, such as sick pay or the cost of paying the premiums for an income continuance plan or an occupational disability benefit insurance. The test of service is *de facto* not *de jure* however in a number of cases it has been held that such claims cannot be maintained with regard to servants of the State.

8.69 In *Attorney General v Ryan's Car Hire*[76] the Minister for Defence could not recover from the defendants for the losses incurred due to an accident they had caused a sergeant in the Air Corps on account of this. Kingsmill-Moore J in rejecting the plaintiff's argument professed himself to be

> "averse to any attempt to extend the scope of an action which, together with the action *per quod consortium amisit*, appears to me to be anomalous and one to be restricted rather than extended."[77]

The possible scope of this action was further restrained by O'Keeffe P in *Chapman v McDonald*[78] where he considered that it really only applied to domestic situations.

8.70 Given these restrictions and the fact that it would only ever be an option with regard to certain types of collateral benefits and only one type of provider, *viz.* an employer, the action is not a viable mechanism for transferring the cost of the collateral benefit from the provider to the tortfeasor. It is of too limited an application to ground any sort of a general policy of reimbursement.

Arguments in Favour of Option 3

8.71 As highlighted above, a policy of reimbursement appears to be the most attractive from a public policy perspective. Furthermore, Cooper points out that where a collateral benefit derives from a scheme to which a large number of people contribute, the reimbursement to that scheme of the value of the benefit should reduce

---

FELDTHUSEN, ECONOMIC NEGLIGENCE, (2nd ed. 1989); The Hon. Sir Anthony Mason, The Recovery and Calculation of Economic Loss in NICHOLAS MULLANY, TORTS IN THE NINETIES (1997); Fleming *op.cit.* fn.68.

[76] [1965] IR 642.

[77] *Ibid.* at p.664

[78] [1969] IR 188

the cost of contributing towards the scheme. For example, in an insurance context this policy of reimbursement should reduce the insurance premiums that are borne by the public as a whole.[79]

8.72 Moreover, Lewis argues that the money recouped by the collateral source could be reallocated in order to assist those whose injuries were not caused by a tort and who, therefore, have comparatively meagre compensation.[80] However he recognises the practical problems of such an aim: very rarely would monies recouped by the collateral source be earmarked for other deserving purposes such as the compensation of those victims of non-tortious injury. Rather, the monies would, as noted in the preceding paragraph, be absorbed into the 'general pool' of funds and therefore only have the result of boosting the collateral source's profits and, perhaps, lowering the cost of the contributors' premiums. In this regard, therefore, it may be argued that, rather than reimbursing the collateral source, the value of the collateral compensation could be transferred into a central fund with the aim of assisting those victims of injury who do not have the possibility of recourse to tort law.

Arguments against Option 3

8.73 Militating against an overall recommendation that double compensation be avoided by means of a general policy of reimbursement is the economic reality of such a proposition. As can be seen from the brief overview above, the law in its current state of development does not provide any simple way to effect a retransfer of monies, apart perhaps from when the injured party is under a contractual obligation to reimburse the benefit provider. The possible causes of action outlined entail proof of further facts, criteria, and claims in a court of law. This necessarily involves additional costs. The value of the benefit will also have to be assessed. When one then compares the amount of money clawed back the initial attractiveness of the option diminishes.

8.74 Apart from the practical feasibility of this option there also arises the question as to its desirability. Reimbursement spreads the loss solely onto the defendant and the collateral source bears none of the burden. Where the collateral source has a legal obligation to confer the benefit on the plaintiff, it could be argued that the former was under a greater obligation to pay the compensation than the defendant (who is liable as the result of a moment's inadvertence). Furthermore, as alluded too earlier in this paper, the defendant is probably less likely to be able to subsume the costs than the collateral benefit provider.[81]

8.75 The aforementioned arguments are prefaced on the assumption that the benefit provider is usually an insurer and while this is often the case it is of course not

---

79 KD Cooper, *A Collateral Benefits Principle*, (1971) 49 Canadian Bar Review 501 at p.523.

80 Richard Lewis, *Deducting Collateral Benefits from Damages: Principle and Policy*, 18 Vol. 1 Legal Studies 15 at p.32.

81 *Supra* paras.8.29-8.30.

always so. Consequently in addition there may be the difficulty of ascertaining who exactly provided the collateral benefit e.g. in the case of charitable donations from the general public following a huge disaster. Reimbursement in such cases can fairly be said to be unworkable.

Evaluation of a Policy of Reimbursement

8.76 A mechanism which immediately provides for the transfer of money back to its source and away from the tortfeasor without recourse to the courtroom would obviate many of the arguments against a policy of reimbursement. A policy of reimbursement is workable where arrangements between collateral benefit providers facilitate transfers such as in some of the foreign jurisdictions examined in chapter 6. Where this type of mechanism is not however in place, the costs of establishing one would be extensive.

8.77 The Commission is of the opinion that a policy of reimbursement is not viable, particularly in light of the following: (i) the overall aim of reforming the law to avoid double compensation implies that any recommendation should facilitate the optimum use of resources; (ii) the mechanisms currently available in Irish law to retransfer the loss from the benefit provider to the tortfeasor are insufficient to base a general policy of reimbursement.

8.78 The Commission has no evidence to indicate the costs which would be involved in transferring losses from one source to another. However, it is provisionally of the opinion that they are significant enough to operate against the adoption of a policy of reimbursement.

8.79 The Commission's provisional recommendation is in favour of a general policy of deduction as this facilitates the optimum use of resources. Furthermore, as the purpose of compensatory damages is to compensate and a punitive/deterrent element is not recognised in this jurisdiction, the retransfer of costs from the collateral benefit provider to the defendant is not necessary.

Provisional Recommendation

8.80 Having considered the merits of the three broad policy options, the Commission is provisionally of the view that a general policy of deduction promotes the optimum use of society's resources. The Commission recognises however, that in respect of certain benefits there may be compelling reasons which justify non-deduction; for example the deduction of charitable benefits could serve to discourage social solidarity and benevolence therefore it is preferable not to deduct charitable benefits. The reform option chosen therefore becomes a general rule of deduction subject to certain exceptions justified in the public interest.

CHAPTER 9 INDIVIDUAL COLLATERAL BENEFITS: EVALUATION OF OPTIONS

9.01 In this chapter the arguments, rationales and policy options discussed elsewhere in this paper are applied to the individual collateral sources of compensation and the Commission sets out its provisional recommendations. It was stated in the previous chapter that the Commission prefers a general policy of deduction subject to certain exceptions.[1] This is considered to be the most cost effective method of compensating for the losses caused by accidents. It has also been stated that the Commission prefers the 'effect' approach as to whether a benefit actually compensates the injured party or not i.e. even if a collateral payment is not intended to compensate for the same loss as an award of damages compensates, if its effect is to compensate the plaintiff for the same loss, then the amount of the benefit should be deducted from the award of damages which compensates for that loss.[2]

9.02 Bearing in mind these broad policy recommendations, the main arguments for and against the deductibility of each collateral benefit are set out below. In respect of certain benefits, the arguments against deduction are considered more convincing and hence the Commission finds that certain exceptions to a general rule of deduction are justified. This is not surprising in view of the analysis in previous chapters of the law in other jurisdictions. No country has opted for pure deductibility without exceptions: charitable benefits and non-indemnity insurance payments are the most obvious and oft-cited of these exceptions.[3]

9.03 The Commission is aware that the recommended change from a general rule of non-deduction to one of deduction entails a considerable change in the law. In this respect it is important to remember that to deduct a collateral benefit from an award of damages is not to take away a benefit earned by a plaintiff, rather it is to recognise that insofar as a payment is received, a loss is mitigated and therefore less damages are required to compensate that loss.

9.04 As the Commission favours a general rule of deduction as the most effective method of dealing with the costs of accidents, any exceptions which allow double compensation should be carefully limited. Certain collateral benefits, (such as insurance payments and pensions) may be funded in a variety of ways: they may

---

1 *Supra* paras.8.35-8.36.

2 *Supra* para..8.28.

3 See generally chapters 2 and 6 and paras.4.02-4.13.

be entirely privately financed and paid for by the direct contributions of the plaintiff; they may be wholly funded by a third party such as an employer for the benefit of the plaintiff; or, they may be jointly financed by contributions from both the employer and employee. In some cases some Commissioners are of the opinion that reasons justifying non-deduction may not be applicable to all of these methods of financing a benefit.

9.05 The Commission believes that the public interest is best served by legislation which is certain and can be applied with minimal cost and complication. It is essential that any exceptions to the general rule should not lead to the introduction of additional issues into the already lengthy and complex litigation process. Nor should the exceptions be so widely framed as to negate the benefits of the general rule of deduction. The Commission has chosen in this Consultation Paper to recommend certain exceptions as opposed to opting for complete deductibility of all benefits. Submissions are welcome on all aspects of these provisional recommendations.

9.06 Current statutory deductions are governed by the five year rule.[4] Where the Commission recommends deduction of a particular type of collateral benefit the details of how future deductions should be addressed is dealt with at the end of this chapter.

Insurance Payments

9.07 Indemnity insurance is already normally subject to subrogation rights at common law. The types of insurance which offer collateral sources of compensation to accident victims are usually non-indemnity policies such as an accident insurance policy; these do not contain subrogation rights. It must be pointed out that all or part of the payments under such policies may often compensate for a non-pecuniary loss for which an award of damages does not compensate, in which case, in view of the foregoing broad policy considerations, it would not fall to be deducted.

Arguments against Deductibility

- The plaintiff has *paid for* the insurance policy and is entitled to benefit from his or her thrift and foresight.

- This reasoning can also be applied to situations where the plaintiff has not paid the contributions directly but rather indirectly through some facet of the employment relationship: e.g. many collective bargaining agreements provide for the payment of such policies by the employer in lieu of a higher wage.[5]

---

4 *Supra* paras.7.66-7.68.

5 Also sometimes referred to as the social wage theory.

- Where the contributions have been paid by a third party such as the employer on a voluntary *ex-gratia* basis the payment of same is in order to attract the employee and is part of the employment relationship. Thus any deduction would interfere with that relationship and penalise the plaintiff.

- The wrongdoer should not benefit from the plaintiff's foresight, thrift etc.

- The general deterrent effect of awards of damages would be diminished as deduction allows the tortfeasor to avoid full economic liability for the consequences of his or her actions.[6]

- The maxim *res inter alios acta* is applicable: the contract existed independently of the event which caused the payment of the insurance.[7]

- Insurance payments fulfil a valuable function in providing interim payments to the insured before any award is made; it is therefore in the public interest to encourage insurance coverage as it reduces the burden on the State and society in general.

- Deduction would act as a disincentive to people to take out insurance policies as it would mean that the insured person is effectively worse off than the uninsured. Even if the insured were to be given credit for premiums paid he or she would still suffer a disadvantage, having already made the sacrifice at the time of paying the premiums.

- Deduction would complicate the tort system unduly. An example of further issues which could arise in litigation are whether a collateral benefit that would have been paid if the plaintiff had submitted a claim ought to be taken into account; or whether the plaintiff was contributorily negligent in failing to pay the renewal premium and thus allowing the policy to lapse.

- Deduction from general damages could lead to higher awards of damages.

- Deduction would also complicate settlements.

Arguments in favour of Deductibility

- The plaintiff still benefits from the policy as he or she has the peace of mind and security of knowing he is covered against the insured eventualities. Furthermore, insurance often covers losses not covered by tort damages. The plaintiff also has the advantage of early compensation.[8]

---

6 See generally paras.3.03-3.13 for a full discussion of any possible punitive or deterrent function of compensatory damages.

7 See paras.3.14-3.17

8 See paras.3.20-3.21

- Where an employer or third party pays the premiums on a voluntary *ex-gratia* basis, the purported justifications of thrift and foresight on the part of the plaintiff do not exist and therefore the payments ought to be deducted.

- The wrongdoer is not really benefiting as it is the insurer who pays in most cases.

- The function of damages is compensatory therefore the tortfeasor is strictly only liable for the net loss caused by the accident; insofar as insurance payments compensate the plaintiff the tortfeasor is not liable.

- Deduction would not act as a disincentive to purchasing insurance as the public does not generally consider tort law when taking out insurance.

- Deduction could lead to lower premiums as it allows for the possibility of a policy which stipulates the repayment of insurance in the event of a successful tort claim and consequently offers lower premiums.

- Deduction would not influence any purported deterrent effect of damages' awards as accidents are usually the result of a moment of inadvertence and do not involve the calculation of the financial consequences by the tortfeasor.

Provisional Recommendation

9.08 The Commission is of the view that insurance payments should be excepted from the general rule of deduction which it recommends. The non-deductibility of such payments is considered to be in the public interest. The important role of insurance in *inter alia*, cushioning people against the losses consequent on accidents in their immediate aftermath, is one which society in general benefits from and therefore ought to be encouraged. As the injured party has paid for the policy, they are entitled to gain from their thrift and foresight.

9.09 Some Commissioners provisionally recommend that only insurance payments which are entirely unrelated to the plaintiff's employment, i.e. financed separately by the plaintiff, should be non-deductible. It is considered that where the insurance policy has been wholly or partially financed by an employer, the reasons for non-deductibility are not as convincing as the plaintiff has not exercised the aforementioned thrift and foresight.

9.10 It is recognised that there may be objections to this delimitation on the exception to deductibility on the ground that the plaintiff has paid for the payments through his or her work - the so called social wage argument – and therefore no distinction should be made between an entirely privately plaintiff funded policy and one paid for by the plaintiff by virtue of his or her employment. However it is considered that the greater public interest is served by the elimination of double compensation for reasons discussed earlier in this paper; where the employer has partially or entirely paid for the insurance policy and the payments are not deducted

from an award of damages which compensates for the same loss, the employer is funding double compensation with consequent waste of resources and increased costs of employment. To widen the scope of this exception, they believe, invites the litigation of further extraneous issues, e.g. whether the employer really funded the policy in lieu of a higher wage or not, whereas the strict guidelines proposed would be capable of straightforward application in practice.

9.11 Some Commissioners prefer the view, which is favoured in the UK[9] and common law jurisdictions discussed in chapter 6, that where the plaintiff can prove that he has paid for the insurance policy, either by direct contributions or through his labour, and in lieu of a higher wage, these insurance payments should also be non-deductible. Under this view the two other methods of funding insurance payments – jointly by employer and plaintiff employee, and entirely by the employer – are potentially non-deductible. This avoids the concerns that the plaintiff is being denied the benefit of contributions made in the context of the employment relationship by being treated differently to the person who purchased a policy outside of the employment context.

9.12 It was noted in chapter 7 that there may be certain types of insurance payments which do not fall within section 2, namely where the policy is taken out by the employer as an indemnity against any payments which he or she might be required to pay in the event of an accident sustained by an employee. This would include, for instance, an income continuance plan. The Commission is of the view that these payments are not covered by section 2 and are therefore deductible. Not only is there no reason to allow over-compensation, but a policy of non-deduction is particularly inequitable where the employer is the defendant, as the one person is responsible for doubly compensating the plaintiff.[10] Moreover, in such cases, the insurance cover is not directly for the benefit of the employee, so the social wage argument does not apply.

Charitable Payments

9.13 Charitable payments have traditionally been excepted from the general rule of deduction. However a difference of opinion and indeed law has arisen in cases where the defendant tortfeasor is the donor.[11] It is possible that benefits in kind do not fall within section 2 of the *Civil Liability (Amendment) Act, 1964*.[12] Even if this is the case it has already been pointed out that benefits in kind are not deductible at common law.[13] The Commission sees no reason for distinguishing

---

9 See for example Lord Reid in *Parry v Cleaver* [1970] AC 1 at p.16 discussed *supra* at paras. 4.05-4.06. See also the *dicta* in *Hussain v New Taplow Paper Mills Ltd.* [1987] 1 All ER 417.

10 It follows from this recommendation that an examination of the compensatory effect of insurance payments falling within the exception becomes unnecessary.

11 See paras.4.10-4.13 for the treatment of charitable payments in England and chapter 6 for other jurisdictions.

12 See para.7.15

13 *Ibid.* See also *Ryan v Compensation Tribunal* [1997] ILRM 194 and *Basmajian v Haire*,

between charitable monetary payments and benefits in kind and its recommendations in this sphere encompass both types of charitable benefit.

Arguments against Deductibility

- It is in the public interest to encourage social solidarity and benevolent behaviour.
- The wrongdoer should not be relieved by the generosity of others. To deduct would offend public feeling.
- The intention of the donor is not to cover any of the losses covered by tort damages, rather they simply intend to express sympathy, or perhaps cover non-pecuniary losses which, since the nature of these losses is impossible to quantify, can never be overcompensated.
- It follows that it would be impossible to identify from which head of damages the payment ought to be deducted, at least in the case of cash payments.
- Charitable benefits, like insurance payments, fulfil an important function as they are more immediate than tort awards; deduction would discourage public giving or could lead to a change in its pattern, perhaps causing people to wait until after the award. This would increase the burden on the State, not to mention the injured party.
- *Res inter alios acta applies.*[14]
- The erratic nature of charitable benefits would mean that deduction would not have any appreciable effect on insurance premiums; thus no public interest would be served by their deduction.

Arguments in favour of Deductibility

- Deduction would not discourage charitable payments; indeed if the donor were to think about the effect, he or she might prefer that there would be no overcompensation once the purpose of alleviating the immediate effects of the accident was fulfilled.
- Any discussion of the intention of donors involves a fictional imputation of intention as some donors may prefer that there be no overcompensation and one cannot know individual intentions: all should be treated alike.

Unreported. High Court, 2 April 1993, Barr J.

[14] *Supra* paras.3.17-3.12

Provisional Recommendation

9.14 The Commission believes that there is a clear public interest in treating charitable benefits as non-deductible.[15] Such an exception is justified in the public interest in order to encourage public giving through charity as an expression of social solidarity. Spontaneous acts of benevolence might be chilled if charitable benefits were to be deducted.

9.15 When the payments or other benefits emanate from the tortfeasor, the same arguments used in favour of non-deduction of all other charitable benefits dictate that these payments be deducted in order not to discourage this type of giving.[16] Moreover, when the tortfeasor is the donor one cannot argue that the wrongdoer is being relieved by the donor. It is recognised that the tortfeasor can protect himself and could, if he or she wanted pre-award payments to be used in mitigation of damages, stipulate this as a term of the payment. It is also possible that the tortfeasor may want to make a charitable donation without his insurers reaping the benefits, although it is considered that this is too infrequent a possibility as to hold much weight. In the final analysis the Commission finds the arguments in favour of deducting pre-award charitable payments from defendant tortfeasors more convincing and accordingly provisionally recommends that they be deducted.

Pensions

9.16 It is only where a person is in receipt of a pension, the payment of which arises as a consequence of an accident, and also claims damages for loss of earnings, that the issue of double compensation arises. It follows logically from the general rule of deduction which focuses on the effect of a benefit that where a pension fulfils the above two criteria it is a potential collateral benefit i.e. it arises as a consequence of the accident and compensates for the same loss as a head of damages. These are the only type of pension payments which are at issue in this debate and the subject of the discussion below. Furthermore, only pension payments received earlier than the normal retirement age can potentially be collateral benefits, as after that age a person would be in receipt of a pension regardless of any action for damages.

9.17 On this analysis it is clear that a state disability pension will always be a collateral benefit where damages are claimed. An ordinary state retirement pension will not, as it is not payable before the age of 65 or 66 depending on the pension and therefore the Commission does not consider it to be a potential collateral benefit.

9.18 In the occupational pension sector, as was explained in chapter 7, there are essentially two types of pension schemes; defined contribution schemes and defined

---

15 Subject to the exception considered *infra* at para. 9.15.

16 This has been accepted in Scotland: section 10(f) *Administration Act, 1982*, and in Canada and was suggested in England in *Hussain v New Taplow Paper Mill Ltd.* [1987] 1 ALL ER 417 with regard to encouraging employer defendants to make such payments.

benefit schemes. The pension payable under either scheme will be the sum of a person's contributions in addition to the investment earned by those contributions.

9.19 Early retirement is regulated by the Revenue Commissioners who permit a pension to be paid at any age if it is due to ill-health; otherwise a person must be at least 50 years old.[17] However, even if a person retires earlier than age 50 and takes an ill health early retirement pension, the payments are still essentially the sum of their contributions plus the investment earned. It is only in the case of an enhanced benefit scheme that they will receive more.

Arguments against Deductibility of Pension Payments

- Pension payments are indistinguishable from insurance monies, therefore the paid for and associated arguments apply, as entitlement stems from contributions funded by the plaintiff.

- Where entitlement arises through a pension scheme associated with the plaintiff's work, this is equivalent to the payment of contributions privately by virtue of the concept of the social wage, i.e. the plaintiff has earned the entitlement through his or her work in lieu of a higher wage.[18]

- The accident is the *causa sine qua non* and not the *causa causans* of receipt of the payment.[19]

- Deduction would complicate and perhaps discourage settlements.

- A pension is intrinsically different from a wage in that the latter is a "reward for contemporaneous work" while the former is "the fruit through insurance, of all the money which was set aside in the past in respect of his past work".[20] Therefore payments should not be deducted from damages for loss of earnings.

---

17 See PAUL KENNY, UNDERSTANDING PENSIONS, THE FRIENDLY GUIDE TO PENSION SCHEMES (1994) at p.9; The Revenue Commissioners, *Revenue Pension Manual* (1998), chap. 9.

18 Article 141 (ex Article 119) of the Treaty of Rome defines pay as follows:

> "...the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."

See also the interpretation of this article in *Defrenne v Sabena* [1976] ECR ; See also *Barber v Guardian Royal Exchange Assurance* [1990] 2 CMLR 513; *Bilka-Kaufhaus GmbH v Weber Von Harz* [1986] 2 CMLR 701; *Birds Eye Walls Ltd v Roberts* [1994] IRLR. See also *Anti-Discrimination (Pay) Act, 1974*, s.1(1) which contains a broad definition of pay encompassing the interpretation given to Article 141 (ex. 119) of the Treaty of Rome in European case law.

19 *Supra* paras.3.17-3.20

20 *Per* Lord Reid in *Parry v Cleaver* [1970] AC 1; see paras.4.18 *et seq.*

- The wrongdoer should not be allowed to benefit from the fruit of the plaintiff's past work.

- Early pension payments also seek to compensate for non-pecuniary losses such as the change in lifestyle, pain and suffering etc. This is illustrated by the fact that they will often continue to be payable even if the plaintiff later takes up alternative employment.

- Entitlement to statutory disability pensions arises by virtue of PRSI contributions; therefore no distinction should be made between statutory pensions and private pension payments.

Arguments in favour of Deductibility of Pension Payments

- Regardless of whether the payments serve any additional purposes, the effect is to compensate for loss of earnings and therefore they ought to be deducted.

- The employer bears the burden of the extra payments under enhanced benefit schemes, therefore where the employer is also the defendant, one party is funding the plaintiff's double compensation and the costs of employment in general are unnecessarily increased.

- Not to deduct early pension payments is inconsistent with the deduction of sick pay or disability benefit payable pursuant to an employer indemnity insurance policy as these types of payment fulfil the same function.

- Where the plaintiff is a member of a pension scheme by virtue of their employment and the employer has either entirely or partially paid the pension contributions, there is no element of investment and thrift therefore such payments should be deducted.

- Statutory disability pensions are different from pensions in the private sector as PRSI contributions are compulsory so they do not involve the same element of thrift and foresight and therefore do not merit exception from deduction in the public interest.

Provisional Recommendation

9.20 The Commission is of the opinion that, as with insurance payments, there are compelling reasons which justify the exception of pension payments from the general rule of deduction. There is however a divergence of opinion as to the limits to this exception to the general rule of deduction.

9.21 The Commission agrees that there are no reasons to justify the exception of statutory disability pensions from the general rule of deduction. As discussed in chapter 7, social insurance benefits are financed by 'current income financing',

also known as 'Pay As You Go' (PAYG). This essentially means that the contributions made in a given year are applied to making payments to beneficiaries in that year.[21] The cost of the payments is funded by the contributions received and any deficit is met by the Exchequer. The Commission believes that the absence of an actuarial link, in conjunction with the obligatory nature of PRSI payments, and the fact that social insurance is funded by society as a whole, removes this type of pension from the scope of the exception justified in the public interest.

9.22 Statutory disability pensions are currently deductible under section 237 of the *Social Welfare (Consolidation) Act, 1993* where the injury results from an accident with a mechanically propelled vehicle.[22] The Commission favours removing this anomaly so that deduction applies regardless of where or how the accident occurs. Moreover, deduction should only be from the relevant head of damages, i.e. loss of earnings, and not from general damages as it is only where a benefit compensates for the same loss as a head of damages that double compensation arises.

9.23 Some Commissioners are of the opinion that only occupational ill health early retirement pensions or statutory disability pensions are potential collateral benefits. On this view, ordinary retirement pensions can never be collateral benefits and are therefore not deductible. The reasons are twofold: (i) entitlement to a normal retirement pension is entirely unconnected to injuries sustained in an accident and, (ii) where a person takes retirement they will not be claiming for loss of earnings.

9.24 It follows from the above that these Commissioners are only concerned in their recommendation with occupational ill health early retirement pensions. Normal retirement pensions are non-deductible as outside the scope of the collateral benefits debate. These Commissioners recommend that occupational ill health retirement pensions should be deductible from awards of damages for loss of earnings unless they have been entirely privately funded by the plaintiff outside of the employment context. It is only in these circumstances, they believe, that the pension payments merit different treatment from statutory disability pensions as the plaintiff has exercised thrift and foresight in purchasing a private policy and an analogy with the insurance exception in the same circumstances applies.

9.25 Some Commissioners prefer to adopt the criteria implied by the general rule of deduction which focuses on the effect of the benefit. This means that where pension payments arise in consequence of an accident, and serve to compensate for loss of earnings for which damages are also claimed, those pension payments are collateral benefits regardless of the term used to describe them. On this view it is still possible for an early retirement pension (not specifically an ill health early retirement pension) to be a collateral benefit. [23]

---

21 *Social Welfare (Consolidation) Act, 1993,* ss.6-8; Department of Social Welfare, *Social Insurance in Ireland*, (October 1996), para. 2.3 and in general.

22 *Supra* paras.7.44-7.46

23 A State retirement pension will not be paid early and therefore is not a collateral benefit.

9.26 These Commissioners are of the view that it is in the public interest to except pension payments from the general rule of deduction for the reasons already rehearsed in this paper. Furthermore they make no distinction between the person who paid money directly towards a scheme and the person who paid through their work, in lieu of a higher wage. This recognises the concept of the social wage whereby the non-pay element of compensation is prevalent in the modern workplace: many people receive as part of their employment package partial payment of pension contributions by their employers. As Geoghegan J noted in *Greene v Hughes Haulage,*[24]

> " [I]n most cases the benefit policy will form part of the remuneration and the employee will therefore be indirectly contributing to the premiums...."[25]

9.27 These Commissioners therefore provisionally recommend that where a plaintiff can show that he or she has paid for the pension, either directly or through his or work, the early pension payments should not be deductible from an award of damages for loss of earnings. In the case of this provisional recommendation no distinction is made between the different types of pension payments in the private sector, because as pointed out above, where a person takes their pension earlier than expected on account of ill health, the substance of the pension is the same as if they had waited until normal retirement age to receive it. The only exception to this is in the case of an enhanced benefit scheme. Where a defined benefit pension scheme provides for enhanced benefits, the cost of these is borne by the employer and furthermore the plaintiff receives more than their equitable entitlement. The plaintiff is therefore not considered to have paid for this element of the pension and it should be deducted.

9.28 With regard to the calculation of damages for loss of pension rights, at issue are the extra pension payments received because the plaintiff has taken retirement earlier than expected as a consequence of the accident. The Commission holds that the pension payments received after the age at which the plaintiff would normally have been expected to retire are no longer payments 'in consequence of an accident' as at this point the plaintiff would have been in receipt of pension payments regardless of any accident. The fact that the payments are of a reduced amount is compensated for under the head of damages called loss of pension rights. This purports to make up the difference between the residue of the plaintiffs' pension rights, which they are in receipt of, and the full entitlement which they would have received but for the accident. It is entirely logical that in calculating the loss of pension rights, the pension payments which the person is in receipt of after the age of normal retirement should be taken into account as clearly the pension payments mitigate this loss. The Commission is of the opinion that as these payments are no longer a consequence of the injuries for which damages are claimed they are outside the scope of section 2.

---

[24] [1998] 1 ILRM 34

[25] *Ibid* at p.44.

9.29 However, prior to the normal pensionable age, the payments are not being used as normal pension payments as they are compensating the plaintiff for the loss of a job and therefore to take them into account in assessing damages for loss of pension rights would eliminate much of the compensation for this loss. The reason for not deducting the earlier payments from damages for loss of pension rights is best explained by repeating the dicta of Lord Hope in *Longden v British Coal Corporation*:[26]

> "What the plaintiff is seeking in his claim for pension loss is a sum of money to recompense him for the loss of the retirement pension which would otherwise have been available to enable him to support himself and his family after his normal retirement age. It is of no help to him to be told that the money to compensate him for this loss is already being paid to him and that it will continue to be paid to him during the period when he is unable to earn wages because of his disability. He cannot reasonably be expected to set aside the sums received as incapacity pension during this period in order to make good his loss of pension after normal retirement age."[27]

Sick Pay

9.30 As noted at paragraphs 7.48-7.49 above, certain types of social welfare benefit which are in effect sick pay are already deductible from damages for loss of earnings for a period of up to five years from the date of the accident. These are injury benefit and disablement benefit which are payable where injuries are sustained due to employment, and sickness benefit where injuries are sustained from an accident involving a mechanically propelled vehicle.[28]

Arguments in favour of Deductibility

- The purpose of sick pay is to compensate for loss of earnings and therefore not to deduct clearly allows overcompensation.
- Not to deduct sick pay would provide a perverse incentive to not return to work as the injured employee could retain the pay and recover for loss of earnings.
- In cases where the employer is also the defendant, the non-deduction of sick pay would place an undue financial burden on the employer who must doubly compensate the injured employee.

---

26 [1998] 1All ER 289

27 *Ibid* at p.300.

28 Sections 75 and 237 of the *Social Welfare (Consolidation) Act, 1993* respectively.

- Not to deduct sick pay is inconsistent with the deduction of statutory disability pensions.

Arguments against Deductibility

- Sick pay is a form of insurance and therefore falls within that exception.
- Sick pay is earned by service, especially where it is often an accrued right, to this end the paid for argument also applies here. [29]
- Those employers who do not provide for the recovery of sick pay in the event of an award of damages for loss of earnings must intend the employee to be the recipient of the benefit.
- To set off sick pay against damages for loss of earnings ignores the fact that the plaintiff is unable to work, thus in the United States sick pay is seen to be for loss of earning capacity and is non-deductible.

Provisional Recommendation

9.31 The Commission provisionally recommends that all types of sick pay should be deducted from a plaintiff's award of damages for loss of earnings: to the extent that sick pay is received there is no loss of earnings and consequently not to deduct is to permit double compensation. Unlike in the case of insurance or retirement pensions, there are no compelling reasons to allow double compensation in this instance. Statutory injury and disablement benefits are largely financed by employers. Indeed the original rationale for the introduction of section 39 of the *Social Welfare (Occupational Injuries) Act, 1966* which governed the deductibility of injury and disablement benefit and was a precursor to section 75 of the *Social Welfare (Consolidation) Act, 1993* was based on the fact that such payments were entirely funded from employer's PRSI.[30] Likewise the employee contribution element is usually missing in the case of income continuance plans.[31]

9.32 Furthermore the public interest would benefit from the reduced costs of employment resulting from the indirect reduction in the financial burden on

---

29 See paras.6.13-6.16 for an illustration of this approach in Canada.

30 Employer's and employee's PRSI were amalgamated into the Social Insurance Fund in 1995. Thus one could argue that this direct correlation between employer's funding and the benefit no longer exists. However class J PRSI which only covers a person in relation to occupational injury benefit is solely funded by employers PRSI; hence reading between the lines, employers still finance these types of sick pay.

31 Kenny notes that employer contributions under a Permanent Health Insurance Scheme are not part of a pension scheme and are not the trustees responsibility. *Op. cit* fn.14 at p.19. See also *Greene v Hughes Haulage Ltd.* [1998] 1 ILRM 34.

employers.[32] It is submitted that there are no reasons to distinguish between benefits paid under occupational schemes and under statute in this regard. To the extent that a person may be said to earn sick pay the argument applies equally to both types of payment. Also, in practice, the payment received by the employee may consist of the statutory entitlement plus a contractual amount. Neither does entirely voluntary sick pay warrant any separate treatment as it also serves to mitigate the plaintiff's loss of earnings, and unless the employer attaches the condition that the wages be repaid, non-deductibility would cause double compensation.

9.33 Thus it is irrelevant if the source of the sick pay is statute, an employer indemnity insurance plan, an income continuance plan, occupational disability benefit or any combination of these. The only situation where the source of the sick pay is significant is where the payments are made by an employer on condition that they be repaid in the event of an award of damages. In such a case it is clear that double compensation will not arise by non-deduction as the plaintiff employee will not be permitted to retain the payments.

Social Welfare Payments

9.34 The deductibility of various social welfare benefits is already largely governed by specific statutory exclusions.[33] Our recommendations have already dealt with social welfare benefits in respect of sickness and disability under the relevant headings above.[34] To the extent that social assistance payments could arise in consequence of an injury, it is submitted that the regulation of entitlement to assistance payments means that in effect they will not give rise to double compensation. Possible arguments are considered below in relation to any social welfare payments, not already the subject of a recommendation, which could give rise to double compensation.

Arguments in favour of Deductibility

- The insurance analogy is not applicable to social insurance as the Pay As You Go method of financing the payments removes any actuarial link between contributions and payments.[35] Furthermore, the contributory principle means that benefits do not accrue in proportion to contributions. [36]

---

32 For some analysis of the insurance costs borne by employers see generally the Deloitte and Touche Report on *The Economic Evaluation of Insurance Costs in Ireland* (Department of Enterprise and Employment, 1996).

33 See paras. 7.35-7.37 with regard to disability pensions and paras. 7.39-7.41 with regard to injury benefits, disablement benefits, sickness benefits and disability pensions.

34 *Supra* paras.9.16-9.17 with regard to statutory disability pensions and paras.9.30-9.36 with regard to the various types of sick pay available under statute.

35 *Supra* para.9.21

36 In the Department of Social Welfare report *Social Insurance in Ireland*, (October 1996) the

- The thrift and foresight reasons for excepting insurance payments do not apply to social insurance payments as PRSI payments are compulsory.

- Social welfare payments serve to compensate the recipient for the loss of an income which would normally be available from a person's own means. Where the cause of the payment is an accident for which damages are claimed, no loss is sustained insofar as the social welfare payment already compensates the plaintiff, the payments should therefore be deducted from the appropriate head of damages. [37]

  Social insurance payments are funded by society as a whole and therefore to allow double compensation by not deducting is particularly wasteful of society's resources.

Arguments against Deductibility

- Social insurance contributions have "a significant insurance dimension which is not outweighed by the absence of an actuarial link between benefits and contributions" and therefore the insurance analogy is applicable. [38]

- The purpose of social welfare payments is to assist people in need and not the wrongdoer. They are therefore akin to charitable benefits and should be non-deductible on these grounds.[39]

- Given the uncertainty of the duration and amount of the payments, the calculation of any deductions, especially when dealing with lump sum awards, is fraught with difficulty.

---

contributory principle is explained at para.4.2.2 as follows:

> " The principle of solidarity means in effect that there is not a proportional link between contributions paid by individual insured persons to finance Social Insurance and the vulnerability of the persons covered related to knowledge of differences among them in the likely incidence of unemployment, sickness, occupational accidents and diseases, permanent incapacity for work and longevity."

37 In the Australian case of *Evans v Muller* 47 ALR 214 unemployment benefits were deducted as they were considered to be in the nature of a partial substitute for wages.

38 *Report of the Commission on Social Welfare* (1986), Chapter 12, p.273. The Commission cites as instances of the similarity with insurance the following factors: long-term benefits such as pensions require a greater contribution record than short-term benefits; amounts of some insurance payments are differentiated on the basis of insurance contributions with higher payments accruing to recipients with better insurance records; minimal criteria in terms of insurance contributions are applied across the full range of benefits.

39 This is the view which has found favour in Canada; see Dubin J in *Boarelli v Flannigan* (1973) (3d) 4 at p.8.

Provisional Recommendation

9.35 Any exceptions to the general rule of deduction must be founded on compelling reasons which dictate that non-deductibility is in the public interest.[40] It follows that any social welfare payment, whether it is contributory or non-contributory, which serves as a collateral source of compensation for an accident victim, should be deducted unless there are public policy reasons which justify its exception.

9.36 The Commission is of the opinion that since the costs of social welfare payments are borne by society as a whole, either directly through PRSI contributions or indirectly through taxation, they should be deductible from any award of damages which meets the same as the payment in question. The compulsory nature of social insurance payments precludes the application of the insurance analogy. As regards whether the present period of five years is acceptable, this is discussed below.

The Five Year Rule for Deduction of Benefits

9.37 The Commission's recommendations for eliminating unnecessary double compensation entail the deduction of the following collateral benefits:

- charitable payments emanating from the tortfeasor;
- insurance payments financed through the plaintiff's employment (this is the provisional view of some Commissioners);
- insurance payments where the plaintiff cannot show that they have financed the policy, either directly or through their work (this is the provisional view of some Commissioners);
- statutory disability pensions, payable prior to normal pensionable age;
- occupational ill health early retirement pensions where they are not entirely financed privately by the plaintiff outside of the employment context (this is the provisional view of some Commissioners);
- pension payments received before the normal expected retirement age where the plaintiff cannot show that they have paid for same (this is the provisional view of some Commissioners);
- sick pay, or any type of pay which fulfils this function, including under statute or occupational schemes;

---

[40] See for example para.9.05 in relation to the exception of insurance payments and para.9.13 for the reasons as to why charitable benefits merit exception from the general rule of deduction.

- any other social welfare payment, whether contributory or non-contributory, which compensates for the same loss as an award of damages.

9.38 At present the specific statutory provision for deduction of certain social welfare payments from damages stipulates that deduction takes place in respect of "the value of any rights which have accrued or will probably accrue ..... for the five years beginning with the time the cause of action accrued."[41] The reasons for fixing on this period have been discussed already at paragraphs 7.66-7.68 above. While it is recognised that five years is essentially a compromise, it is submitted that some cut off point for the deduction of future benefits is necessary.

9.39 There are many practical difficulties associated with the calculation of future social welfare payments, such as changes in eligibility due to changes in the nature of the injuries and statutory regulation which reflects budgetary and other government policies. In addition, other factors such as inflation, the economic climate in general, recovery sooner than expected or later than expected, or death, are all elements which render the deduction of any type of future payments an exercise fraught with imprecision. The Commission is therefore provisionally of the view that with the exception of charitable payments from the defendant tortfeasor (which will be precisely quantifiable), any deduction of future benefits should be subject to a maximum period of five years. [42]

9.40 In practice this five year limit entails a decision by the judge as to when the plaintiff is likely to return to work or recover from injuries sufficiently to be able to return to work. If it is decided that a plaintiff will most probably be in receipt of disability benefit for example, for the subsequent six years, then a maximum of five years' benefits are deducted from damages for loss of earnings. If on the other hand, it is estimated that a plaintiff will be capable of returning to full time employment after four years, only four years benefits are deducted from the damages. Should the plaintiff in fact find him or herself unable to return to work at the end of year four, he or she has the advantage of an extra year's disability benefit which was not deducted; however as the damages for loss of earnings would also

---

[41] Section 75(1) Social Welfare (Consolidation) Act, 1993

[42] The recommendation in respect of the deduction of charitable benefits donated by the tortfeasor obviously only applies to pre-award payments. No cut off point for the deduction of future social assistance payments is required as receipt of such payments is dependent on means and for the reasons explained at paras.7.58-7.61, the award of damages would most probably render the plaintiff ineligible for any future payments, therefore such payments would not be 'likely to accrue' in the future and should not be taken into account in the assessment of damages for future loss.

have been calculated on the basis of the plaintiff returning to work at that time, it can hardly be said to be an advantage.

Submissions

9.41 The Commission reiterates that all of the above recommendations are provisional and welcomes submissions on any aspect of the debate.

CHAPTER 10 PROVISIONAL RECOMMENDATIONS

The Commissions provisional recommendations are predicated on the following two premises:

1. that the main mechanism of compensating for loss in our legal system is tort law;

2. that the main function of damages in such a system is to compensate for actual or net loss.

Far-reaching changes to section 2 of the *Civil Liability (Amendment) Act, 1964* will be required under the provisional recommendations set out below and we welcome submissions on all aspects of these recommendations.

1. The Need for a Move to a General Rule of Deductibility

The Commission provisionally recommends that the public interest in reducing or eliminating double compensation requires that a broad principle of deduction of all collateral benefits should be established in Irish law[1]

This means that the main departure point of section 2 which is non-deductibility should be changed to become one of deductibility.

2. Collateral Benefits that do not meet a Loss Covered by Damages are not Covered by the Broad Rule of Deductibility

The Commission provisionally recommends that any collateral benefit that does not compensate for a loss covered by damages should continue to be deemed non-deductible as this does not give rise to double compensation.

This means that an amended version of section 2 ought to state unambiguously that the new rule of deduction only applies to collateral benefits which compensate for a loss that is also compensated for by an award of damages.

---

[1] See para.8.36

3. Any Exceptions to the Broad Rule of Deductibility should be regulated by Statute and not left to Judicial Discretion

In the interests of clarity and predictability, the Commission provisionally recommends that any exceptions to the general rule of deductibility should be set out under statute law and not left to judicial discretion.[2]

This means that the statutory language should be as clear as possible, leaving no room for argument by analogy or otherwise to expand existing exceptions (such as they might be) or to tack on new ones through creative interpretation.

4. Considerations of the Public Interest Require Two Heads of Exception

The Commission provisionally recommends that certain collateral benefits that may have the intent or effect of compensating for a loss (and thus doubly compensating in the event of an award of compensatory damages) should nevertheless be deemed non-deductible on the ground of public policy as follows:[3]

- ***Certain Insurance Payments Should be Exempted as a Non-Deductible Item on Public Policy Grounds***

The Commission is provisionally of the view that there is a clear public interest in treating certain insurance payments as non-deductible. Such an exception is justified in the public interest to ensure that an individual can enjoy the benefits of his own thrift and foresight in circumstances where he insures against future contingencies. [4]

Some Commissioners provisionally recommend that where the individual directly pays insurance premiums, such insurance payments are to be deemed non-deductible, whereas all others are deductible.[5]

Other Commissioners add to the above that where it is reasonable to assume that a plaintiff indirectly contributes, such as where the payment of such premiums by his employer can be considered as is in lieu of a higher wage, such insurance payments are also to be non-deductible.[6]

- ***Charitable Payments as a Non-Deductible Item on Public Policy Grounds***

The Commission is provisionally of the view that there is a clear public interest in treating charitable payments, not emanating from the defendant tortfeasor, as non-

---

2 Para.1.23

3 Para.8.27

4 Para.9.08

5 Para.9.09

6 Para.9.11

deductible. Such an exception is justified in the public interest in order to encourage public giving through charity as an expression of social solidarity. Such spontaneous acts of giving might be chilled if the benefit were to be deducted. We make no distinction between monetary charitable payments and benefits in kind.[7]

The same reasons which dictate non-deduction for third party charitable benefits operate in favour of deduction of charitable payments from the tortfeasor and the Commission therefore provisionally recommends their deduction.[8]

5. The Deductibility of Pensions

The Commission provisionally recommends that all statutory disability pension payments be deductible from awards of damages for loss of earnings.[9]

Some Commissioners are provisionally of the view that a pension which is classified as a retirement pension is not a collateral benefit and therefore the issue of deduction does not arise.

These Commissioners are of the view that only occupational ill health retirement pensions financed in a manner unrelated to the employment are non-deductible and all other ill health pensions, including statutory disability pensions, are deductible.[10]

Other Commissioners are provisionally of the view that any pension payment which arises as a consequence of an injury and compensates for the same loss as an award of damages is a potential collateral benefit.[11]

These Commissioners are of the view that where a plaintiff has paid for the pension scheme, either directly, or indirectly through his or her employment, the payments should be non-deductible. These Commissioners consider that because of the structure of occupational pensions it is not viable to distinguish between disability pensions and early retirement pensions, as the payments emanate from the same contributions and investment in either case. Where however enhanced benefits are payable under the pension scheme, the plaintiff cannot be shown to have paid for same and these will be deductible.[12]

The Commission is provisionally of the view that the pension payments after the age at which a person would normally be expected to retire are not payments 'in consequence of an accident' as those payments would have been payable, albeit at a

---

7 Para.9.14

8 Para.9.15

9 Para.9.22

10 Para.9.23

11 Para.9.25

12 Para.9.27

higher level, even if the accident had not taken place. These payments are therefore outside of the scope of section 2 and thus will be taken into account in the calculation of an award of damages for loss of pension rights.

6. Sick Pay

The Commission is provisionally of the opinion that any payment which purports to, or has the effect of, compensating for loss of earnings while a person is incapable of carrying on their normal employment should be deductible from damages for loss of earnings. Thus we believe the deduction of both statutory and non-statutory types of sick pay is in the public interest as it eliminates double compensation and reduces employment costs where the employer is the defendant tortfeasor.[13]

7. The Deductibility of Social Welfare Payments

The Commission is provisionally of the view that since the costs of social welfare payments are generally borne by society as a whole, they should be deductible from an award of damages provided the payment in question goes to meet the loss compensated for by the award of damages.[14]

8. The Impracticability of the Reimbursement Option at Present under Irish Law

The Commission recognise the moral and intellectual attractiveness of reimbursement of the collateral benefit provider which functions effectively to deny the defendant any undue benefits from a general rule of deductibility.

However, the Commission provisionally recommend that such an option is not viable in Ireland at present since it works optimally in legal systems where, unlike ours, the tort system of compensation is mixed with general social compensation and where elaborate transfer arrangements exist within the insurance industry.[15]

---

[13] Paras.9.31-9.32

[14] Para.9.36

[15] See paras.8.76-8.79

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) **[out of print] [photocopy available]**
[10p Net]

Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)
[£ 1.50 Net]

Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977)**[out of print]**
[£ 1.00 Net]

Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977) [£ 2.50 Net]

First (Annual) Report (1977) (Prl. 6961) [40p Net]

Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978) [£ 1.00 Net]

Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse (Dec 1978)**[out of print]**
[£ 1.00 Net]

Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbouring of a Child (Feb 1979) [£ 1.50 Net]

Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) [£ 1.00 Net]

Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (Dec 1979) [£ 1.50 Net]

Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]

Working Paper No. 9-1980, The Rule Against Hearsay (April 1980)
[£ 3.50 Net]

Third (Annual) Report (1980) (Prl. 9733) [75p Net]

First Report on Family Law - Criminal Conversation, Enticement and Harbouring of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) [£ 2.00 Net]

Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (Sep 1981) [£ 1.75 Net]

Fourth (Annual) Report (1981) (Pl. 742) [75p Net]

Report on Civil Liability for Animals (LRC 2-1982) (May 1982) [£ 1.00 Net]

Report on Defective Premises (LRC 3-1982) (May 1982) [£ 1.00 Net]

Report on Illegitimacy (LRC 4-1982) (Sep 1982) [£ 3.50 Net]

Fifth (Annual) Report (1982) (Pl. 1795) [75p Net]

Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983) [£ 1.50 Net]

Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (Nov 1983) [£ 1.00 Net]

Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (Dec 1983) [£ 1.50 Net]

Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (Dec 1983) [£ 3.00 Net]

Sixth (Annual) Report (1983) (Pl. 2622) [£ 1.00 Net]

Report on Nullity of Marriage (LRC 9-1984 (Oct 1984) [£ 3.50 Net]

Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (Oct 1984) [£ 2.00 Net]

Seventh (Annual) Report (1984) (Pl. 3313) [£ 1.00 Net]

Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985) [£ 1.00 Net]

Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985) [£ 3.00 Net]

Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985) [£ 2.00 Net]

Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985) [£ 2.50 Net]

Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985) [£ 2.50 Net]

Report on Minors' Contracts (LRC 15-1985) (August 1985) [£ 3.50 Net]

Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985) [£ 2.00 Net]

Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (Sep 1985) [£ 3.00 Net]

Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (Sep 1985) [£ 2.00 Net]

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (Oct 1985) [£ 3.50 Net]

Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (Oct 1985) [£ 2.00 Net]

Eighth (Annual) Report (1985) (Pl. 4281) [£ 1.00 Net]

Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (Sep 1987) [£ 4.50 Net]

Consultation Paper on Rape (Dec 1987) [£ 6.00 Net]

Report on the Service of Documents Abroad re Civil Proceedings - the Hague Convention (LRC 22-1987) (Dec 1987) [£ 2.00 Net]

Report on Receiving Stolen Property (LRC 23-1987) (Dec 1987) [£ 7.00 Net]

Ninth (Annual) Report (1986-1987) (Pl 5625) [£ 1.50 Net]

Report on Rape and Allied Offences (LRC 24-1988) (May 1988) [£ 3.00 Net]

Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (Sep 1988) [£ 3.00 Net]

Report on Malicious Damage (LRC 26-1988) (Sep 1988)
[out of print] [£ 4.00 Net]

Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (Oct 1988) [£ 5.00 Net]

Tenth (Annual) Report (1988) (Pl 6542) [£ 1.50 Net]

Report on Debt Collection: (2) Retention of Title (LRC 28-1989) (April 1989)
[out of print] [£ 4.00 Net]

Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989) [£ 5.00 Net]

Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989) [£ 5.00 Net]

Consultation Paper on Child Sexual Abuse (August 1989) **(out of print)** [£10.00 Net]

Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989)(Oct 1989) [£ 4.00 Net]

Eleventh (Annual) Report (1989) (Pl 7448) [£ 1.50 Net]

Report on Child Sexual Abuse (September 1990) (LRC 32-1990) [£ 7.00 Net]

Report on Sexual Offences Against the Mentally Handicapped (September 1990) (LRC 33-1990) [£ 4.00 Net]

Report on Oaths and Affirmations (LRC 34-1990) (December 1990) [£ 5.00 Net]

Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991) [£ 6.00 Net]

Consultation Paper on the Civil Law of Defamation (March 1991) [£20.00 Net]

Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991) [£ 7.00 Net]

Twelfth (Annual) Report (1990) (PI 8292) [£ 1.50 Net]

Consultation Paper on Contempt of Court (July 1991) [£20.00 Net]

Consultation Paper on the Crime of Libel (August 1991) [£11.00 Net]

Report on The Indexation of Fines (LRC 37-1991) (October 1991) [£ 6.50 Net]

Report on The Civil Law of Defamation (LRC 38-1991) (December 1991) [£ 7.00 Net]

Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991) [£ 6.00 Net]

Report on The Crime of Libel (LRC 41-1991) (December 1991) [£ 4.00 Net]

Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992) [£ 8.00 Net]

Thirteenth (Annual) Report (1991) (PI 9214) [£ 2.00 Net]

Report on The Law Relating to Dishonesty (LRC 43-1992) (September 1992) [£20.00 Net]

Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992) **[out of print]** [£ 6.00 Net]

Consultation Paper on Sentencing (March 1993)**[out of print]** [£20.00 Net]

Consultation Paper on Occupiers' Liability (June 1993) **[out of print]** [£10.00 Net]

Fourteenth (Annual) Report (1992) (PN.0051) [£ 2.00 Net]

Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994) [£20.00 Net]

Consultation Paper on Family Courts (March 1994) [£10.00 Net]

Report on Occupiers' Liability (LRC 46-1994) (April 1994) [£ 6.00 Net]

Report on Contempt of Court (LRC 47-1994) (September 1994) [£10.00 Net]

Fifteenth (Annual) Report (1993) (PN.1122) [£ 2.00 Net]

Report on The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995) [£10.00 Net]

Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995) [£10.00 Net]

Report on Interests of Vendor and Purchaser in Land during period between Contract and Completion (LRC 49-1995) (April 1995) [£ 8.00 Net]

Sixteenth (Annual) Report (1994) (PN. 1919) [2.00 Net]

An Examination of The Law of Bail (LRC 50-1995) (August 1995) [£10.00 Net]

Report on Intoxication (LRC 51-1995) (November 1995) [£ 2.00 Net]

Report on Family Courts (LRC 52-1996) (March 1996) [£10.00 Net]

Seventeenth (Annual) Report (1995) (PN. 2960) [£2.50 Net]

Report on Sentencing (LRC 53-1996) (August 1996) [£ 8.00 Net]

Consultation Paper on Privacy: Surveillance and the Interception of Communications (September 1996) [£20.00 Net]

Report on Personal Injuries (LRC 54-1996) (December 1996) [£10.00 Net]

Eighteenth (Annual) Report (1996) (PN. 3760) [£ 2.50 Net]

Consultation Paper on The Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (September 1997) [£10.00 Net]

Report on The Unidroit Convention on Stolen or Illegally Exported Cultural Objects (LRC 55-1997) (October 1997) [£15.00 Net]

Consultation Paper on Aggravated, Exemplary and Restitutionary Damages (April 1998) [£15.00 Net]

Report on Land Law and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds (LRC 56-1998) (May 1998) [£ 8.00 Net]

Report on Privacy: Surveillance and the Interception of Communications (LRC 57-1998)(June 1998) [£20.00 Net]

Report on The Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (LRC 58-1998)(June 1998) [£10.00 Net]

Nineteenth (Annual) Report (1997) (PN. 6218) [£3.00 Net]

Consultation Paper on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury) (Nov. 1998) [£15.00 Net]

Consultation Paper on Statutory Drafting and Interpretation: *Plain Language and the Law* (LRC-CP14-1999) (July 1999) [£6.00 Net]