



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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**REPORT**

**ON**

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

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**(LRC 68 - 2002)**

**IRELAND**

**The Law Reform Commission**

**IPC House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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# 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 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second 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 December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published sixty six Reports containing proposals for reform of the law; eleven Working Papers; nineteen Consultation Papers; a number of specialised Papers for limited circulation; *An Examination of the Law of Bail*; and twenty three Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix C to this Report.

## Membership

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

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## NOTE

This Report was prepared on the basis of a reference from the Attorney General dated 12 December 1997, pursuant to section 4(2)(c) of the *Law Reform Commission Act 1975*. The subject matter of this Report is also included in the Commission's Second Programme for Law Reform, already referred to, which extends the Commission's involvement in this area.

A Consultation Paper on the subject matter of this Report was published in August 1999 (CP 15-1999) and after extensive research and consultation, including consultation with those that attended the seminar mentioned in Appendix B to this Report, the Commission puts forward these proposals for reform.

While these recommendations are being considered by the Department of Justice, Equality and Law Reform, informed comments or suggestions can be made to the Department by persons or bodies with special knowledge of the subject.



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## INTRODUCTION

1 Section 2 of the *Civil Liability (Amendment) Act 1964* 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.”

2 This provision was the subject of a reference to the Commission by the then Attorney General, Mr David Byrne, SC under section 4(2)(c) of the *Law Reform Commission Act 1975*. 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 appropriate proposals for reform.

3 The effect of section 2 is that certain payments, such as insurance payments, which an individual may receive in connection with a personal injury, shall not be deducted from any award of damages that they may subsequently receive in an action taken against the tort-feasor. These payments are known as collateral benefits. The general rule of non-deductibility contained in section 2 means that the payment of these collateral benefits cannot be relied upon by the defendant to reduce the award of damages. 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.

4 One view of this outcome, is that a system which permits double compensation is contrary to the public interest since it is objectionable in principle as well as wasteful and inefficient. An alternative view is that the collateral benefit was paid for, whether by the plaintiff or by someone else on his behalf, and the plaintiff should get some value for this payment. This Report consists largely of the playing out of the tension between these fundamental policies in a number of different contexts. The Report also addresses section 50 of the *Civil Liability Act 1961*, which is the equivalent to section 2, but in the context of fatal injuries. For the sake of comprehensiveness, the Commission considers the effect that the proposed amendments to section 2 would have upon section 50.

5 The topic addressed by this Report represents a relatively small segment of the law relating to personal injuries. The importance of the law applicable to personal injuries and the context within which this law operates has been acknowledged by a number of investigations. The recent establishment of the Personal Injuries Assessment Board highlights the economic, political and legal importance of this area. The Commission has already been involved in exploring personal injuries litigation. Apart from the present Report, the following publications also addressed topics relevant to this area of the law:

- Report on the Statute of Limitations: Claims in respect of Latent Personal Injuries (LRC 21 - 1987) (September 1987)
- Report on Personal Injuries: Periodic Payments and Structured Settlements (LRC 54 - 1996) (December 1996)
- Consultation Paper on Aggravated, Exemplary and Restitutionary Damages (May 1998)
- Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60 - 2000) (August 2000)

In addition, our Second Programme on Law Reform (2001 - 07) includes the law of compensation for personal injuries as one of the items the Commission intends to consider.

6 The Colloquium on our Consultation Paper, which was held in April 2000, was attended by interested and expert participants who are listed in Appendix B to this Report. The Commission wishes to thank the members of the audience for their interest and their

comments. The Commission is also grateful to other persons and bodies with whom we consulted on particular aspects of this Report, including Enda Flynn and Eoin Corrigan of the Department of Social, Community and Family Affairs, Ann Hughes of the ESB, Paul Kenny of the Irish Pensions Trust, Michael Carroll of the Solicitor's Office at CIÉ, Marie Daly of IBEC, Piers Seagrave Daly, Actuary, Dr Thomas Leigh and Claire J Turk of the Medical Defence Union, Eoin O'Dell of Trinity College Dublin, Professor Richard Lewis of Cardiff University and Rory Brady SC.

7 The practice of the Commission is to design its reports to be read in conjunction with the relevant consultation papers. Commission reports do not, therefore, repeat the content of the consultation papers on the same topic. In this Report, for instance, the Commission does not address the analysis contained in the Consultation Paper of the broad framework which establishes the primacy of tort law as a mechanism for compensatory loss. A further aspect of the Consultation Paper that is not addressed in this Report is the detailed survey of relevant developments in English law.

8 This Report addresses the different categories of collateral benefit to which section 2, and any proposed amendments to that section, apply. These are, in the order in which they are presented in the Report, insurance payments, charitable payments, pension payments, sick pay and social welfare payments. There is a chapter dedicated to the individual categories of collateral benefit and each chapter considers the nature of the collateral benefit, whether the benefit in question is deducted from awards of damages under the present law and the reasons for such treatment. Each chapter analyses the policy arguments that are relevant to the deductibility of the individual collateral benefits and the respective weight of these arguments. The Commission then makes recommendations as to whether the collateral benefit should be deductible from an award of damages and such other recommendations as flow from this conclusion, such as whether the tortfeasor or the donor of the collateral benefit should compensate the victim of the tortious accident and how this distribution of the burden of payment should be effected.



## CHAPTER 1            INSURANCE

### Part A            Introduction

1.01    The focus of this paper is section 2 of the *Civil Liability (Amendment) Act 1964* which reads 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....”

1.02    The effect of this section, in essence, is that where the plaintiff is insured against the loss or injury caused by an accident for which he can also sue, he is permitted to cumulate his remedies. This means that the plaintiff is entitled to keep both the original payment that he received from the insurance company and the sum of damages that he received subsequently from the tortfeasor.

1.03    The same fundamental principles apply in respect of each of the collateral benefits discussed in Chapters 2 to 6, although their application differs somewhat from one area to another. These principles are summarised in the following paragraph and will be described in more detail later in this Chapter.

1.04    First, the object of tort law is to compensate the victim for the loss which he has suffered. In other words, he ought not to be paid twice for the same loss or injury. Secondly, there is the so-called ‘paid for’ principle, according to which the plaintiff should get full value for that for which he has paid, such as insurance. On one view, the application of the ‘paid for’ principle would lead to the plaintiff being compensated twice, once by means of insurance proceeds and again by the award of damages. Thirdly, there is the policy of

encouraging thrift and foresight, which leads towards a similar result as the 'paid for' policy. The final policy applies to the employment context, which in practice is the most common and most important context in which collateral benefits and compensation for personal injuries arise. This is the so-called 'social wage' policy, which is a widening of the 'paid-for' principle and follows the assumption that, even if the employee-plaintiff did not pay for the collateral benefit directly, the employer paid for it as part of the remuneration package. The basis of this theory is that the collateral benefit was part of the employee's remuneration package and it is legitimate to assume that a lower salary was paid in return for the receipt of this benefit.

## **Part B            History and Policy**

### ***(i)        History***

1.05 It is instructive to note the historical context in which the common law insurance exception, which is now enshrined in section 2, came to be established. In *Bradburn v Great Western Railway Co*<sup>1</sup> it was held that payments under an accident insurance policy ought to be ignored in the assessment of damages for personal injury. This case involved a railway passenger who had bought an accident insurance policy which offered cover of up to £1,000 if he should suffer an accident while travelling by rail. He was injured in an incident in which he was thrown to the other side of a railway carriage when a train driver applied the brakes too suddenly. The plaintiff was temporarily paralysed and was unable to return to his work for five weeks. In an action for damages, the jury found that his total claim was worth £217. The question which then arose was whether the insurance moneys he had already received ought to be taken into account to reduce these damages. The Court of Exchequer Chamber held that they should not.

1.06 The *Bradburn* decision paved the way for the *general* insurance exception to enter the common law. Nevertheless, the decision could also be regarded as a product of its own particular facts. Personal accident insurance is uncommon, even today. This protection did not arise as part of his employment context. Instead,

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<sup>1</sup> (1874) LR 10 Exch 1.

the plaintiff had exercised thrift and foresight in taking out this policy and had personally paid for all the premiums.<sup>2</sup>

**(ii) Recommendation in the Consultation Paper**

1.07 In the Consultation Paper, the Commission took the view that double recovery is generally an inequitable and wasteful use of resources. However, the provisional recommendation was that insurance proceeds should be exempt from the general rule of deduction, as the non-deductibility of such payments was considered to be in the public interest. The Paper stated:

“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.”<sup>3</sup>

1.08 We now turn to the two lines of justification relied upon: the ‘paid-for’ argument and the ‘thrift and foresight’ argument. No conclusion will be reached until later in this Chapter, by which point we shall also have considered the three different categories of insurance.

**(a) The ‘paid for’ policy**

In *Parry v Cleaver*<sup>4</sup> Lord Reid stated that the “real and substantial” reason for not deducting the insurance payments in *Bradburn* was: “... 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.” He went on to state that deduction of the insurance money would cause financial loss to the plaintiff, since it would mean that he had wasted the money spent on premiums: “...if he had not

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<sup>2</sup> See Lewis *Deducting Benefits From Damages For Personal Injury* (Oxford 1999) at 57.

<sup>3</sup> Law Reform Commission *Consultation Paper on The Deductibility of Collateral Benefits from Awards of Damages* (CP 15 - 1999) at paragraph 9.08.

<sup>4</sup> [1970] AC 1.

spent it he would have had it in his possession at the time of the accident grossed up at compound interest.”<sup>5</sup>

1.09 However, this reasoning has been described by Atiyah as fallacious:

“...it is a complete misconception to assume that because the plaintiff does not have the benefit of his insurance moneys he has wasted his premiums. The fact is that the insurance company has been on risk all the time, and the plaintiff might at any time have suffered a non-tort-caused accident, in which event he would have been entitled to payment of the insurance moneys with no tort damages to complicate the picture. The fact that the risk did not eventuate hardly means that the plaintiff has wasted his premiums. One might as well argue that if the plaintiff was never injured at all he would have wasted his premiums. In the third place, it must be remembered – and this appears in danger of being forgotten in all discussions of the collateral benefits rule – that what is at issue is the amount of tort damages, not the question whether the plaintiff should get to keep his insurance payments.”<sup>6</sup>

1.10 Moreover, empirical evidence collected in England and Wales<sup>7</sup> establishes that the insured person is far more likely to be injured in circumstances where tort compensation would not have been available. In any case, insurance cover provides benefits even to those who may be able to claim in tort:

“.....even if the plaintiff’s injury is caused tortiously the tortfeasor may be insolvent. Beyond this, the plaintiff may prefer to rest content with his insurance proceeds and avoid all the time, trouble and uncertainty which is necessarily involved in bringing a lawsuit. And even if he is prepared to go ahead

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<sup>5</sup> *Parry v Cleaver* [1970] AC 1 at 14.

<sup>6</sup> Atiyah “Collateral Benefits Again” [1969] Mod LR 397 at 402-403.

<sup>7</sup> The Royal Commission on Civil Liability and Compensation for Personal Injury, chaired by Lord Pearson in 1978, provided statistics concerning injured people who had been treated in hospital, and whose injury had led to at least four days’ incapacity for work or for other normal activities. Only 6.5% of accident victims recovered damages – see *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmnd 7054 1978).

with litigation, he may need money right away for medical and living expenses and find it hard to await upon an eventual judgment in his favour. In effect the person taking out accident insurance does so in order to secure himself against the financial consequences of an accident and not to indulge himself in the speculative gamble of double recovery where his injury is caused tortiously.”<sup>8</sup>

1.11 As against this, the proponents of the ‘paid-for’ argument reason as follows: without double recovery, the person who has bought insurance has lost money in comparison to the person who has not. He has paid the insurance premiums, yet he will receive the same amount in damages as his counterpart who has spent no money on an insurance policy.

*(b) The ‘thrift and foresight’ policy*

1.12 The basis of the ‘thrift and foresight’ argument is that those members of the public who have acted responsibly and exercised thrift and foresight by taking out insurance cover, should retain the benefit of such insurance cover. To put essentially the same point from the perspective of the future; if the proceeds of insurance cover were taken into account to reduce damages, this would act as a disincentive to provide for a ‘rainy day’.

1.13 The Commission accepts that the aim of encouraging people to provide for themselves in the event of an accident is a worthwhile one. However, it is questionable whether the chance to recover twice over, in the event that one is involved in a tortious accident, does in fact have this effect. It seems a rather unlikely form of gambling. A range of different considerations may influence the prospective purchaser including, for example, whether they can afford the policy and whether it provides value for money. Moreover, since section 2 incorporates different types of insurance policies, the reason for taking out the policy will be related to what the policy covers. Research undertaken by the VHI<sup>9</sup> indicates that the commonly-cited reasons for taking out private medical health insurance, as half the population have done, are as follows:

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<sup>8</sup> McGregor *McGregor On Damages* (16th ed Sweet & Maxwell 1997) at 636.

<sup>9</sup> VHI *White Paper on Private Health Insurance* (Dublin 1999) at 7.

- protection against large hospital/medical bills;
- peace of mind about health care needs;
- faster access to hospital beds;
- avoidance of waiting lists;
- option of private/semi-private accommodation.

1.14 These findings are consistent with research conducted by the Economic and Social Research Institute,<sup>10</sup> which identified considerations of security and access as motivating people to take out private health insurance. The English Law Commission<sup>11</sup> has deduced (from a survey of empirical evidence) that disregarding insurance payments in the calculation of damages did not result in the widespread purchase of insurance. This evidence undermines the force of the ‘thrift and foresight’ argument.

(c) *The ‘social wage’ policy*

1.15 The so-called ‘social wage’ policy is an extension of the ‘paid for’ argument. It applies where the insurance policy has been wholly or partially financed by an employer. According to this argument, the plaintiff has indirectly ‘paid for’ the insurance policy by the fruits of his labour and therefore, no distinction should be made between this plaintiff and a plaintiff who has paid the insurance premiums directly. If one accepts the ‘paid-for’ theory as a justification for double recovery, this theory should also apply in situations where the plaintiff’s employer has paid the premiums on behalf of the plaintiff.

1.16 Confronted with this argument, the Commissioners adopted differing views in the Consultation Paper.<sup>12</sup> Some of the Commissioners recommended that only insurance payments financed separately by the plaintiff should be non-deductible. These Commissioners considered that where the insurance policy has been wholly or partially financed by an employer, the reasons for non-deductibility are not as convincing, particularly because the plaintiff has not exercised the requisite ‘thrift and foresight’. These

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<sup>10</sup> White Paper on Private Health Insurance (1999) at 7.

<sup>11</sup> Law Commission of England and Wales *Consultation Paper on Damages for Personal Injury: Collateral Benefits* (No 147 1997) at 90.

<sup>12</sup> Law Reform Commission *Consultation Paper on The Deductibility of Collateral Benefits from Awards of Damages* (CP 15-1999) at paragraphs 9.09-11.

Commissioners were also influenced by the fact that, where the employer who has partially or entirely paid for the insurance policy is also the defendant, not deducting the insurance payment from an award of damages would oblige the employer-defendant to compensate the plaintiff twice.

1.17 On the other hand, some Commissioners preferred the view that, where the plaintiff's employer has paid for the insurance, such payment should realistically be regarded as part of the total remuneration package.<sup>13</sup> These Commissioners considered that it would be unfair to draw a distinction between two similar employee-plaintiffs, one of whom was paid a higher wage and paid the insurance premiums directly in his or her own name, while another employee-plaintiff received a lower wage, on the basis that the employer would pay his insurance premiums for him. The members of the Commission who favoured the so-called 'social wage' argument, considered that there should be no distinction drawn between these two categories of plaintiff.

1.18 We have set out these divergent policies here, so that the reader may have them in mind while appraising the rules of law in Part C. However, the description of the policies is somewhat tentative, as they impact in rather different ways and with different weights on the three distinct categories of insurance, which we consider in Part D below. Accordingly, we shall postpone until Part E giving our views as to how these policies ought to affect the law.

## **Part C            The Present Law**

### ***(i)        Scope of Section 2***

1.19 On a literal interpretation of section 2(a), it would seem that all insurance moneys payable in consequence of an injury are encompassed within the rule of non-deductibility. This wide interpretation is attractive on the basis of its simplicity. However, it makes no allowances for the fact that many different types of insurance policies could come within its remit. This interpretation also fails to take into account the fact that the reasoning and

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<sup>13</sup> See, for example, Lord Reid in *Parry v Cleaver* [1970] AC 1 at 16 discussed above. See also *Hussain v New Taplow Paper Mills Ltd* [1987] 1 All ER 417.

justifications which gave rise to the establishment of the insurance exception may not apply equally to all policies. In a book written in 1989, it was stated that a broad interpretation should be given to section 2(a):

“the words of the statute [‘any sum payable...under any contract of insurance’] are merely descriptive of the insurance moneys themselves so that as long as the moneys in issue are identifiable as proceeds of a policy of insurance, neither the path by which they reach the plaintiff, nor the fact that the plaintiff has no right to enforce payment of the moneys, that the payee under the policy is not the plaintiff, or that the policy cannot be shown to have been taken out for the benefit of the plaintiff is relevant.”<sup>14</sup>

1.20 This quotation squarely raises the question of whether *all* types of insurance policies are covered by section 2(a). This issue has now been addressed in two cases decided in the 1990s: *Dennehy v Nordic Cold Storage*<sup>15</sup> and *Greene v Hughes Haulage*.<sup>16</sup> Both cases concerned income continuance payments. In the latter, the payments were held to come within the confines of section 2; in the former, they were held to fall outside the section. The question is how did the courts differentiate between the two cases, given that section 2 supplies no criteria on which to base such a differentiation. We shall now consider these two cases.

**(ii) Dennehy and Greene**

1.21 In *Dennehy*, an employee was absent from work due to an injury. He received moneys from his employer pursuant to a non-contributory income protection plan. He subsequently sued his employer for loss of earnings. The employee in his claim for loss of earnings, argued that by virtue of section 2 the moneys received on foot of this contract ought not to be taken into account. Hamilton P (as he then was) rejected this contention and held that the payments fell outside the section and were therefore deductible:

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<sup>14</sup> White *Irish Law of Damages* (Butterworths 1989) at paragraph 4.10.00.

<sup>15</sup> High Court (Hamilton P) 8 May 1991.

<sup>16</sup> [1998] 1 ILRM 34.

“I am satisfied it was never intended by the [legislature] 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 and I so rule.”<sup>17</sup>

1.22 Hamilton P, before deciding on the facts before him, looked at what the position would be **if** a plaintiff had paid the premiums:

“It seems to make sense if the man himself wants to spend his own money to insure himself against sickness he is entitled to do it but he shouldn’t be penalised for that. That would make sense. In other words the employer can’t take the benefit of somebody being prudent himself and taking out insurance, in the event of the disablement.”<sup>18</sup>

1.23 To adopt the language used in this Chapter, Hamilton P favoured the ‘paid for’ argument. In doing so, he considered the rationale behind an award of damages:

“Now, everybody is aware that the purpose of damages in a case of this nature is to attempt to compensate the plaintiff as far as money can do it, for the injuries that he sustained in the accident and the effect these injuries had on him or are likely to have on him in the immediate future...

It seems to me that if the legislator intended that any payment under any contract of insurance would have to be removed from consideration of the loss sustained by the Plaintiff, it would mean that he would recover more than the accident had actually cost him in the terms of loss of wages and I cannot believe, having regard to the long-standing basis at common law for the assessment of damages, that they so intended.

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. That was entered into by him and he was entitled to the benefit of that. In my opinion, in attempting to construe

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<sup>17</sup> High Court (Hamilton P) 8 May 1991 at 2 (Our emphasis).

<sup>18</sup> *Ibid* at 7.

the Statute, 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 and I so rule.”<sup>19</sup>

1.24 Thus, the fact that the plaintiff in *Dennehy* had not made any contributions to the scheme was material. In *Greene*, Geoghegan J addressed the situation that arose in *Dennehy* (namely the employer as defendant) and made the following *obiter* remark:

“It could be said that **an anomalous injustice could occur if the defendant was himself the employer**...But I do not think that the interpretation of the clear words of the section should be governed by such considerations.”<sup>20</sup>

1.25 This is, of course, the right stance from which to decide what the law is, but not what it ought to be. In *Greene*, the type of payments at issue arose by virtue of an employee-benefit plan, specifically a disability benefit plan contracted for and paid for by the plaintiff’s employer. Unlike *Dennehy* however, the employer was **not** the defendant. Counsel for the defendant, relying on the decision of Hamilton P in *Dennehy* argued that the insurance policy in *Greene* was not of the kind contemplated in section 2. Geoghegan J<sup>21</sup> while accepting the final outcome 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...”<sup>22</sup> By contrast, he stated of the facts before him:

“...this case is totally different from the contract of insurance in the *Dennehy* case as this contract of insurance was not an

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<sup>19</sup> High Court (Hamilton P) 8 May 1991 at 1-2.

<sup>20</sup> [1998] 1ILRM 34 at 44 (Our emphasis).

<sup>21</sup> In the absence of a written judgment in this case, Geoghegan J and counsel for the defendant were relying on a note by Kerr in *The Civil Liability Acts, 1961 and 1964* (Round Hall Press 1993) at 134. Geoghegan J, however, did not agree with Kerr’s analysis of the basis of the ruling. See *Greene op cit* at 40.

<sup>22</sup> [1998] 1 ILRM 34 at 41.

indemnity contract but rather a contract taken out by the employer **for the benefit of persons such as the plaintiff.**”<sup>23</sup>

1.26 The fact that the contract of insurance was taken out for the benefit of the plaintiff was clearly material and Geoghegan J concluded that such contracts of insurance did fall within the terms of section 2(a).

1.27 In deciding how to treat the insurance payments which arose from an insurance policy where the premium had not been paid directly by the plaintiff, Geoghegan J also looked to the intention behind section 2. He held that the Oireachtas intended section 2 to be interpreted in a manner similar to section 50 of the *Civil Liability Act 1961* which provided for equivalent 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*<sup>24</sup> and *Green v Russell*<sup>25</sup> 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.”<sup>26</sup>

1.28 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 be deducted on the basis that they were paid by the employer. The common law approach was however, considered by Geoghegan J to be irrelevant, as the collateral payments in question clearly fell within the scope of section 2.

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<sup>23</sup> [1998] 1 ILRM 34 at 41. (Our emphasis).

<sup>24</sup> [1955] 1 QB 13.

<sup>25</sup> [1959] 2 QB 226.

<sup>26</sup> [1998] 1 ILRM 34 at 44. (Our emphasis).

1.29 As an alternative argument and one which is of more relevance if one is considering whether or not the legislation should be changed, Geoghegan J expressed strong support for the ‘social wage’ argument, stating:

“Although the plaintiff in this case did not pay premiums the insurance arrangements were part of her remuneration package and contract as I understand her contractual arrangement with her employer...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.”<sup>27</sup>

**(iii) *Hussain v New Taplow Paper Mills***<sup>28</sup>

1.30 The English law supports *Dennehy*. In the House of Lords case of *Hussain*, the plaintiff had lost an arm because of the negligence of his employer. He continued to work for the same firm but in a different job. For the first thirteen weeks after his accident his employer paid his wages in full. It was agreed that this sick pay was deductible from damages. However, under his contract of employment he was then entitled to further payments equal to half of his ‘pre-accident’ earnings. These payments were to continue irrespective of whether he continued to work for the employer. The employer obtained reimbursement of these sums under the provisions of a permanent health insurance policy taken out for all its employees but funded by the employer alone.

1.31 The House of Lords held that these additional sums were to be taken into account. The reason was that the payments were indistinguishable from the uninsured sick pay which had been forwarded in lieu of wages for the first 13 weeks. The basic character of these payments was unaffected by the fact that the defendant-employer took the precaution of insuring against the possibility of having to make them. The payments remained a partial substitute for earnings and, as such, were of the same nature as the sums lost. The plaintiff argued that the payments he received from his employer should be ignored, as they were paid under the employer’s scheme. It

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<sup>27</sup> [1998] 1 ILRM 34 at 44. (Our emphasis).

<sup>28</sup> [1988] AC 514.

was argued that these payments should come within the “classic head of exception” of insurance payments and consequently should be non-deductible. This submission was premised on the basis that the plaintiff had **indirectly** paid for the premiums by taking a lower wage. Lord Bridge, however, treated this argument more realistically and with more caution than has usually been the case. He rejected it on the grounds that there was no evidence to suggest that the plaintiff’s wage **would have been** higher if the insurance scheme had not existed. He went on to state:

“.....it positively offends my sense of justice that a plaintiff, who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity to work from two different sources, her employer and the tortfeasor. It would seem to me still more unjust and anomalous where, as here, the employer and tortfeasor are one and the same.”<sup>29</sup>

1.32 *Hussain* was followed in the case of *Page v Sheerness Steel Plc*<sup>30</sup> at first instance and also in the Court of Appeal, so that this line of authority may be regarded as being the English law on this point. In *Page* Dyson J in the trial court stated:

“It seems to me that it is an essential requirement of the insurance exception that the cost of the insurance be borne wholly or at least in part by the plaintiff.” Dyson J’s decision on this point was affirmed by the Court of Appeal on the same basis that prevailed in *Hussain*, namely that the plaintiff had not paid for the permanent health insurance payments which he received. Accordingly, the benefit was classified as ‘sick pay’ rather than as ‘insurance’.<sup>31</sup>

1.33 In *Greene* Geoghegan J distinguished this English line of authority, stating that:

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<sup>29</sup> [1988] AC 529-532.

<sup>30</sup> [1996] PIQR 26 (first instance) and [1997] 1 WLR 652 (Court of Appeal). 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.

<sup>31</sup> *Ibid.*

“...in the *Hussain* case the employers 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.”<sup>32</sup>

**(iv) Concluding comment**

1.34 In *Dennehy*, Hamilton P held that, when an injured person benefits from a policy of insurance that the employer has effected, he should not also recover damages for loss of wages from that employer. It is interesting to note that at no point in the case does he mention that indirect payments by the plaintiff would suffice - *i.e.* the ‘social wage’ argument.

1.35 This result in *Dennehy* was interpreted by Geoghegan J in *Greene* as establishing **only** that indemnity contracts of insurance policies are not included under section 2(a). This conclusion is based on the reasoning that such policies are not taken out **directly** for the benefit of the plaintiff, the benefit to the plaintiff being an indirect effect. Thus *Dennehy* was distinguished in *Greene*, on the basis of a test which is rather difficult to apply, namely “the contract...was not an indemnity contract but rather a contract taken out by the employer for the benefit of persons such as the plaintiff.”<sup>33</sup> However, an employer could make a contract which (a) indemnifies him in the event of an accident at work and (b) brings a benefit to the employee, even if a third party is responsible for an accident. Accordingly, the distinction drawn in *Greene* would not always be easy to apply. Any new law should have to set out a test which was easier to apply than this. More importantly, even Geoghegan J remarked in *Greene* that “an anomalous injustice could occur if the defendant was himself the employer” and in *Hussain*, Lord Bridge remarked: “it positively offends my sense of justice that a plaintiff who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity...from two sources, her employer and the tortfeasor”. Against this background we turn to consider the individual categories of insurance policies.

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<sup>32</sup> [1998] 1 ILRM 34 at 44.

<sup>33</sup> [1998] 1 ILRM 34 at 41.

## **Part D            The Individual Policies**

1.36 As was noted earlier, section 2(a) refers very broadly to ‘any contract of insurance’. The section makes no distinction between the different types of insurance policies which it potentially covers. In order to devise wise policy in this area, the Commission believes that it is vital to consider each of the categories of insurance individually in the light of the underlying and divergent policies identified in Part A, namely the normal principle of no double compensation and, on the other hand, the ‘paid for’, ‘thrift and foresight’ and ‘social wage’ arguments.

1.37 There are three main types of first party insurance that could be paid to a tort litigant in respect of personal injury (and we should recall here that section 2 is confined to “a wrongful act...resulting in *personal injury* not causing death”). The three types which are relevant are: personal accident insurance, permanent health insurance and medical expenses insurance. There are a number of differences between these policies and we shall return to deal with these later in this Part. Before doing so, we must consider a more general distinction which may be relevant.

### **(i)        *Indemnity and non-indemnity insurance***

1.38 In general insurance law, there are two fundamentally different types of contracts, namely indemnity based and non-indemnity based agreements. In indemnity insurance<sup>34</sup> the amount recoverable is measured by the extent of the policyholder’s financial loss. In non-indemnity insurance, the amount recoverable is fixed. It is payable when the risk insured against happens, irrespective of whether the insured in fact sustains a pecuniary loss. Indemnity insurance includes virtually all classes of insurance except life assurance,<sup>35</sup> personal accident insurance and sickness insurance.

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<sup>34</sup> “Non-indemnity policies are those where compensation becomes payable on the occurrence of a specified event. For example, in a life insurance policy the policy will become payable on the death of the insured. Indemnity policies, on the other hand, are policies where the risk insured may not happen at all. There is no specification of an event.” See O’Regan Cazabon *Insurance Law in Ireland* (Round Hall 1999) at paragraph 1-14.

<sup>35</sup> *Dalby v India and London* (1854) 15 CB 365 at 387.

These three classes of insurance are the non-indemnity-based<sup>36</sup> categories of insurance. For the purposes of this Report, we are concerned with insurance coverage for accidents that have caused personal injuries. Thus, the relevant categories are medical expenses insurance, income continuance (permanent personal health) insurance, personal accident insurance and sickness insurance.

1.39 The principle of indemnity essentially means that a policyholder should not make a profit out of an insured loss. In line with this, the courts have developed the principle of subrogation to prevent the assured from recovering more than an indemnity. The way that this operates is that an insurance company, after paying its policyholder's claim, takes over any of his rights of recovery (including tortious rights). Moreover, if the plaintiff's damages include an amount which he is also entitled to claim under an indemnity-based contract of insurance, he must account to the insurance company for this. As Lord Blackburn stated:

“[t]he general rule of law is that, where there is a contract of indemnity...and a loss happens, anything which reduces or diminishes the loss, reduces or diminishes the amount which the indemnifier is bound to pay.”<sup>37</sup>

Essentially, the contractual duties of insurers are to make good the policyholder's loss, and if the loss is otherwise made good, the insurers are not liable, since there is no loss. In rather the same way, the principle of contribution prevents a person with two insurance policies which cover the same event from recovering the loss twice.

1.40 Thus, at common law, the indemnity principle, indemnification *aliunde* and contribution principles were fundamental pillars of insurance contract law. It seems unlikely that the legislative intention behind section 2(a) was to overturn these long-established core principles. In *Greene* Geoghegan J stated that the old rule had survived the enactment of section 2. He did so by way of distinguishing Hamilton P's decision in *Dennehy*: “the contract of insurance in *Dennehy* appears to have been simply a contract indemnifying the employer against a liability which the employer

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<sup>36</sup> *Theobald v Railway Passengers Assc Co* (1854) 10 Exch 45 at 53.

<sup>37</sup> *Burnand v Rodocanachi* (1882) App Cas at 339.

himself took on.”<sup>38</sup> However, as we have seen, Geoghegan J then went on to rule that an insurance contract which was not very different from that in *Greene* came within section 2.

1.41 The basic fact is that the wording of section 2(a) refers imprecisely to “any contract of insurance”. The brevity and lack of precision in the wording of section 2(a) means that it does not distinguish between indemnity-based and non-indemnity-based contracts of insurance. It remains arguable that indemnity-based contracts of insurance also fall within this provision. At the very least, therefore, any reform ought to clarify the position as regards indemnity insurance.

1.42 However, for three reasons, we do not consider that the appropriate dividing-line between cases in which insurance proceeds are taken into account is whether or not the insurance is non-indemnity-based. First, there is a good deal of overlap between the grounds for payment of the insurance proceeds and those for payment of damages, even in the case of non-indemnity insurance. To put the point more precisely; the focus of this Report is the assessment of damages. In the case of non-indemnity insurance, there will be substantial, although not (as in indemnity insurance) total overlap between the damages awarded by a court and the proceeds of the insurance policy. Thus, if it were not for section 2, a court would take into account the insurance payments from the insurance company to the extent that there is an overlap.

1.43 Secondly, the ‘paid-for’ rule needs to be considered. If one regards this rule as a good justification for allowing double compensation, there should be no difference in the case of indemnity insurance, where there is a total overlap. Finally, and most practically, the *Greene* case illustrates the frequent difficulty and even artificiality in characterising insurance as ‘indemnity’ rather than ‘non-indemnity’. What seems to follow is that, as a matter of policy, the distinction between ‘indemnity’ and ‘non-indemnity’ insurance is not helpful in determining whether to remove or reform the principle laid down in section 2.

1.44 *The Commission recommends that the distinction between indemnity based and non-indemnity based contracts of insurance*

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<sup>38</sup> [1998] 1 ILRM 34 at 41 and 44.

*should not be relevant to determining whether a payment under a contract of insurance should be deducted from an award of damages.*

1.45 We turn now to consider the three different types of policies: income continuance, medical expenses and personal accident.

**(ii) *Income continuance (permanent health insurance)***

1.46 Permanent health (income continuance)<sup>39</sup> insurance is a curious form of insurance. While the moneys that are paid are identifiable as proceeds of a policy of insurance, the real economic and social effect is more akin to sick pay. However, there is a legal difference: whereas sick pay is funded directly by the employer's own resources, permanent health payments are made by the insurance company, with the premiums usually being paid by the employer. In the context of section 2, there is a reason why this distinction matters. As will be explained in Chapter 4, sick pay does not generally come within the scope of section 2, whereas permanent health insurance could well come within section 2 (a). In Part C, we saw that in one case (*Dennehy*) the payments were held not to come within section 2 and in the other (*Greene*) it was decided that they did. This was on the basis that, in the latter case, the policy of insurance was held to be taken out for the benefit of the employee. However, irrespective of whether the policy benefits the plaintiff directly, this does not take away from the nature of the payment – essentially, it provides cover for loss of earnings in the event of ill-health, whether caused by an accident or otherwise. For the purposes of this Report, the analysis is confined to employer-employee situations and does not address the situation of a self-employed person who pays the premiums under his or her own income continuance insurance policy.

1.47 In summary, while there may be legal reasons for treating the two – income continuance and sick pay – differently, there appears to be no good policy reason to do so. On the contrary, from a policy perspective, the two payments have two major features in common.

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<sup>39</sup> *Health Insurance (A Report of the Office of Fair Trading)* (Office of Fair Trading 1996) at 51 described permanent health insurance as:

“a product whose purpose is essentially extended sick pay. It is an income replacement policy, but one which replaces income lost only as a result of sickness or continuing disability. It thus supplements whatever individual policyholders may receive from employers or the State.”

In the first place, most of these types of insurance are by their nature purchased by employers in order to benefit their employees. An amount will be paid to the employer in the shape of a regular income, according to a formula defined in the policy. This is usually some percentage of the individual employee's income before disablement. The money is received by the employer as if it were a trading receipt. It is then paid on by the employer (at his discretion) to the member of the individual scheme and it is regarded as if it were 'salary' in the hands of the employee. It is fully-chargeable for the purpose of calculating PRSI contributions by both employer and employee. If permanent health insurance is not deducted from any damages, then double-recovery will result. In addition, as with sick pay, where the employer is also the tortfeasor, the employer will end up paying out **twice**, once as employer and once as tortfeasor. This could act as a deterrent for the future provision of this cover by employers who would naturally feel aggrieved that their initial payments were not taken into account in the assessment of damages.

1.48 The second policy consideration applies to both income continuance and sick pay: double recovery is unwise, as it will encourage absenteeism from work.

1.49 *Accordingly, the Commission recommends that double recovery should be barred in respect of permanent health insurance and payments received under such insurance policies should be deducted from awards of damages.*

**(iii) Medical health insurance**

1.50 Medical health insurance contracts cover the provision of hospital in-patient services. Under such contracts, insurance moneys are paid to meet specific medical costs as they accrue. Insurance companies pay the medical cost directly to the medical service-provider.<sup>40</sup> The problem that can arise with this arrangement is that an accident victim may in some instances be able to recover damages from the person who caused the accident. This results in the victim recovering his medical expenses twice over: the medical health insurance company pays the hospital and the defendant's insurance company pays the plaintiff the same sum causing an effective windfall to the plaintiff.

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<sup>40</sup> O'Regan Cazabon *Insurance Law in Ireland* (Round Hall 1999) at paragraph 11-15.

1.51 This outcome has now been avoided in Ireland<sup>41</sup> by statutory intervention. Regulations adopted under section 10 of the *Health Insurance Act 1994*<sup>42</sup> allow the insurance company to recoup the money from the defendant who caused the accident (or his insurance company). These regulations, in effect, established a statutory recovery clause in the context of medical health insurance. The result is that double recovery does not occur, as there is a mechanism available to medical health insurance providers to recoup the money originally paid out from the person who caused the accident. The net result is that the plaintiff-accident victim recovers once only.

1.52 The question here is whether the Commission should recommend that the *Health Insurance Act 1994* regulations be repealed, so that accident victims could recover their medical expenses twice over. To enforce the ‘paid for’ principle to this extent would be a very strong thing to do, bearing in mind that the Oireachtas has decided, as recently as the 1990s, to prefer against allowing double compensation. It is also of relevance that, as what

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<sup>41</sup> In the English context, Cane *Atiyah’s Accidents Compensation and the Law* (6<sup>th</sup> ed Butterworths 1999) at 330 states that BUPA tries to avoid double recovery by stipulating that it will not pay for medical expenses which are legally recoverable from a third party. However, since, in practice, the expenses will usually need to be paid long before any damages are received, BUPA will advance the amount payable by way of loan, and the member is expected to repay this when damages are recovered. He suggests that many members secure double recovery, and the amount repaid to BUPA in this way is negligible. The Law Commission of England and Wales Consultation Paper stated that Cane overestimates the extent to which private medical insurance leads to overcompensation because informal enquiries suggest that some private medical insurers are becoming more assiduous in the exercise of their contractual and/or automatic subrogation rights. See Law Commission of England and Wales *Consultation Paper on Damages for Personal Injury: Collateral Benefits* (No 147 1997) at 36.

<sup>42</sup> Article 10, Part VII, *Miscellaneous Provisions, Health Insurance Act 1994 (Minimum Benefit) Regulations 1996*, (SI No 83 of 1996) provides: “Notwithstanding articles 5 and 6, the total amount of prescribed minimum benefits payable by a registered undertaking in respect of the provision of prescribed health services to an insured person may be **reduced by corresponding third party recoveries** which that registered undertaking has made in respect of those services.” (Our emphasis). “**Third party recovery** means a payment to a registered undertaking as a result of the acceptance by a third party of full or partial liability for fees or charges arising from the provision of prescribed health services to an insured.” (Our emphasis).

might be regarded as part of the package, the policyholder is allowed a tax concession (at the standard rate) on the premiums paid for the health insurance. Moreover, the Commission understands that the present system is working satisfactorily.

1.53 *The Commission recommends that no change should be introduced as regards medical health insurance.*

**(iv) Personal accident insurance**

1.54 To go back to the distinction explained above, personal accident insurance policies are not contracts of indemnity, in that (a) the amount to be paid is predetermined, and (b) no attempt is made to measure the exact pain, suffering, or financial loss which a person may suffer as a result of a particular accident. Instead, the amount of payment under an accident insurance policy is based on units of benefit. In other words, there is a schedule listing the types of accident and sickness covered and, on the other side of the ledger, the amount payable in respect of each. Units of benefits vary, but it is usual to provide for the following: death, loss of limbs or eyes, permanent or temporary total disablement, permanent partial disablement and certain additional cover for medical expenses. The object of such a policy may include compensation for pain and suffering, as well as compensation for pecuniary losses and related costs, depending upon the terms of the particular policy.

1.55 Unlike the other two insurance payments, the premiums payable under personal accident insurance policies will normally be paid directly by the plaintiff. This means that, in terms of the arguments considered earlier in this Chapter, the plaintiff can usually rely on the 'paid for' notion and need not fall back on the 'social wage' argument. Secondly, since the plaintiff is paying directly for the policy, the argument which applied in the context of income continuance policies, namely that the employer may end up paying out twice, does not arise. Thirdly, in relation to personal accident insurance, Cooper argues<sup>43</sup> that cumulation can validly occur, as there is not always a complete overlap between the damages and the proceeds of the insurance policy. This would depend, however, on the actual terms of the individual contract and on the heads of damage for which the court awards compensation. It should be noted that this

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<sup>43</sup> Cooper "A Collateral Benefits Principle" (1971) *Canadian Bar Review* 501 at 513.

type of insurance is rare today, as indicated by the fact that there is no Irish case on this category of collateral benefit.

1.56 *The Commission recommends that, in the case of a personal accident insurance policy, a plaintiff who has paid the entirety of the insurance premiums payable under such contract, directly and independently and in his or her own name should be allowed to make double recovery.*

### **Recommendation**

1.57 We have considered the three principal types of insurance which are relevant in this area and reached conclusions as to whether each should be capable of being deducted from any award of damages made in respect of the same damage, injury or loss. So far, each has been considered individually. However, for the purpose of drafting, it is more clear and straightforward to treat the proposals together and to make a single recommendation (although an exception has to be made for the *Health Insurance Act 1994*). This will also carry the advantage that it will cover any other category of insurance policy, additional to the three categories reviewed here. In the Consultation Paper (at paragraph 8.36), the Commission was in favour of the principle that a plaintiff should be compensated once only and consequently favoured a broad rule of deductibility. One of the exceptions to this is where the individual has himself paid the premiums directly (at paragraph 9.09). Having considered the various argument for and against the deductibility of insurance payments, the Commission considers the 'paid for' principle to be persuasive and favours the same broad principle of deductibility that prevailed in the Consultation Paper. A number of distinct points need to be made.

1.58 First, insurance under the *Health Insurance Act 1994* is not affected by the recommendations contained in this Report. Secondly, in almost all cases of income continuance insurance, the employer will pay some or all of the premiums so the general deductibility rule will apply. That leaves personal accident insurance as the main category of insurance in respect of which the plaintiff would still be able to recover double compensation. The argument, however, is not particular to personal accident insurance and this Report therefore covers any situation in which the plaintiff has himself paid the premiums directly.

1.59 There is another point which is relevant to drafting. It is that the double compensation rule did not come into the law for the first time by virtue of section 2 of the 1964 Act. Rather, section 2 was a formulation of the common law. Therefore, to amend the law it is not sufficient simply to remove or qualify section 2, because this would leave the pre-existing common law. This feature has been taken into account in the form of words proposed below.

1.60 *The Commission suggests the following draft:*

*“In assessing damages in an action to recover damages in respect of a wrongful act...resulting in personal injury, account shall be taken of any sum payable in respect of the injury under any contract of insurance, subject to the exception that account shall not be taken of payments made under a contract of insurance where the plaintiff has paid the entirety of the insurance premiums, directly and independently, and in his or her own name. Insurance payments under the Health Insurance Act 1994 and regulations promulgated thereunder, are not subject to this provision.”*

## **Part E            The Triangular Relationship: Who Pays?**

1.61 The previous paragraphs have been directed to the issue of whether and in what circumstances the law should allow the plaintiff to receive double compensation. We have recommended that, in certain cases (probably the majority in practice) there should be no double recovery. This recommendation naturally leads on to the following question: if the plaintiff is only entitled to keep one payment, which of the potential payers - the plaintiff's insurance company, the defendant or the defendant's insurance company - should end up shouldering the burden?

1.62 Before going any further, we ought to outline two devices in the existing law, *ie* subrogation and the use of a recovery clause. When they operate, these devices have the following effects: first, they prevent double recovery and; secondly, they ensure that it is the defendant's, rather than the plaintiff's, insurer who ultimately bears the burden of compensating the defendant.

**(i) Subrogation**

1.63 It is a fundamental rule of indemnity insurance law that the policyholder is entitled to be fully indemnified to the extent of the loss sustained, but never more than fully indemnified. An insurer who has indemnified the policy may step into the shoes of that policyholder and pursue any right of action which would have been available to the policyholder. The object of this automatic transfer is to enable the insurer to recover the value of the insurance payments. The right of subrogation is only available to indemnity insurers.

1.64 If the insurer does exercise his subrogation rights and sues the defendant successfully, then at common law, the defendant would have a defence against any action by the plaintiff for the same head of damage. This is what makes the unqualified character of section 2 so odd. Ought it really be interpreted to mean that the defendant should be at risk of being sued twice, once by the plaintiff's insurer and once by the plaintiff? Leaving this difficulty aside, the net effect of the right of subrogation, where it is exercised, is twofold. First, the plaintiff recovers only once; and secondly, it is the defendant who ultimately pays.

1.65 However, the important practical point is that, in response to informal enquiries, we were told that subrogation rights are rarely utilised. Thus, it would be unwise to build too high a castle on such a flimsy foundation and, accordingly, we shall base no recommendation upon a policy of subrogation.

**(ii) Recovery clauses**

1.66 It is common for insurance contracts to contain an express provision for the recovery of payments made under such contract in the event that the plaintiff receives an award of damages in tort. We refer to such contractual provisions as 'recovery clauses'. A typical example of a recovery clause is as follows: "in the event of the plaintiff being successful in the tort action, any money which has been advanced to the plaintiff by way of insurance must be repaid to the insurance company".

1.67 In essence, the difference between a recovery clause and subrogation is that in the latter situation, the insurance company steps into the shoes of the plaintiff and recovers the money from the defendant. By contrast, in the former situation, the plaintiff recovers

damages from the tortfeasor and is then contractually obliged to repay this money to the insurance company. The advantage of using a recovery clause rather than subrogation is that there need only be one action, in that the collateral source is able to ‘piggy-back’ their claim onto the plaintiff’s claim, as the plaintiff will be suing for general damages anyway.

1.68 If utilised, either the doctrine of subrogation or a recovery clause would remove the risk of double compensation. However, the doctrine of subrogation is only available in the case of indemnity insurance and, as noted above, is seldom used in practice.

1.69 Accordingly, we must now consider whether it is desirable and practicable to have some statutory machinery by which effectively to shift the burden from the collateral benefit provider to the defendant. There are essentially two options: either there is a statutory recoupment mechanism or there is not.

***(iii) Simple deduction with no recoupment***

1.70 If section 2 were substantially qualified in the way the Commission recommends in the previous Part, this would allow a defendant to plead that a plaintiff’s damages should be reduced to the extent that the latter has already received, or will receive in the future, collateral compensation to cover the same loss as the award of damages in question. In short, the plaintiff would receive only one payment and to focus on the point with which we are concerned in this Part, it would be the collateral source which would shoulder this expense. The advantages of this option are its simplicity and cost-efficiency, as a policy of deduction avoids the transaction costs associated with reimbursing the collateral source.

1.71 The disadvantage of simply amending section 2 without making further adjustment is one of principle, namely that it would be the collateral source which has to shoulder the expense of the single payment to the plaintiff. It could be argued that a reduction in the defendant’s liability would mean that any punitive or deterrent function of compensatory damages would be decreased. As Lewis states:

“...it appears to subsidise the wrong doer at the expense of the Good Samaritan and thus offends our sense of morality. Reduction also undermines the deterrent aspect of the law of

tort. It limits the financial penalty imposed for careless behaviour and thus lessens the incentive to minimise the risk of causing injury. In summary, the objection is that it reduces the extent to which the tortfeasor bears responsibility for his actions.”<sup>44</sup>

1.72 However, the counter-argument to this is that:<sup>45</sup>

“... this desire to ensure that the defendant gets his just desserts by preventing him from transferring responsibility for payment to another can be misplaced, especially given the extent to which individual responsibility for wrongdoing has already been removed from the tort system.”<sup>46</sup>

1.73 Before we return to weighing up these two sets of considerations, we ought to dispose of one adventitious point. As the law is at present, it would always be open to the collateral source to include a recovery clause or in the case of indemnity insurance, to insist on their subrogation rights. The result in either case is first, double recovery is prevented and secondly, it is the defendant’s insurance company (or the defendant), who pays the damages. This second feature would reverse the result of the simple deduction. Thus, to operate a simple deduction model might seem to necessitate the rendering void of both recovery clauses and the subrogation doctrine. We do not recommend that such clauses be rendered void by legislation, since such a radical change would require a detailed examination of areas not covered in this Report.<sup>47</sup>

**(iv) Recoupment**

1.74 The alternative is to provide for automatic recoupment rights in all insurance policies. This would require a legislative change by which the defendant would be obliged to pay the collateral benefit provider the amount of money that was originally paid to the plaintiff.

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<sup>44</sup> Lewis “Deducting Collateral Benefits from Damages: Principle and Policy” (1998) *Legal Studies* 15 at 36.

<sup>45</sup> *Ibid* at 37.

<sup>46</sup> Cooper “A Collateral Benefits Principle” (1971) 49 Can B Rev 501 at 527.

<sup>47</sup> See Law Commission for England and Wales *Report on Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits* (No 262 1999) at 147.

The net result would be that the plaintiff would be paid only once and – to take the central point in this Part – it would be the defendant, and not the collateral benefit provider, who would ultimately pay the damages to the plaintiff, either at his own expense or that of his insurance company. In short, the moral objection outlined above would certainly be met.

1.75 There are two possible ways in which recoupment could be put into operation: either directly or indirectly. The latter would operate along the lines of a compulsory statutory recovery clause. Section 2 would be retained so that the defendant would pay the plaintiff. The plaintiff, however, would have to repay the collateral benefit provider the amount of money originally paid by the collateral benefit provider to the plaintiff.

1.76 Alternatively, with the direct option, section 2 would be removed. As a result, the defendant would not make a payment to the plaintiff under this head of damages. Instead, the defendant would pay the money, which he has saved because of the deduction, directly to the collateral benefit provider. As we have seen, this system has already been established by statute in the case of medical health insurance. In summary, the collateral benefit provider pays the medical service provider and is then reimbursed directly by the defendant's insurance company.

1.77 Each of these options involve the potentially substantial transaction costs of facilitating the reimbursement of the collateral payment to its provider. The direct method of recoupment may appear less cumbersome as it would avoid all the practical problems of recoupment clauses, mentioned earlier. On the other hand, it could result in two legal actions whereas, at present, there is only one.<sup>48</sup> In any case, the two alternative methods have sufficient in common for them to be discussed together in the next section.

### ***Recommendation***

1.78 At present, recoupment-type mechanisms exist in the form of subrogation rights and recovery clauses, yet usage of such

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<sup>48</sup> Medical health insurance may be a special case of direct recoupment, in that the amounts involved for medical services are fairly clear-cut. The two health insurers – VHI and BUPA – are well-organised to recover the moneys paid out.

mechanisms is limited. Lewis<sup>49</sup> states that it is largely because of the potential costs involved that insurers make little use of their right of subrogation.<sup>50</sup> There may also be an element of believing that, in the long run, the snakes and ladders cancel out, and it makes for commercial amity if litigation among insurance companies is minimised. As a result of these two points, one can deduce that, even in the case of non-indemnity insurance, a statutory recoupment right may not be utilised if it were made available.

1.79 In addition, shifting the burden of the loss to the defendant does not alter significantly the burden of those who ultimately finance the plaintiff's compensation.<sup>51</sup> 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 finance the collateral compensation schemes) are reduced. However, since, even in the medium term, most people contribute to one or other or both types of insurance, such a readjustment would probably achieve little in the way of fairness. Cooper comments:

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<sup>49</sup> Lewis "Deducting Collateral Benefits from Damages: Principle and Policy" (1998) *Legal Studies* 15 at 33.

<sup>50</sup> Although empirical evidence is sparse, one study of insurance practice in the USA suggests that the cost of subrogation in less serious accidents could amount to half of the sum claimed. As a result, insurers often allow tortfeasors to escape without paying for the damage they cause because it is too expensive or difficult to do otherwise. Both fire and household insurance illustrate the limited use of recoupment. Recoveries in respect of such policies are less than one per cent of the losses paid. Although more use is made of subrogation where property damage to motor vehicles is involved, insurers again have found the potential costs to be prohibitive. As a result, insurers have entered into 'knock for knock' agreements with other insurers. – see Lewis *ibid* at 63.

<sup>51</sup> "The vast majority of personal injury claims arise out of circumstances in which liability insurance is compulsory by law, and the Pearson Commission estimated that 88% of claims, and 94% of amounts paid in personal injury cases were dealt with by liability insurers. Moreover, most other personal injury cases involve, as defendant, large corporations or public authorities who act effectively as self-insurers. These bodies can, for most practical purposes, be treated as although they were insurers as well as tortfeasors. The effect of this is that, in most situations, only an insurer has a real stake in a tort claim, and most tort claims are handled throughout by an insurance company, rather than by the tortfeasor." Cane (ed) *Atiyah's Accidents, Compensation and the Law* (6<sup>th</sup> ed Butterworths 1999) at 190.

“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.”<sup>52</sup>

1.80 *In conclusion, the Commission recommends that no form of statutory recoupment clause should be introduced. The policy of allowing the loss to lie where it has fallen, coupled with the qualified removal of section 2 would have the aggregate effect that there would be less double recovery, which should benefit the defendant’s insurance company and its policyholders, not the provider of the collateral benefits. This does not affect rights of recoupment and subrogation that exist under contractual arrangements.*

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<sup>52</sup> Cooper “A Collateral Benefits Principle” (1971) 49 *Canadian Bar Review* 501 at 532.

## Summary of Recommendations in Chapter 1

- (1) The Commission recommends that the distinction between indemnity based and non-indemnity-based contracts of insurance should not be relevant to determining whether a payment under a contract of insurance should be deducted from an award of damages. [paragraph 1.44]
- (2) The Commission recommends that double recovery should be barred in respect of permanent health insurance and payments received under such insurance policies should be deducted from awards of damages. [paragraph 1.49]
- (3) The Commission recommends that no change should be introduced as regards medical health insurance. [paragraph 1.53]
- (4) The Commission recommends that, in the case of a personal accident insurance policy, a plaintiff who has paid the entirety of the insurance premiums payable under such contract directly and independently and in his or her own name should be allowed to make double recovery. [paragraph 1.56]
- (5) The Commission recommends the following amendment to the wording of section 2 of the *Civil Liability Act 1964*:

“In assessing damages in an action to recover damages in respect of a wrongful act...resulting in personal injury, account shall be taken of any sum payable in respect of the injury under any contract of insurance, subject to the exception that account shall not be taken of payments made under a contract of insurance where the plaintiff has paid the entirety of the insurance premiums, directly and independently, and in his or her own name. Insurance payments under the *Health Insurance Act 1994* and regulations promulgated thereunder, are not subject to this provision.”  
[paragraph 1.60]
- (6) The Commission recommends that no form of statutory recoupment clause should be introduced. The policy of

allowing the loss to lie where it has fallen, coupled with the qualified removal of section 2 would have the aggregate effect that there would be less double recovery, which should benefit the defendant's insurance company and its policyholders, not the provider of the collateral benefits. This does not affect rights of recoupment and subrogation that exist under contractual arrangements. [paragraph 1.80]



## CHAPTER 2 CHARITABLE BENEFITS

### Part A The Present Law

2.01 On a literal reading, charitable gifts of money to a plaintiff clearly come within the ambit of section 2(b) *Civil Liability (Amendment) Act 1964* by reason of the reference therein to 'gratuities' (The provision states that: "in assessing damages...account shall not be taken of ...(b) any...gratuity..."). Consequently, they are to be ignored in the assessment of the plaintiff's damages.

2.02 Three particular features of the law in this area require attention. The first of these is the central question of whether the principle of non-deductibility ought to be suspended where charitable gifts are concerned. The comprehensive terminology of section 2 entails the disregard of a collateral benefit, irrespective of its source. Thus, the charitable payment is non-deductible, even where the donor is the defendant. At common law (which still applies with regard to benefits-in-kind, for instance), the position is not so clear. This is largely due to the policy view<sup>53</sup> that, in the case of charitable payments by the defendant tortfeasor, the general rationale for the non-deductibility of charitable benefits does not apply. On this view, the non-deduction of such payments from an award for damages would discourage the defendant from making *ex gratia* payments to the plaintiff. As will be seen below, the Commission differs from this view. The second point which the Commission has considered is whether the common law approach that deduction ought to be allowed when the donor is the defendant, is the better approach.

2.03 The third point concerns benefits-in-kind and rarely arises in practice. On a literal interpretation, the deductibility of charitable

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<sup>53</sup> *Hussain v New Taplow Paper Mills Ltd* [1987] 1 ALL ER 417. This Court of Appeal decision was affirmed, on different grounds, in the House of Lords.

benefits-in-kind would seem to be outside the scope of section 2(b). Therefore, such benefits would fall to be determined by the common law. In *Ryan v Compensation Tribunal*<sup>54</sup> Costello P clearly accepted that benefits-in-kind (in this case the provision of services) were non-deductible.<sup>55</sup> The question here is whether there should be different rules, according to whether the charitable benefit takes the form of money or a benefit-in-kind.

## **Part B            Reform of the Law**

2.04 The arguments for and against the deduction of charitable payments are rehearsed at paragraph 9.13 of the Consultation Paper and since the Commission has not changed its view on them, they may be summarised briefly as follows:

### **(i)        Arguments against Deductibility**

- The wrongdoer should not be relieved by the generosity of others. To deduct would offend public sentiment.
- The intention of the donor is not to cover any of the losses covered by tort damages, rather he simply intends to express sympathy or perhaps to cover non-pecuniary losses.
- 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. It is in the public

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<sup>54</sup> [1997] ILRM 194.

<sup>55</sup> *Ibid* at 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 were cited in support of the proposition. See also *Basmajian v Haire* High Court (Barr J) 2 April 1993.

interest to encourage social solidarity and benevolent behaviour.

- 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.

**(ii) *Arguments in favour of Deductibility***

- Deduction would not necessarily discourage charitable payments. First, if the donor were to think about the effect, he or she might prefer that there would be no overcompensation, so long as the aim of alleviating the immediate effects of the accident was fulfilled.
- Second, any discussion of the intention of donors involves a fictional imputation of intention. As one cannot know individual intentions, all persons who make such charitable donations should be treated alike.

***Recommendation***

2.05 Subject to the exception considered in the next paragraph, the Commission believes that there is a clear public interest in treating charitable benefits as non-deductible. We believe that this rule is justified in the public interest, in order not to discourage spontaneous acts of social solidarity. *The Commission thus recommends that, in general, charitable benefits should not be deducted from an award for damages.*

2.06 The position might be different, however, if the charitable payments or other benefits emanate from the tortfeasor. In these circumstances, one of the major arguments which was influential in deciding against the deductibility of charitable benefits is inapplicable, which suggests that charitable payments ought to be deducted in those circumstances. The reason is that it may be a disincentive to the tortfeasor to make a timely and useful gesture, if he suspects that he will later have to pay again.<sup>56</sup> A further point is

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<sup>56</sup> 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 the aim of encouraging employer-

that, when the tortfeasor is the donor, one cannot argue that the wrongdoer is being relieved undeservedly by the donor.

2.07 As against this conclusion, it might be argued that it would have been open to the tortfeasor to protect himself in that, if he wanted ‘pre-award’ payments to be deducted, this could have been stipulated as a condition to the payment of the charitable benefit. A donor must be allowed to impose such a condition on his gift (though it is, of course, unlikely except where the donor is a potential defendant). It is also possible that the tortfeasor may want to make a charitable donation without his insurers reaping the benefits. Thus, in the final analysis, the Commission prefers the arguments in favour of not allowing a defendant to deduct ‘pre-award’ charitable payments from the amount which he himself has to pay in damages even in the case in which the donor is the defendant. However, the Commission is of the view that donors are entitled to attach such conditions to the gift as they wish. Accordingly, the following recommendation is not limited to donors who are also defendants in the tortious action.

2.08 *The Commission recommends that a charitable gift should not be deducted unless the donor stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages.*

2.09 However, a difficulty may arise in the practical operation of this rule. In Chapter 4, the Commission recommends that sick pay should be deductible, even if the defendant is not the employer. Charitable donations by an employer will frequently take the form of sick pay that is paid to an employee who was injured at work. Accordingly, the Commission makes an exception to the present recommendation, where the donation takes the form of sick pay. As a matter of practicability, it will not always be easy to distinguish sick pay from other types of donation. To assist in drawing this distinction, the draft provision which follows establishes a presumption that, if the donation accords with the definition of sick pay, it should be presumed to be sick pay:

*“...[W]here a charitable gift (whether in the form of money or in kind) has been given to the plaintiff in response to the incident which also gave rise to the cause of action, in*

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defendants to make such payments.

*assessing damages...account shall not be taken of the gift or its value save that it shall be taken into account in the following circumstances:*

*(i) the donor stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages; or*

*(ii) the donation takes the form of sick pay (sick pay being presumed to include any series of payments made by an employer to an injured employee, that resemble the employee's regular remuneration in frequency, amount of payment, or both)."*

2.10 Finally, we turn to the rare situation in which the donation takes the form not of money, but of a benefit-in-kind. Whatever view one takes of the deductibility of charitable gifts which are monetary, to make a different rule simply because the donation was a benefit-in-kind would, in the Commission's view, be without justification.

2.11 The Commission sees no reason to distinguish between charitable payments that are monetary and those that take the form of benefits-in-kind. *The Commission accordingly recommends that the proposal regarding the non-deductibility of charitable benefits should apply irrespective of the form of the charitable benefit.*

**(iii) Draft Legislation**

2.12 *The Commission recommends the following draft legislation:*

*"...[P]rovided that, where a charitable gift (whether in the form of money or in kind) has been given to the plaintiff in response to the incident that also gave rise to the cause of action, the gift or its value shall not be deductible, subject to the following:*

*(i) where the charitable benefit was paid by the defendant, it shall be deductible only if the donor-defendant stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages; and*

- (ii) *where the donation takes the form of sick pay, it should be deductible from an award of damages (sick pay being interpreted to include any series of payments made by an employer to an injured employee, that resemble the employee's regular remuneration in frequency, amount of payment, or both)."*

## Summary of Recommendations in Chapter 2

- (1) The Commission believes that there is a clear public interest in treating charitable benefits as non-deductible. We believe that this rule is justified in the public interest, in order not to discourage spontaneous acts of social solidarity. The Commission thus recommends that, in general, charitable benefits should not be deducted from an award for damages. [paragraph 2.05]
- (2) The Commission recommends that a charitable gift should not be deducted unless the donor stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages. [paragraph 2.08]
- (3) The Commission recommends that the proposal regarding the non-deductability of charitable benefits should apply irrespective of the form of the charitable benefit. [paragraph 2.11]
- (4) The Commission recommends the following draft legislation:

“...[P]rovided that, where a charitable gift (whether in the form of money or in kind) has been given to the plaintiff in response to the incident that also gave rise to the cause of action, the gift or its value shall not be deductible, subject to the following:

  - (i) where the charitable benefit was paid by the defendant, it shall be deductible only if the donor-defendant stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages; and
  - (ii) where the donation takes the form of sick pay, it should be deductible from an award of damages (sick pay being interpreted to include any series of payments made by an employer to an

injured employee, that resemble the employee's regular remuneration in frequency, amount of payment, or both).”  
[paragraph 2.12]

## CHAPTER 3 OCCUPATIONAL PENSIONS

### Part A Introduction

3.01 Pensions may arise from one's job (occupational pension)<sup>57</sup> or from the State (social welfare). The latter type is covered in Chapter Five. The former is the subject of this chapter. The scenario with which we are concerned is as follows: there is a serious accident, as a result of which the victim is obliged to retire. He therefore receives an (early) retirement pension. Subsequently, he brings an action against the person who caused the accident seeking damages, including damages for loss of earnings. In the context of our concern regarding double compensation, the critical issue is whether the pension payments should be taken into account in the assessment of damages for loss of earnings. It should be stressed here that we are initially considering only pension payments received earlier than the normal retirement age, since only these payments can potentially be collateral benefits. After that age, a person would be in receipt of a pension regardless of any action for damages and thus no question of collateral benefits can arise. However, for the sake of completeness, the impact of the accident on post-retirement rights is considered in Part E. As a final preliminary point, we should add that there are a number of special statutory schemes dealing with pensions for the Garda Síochána, Army or other groups of State servants.<sup>58</sup> We have thought it inappropriate to include these particular codes in our general survey of double compensation.

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<sup>57</sup> The term "occupational pension scheme", as defined in section 2 of the *Pensions Act 1990*, is generally used to distinguish job-related pension schemes from State social welfare schemes: See Kenny *Understanding Pensions* (1994) at 59.

<sup>58</sup> For cases on double compensation in this context, see: *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 *Irish Pensions Law and Practice* (Oak Tree Press 1996) at paragraph 5.50.

3.02 The present law seems to be clear. Section 2(b) states that “any pension” shall be ignored in the assessment of the plaintiff’s damages. Thus, where a plaintiff is involved in a tortious accident and receives pension payments, he is also entitled to claim damages for loss of earnings – and here is the important point – without his pension payments being taken into account in the assessment of damages for loss of earnings. This results in recovery of a sum which is larger than is necessary merely to compensate the plaintiff for the loss and damage he suffered.

### ***The historical context***

3.03 It is instructive to note the historical context in which the common law pension exception, which is enshrined in section 2, came to be established. This area of the law was in a state of confusion in England following a series of Court of Appeal decisions.<sup>59</sup> The House of Lords then clarified the matter in *Parry v Cleaver*.<sup>60</sup> In that case, the plaintiff policeman had been injured at work due to the defendant’s negligence. He was subsequently discharged from work and received a police ill-health pension. The question arose as to whether this pension, to which he was entitled on being discharged from the police force for disablement, should be deducted from the damages for lost earnings which he would otherwise have received from the defendant. The majority of the House, drawing an analogy with private insurance payments, held that the disability pension was not to be set off against damages for lost earnings.<sup>61</sup> The minority thought that the pension resembled a form of sick pay and, thus, should be set off against damages.<sup>62</sup>

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<sup>59</sup> *Payne v Railway Executive* [1952] 1 KB 26, *Browning v War Office* [1962] 3 All ER 1089.

<sup>60</sup> [1970] AC 1. The details are set out in the Consultation Paper at paragraphs 4.18-28.

<sup>61</sup> Giving the leading majority judgment, Lord Reid, after recognising expressly 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

3.04 It is also of note that the majority in *Parry* held that direct contributions to the pension scheme from the employee's pay are not a requirement for non-deductibility. Lord Pearce spoke of how it "would be unreal"<sup>63</sup> to draw a dividing line between contributory and non-contributory pensions.

## **Part B            Policy**

3.05 As can be seen from *Parry v Cleaver*, pensions have been treated as non-deductible by analogy with insurance payments. The

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events turn out, *ie* 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". 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.

<sup>62</sup> Giving the leading minority judgment, Lord Morris 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, if he had not suffered the injuries. He commented as follows (at 23): "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." After setting out the payments at issue in detail, he continued (at 26-27): "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."

<sup>63</sup> *Ibid* at 36. Lord Pearce disapproved 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."

basic element of setting monies aside to provide for a future contingency is common to insurance and pensions and naturally, there will be a large degree of overlap between the arguments for and against the deduction of pensions and of insurance payments.<sup>64</sup> The common arguments for and against the non-deduction of pensions and insurance payments are summarised in the next paragraph. However there are certain arguments, which will be considered below, which, in the Commission's opinion, tip the scales in favour of the non-deductibility of pensions.

3.06 In the first place, there is the fundamental notion that the plaintiff is only entitled to be compensated once:

“...it must be remembered - and this appears in danger of being forgotten in all discussions of the collateral benefits rule - that what is at issue is the amount of tort damages, not the question whether the plaintiff should get or keep his insurance payments. In this case the plaintiff was awarded his disability pension and there was no question of this being taken away from him. Similarly, if the plaintiff collects on a personal accident insurance policy, he receives and keeps his insurance money. The question at issue is how much *more* he should receive in tort damages. To argue that he “has paid” for his insurance payments is beside the point when it is not the insurance payments, which are in issue. It might be more pertinent to ask if he has ‘paid’ for his right to a tort action, to which of course there can only be one answer.”<sup>65</sup>

3.07 The ‘paid-for’ argument is relied upon to justify double recovery in some instances.. According to this argument, if the plaintiff has paid for his pension premium, he should receive some value in return for these payments. It is arguable that the plaintiff does receive what he paid for, namely financial protection and security in the event of early retirement or old age. Moreover, if pension payments are deducted from awards of damages, the plaintiff would receive the benefit of pension payments even if, as is usually the case, he is not able or willing to sue anyone for the accident. Thus he certainly receives something substantial in return for his premiums. As against this proposition, it could be said that if the

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<sup>64</sup> For the arguments in the insurance context, see Chapter 1.

<sup>65</sup> Atiyah “Collateral Benefits Again” [1969] MLR 397 at 403.

individual makes contributions to a pension scheme on the basis that he will be paid twice in the event of being involved in tortious accident, he is being deprived of one of the elements he paid for.

3.08 A further point is that, despite the fact that the employer usually pays a proportion of the contributions towards a pension fund, the employee receives a right in the funds that is akin to a property right. This is demonstrated by the fact that the employees are required by legislation to be appointed as trustees to the pension funds and therefore have some control and input as regards how the pension funds are disbursed.<sup>66</sup> The fact that the pension entitlements of an employee travel with him from one employment to another, reinforces the characterisation of pension payments as property rights of the employee.

### ***Recommendation***

3.09 Before making a recommendation, it is appropriate for the Commission to clarify the nature of a pension and the distinction between pensions and other forms of collateral benefits.

3.10 First, in the case of most occupational pensions a certain proportion of the premiums are paid by the employee, while the remaining and usually greater proportion is paid by the employer. A typical pension might be funded as to 6½% of the salary by the employee; while the employer contributes another 8½ % of the salary.

3.11 Second, the way occupational pension schemes are set up is through a trust, with the employees as the beneficiaries. The Pensions Act, 1990 also requires that some of the trustees of such schemes are selected from among the members/employees. This gives statutory emphasis to the fact that the pension fund is 'owned' by the beneficiary members and is not in the ownership of the employer.<sup>67</sup>

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<sup>66</sup> *Pensions Act 1990*. See below.

<sup>67</sup> Prior to the *Pensions Act 1990* many employers did not have a separate fund and regarded the pension fund as an asset with which they could deal. In fact, at one stage in the liquidation of a company, no priority was given to the repayment of pension contributions to redundant employees. Different pieces of legislation over the last few decades have clearly identified the pension contributions as being owned by the employees, be they employee contributions or employer contributions.

3.12 A third point to note about the structure of pensions is that employees have a right to transfer ‘the pension entitlement’ from one employment to the next. This sets pension payments apart from other forms of collateral benefit, such as insurance payments and sick pay, as will be seen below.

3.13 While analogies have been drawn between pensions and insurance payments and between pensions and sick pay (see *Parry v Cleaver*<sup>68</sup> above) there are a number of distinctions between these categories of collateral benefit. First, when an employee leaves a particular employment, neither sick pay nor insurance benefits which have accrued in the first place of employment transfer to that new employment. In the case of insurance, the premiums cease, as there is no longer an insurable risk for that employment. No benefit accrues to the employee which he or she can carry to the next employment.

3.14 A second distinction between insurance and pension payments is that an employer who pays insurance premiums to insure against the risk of the ill-health or injury of employees is the recipient of the insurance proceeds if the risk materialises. The insurance fund, in many instances, enables the employer to employ a replacement employee. In other words, the insurance premiums paid are in respect of the injury or illness that may occur. By contrast, contributions made towards a pension plan can be regarded as ‘deferred earnings’ that will be drawn down during retirement, and not in any way related to loss of earning due to injury or illness. They exist independently of the accident, which is only one of a number of grounds, such as early retirement, which may trigger the payment of an early pension.

3.15 It is also necessary to consider the distinction between sick pay and pension payments. Sick pay is funded entirely by the employer and is wholly contingent upon the occurrence of an event or an illness that renders the employee incapable of working. Pension payments, on the other hand, are partly funded by the employee and are not contingent upon the occurrence of any event. They are something to which the employee is entitled upon retirement, whether early retirement or otherwise. A caveat that should be mentioned is that, in some cases, employers do provide that a disability benefit will be paid for illness for those employees who are members of an occupational scheme (in the public service, there is specific provision

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<sup>68</sup> [1970] AC 1.

for disability benefit to be paid) but this payment is entirely different from an early retirement pension and would be funded by insurance.

3.16 There are certain policy considerations that apply to the treatment of sick pay but which are not relevant in the context of payments under a pension plan. One policy reason for recommending that sick pay be deducted is that employers should be encouraged to pay sick pay and not be deterred by the fact that the plaintiff-employee could recover twice in respect of the same loss and injury. As pension plans are contributed to by both the employee and the employer and administered by trustees, this risk is considerably lessened. A further policy reason for deducting sick pay from awards of damages is that employees should be encouraged to return to work at the earliest possible opportunity. Since the payment of a pension depends upon retirement, this factor does not operate in the present context.

3.17 The Report will now consider the possible options for reform and whether pension payments should be deductible from an award of damages. As a preliminary matter, we consider the argument that the employee-plaintiff should be allowed to make double recovery in respect of that portion of the pension that is funded by his own contributions. However, the general tradition of the common law has been either to deduct or not to deduct payments and to avoid adding complications to what is already an inherently complicated area of the law. *For these reasons, the Commission does not recommend that there should be a right to double recovery in respect of a proportion only of the pension.*

3.18 The crucial point here is that, in most cases, the plaintiff has not only 'paid for' a substantial proportion of the premiums, he also has something akin to a property right in his pension.

3.19 Lord Wilberforce in *Parry v Cleaver*<sup>69</sup> points out that: "the pension is to be regarded as the reward or earning of pre-injury service and therefore not entering into the computation of lost post-injury wages. I would reach the conclusion that it should not be deducted against damages recoverable from a third person for a proved loss of earning capacity". Lord Pearce also states in *Parry* that:

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<sup>69</sup> [1969] I AER 555 at 582.

“What the employer pays actually or notionally to a pensions fund is part of the total cost which he is prepared to pay in respect of the employee’s service...But in my view 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.”<sup>70</sup>

3.20 The exceptional case is where the plaintiff is suing his employer. It should be recalled that the plaintiff has not paid all of the premiums and usually rather less than half of them. Thus the ‘paid for’ argument applies to only a proportion of the amount. However, as indicated above, an employee has a right akin to a property right in the pension fund and in the pension payments he receives. The argument that applied in relation to insurance payments, namely that the insured should only be allowed to recover the collateral benefit and an award of damages for the same loss if he paid the entirety of the insurance premiums, is therefore not applicable in the context of pension payments.

3.21 In many cases, the defendant will be the same person as the employer who has paid a large proportion of the pension premiums. It is therefore necessary to consider the deductibility of pension payments from the standpoint of the employer-defendant, as well as the employee-plaintiff. The possibility that an employer could be sued by an employee, resulting in double recovery to the latter, would not encourage an employer to provide an effective pension scheme for his employees at substantial cost to himself.<sup>71</sup>

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<sup>70</sup> [1969] 1 AER at 577.

<sup>71</sup> One ought to notice, too, that there are two main types of occupational pension scheme: defined contribution schemes and defined benefit schemes. The pension payable under the former scheme will be the sum of a person’s contributions plus the investment income earned by those contributions; in the latter, the pension will be calculated by means of a formula normally related to the number of years’ service completed in the employment and to pensionable salary or pay. The significant point here is that in the case of a ‘defined benefit’ scheme, the regular amounts contributed by the employee and employer may not suffice to pay the amount due. In that case, the shortfall, which may be substantial, will typically have to be made good by the employer. Thus, the employer will have to pay an amount in addition to the regular payments already made. In other words, the real proportion of the pension, which will have to be paid by the employer, is increased. This

3.22 As against this, the view could be taken that the ‘social wage’ principle applies, as clearly endorsed by Lord Pearce. A further issue for an employer defendant is that, in some instances, he may ‘top up’ the insurance fund in the event of a shortfall or early retirement payments. This is done on the basis of an actuarial report. One might argue that the additional cost falls mainly on the employer. However, an employee who is entitled to the benefit of a pension scheme is also entitled to payment in the event of early retirement, where this is part of the package of benefits. The benefit of an early retirement pension is not awarded to particular employees on an *ad hoc* basis, as occurs in the case of sick pay.

3.23 Apart from any policy consideration, whatever we recommend should be simple and consistent. The consistency is necessary to ensure that there is only one approach as to whether pension payments are taken into account or are not. The rule should be the same regardless of whether the employer is a defendant. To provide otherwise would lead to lengthy argument, delay and cost, which cannot be justified on any ground. To quote Lord Reid in *Parry v Cleaver*: “[s]urely it must be either that a pension is something which by its intrinsic nature is deductible or that by its nature it is non-deductible”.<sup>72</sup>

3.24 *The Commission recommends that the defendant should not be allowed to deduct the value of any pension from the amount of damages. The rule contained in section 2, that pensions are not deductible from awards of damages, should not be altered.*

## **Part C            Enhancement of Benefits**

3.25 If a person retires early, and so receives an early ill-health retirement pension, the amount of the pension payments are still essentially determined by the sum of the contributions plus the investment earned (defined contribution scheme) or the product of the years of service and the pensionable salary (defined benefit scheme). However, in the case of an ‘enhanced benefit scheme’, an employee who retires early due to ill health receives enhanced pension

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possibility would seem to strengthen the argument against allowing double recovery, where the employer is the defendant.

<sup>72</sup> [1969] 1 AER 555.

payments.<sup>73</sup> The enhancement of the pension payments takes the form of a number of ‘added years’, which are calculated according to a formula embodied in regulations. The number of added years is related to the service already completed, but the maximum in any event is 7 (or any smaller number, which would take the total number of credit years to 40).

3.26 The enhancement then, by definition, represents a payment over and above the plaintiff’s accrued interest in the pension scheme. The essential question for the purposes of this Report is whether the enhanced payment should be treated differently from the accrued interest. This depends, in turn, on who pays for the enhancement element of the pension.

3.27 The answer is that the actuary to a pension scheme normally builds into the funding rate an allowance for the fact that a small number of employees will retire early on ill-health grounds. Therefore, the result is that the cost of the enhancement is, in fact, borne by contributions from the employer and (all) the employees in the same way as the accrued element. To the extent that one accepts the argument in Part B, that an employee has a property right in the pension plan that justifies the payment of double compensation, then the same principle would apply to the enhancement of the pension payment, as the employee’s premium covers the cost of any possible enhancement which may occur to the benefit of the employee or his fellow-members.

3.28 *The Commission’s recommendation in this Chapter is that pensions should continue not to be deducted from an award of damages. The Commission does not recommend differentiating*

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<sup>73</sup> Of its nature, a ‘defined contribution scheme’ does not lend itself readily to enhancement of benefits. Typically, such schemes 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. Consequently, early retirement enhancements are rather uncommon in the **public sector**, where almost all of the benefit provision is on a “defined benefit” basis. On the other hand, early retirement enhancements are not very common in the **private sector**. However, in recent years, due to the very steep increases in the premiums payable for prolonged disability insurance, many employers prefer the route of an enhanced early retirement pension as a means of dealing with disablement, and so these benefits are probably more common in the private sector than they used to be.

*between the accrued element of the pension payment or the enhanced payment that was received in this regard. For the purposes of this Report, the Commission recommends that no differentiation should be made between the accrued pension payment or any enhanced pension payment that a plaintiff received.*

3.29 A further issue to be considered is that, depending on how the scheme is formulated, the enhancement of pension payments may occur as a matter of right or alternatively by virtue of the exercise of discretion by the trustees of the pension fund. The Commission does not consider the discretionary or otherwise, nature of the payments to be relevant to the issue of deductibility. The ‘paid for’ argument stresses that an employee who pays contributions towards a pension is entitled to receive double recovery in the event of a tortious accident. An employee who contributes towards a pension fund does so on the basis that he may have the right, whether guaranteed or by exercise of discretion, to receive an enhanced pension package. The potential to have the pension payments enhanced is something for which the employee paid and if enhancement does occur, there is no reason to deny the employee the right to double recovery. The essential point is that the focus is not upon the pension scheme, but on the award of damages and whether deductions should be made from that award. If a payment is not deductible from an award of damages, it is immaterial whether the plaintiff recovers twice because the collateral benefit includes a discretionary enhancement paid by a generous trustee, rather than enhancement paid as of right.

3.30 *The Commission recommends that, where a pension scheme provides for the discretionary enhancement of pension payments, the principle that pensions are not deductible from an award of damages, is not affected by the fact that the enhancement depends upon an exercise of discretion by the trustees of the pension.*

## **Part D           Who Pays?**

3.31 In other Chapters, in which the Commission recommended a policy of deduction, we discussed whether the collateral benefit provider or the defendant should pay the plaintiff. In this chapter, it is recommended that the plaintiff should be allowed to recover both the pension payments and the award of damages. The issue of who bears the financial burden does not therefore arise.

## **Part E            Loss of Post-Retirement Pension Rights**

3.32 If an employee is forced by injury or sickness to take early retirement and receives a pension, we may divide the period for which he receives a pension into two phases. In the first ('early retirement phase') the plaintiff may be paid a pension, even possibly an enhanced pension, by virtue of taking retirement earlier than the normal retirement age. The broad question under consideration in Parts A and B was whether the early pension should be set off against the amount of damages which would otherwise be received from the defendant. The second stage (or 'post normal retirement phase') – which is the subject of the present Part – refers to the payments which, it is anticipated, will be made after the normal retiring age. It should be noted that this Chapter focuses upon the overlap between the early payment of pensions and damages for loss of earnings.

3.33 In relation to the post-retirement pension, the first thing to be noticed is that the amount of this pension will be lower than **would** have been the case if there had been no accident. This is because fewer premiums will have been paid. Accordingly, the damages award may well include an element for 'loss of pension'. This sum may be discounted to reflect the fact that the plaintiff will not have paid any premiums for the lost years. However, we pursue this point no further, since there is no element of double compensation and, hence, it does not come within the scope of this Report and there is no need for reform.

3.34 There is a further issue which we address briefly here, although it is not directly relevant to this Report. The issue is whether the payment for post-normal-retirement loss of pension should be reduced by virtue of any of the payments received in respect of the **pre**-normal-retirement phase. We know of no Irish authority on the point in the existing law, although it has been considered and rejected in England. However there are a few English authorities applying the first principles which are shared by our two legal systems. They appear to yield satisfactory rules and results. We conclude that there is no need to change this area of the law.

3.35 To justify that view, we include the following analysis. We do this only briefly because this area is not really the subject of this

Report. In the context of pensions, this Report focuses upon the overlap between the early payment of pensions and damages for loss of earnings. These payments and the overlap between them do not impact upon the separate issue of post-normal-retirement pension. This view is supported by the recent House of Lords authority of *Longden v British Coal Corporation*.<sup>74</sup> Here, the plaintiff had received a lump sum and annual incapacity pension as a result of an accident in the defendant's employment. In the only substantive House of Lords judgment in the case it was accepted that the plaintiff's claim for loss of pension in respect of the period after retirement age could be no greater than his net loss of pension. This was arrived at after setting off the incapacity pension against the normal retirement pension which he would have received. The issue left to be decided was whether, in calculating that net loss, the total of the pension benefits received and receivable, in respect of the early retirement phase, were to be taken into account. Lord Hope reiterated the general compensatory function of damages and quoted the dicta of Lord Bridge in *Hussain v New Taplow Paper Mills*<sup>75</sup> and *Hodgson v Trapp*<sup>76</sup> to that effect. He 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 useful 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*

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<sup>74</sup> [1998] 1 All ER 289. See, to the same effect, *Parry v Cleaver* [1970] AC 1 at 20-21.

<sup>75</sup> [1988] AC 514.

<sup>76</sup> [1989] AC 807.

*pension during this period in order to make good his loss of pension after his normal retirement age.”<sup>77</sup>*

3.36 In short, the payments received in respect of the early retirement phase are not being used to compensate for the post-retirement phase but rather for the loss of a salary. Consequently, to take them into account in assessing damages for the post-retirement phase would eliminate much of the compensation for this loss of pension rights. This point was made cogently in the passage from *Longden* just quoted. The Commission agrees with it. Moreover, the justification for not taking the payments into account is that these payments are necessary to compensate the plaintiff: they have nothing to do with section 2.

3.37 *The Commission recommends that no change be introduced to the law applicable to post-retirement pension rights, as the present law is satisfactory.*

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<sup>77</sup> [1998] 1 All ER 289 at 300. (Our emphasis).

### **Summary of Recommendations in Chapter 3**

- (1) The Commission does not recommend that there should be a right to double recovery in respect of a proportion only of a pension. [paragraph 3.17]
- (2) The Commission recommends that the defendant should not be allowed to deduct the value of any pension from the amount of damages. The rule contained in section 2, that pensions are not deductible from awards of damages, is not altered. [paragraph 3.24]
- (3) For the purposes of this Report, the Commission recommends that no differentiation should be made between the accrued pension payment or any enhanced pension payment that a plaintiff received. [paragraph 3.28]
- (4) The Commission recommends that, where a pension scheme provides for the discretionary enhancement of pension payments, the principle that pensions are not deductible from an award of damages, is not affected by the fact that the enhancement depends upon an exercise of discretion by the trustees of the pension. [paragraph 3.30]
- (5) The Commission recommends that no change be introduced to the law applicable to post-retirement pension rights, as the present law is satisfactory. [paragraph 3.37]



## CHAPTER 4      SICK PAY

### Part A      Introduction

4.01 In contrast with insurance proceeds, there is no specific reference to sick pay in section 2. Therefore, it has been left to the courts to determine whether the phrase “or other like benefit payable under statute or otherwise in consequence of the injury” encompasses sick pay. The effect of including sick pay within the terms of section 2(b) would be to allow a plaintiff to cumulate his or her remedies. Alternatively, if sick pay does not come within section 2(b), the normal principle that the plaintiff could only claim the amount of damages necessary to compensate him or her for his or her loss would apply and the value of the collateral payment would be deducted from the special damages. As a general proposition, it has been stated that sick pay should be deducted from awards of damages on the basis that there is no loss of earnings, if the plaintiff received sick pay.<sup>78</sup>

4.02 The payment of sick pay can arise in a number of different ways. The contract of employment may provide for sick pay (either conditionally or unconditionally). Where there is no contractual obligation, the employer may pay the plaintiff voluntarily. The sick pay may come from the proceeds of an income continuance plan. Finally, the plaintiff may be entitled to a certain amount of payment under statute, on the basis of his or her previous social insurance contributions. Different policy considerations need to be taken into account, depending on the particular arrangement and the source of the sick pay. We shall consider the distinctive policy implications of each of these methods in Part B.

4.03 Macken J in the recent case of *Hogan v Steel*<sup>79</sup> gave a helpful categorisation of how the courts have dealt with the issue of sick pay to date:

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<sup>78</sup> White *Irish Law of Damages* (Butterworths 1989). at paragraph 14.10.09.

<sup>79</sup> [2000] 1 ILRM 330 at 337-340.

“There appears to be no doubt in law that the general principle is that loss of wages are part of the ordinary special damages which may be claimed. In certain circumstances, however, that right may be cut down or limited. As to the balance of the cases from the other jurisdictions, those cases appear to fall into a number of different categories, namely:

(a) those which are determined on the basis that there were no losses, because there was a legal entitlement, contractual or otherwise, vested in the employee to have wages or salaries paid, whether the absence or sick leave involved a third party or not;<sup>80</sup>

...The policy behind these decisions appears to be that where, by the contract of employment, the employee is legally entitled to receive pay and without any agreement to reimburse his employer, no loss could arise to him at all, and therefore, no recoverable loss could exist against the wrongdoer. The payment is in reality an unconditional payment, contractually earned or legally vesting in the employee.

(b) those which were determined on the basis that the payments were conditional, namely, that for one or other reason, the payments made had to be reimbursed by the receiver of the monies, from monies received from the wrongdoer...<sup>81</sup>

(c) those which were determined on the basis that there were losses, but that the monies given were given in the form of a gift pure and simple.<sup>82</sup>

...The policy behind the approach to this type of money is clearly that where a plaintiff benefits from the generosity or helpfulness of friends/neighbours /others, this generosity

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<sup>80</sup> *Cunningham v Harrison* [1973] 1 QB 942; *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541.

<sup>81</sup> *Franklin v British Railway Board* [1993] IRLR 441; *Dennis v London Passenger Transport Board* [1948] 1 All ER 779.

<sup>82</sup> *Redpath v Belfast & County Down Railway* [1947] NI 167.

should not be taken into account and thereby relieve a wrongdoer who would otherwise be liable for the payment of the monies lost. Of particular importance is the fact that there is no legal right whatsoever to be in receipt of these monies.

(d) those which are determined on the basis that there were losses, and the payments were made from proceeds of insurance policies. Some of these were determined one way as opposed to the other, depending on whether the insurance was for the benefit of the employer or for the benefit of the employee...

(e) those – and they are very small – which appear to be at odds with the general categories above. It is not always clear precisely what is the basis for these last decisions, but in general they appear to be determined on peculiar facts arising.

The most that can be said from the case law is that there appears to be a general policy running through all of the cases, regardless of the outcome, that where there is no loss, there is no entitlement to payment...<sup>83</sup>

4.04 The Commission considers this to be a very useful framework and this Report will adopt it as a basis for analysing the different categories of sick pay, according to the headings set out in the passage. We shall not, however, deal further with category (e), since the cases to which it refers are by definition too idiosyncratic to be the basis for systematic law reform. Category (d) relates to insurance which was addressed in Chapter 1. It shall not be examined in this Chapter but we shall take it into account when we consider our recommendations at the end of the Chapter.

4.05 The following summary of the categories (a) to (d) may be helpful to the reader:

- (i) In the case of (a), the employer pays under his contract of employment and so there is only a single set of payments, which are made by the employer.

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<sup>83</sup> [2000] 1 ILRM 330 at 337-339.

- (ii) Secondly, in case (b), the employer has advanced money conditionally on repayment to him, if the plaintiff succeeds against the defendant. Thus, the net result is that the plaintiff recovers – once only – against the defendant.
- (iii) Finally, it seems that there is currently double compensation only in the case of monies paid voluntarily by the employer (category (c)) or monies from an insurance policy that was taken out for the benefit of the employee, as opposed to the employer (category (d)).

## **Part B            The Three Categories of Sick Pay**

4.06 Each of the three categories of sick pay will now be looked at individually.

### **(i)            Contractual sick pay**

4.07 We must start our discussion of this aspect of section 2 with what may appear as a digression. Section 2(b) of the 1964 Act refers to: “...any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury.” The interpretation given to the phrase “or otherwise” determines whether contractual sick pay falls within the scope of section 2(b). Lynch J in *Honan v Syntex*<sup>84</sup> gave an interpretation of the phrase “or otherwise”. In that case, the claim arose from an industrial accident at the defendant’s factory where the plaintiff was employed. The sum in dispute was paid by the defendants to the plaintiff pursuant to his contract of employment while he was still in their employment, although he was not working due to the injury he had suffered. This money was: “paid as long-term disablement benefit in lieu of wages and it was a payment provided by the defendants for their employees who are unable to work, whether on account of illness or accident”.<sup>85</sup> While the plaintiff agreed that he had received this sum, he submitted that it could not be taken into account as against his loss of earnings by virtue of section 2 of the *Civil Liability (Amendment) Act 1964*. The plaintiff’s case was that the payments were a “like benefit payable... under statute or otherwise in consequence of the injury”. Therefore, it was necessary to give meaning to this phrase. Lynch J stated that:

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<sup>84</sup> *Honan v Syntex (Ireland) Ltd* High Court (Lynch J) 22 October 1990.

<sup>85</sup> *Ibid.*

“...the words ‘or otherwise’ in the phrase ‘payable under statute or otherwise’ has the same general sense as the preceding words and they mean, therefore, 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.

An example of an imposition otherwise than by statute, would be an obligation imposed on a local or subordinate body by circular letter issued by the appropriate minister of state.”<sup>86</sup>

4.08 Lynch J’s interpretation of the contract in that case was that the contract was not within section 2(b) and consequently the sick pay was deductible. Given the facts of this case, the end result was just. If the original payments had not been deducted, the tortfeasor would have paid out once as employer and once as tortfeasor. It can be seen from comments Lynch J made regarding *Honan* in the subsequent case of *Sturdy v Dublin Corporation*<sup>87</sup> that what he had been concerned with in *Honan* was the prevention of double payment by the tortfeasor/employer:

“I am not so sure of the validity of the grounds upon which I decided *Honan v Syntex*, namely, that the payment made was not under ‘statute or otherwise’. I think probably the payment was made ‘under statute or otherwise’, giving otherwise a broader scope than I gave it in that case but, in any event, the payments in that case of *Honan*’s were in view of, or were part wages made by the defendant employer and were probably rightly taken into account on that basis, namely that the loss of wages was really net of such payments and not gross.”

4.09 Thus, the practical effect of Lynch J’s interpretation of “or otherwise” in *Honan* is that, where the employer is also the tortfeasor, payments made by the benevolent employer may be taken into account when deciding on the amount of damages the defendant must pay. However, it seems to follow from the passage quoted above that Lynch did not purport to deal with a situation where the employer is

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<sup>86</sup> High Court (Lynch J) 22 October 1990.

<sup>87</sup> *Sturdy v Dublin Corporation* High Court (Lynch J) 18 Dec 1991.

not also the tortfeasor. Thus, the important point is that in such a situation section 2 would allow double recovery.

**(ii) Conditional payments**

4.10 In contrast to the previous category, with this type of sick pay an employer pays an employee sick pay on condition that if the employee recovers damages from a third party, he will repay this sum of money to the employer. White characterises this situation as follows:

“Unlike in the case of unconditionally payable sick-pay...the tortiously injured employee has sustained an actual loss of earnings for his contract of employment clearly contemplates such a loss as the wages or salary during the period of incapacity are paid only upon the basis of a collateral agreement between the plaintiff and his employer that if the wages or salary in respect of the period of loss are paid, he will recoup the employer in respect to the same upon recovery against the tortfeasor...In the case of such conditional payments, therefore, it is submitted that these are not to be taken into account in reduction of plaintiff’s claim for loss of earnings...”<sup>88</sup>

4.11 An analysis of four Irish cases in this field gives an insight into how the courts have viewed conditional sick pay. First, the fact that there was a contractual obligation to repay the benevolent employer in such instances was recognised by the Supreme Court in *McElroy v Aldritt*.<sup>89</sup> The plaintiff in that case sustained an injury as a result of the defendant’s negligence and continued to receive wages from his employer, despite being unable to work. The defendant claimed that the court, in assessing the plaintiff’s loss of earnings, should take into account the income which the plaintiff received from his employer during his absence from work. However, the plaintiff’s employer had made these payments on the condition that, if the plaintiff succeeded in tort against his wrongdoer, he would repay the wages to his employer. Lavery J, delivering the judgment of the

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<sup>88</sup> White *Irish Law of Damages* (Butterworths 1989) at paragraph 4.10.10. See also Cooper, “A Collateral Benefits Principle” (1971) 49 *Canadian Bar Review* 501 at 504.

<sup>89</sup> Supreme Court 11 June 1953.

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."<sup>90</sup>

4.12 A similar situation arose in the more recent case of *Boyce v Cawley*.<sup>91</sup> In this case, the plaintiff was employed by the ESB as a linesman and as a result of being injured in a road accident in January 1998 he was out of work for a considerable period. Evidence was presented of an agreement that was reached between the ESB and the trade unions in 1975 which entitled employees to receive advance payments during a period of absence from work due to sickness or injury ('the agreement'). In consequence of the agreement, which is described in more detail below, the plaintiff received payments from the ESB and therefore included a claim for special damages, with the intention of reimbursing his employer. Costello J stated that the question was:

"...[W]hether or not the fact that he entered into this agreement now deprives him of the right to maintain such a claim. I think it does not. It seems to me that both the Comprehensive Agreement and the Undertaking signed by the plaintiff in this case refer to the fact that advances are to be made and I think that...[counsel for the plaintiff] is correct in likening these advances to loans made by the employer to help the employee during the period of incapacity from work."<sup>92</sup>

4.13 He went on to state that:

"Quite clearly the employee has a contractual obligation to repay these sums out of damages, if he recovers damages, as he has in this case. That being the case it seems to me that once such an obligation exists the Plaintiff has shown that he

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<sup>90</sup> Supreme Court 11 June 1953 at 3.

<sup>91</sup> *Boyce v Cawley* High Court (Costello J) 13 November 1991.

<sup>92</sup> *Ibid.*

has a recoverable loss and has established, in my judgment, his entitlements to the claim for full Damages.”<sup>93</sup>

4.14 Once again, the legal effect of a conditional term in an employee contract was upheld. Although the outcome of both cases is the same, the tenor of them is slightly different. In *McElroy*, Lavery J focused upon the fact that the liability of the defendant wrongdoer should not be reduced on account of the voluntary payments made for the support of the plaintiff by his or her employer on condition that these would be recouped when the plaintiff was in a position to do so. However in *Boyce v Cawley* Costello J focuses more on the fact that the money had been loaned to the plaintiff and therefore the plaintiff was under an obligation to pay this back.

4.15 The line of law established in these cases had a number of beneficial effects. Employers could, in comfort, provide conditional sick pay for their employees. This may have had the effect of encouraging other employers to provide sick pay, in circumstances where they had not done so previously. The employee thus receives a payment quickly and does not have to wait until his compensation had been finalised. On the other hand, the employee, while receiving the benefits of sick pay, is not receiving a double payment, with all its attendant disadvantages in relation to encouraging absenteeism.

4.16 However, the subsequent case of *McGuinness v Reilly*<sup>94</sup> cast a shadow on these arrangements. In that case the plaintiff who, like the plaintiff in *Boyce* worked for the ESB, was injured in a road traffic accident in September 1987. She sustained a whiplash-type injury. As a result of her injuries, she did not return to work until 1989. She received payments equivalent to her salary from her employer, the ESB for most of that period. Morris J held that the defendant was entirely responsible for the accident and awarded the plaintiff £35,000 in general damages.

4.17 The 1975 Agreement was not brought to the Court’s attention. Therefore, Morris J held that, pursuant to the terms of her employment with the ESB she was entitled to the payments she received from her employer and that she was not obliged to return them. He further ruled that the defendant was entitled to have these

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<sup>93</sup> High Court (Costello J) 13 November 1991.

<sup>94</sup> High Court (Morris J) 30 November 1992.

sums deducted from the amount of damages which would otherwise be awarded. In short, because the 1975 Agreement was not mentioned to him, the judge categorised the situation as (to use our classification) a ‘class (a)’ case. A major consequence of this ruling was that the plaintiff did not repay the ESB.

4.18 This case, therefore, raised concerns for the ESB and other large employers who pay out sums of money to employees who are injured by third parties. They could no longer feel secure that conditional arrangements made with employees would come to the court’s attention. It was therefore not surprising that the next time that such a situation arose, in the case of *Hogan v Steele*<sup>95</sup> the ESB applied to have itself joined as a ‘notice party’. The plaintiff in that case, who was an employee of the ESB was injured while making a delivery to the defendant’s premises. He was unable to return to work and accepted voluntary retirement for more than three years after the accident. During those three years, the notice party made payments to the plaintiff equal to the amount of his salary. The plaintiff sued the defendant and the case settled for a sum of general damages, together with such sum as the court should decide the plaintiff was entitled to for loss of earnings.

4.19 Thus, the case turned on the question of whether the defendant had any liability to compensate the plaintiff for loss of earnings. It was argued by the defendant that the advances made by the notice party ensured that the plaintiff did not, in fact, suffer any loss. In response, evidence was adduced of an undertaking given by the plaintiff, whereby he agreed to repay to the notice party any sums which he might recover from the defendant for ‘loss of wages’. Evidence was also given in relation to an agreement between the notice party and the trade union representatives, known as “the 1975 Comprehensive Agreement” (mentioned earlier).

4.20 Finding in substance for the ESB Macken J awarded the plaintiff damages for loss of earnings as against the defendant and further ordered that upon receipt, the plaintiff repay this sum to the ESB:

**“Having regard to the true nature of the 1975 Agreement.... I am of the view that the plaintiff at all**

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<sup>95</sup> [2000] 1 ILRM 330.

**times knew and accepted that he had no automatic entitlement to the payments in question. He at all times knew and accepted that the monies were advanced on the basis that they would have to be repaid.**

I am also of the view that the notice party did not, at any time, agree that such payments would be made automatically to any injured party pursuant to terms of his employment...

Having regard to these findings, I am of the view that the plaintiff suffered a loss of earnings, that the defendant is obliged to pay the sums so lost to the plaintiff, and that the plaintiff is, in turn obliged to repay the same to the notice party. They are no more than the sum which, absent the notice party exercising a discretion to pay, and paying, would or could have been borrowed by the plaintiff from a local bank or from his credit union. Such borrowings, so long as they were reasonably incurred, would undoubtedly be payable from the defendant to the plaintiff as part of the plaintiff's special damages."<sup>96</sup>

4.21 Macken J went on to comment on the apparent difference in the outcome of the two earlier cases. First, she pointed out that, in *Boyce v Cawley* the outcome of which was the same as in *Hogan*:

“The learned judge accepted that the payments were correctly likened to loans made by the employer to help the employee during the period of incapacity from work. He drew attention to the fact that clause 9.9 is a discretionary clause and rejected the contention of the defendant that the ESB would have paid the monies regardless of whether the plaintiff had a good cause of action or not. The learned judge found that a contractual obligation existed on the plaintiff to repay the monies.”<sup>97</sup>

4.22 In relation to the case with the contrasting outcome, *McGuinness v O'Reilly*, in which it had been held contractual sick pay should be deducted, Macken J commented:

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<sup>96</sup> [2000] 1 ILRM 330 at 343. (Our emphasis).

<sup>97</sup> *Ibid* at 341.

“...on their face, it seems to me that the learned judge’s comments were both logical and correct. He accepted that the plaintiff was entitled under the terms of her contract of employment to receive the payments which she did... But it is unclear from the judgment that any terms of the 1975 Agreement were in fact opened to the judge, and it is equally unclear whether there was any debate at all as to the possible meaning to be attached to clause 9.9. The learned judge quite correctly accepted the evidence tendered him, which was apparently uncontested, as to the true nature to the plaintiff’s terms and conditions of employment. And having accepted that, he followed the cases, such as those at (a) above, which make it clear that no loss of earnings arises in these circumstances.

I am certain that had the learned judge had the benefit of the actual agreement of 1975...and finally it seems clear from his judgment that had the payments made been outside the terms of her contract of employment, and pursuant to an undertaking to repay, that the position would have been different. While I find therefore that there is an apparent conflict between the decision in the Boyce case and the McGuinness case, on a true comparison between the two, there is I believe, no sustainable conflict, since one is not comparing like with like.”<sup>98</sup>

4.23 In short, Macken J took the view that the reason for the outcome in *McGuinness* was that not all the facts were presented to the court.

**(iii) Voluntary payments**

4.24 As has been stated:

“Where the payments made by the employer are voluntary and unconditional, i.e., without obligation to repay on the part of the employee, such payments, like other voluntary payments, are non-deductible and do not go in reduction of the plaintiff’s damages for loss of earnings...”<sup>99</sup>

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<sup>98</sup> [2000] 1 ILRM 330 at 343.

<sup>99</sup> White *op cit* at 213.

4.25 If the *Honan v Syntex* interpretation of “payments arising” had applied to voluntary payments, this would have meant that account could not have been taken of these payments, as there would have been no obligation imposed on the employer. This, in turn, would mean that they would be deducted. The effect of this would be to relieve the tortfeasor at the expense of the donor. However, it is clear from Lynch J’s endorsement in *Honan v Syntex* of White’s treatment of this topic that that was not his intention. The same view emerges from Macken J’s explanation of Lynch J’s comments in *Honan v Syntex*:

“It was held by the learned judge that the words ‘or otherwise’ within the correct meaning of [section 2(b) of the 1964 Act] were words which form part of the same genus as ‘pension or gratuity’ and were no wider, and he therefore held that, since they did not come within the ambit of that section, they were to be taken into account. He explained that in his view the words were to be understood as being in the nature of a statutory obligation. But I do not think this ends the matter. The judgment implies that the defendant was obligated to make the payments in question, although an obligation which the defendant voluntarily undertook. At the very least the judgment makes it clear that there was no suggestion the payments were in any way of a purely voluntary or discretionary nature, without obligation, as the notice party contends for here.”<sup>100</sup>

4.26 It seems, both from this and from the use of the word “gratuity” in section 2(b) that charitable gifts of money to a plaintiff clearly come within the ambit of section 2(b) by reason of the reference therein to “gratuities.” Consequently, the law at the moment is that charitable gifts are not to be deducted in the assessment of the plaintiff’s damages.<sup>101</sup>

4.27 However, our policy throughout this chapter has been against double compensation. The ‘paid-for’ argument is inapplicable. Furthermore, paying someone double for them not to work actively discourages recovery and return to work. This is not a desirable outcome, to put it mildly. Not deducting sick pay from an award of

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<sup>100</sup> Per Macken J in *Hogan v Steele* [2000] 1 ILRM 330 at 340.

<sup>101</sup> See Chapter 2 above.

damages could also act as a disincentive for the benevolent employer to provide sick pay for his employees. This would be an unfortunate outcome, as the sick pay furnished by an employer provides a very valuable cushion to the plaintiff in the immediate aftermath of an accident. Accordingly in line with our proposals in respect of cases (a) and (b), we recommend that sick pay paid as a voluntary gift by an employer, under category (c), should be deductible from an award of damages.

4.28 At this point, we ought to note that we are recommending two rules which could potentially overlap and conflict, unless care is taken to indicate the scope of each. The first rule, considered in Chapter Two, is that charitable benefits are not deductible. In other words, double compensation is permitted in such circumstances. The second rule, just mentioned, is that sick pay is deductible. The question which then arises is how payments by an employer to an employee should be treated, which question is not affected by whether the employer also happens to be the defendant. The Commission's recommendation is that, when the payment amounts to sick pay, the general rule that sick pay should be deducted takes priority over the rule governing the non-deductibility of charitable benefits. This resolution naturally places a heavy premium on the proper characterisation of a payment as sick pay or not. We try to assist a court in this act of characterisation by including in the draft legislation the presumption that 'sick pay' includes "...any series of payments made by an employer to an injured employee, that resemble the employee's regular remuneration in frequency, amount of payment, or both."<sup>102</sup>

4.29 We believe that this definition should be a guideline and not a conclusive rule in order to allow room for judicial common-sense in rarely visited legal territory in which we think it would be difficult for a draftsman to anticipate all eventualities.

***(iv) Payment out of employer's insurance policy***

4.30 Following the analysis in previous sections, we consider that, as sick pay funded out of the employer's insurance policy has not been wholly paid for by the plaintiff, he should not be allowed double recovery. If, on the other hand, the sick pay derives from a policy of

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<sup>102</sup> See Chapter 2 above.

insurance that was exclusively paid for by the employee, then that employee should get double compensation. This result is achieved by the recommendations the Commission makes in this Chapter, as well as the draft legislation recommended in respect of insurance payments, the primacy of which is ensured by the wording recommended for the treatment of sick pay on the following page.

4.31 Since category (d) involves insurance and the insurance premiums may be paid by either the employee or the employer, as indicated above, this category of sick pay is dealt with in Chapter One.

## **Part C            Recommendations for Reform**

### ***(i)        Summary***

4.32 It may be helpful to the reader if we commence with a summary of the existing law as analysed in Part B. In review of what has just been said, we need not consider cases (c) and (d) any further here. In the remaining two cases, (a) and (b), the situation may be summarised as follows:

### ***(ii)      Contractual sick pay***

4.33 Here, the employer has paid the employee sick pay under his contract of employment and there is no express condition to repay. In *Honan* it was held that, at any rate, where the defendant and the employer are the same party, account should be taken of the amount of the sick pay. The position is not so clear where the defendant is not the employer.

4.34 The Commission takes the view that, even in this second situation, there should be no double recovery on the basis of the principle against double compensation: the employee has paid no premiums and consequently there is no basis on which the 'paid-for' argument would apply.

### ***(iii)     Conditional sick pay***

4.35 Here, the employer advances sick pay to his employee on the basis that this is repaid if the plaintiff succeeds against the defendant and recovers the money paid from him. In net terms, there is

therefore no double compensation in principle (a qualification to which we will return). (In practice, category (b) leaves open the possibility that double-recovery may occur; but this is something we shall consider later in this Chapter). It is necessary, however, for the law to accommodate the fact that, in this situation, the amount of the sick pay is not to be taken into account in the defendant's favour, by virtue of the fact that the plaintiff must repay it to his employer. The Commission seeks to achieve this result in the following draft, by the formulation "where the sick pay gives rise to a legally-enforceable debt".

4.36 *The Commission recommends that, in the context of sick pay, the law should state clearly that (so far as there is any at present) there should be no double compensation. We would achieve this result by providing in statute that:*

*"In assessing damages, ...account shall be taken of any sick pay paid in consequence of the injury; save that no account shall be taken where the sick pay gives rise to a legally enforceable debt or where the sick pay is a charitable donation."*

#### **Part D           Who Pays?**

4.37 As indicated, categories (c) and (d) are dealt with in other chapters (Chapters 1 and 2, respectively). On the basis of the assumption, outlined earlier, that there is no double compensation, we are concerned with the issue of who pays in two distinct situations: where the sick pay is paid without obligation to repay under contract and where it is a conditional payment.

##### **(i)       Contractual sick pay, with no obligation to repay**

4.38 As indicated earlier, the interpretation of section 2 that has been reached is that the provision does not apply in the case of contractual sick pay. Therefore, in assessing damages, account will be taken of any sick pay that was paid to the plaintiff pursuant to contract. The Commission has considered the policy implications of this in two types of situation. In the first place, where the employer and tortfeasor are the same person, account is taken of any payments

made by the employer.<sup>103</sup> This result is satisfactory, from the point of view of the principle against double compensation. No issue arises as to who should pay since there is only one possibility, the employer. We are, in effect, recommending no change to the law on this point and so no more need be said.

4.39 The second situation is where the tortfeasor and employer are not the same person. In this context, the manner in which section 2 has been interpreted would have the net result that the collateral source (the benevolent employer) would end up shouldering some of the tortfeasor's liability.

4.40 This problem is exacerbated by the fact that even if an employee's accident triggers the employer into seeking an agreement from the employee to repay the money, this subsequent agreement will not be recognised by the courts.<sup>104</sup> In *McGuinness v Reilly*<sup>105</sup> for instance, the plaintiff who was injured in a road traffic accident received payments equivalent to her salary from her employer, the ESB for most of the period she was out of work. Shortly after her accident the ESB required her to sign an agreement to refund the ESB for the advance payments. Morris J held that the defendant was entirely responsible for the accident and awarded the plaintiff general damages. He further held that notwithstanding this "purported agreement" the ESB was contractually obliged to make the payments which had been made to the plaintiff and that the plaintiff was thus under no obligation to refund the sum advanced. Morris J concluded that the plaintiff was not entitled to claim special damages.

"With regard to loss of earnings the plaintiff was paid by her employers while she was away from work ... the plaintiff... is entitled under the terms of her employment to receive payment from the ESB while she is out of work irrespective of whether her absence from work is as a result of an illness or an accident.

The Plaintiff executed a document on the 22/9/87 whereby she purported to agree that in consideration 'of the ESB making me advance payments during my absence from duty' to refund

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<sup>103</sup> *Honan v Syntex (Ireland) Ltd* High Court (Lynch J) 22 October 1990.

<sup>104</sup> *McGuinness v Reilly* High Court (Morris J) 30 November 1992.

<sup>105</sup> *Ibid.*

the Board out of any moneys which she recovered by way of damages from the Third Party the total amounts so advanced. However, the agreement to pay the ESB is based upon a purported consideration of the ESB making the plaintiff the advance payments. I am satisfied from the evidence which I have heard that the ESB were obliged to make these payments apart altogether from the purported agreement of the 22/9/87. I therefore hold that the Plaintiff is under no obligation to refund the ESB the sums advanced and accordingly she is not entitled to claim them as special damages in this action.”<sup>106</sup>

4.41 The effect of the decision that the money paid by the ESB would be taken into account in the assessment of special damages was that the ESB ended up shouldering some of the defendant’s liability. In this context the benevolent employer is paying the price for another’s negligence. This case is one which turns upon its own specific facts and does not preclude the efficacy of such recoupment clauses.

4.42 From a practical perspective, the major attraction of the present position is its simplicity: the loss lies where it falls, and all the cost implications of readjustment are avoided. However, from the perspective of justice, this position may be regarded as unsatisfactory. The benevolent employer is paying the price of another’s negligence.

4.43 Moreover, there is an additional policy aspect which must be taken into consideration: the value of encouraging employers to pay sick pay. In the present situation, the law has the reverse effect. Bearing in mind these divergent policies, two possible methods of reform ought to be considered.

### ***Options for reform***

(a) *Informing employers and solicitors of the need to impose a requirement of repayment*

4.44 The simplest method would be for an employer, when advancing sick pay, to do so on the basis that it must be repaid by the employee, if he secures damages from a third party in a legal action. In terms of the typology of this Report, this would mean advancing

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<sup>106</sup> *McGuinness v Reilly* High Court (Morris J) 30 November 1992 at 6.

money by situation (b), in which the payments have to be reimbursed by the plaintiff from monies received from the wrongdoer. This is in contrast to situation (a) in which the plaintiff employee is paid unconditionally by his or her employer and recoverable loss exists against the wrongdoer.

4.45 Practitioners have informed us that many employers either do not know, or have given no thought to the notion, that they can incorporate conditional obligations into their contracts. This is something which needs to be taken into account at the stage at which the contract is drawn up, not after the accident has occurred.

4.46 *In view of this, one straightforward reform would be to highlight to employers that the mechanism of conditional sick pay is a legally recognised mechanism available to them to protect their interests. We recommend therefore, that the Law Society of Ireland and employers' organisations consider issuing a circular to bring this option to their members' attention.*

*(b) The establishment of a statutory presumption*

4.47 Given that the previous recommendation may not alert all employers to the possibility of attaching conditions to the payment of sick pay and would not change matters for the employers with existing employee contracts, the question arises whether the Commission should go further. The next proposal, therefore, would be that, instead of leaving it to the employer to include the appropriate term in the contract of employment, a term would be inserted by statute, which would have the same effect. Thus, where a benevolent employer pays contractual sick pay to an employee injured by a third party, this payment would be presumed to be by way of advance or loan. Such intervention would be analogous to the protection of the consumer under the *Sale of Goods and Supply of Services Act 1980*.

4.48 However, there are a number of possible disadvantages to such a change. First, from the point of view of principle, this is an interference with freedom of contract. One question which arises in this regard is whether the intervention is justified since the employer could have protected himself. Secondly, if such a statutory term were established, several significant points of detail would have to be settled. If a loan analogy is being used to justify recommending the presumption, the exact terms of the 'loan' would have to be set out,

such as the amount the tortfeasor would have to pay to the plaintiff and whether the presumption would be drafted so widely as to encompass tax and PRSI. Another issue to be determined would be whether contributory negligence would have any impact on the amount the plaintiff would have to repay, for instance where the reduction in damages was due to the employee's negligence, would the employee be liable for the remainder? If, as might be desirable from the employer's perspective, the loan were to be made repayable by way of deductions from the employee's salary, the employee's express sanction would have to be given. Finally, it would have to be settled whether the presumption was rebuttable by express words to the contrary.

4.49 Of course, a number of employers will already have dealt in their employee's contract of employment with the possibility of sick pay being advanced and repaid. Thus, in many cases, they will have settled the questions just raised. The issue arises, therefore, whether the sort of legislation under discussion here would override the rule laid down in the contract of employment, or whether it would apply only where the matter had not been resolved in the contract.

4.50 We assume that it is likely that most employers who pay out sick pay on a regular basis and for long periods use conditional sick pay contractual terms. The statutory presumption would, therefore, have most impact in areas where only small amounts of money are involved.

4.51 *The Commission does not recommend the creation of a statutory presumption that sick pay is advanced on the condition that it will be repaid if the employee recovers an award of damages.*

(c) *Court Order*

4.52 A third and final option for the reform of the law applicable to contractual, non-conditional sick pay, is that the court which awards the damages could demand an undertaking from the plaintiff to pass the money on to the employer. A useful illustration of this possibility arose in the context of a conditional payment in *Hogan v Steele*.<sup>107</sup> Here, Macken J ordered that the plaintiff recover the sum of

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<sup>107</sup> [2000] 1 ILRM 330.

£30,475.87<sup>108</sup> for loss of earnings from the defendant and further ordered that the sum be paid on receipt by the plaintiff to the notice party. In practice, such an undertaking may be necessary to prevent the plaintiff spending the money and also to ensure that the money is passed on to the employer.

4.53 The court may award damages on condition that the plaintiff reimburse the collateral source with the value of the benefit which the plaintiff had received. Cooper has noted that the English and Canadian courts have employed this mechanism, even where only a moral obligation existed.<sup>109</sup> 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. 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 of reimbursement, would unjustly burden the collateral source to the effective relief of the tortfeasor.

4.54 The court’s intervention in this regard has its attractions. An order of the court that the plaintiff is obliged to repay the benefit to the employer, should avoid the need for the employer to bring further legal proceedings to establish the obligation to re-pay. In the event that the plaintiff fails to comply with the court order, steps may then be taken to enforce the order. This device also has the advantage of appearing to be simple and flexible, since it can be tailored to individual circumstances. As has just been indicated by reference to *Hogan* it can be operated under the existing law, with no need for any legislative change. The Commission considers that it is worth highlighting the device of a court order to the effect that the plaintiff must reimburse the collateral source and we recommend that the courts make use of such a device in appropriate circumstances.

4.55 This device will not always work, however. The employer will often not be represented or be a notice party in the action taken by the employee and the court may decline to make the order. A

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<sup>108</sup> Euro equivalent of €38,704.35.

<sup>109</sup> D Cooper “A Collateral Benefits Principle” (1971) 49 *Canadian Bar Review* 501 at 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.

further drawback is that most cases will not end up in court, but will be settled and there would therefore be no opportunity for the court to order the plaintiff to give an undertaking.

**(ii) Conditional payments**

4.56 Here, what happens in theory is that the collateral benefit (sick pay) cannot be taken into account by the defendant to reduce the amount of damages by virtue of the fact that the plaintiff will have to repay to the employer the amount advanced to him by his employer. In theory, this is a good system: the plaintiff is compensated once and once only and the net result is that the compensation comes from the defendant or his insurance company. Thus, theoretically, there is no cause for concern as to who pays. Instead, in this section, there is a practical concern to be considered. In some cases the employee-plaintiff receives moneys from the defendant, but fails to pass them on to his employer. We consider this difficulty here. The same difficulty could have arisen in the context of contractual sick pay if a statutory recoupment mechanism had been adopted.

4.57 The first point to note by way of background, is that different employers will have different standards and different attitudes to the payment of sick pay. Some employers pay sick pay to their employees systematically,<sup>110</sup> others do not pay sick pay at all. In between lies the employer who pays sick pay on an *ad hoc* basis and usually only in cases of hardship. These varying attitudes are, in turn, reflected in the reporting back facility. At one end of the spectrum are employers, who have a medical benefit section that would advise them if someone was out sick and if a third party is involved. Employers with few employees would also be likely to be aware of sick leave of their employees and the cause thereof. At the other end of the spectrum are the employers who have no 'reporting back' facility. These employers often do not recoup sick pay. They do not have a clear picture of how often or how much double recovery occurs. Thus the employer's practice and attitudes vary substantially.

4.58 We should interpolate at this point that, whereas employees who were employed on a "permanent and pensionable basis"<sup>111</sup> in the

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<sup>110</sup> The ESB have a comprehensive agreement with the trade unions since 1975 in this regard.

<sup>111</sup> Employees who came within PRSI contribution class D1.

public sector formerly paid a lower rate of PRSI contributions,<sup>112</sup> this position changed in April 1995 and all employees now pay full PRSI and receive commensurate welfare benefits. The importance of encouraging employers in the public sector to provide financial assistance in the immediate aftermath of an accident has therefore diminished since 1995. The amount of sick pay at issue is accordingly less, and in most cases, it is supplemental to other benefits. It is therefore likely that some employers may not bother to seek the return of this sick pay.

4.59 The other variable factor is how long an employer is willing to pay an employee sick pay. The duration of payment and its aggregate amount naturally affects whether an employer feels it worthwhile to pursue this money. One employer to whom we spoke typically pays out sick pay for a period of a few weeks or a month and does not generally seek repayment thereof. On the other hand, another employer has experience of people being out of work for up to four years. Thus, there is a big qualitative difference between employers and this may influence their decision whether to seek repayment of sick pay. An additional factor that may influence an employer's decision not to pursue a contractual remedy against an employee is the cumbersome nature of the conditional sick pay arrangement.

4.60 The result of all these factors is that employers do not always seek to recoup sick pay and double recovery therefore does sometimes occur. This, in turn, operates as an incentive for employees not to return to work at the earliest possible opportunity, which, in turn, results in employers being less willing to pay sick pay in the first place. Therefore, the best way to encourage the payment of sick pay by employers and to encourage people to go back to work at the earliest opportunity is to have an efficient and 'easy-to-use' mechanism available for them to recoup this money.

4.61 In broad terms, there are three possible reasons why the conditional payment system does not always result in an employer

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<sup>112</sup> The effect of the pre-1995 state of affairs was highlighted by Costello J in *Boyce v Cawley*: "The plaintiff, being employed in the ESB, is regarded, for the purpose of the *Social Welfare Act* as being employed in the public service sector. The evidence establishes that under the Social Welfare code he is regarded as being in the D1 class of that code. **This means, in fact, that he is not entitled to any unemployment assistance or disability benefits under the Social Welfare Act.**" (Our emphasis).

recovering from his employee, the money which was advanced. First, even where an employer does decide to incorporate and operate a conditional term, the employee may spend or refuse to pass on the money owed to the employer. While the employer has a legal remedy, such as an action for breach of contract, available to him, it is unlikely that an employer would be willing to sue his own employee, as such a course of action would not be good for labour relations in the workforce in general.

4.62 Secondly, the *McGuinness* case illustrates the drawbacks of a system where the collateral source interests were not fully represented. In particular, this case illustrates the difficulty of accommodating the interests of a collateral benefit provider, within a legal action between two other parties.

4.63 Finally, most cases will not end up in the court but will be settled. This might lead to certain disadvantages for the collateral benefit provider as, unlike court cases, settlements are not usually in the public domain and the employer has no possibility of being personally represented or present. The employer may not even know that a third party exists against whom a potential claim could be made. A practical problem which could arise is in the context of an 'out of court' settlement. The sum eventually paid on by the 'plaintiff-employee' to his employer will usually depend upon the amount of the loss of earnings head in the settlement. There might seem a danger that this amount might be reduced, but with a corresponding gain in another head, in order to give an advantage to the plaintiff.

4.64 In response to questions, we have been informed by practitioners that the issue of conditional sick pay does not make settlements more drawn out or difficult. We were also informed that, following *Hogan v Steele* the legal position concerning advances equivalent to sick pay has been clarified.

4.65 The legal position is that advances equivalent to sick pay are just another head of special damages and are easy to quantify.

4.66 Nevertheless, we are left with the difficulty that the employee may not pass on the money received from the defendant to his employer, in repayment of the advance of sick pay. Three possible solutions may be considered:

(a) *Statutory recoupment*

4.67 One of the options for reform the English Commission considered when examining collateral benefits in general, was the provision of a statutory recoupment right. However, they ultimately decided against it. Their conclusions offer a useful insight:

“We considered that the arguments of principle for and against an automatic recoupment right were finely balanced. We recognised the force of the “unjust enrichment” argument - at the same time we acknowledged (with the possible exception of charitable payments) that any ‘injustice’ was weakened by the third party’s opportunity to provide contractually for repayment of the collateral benefit (or to render the benefit conditionally). On that basis, we considered that general policy considerations were crucial in determining whether there should be an automatic recoupment right.<sup>113</sup>

We thought that there was a real question whether there would be any practical point in creating new statutory recoupment rights. We found it significant that provision for, and enforcement of, recovery rights is not widespread. This suggests that if the law were changed to provide for third parties to have recoupment rights, there would probably be little change in practice.

Even if providers of collateral benefits would enforce a new automatic recoupment right, we noted policy arguments against this option for reform. First, the transaction costs of allocating tort liability for personal injury are already very high and are borne by large groups in society. A recoupment

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<sup>113</sup> The Law Commission of England and Wales *Report on Damages for personal injury: medical nursing and other expenses; Collateral Benefits* (No 262 1999) at 145.

right for third party providers of collateral benefits which enforced would increase costs still further.

We have concluded that we should not recommend a new statutory right for the provider of a deductible collateral benefit to recoup its value from the tortfeasor. We are influenced by the limited support amongst consultees for statutory reform in this area. Again, many consultees considered it sufficient that collateral benefit providers can provide contractually for recoupment.”<sup>114</sup>

4.68 This conclusion is based on the reasoning that the employer already has at his disposal a legal mechanism to secure payment and if he fails to utilise it, then he cannot be heard to complain. The common law is the same here as in England on these points. We accept the approach favoured in England, therefore, and do not recommend a statutory recoupment right.

*(b) The use of undertakings*

4.69 One possible solution to the problem of how to ensure recoupment of sick pay to employers, when due, is a simple mechanism that is already used in some similar instances. This option involves the giving of an undertaking that the monies due to the employer will be held on behalf of and re-paid to the employer if and when the employee receives an award of damages. Some employers have sought such an undertaking<sup>115</sup> from the plaintiff’s solicitors in the context of ‘out of court’ settlements. Under such arrangements, the employee-plaintiff would be required to agree to the giving of this undertaking and its terms with his solicitor, before the employer would pay the sick pay.

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<sup>114</sup> The Law Commission of England and Wales *Report on Damages for personal injury: medical nursing and other expenses; Collateral Benefits* (No 262 1999) at 148.

<sup>115</sup> The Law Society of Ireland has set out “Principles relating to Professional Undertakings: Professional Guidance Committee of the Law Society of Ireland”, which defines “an undertaking” as follows: An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor in the course of his practice, either personally or by a member of the solicitor’s staff whereby the solicitor (or in the case of a member of his staff, his employer) becomes personally bound.”

4.70 There are a number of practical questions that need to be addressed in relation to this option:

4.71 First, and perhaps most fundamentally, will the particular employee's solicitor agree to this arrangement? This is entirely dependent upon the personal relationship between the solicitor and client and cannot be interfered with by any third party.

4.72 A second practical aspect of using undertakings to ensure repayment of sick pay to an employer is that, even if an undertaking is given, its terms will depend on the particular circumstances of the employment relationship, the sick pay and the award of damages. The terms of an undertaking would have to deal with the fact that there may, in fact, be no damages award, or that the award may be less than wages paid in advance and numerous other factors outside the control of a solicitor. Presumably, the terms of the undertaking would also deal with the very common situation in which there is a settlement out of court and may state that the employee's solicitor will have to agree any reduction in the damages sought with the employer. Thus an employer would have to be convinced it is getting a proportionate share of the damages before it would confirm that the undertaking had been discharged. This is, of course, a matter of some difficulty, since the employer's solicitor is unlikely to be represented at the negotiations.

4.73 From consultations with a number of legal practitioners who represent large employers, we formed the view that solicitors are usually reluctant to give undertakings, but will do so where, as is often the case, their client needs the undertaking because a well-intentioned employer has advanced money to the employee to keep him afloat pending the court case, but is insisting on an undertaking as a form of security. These practitioners have encountered no problems with the giving of undertakings by solicitors in such instances.

4.74 No third party – not the Law Society and certainly not the Law Reform Commission – can recommend that any particular solicitor should give an undertaking in any particular case. All that the Commission can do is to note the possible advantage of such an arrangement, whilst also stressing its possible dangers. It is for the parties involved, especially the employee's solicitors, to assess

whether an undertaking should be given in the circumstances of any particular case.

4.75 A solicitor may decide to give an undertaking to his client's employer that the monies due to the employer will be held on behalf of and re-paid to the employer if and when the employee receives an award of damages. This may be done, for instance, where it appears to be the only way to ensure his client will receive a financial contribution, in the form of sick pay, from his employer. The benefit of such an undertaking is that it would give the employer reasonable confidence that his advance would be paid back out of any damages.

## Summary of Recommendations in Chapter 4

- (1) The Commission recommends that, in the context of sick pay, the law should state clearly that (so far as there is any at present) there should be no double compensation. We would achieve this result by providing in statute that:

“In assessing damages,... account shall be taken of any sick pay paid in consequence of the injury; save that no account shall be taken where the sick pay gives rise to a legally enforceable debt or where the sick pay is a charitable donation.” [paragraph 4.36]
- (2) The Commission considers that one straightforward option for reform would be to highlight to employers that the mechanism of conditional sick pay is a legally recognised mechanism available to them to protect their interests. The Commission recommends therefore, that the Law Society of Ireland and employers’ organisations consider issuing a circular to bring this option to their members’ attention. [paragraph 4.46]
- (3) The Commission does not recommend the creation of a statutory presumption that sick pay is advanced on the condition that it will be repaid if the employee recovers an award of damages. [paragraph 4.51]

## CHAPTER 5 SOCIAL WELFARE PAYMENTS

### Part A Social Welfare

5.001 The term ‘social welfare payment’ in the wide sense in which it is used in this Report, refers to the range of income support payments administered by the Department of Social and Family Affairs or the Health Boards.<sup>116</sup> There are three major categories, of which the first two are paid by the Department and the third by the Health Boards.

#### (i) *Social insurance benefits*

5.002 A person’s eligibility for social insurance benefits depends on the payment of social insurance contributions in the form of Pay Related Social Insurance (PRSI) by that person. These contributions are compulsorily paid by employers, employees and the self-employed into the Social Insurance Fund. Upon payment of the requisite number of contributions, the individual becomes entitled to a variety of benefits irrespective of any other income they may have.<sup>117</sup> Social insurance benefits are financed by ‘current income financing’. This essentially means that the contributions made in a given year are applied to making payments to beneficiaries in that year,<sup>118</sup> with any deficit being met by the Exchequer and funded out of general taxation. Due to a number of factors, including the more buoyant economic conditions in recent years, the demographic balance between the people contributing and those receiving benefits and the

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<sup>116</sup> Until 1997, this Department was known as ‘The Department of Social Welfare’ – see *Social Welfare (Alteration) Order* (SI No 307 of 1997). It is now known as the Department of Social and Family Affairs.

<sup>117</sup> The range and length of entitlement to benefits is governed by an individual’s PRSI class and the period over which contributions have been made.

<sup>118</sup> Sections 6-8 of the *Social Welfare (Consolidation) Act 1993*; and see Department of Social Welfare *Social Insurance in Ireland* (1996) paragraph 2.3 and in general.

inclusion of the self-employed in the scheme from 1998, there has been no Exchequer contribution required since 1997. This will alter, however, with the ageing of the population.

**(ii) Social assistance payments**

5.003 Eligibility for social assistance payments is determined by a means assessment, whereby an individual qualifies for assistance payments provided that their income is below a certain threshold level. Generally, the recipients of social assistance will have either no or insufficient social insurance contributions to qualify for social insurance benefits. Hence, social assistance payments are financed by general taxation.

**(iii) Health Allowances**

5.004 As with the previous category, these are means-tested. Broadly speaking, their objective is to attempt to compensate for loss of faculty by a range of specific payments, which help the recipient to stay active in the community. For example, mobility allowance is paid to people with severe disabilities who are unable to walk, but would benefit from a change in surroundings.

5.005 Since health allowances are paid out of general taxation the policy considerations that apply to health allowances, such as the so-called ‘paid-for’ or ‘social wage’ arguments also apply to social assistance payments. Accordingly, we shall not deal with health allowances separately and it will be understood, unless the contrary is indicated, that what is said about social assistance payments applies also to health allowances.

5.006 As a final preliminary point,<sup>119</sup> we ought to emphasise that section 2(b) is confined to payments made “in consequence of the injury” and it is implicit that the same injury gave rise to the award of damages. It is important to note that the social welfare system is contingency-based and in order to qualify for a social welfare benefit, a person must experience one of a number of contingencies, such as

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<sup>119</sup> On this paragraph, see generally: *Ryan v Compensation Tribunal* [1997] 1 ILRM 194; McMahon & Binchy *Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) paragraph 44.128; Law Reform Commission *Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits* (CP 15 - 1999) at paragraphs 7.39 and 7.63-64.

sickness, maternity, unemployment, old age, invalidity, among other.<sup>120</sup> Thus, a social welfare benefit can be categorised as a collateral benefit only if the contingency giving rise to the payment in question, was the accident that also gave rise to an award of damages. It is only in this circumstance that there is a possibility of double compensation and a need to consider whether the exclusionary rule contained in section 2 together with such changes as are recommended in this Report, apply.

## **Part B Double Recovery in the Context of Social Welfare**

5.007 Section 2(b) of the *Civil Liability (Amendment) Act 1964* uses the phrase “any pension, gratuity or other like benefit payable under Statute.” Therefore, the scope of section 2 is determined by the meaning given to the word “benefit”. Used in its ordinary and natural sense, the word means ‘advantage’ and the words “benefit payable under Statute” in section 2 are clearly broad enough to embrace every kind of social welfare payment.<sup>121</sup> Moreover, “benefit payable under statute” is broad enough to encompass both kinds of social welfare payment, *ie* social insurance benefits and social assistance (including health allowances). There is a second argument that favours the same conclusion: as we shall see in Part D, sections 75 and 237<sup>122</sup> of the

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<sup>120</sup> It should be noted, in respect of social welfare payments, that a person may experience more than one contingency at any one time. For example, a woman who is out from work on sick leave could also be pregnant. In this case, the woman could have entitlement to both disability benefit and maternity benefit at the same time. The **concurrent** payment of more than one payment is generally not allowed under the social welfare code. To take an example, **Maternity Benefit** and **Disability Benefit** would not each be payable at the same time. Since **Maternity Benefit** is normally payable at a higher rate than disability benefit, this is the payment that would be paid for the duration of the maternity leave period. On the face of it, therefore, while maternity benefit would not normally be considered a “collateral benefit”, depending on the circumstances, (such as those outlined above) it could have the **effect** of compensating a plaintiff for the same loss of earning as **Disability Benefit**.

<sup>121</sup> White *Irish Law of Damages* (Butterworths 1989) at paragraph 4.10.15. In reaching this conclusion, White looked at how the courts construed “benefit” in the context of section 50 of the *Civil Liability Act 1961*. The same provision was also looked at by Geoghegan J in *Greene* in interpreting the scope of section 2 in the context of sick pay.

<sup>122</sup> Section 237 states: “Notwithstanding section 2 of the *Civil Liability (Amendment) Act 1964*, ...in assessing damages in any action in respect of

*Social Welfare (Consolidation) Act 1993* provide that, in defined circumstances, certain benefits should be deducted from awards of damages for the five years beginning from the time the cause of action accrued. These sections are expressly stated to apply “notwithstanding section 2 of the *Civil Liability Act 1964*.” It may be deduced from this phrase that social welfare payments are included within section 2 unless, of course, they fall within the wide exceptional categories established by the 1993 Act. The importance of this interpretation resides in the fact that such payments include unemployment assistance and supplementary welfare allowance, both of which may be paid as a result of an accident.

5.008 The interpretation just explained was adopted in *Kiely v Carrig Junior & Cosgrave*.<sup>123</sup> The plaintiff was a butcher running his own business. He was a rear seat passenger in a motor car which was involved in a major collision with the defendant’s vehicle. It was accepted by the court that, as a result of the accident, the plaintiff would never be fit for a full range of heavy manual work, including that of butcher. Barr J acknowledged that the “calculation of loss of earnings to date presents a complication, *ie*, whether the unemployment assistance paid by the Department of Social Welfare to the plaintiff should be taken into account or not.”<sup>124</sup> He then referred to the wording of section 2 and stated:

“Unemployment assistance as opposed to normal unemployment benefit is an unusual benefit. ...It appears to have been paid by the Department of Social Welfare in this case because during his period of self-employment, the plaintiff had ceased to pay PRSI contributions and therefore had ceased to be eligible for various benefits to which otherwise he would have been entitled.”<sup>125</sup>

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liability for personal injuries not causing death relating to the use of a mechanically propelled vehicle..., there shall be taken into account the value of any rights arising from such injuries which have accrued, or are likely to accrue, to the injure person in respect of disability benefit or invalidity pension...for the period of 5 years beginning with the time when the cause of action accrued.”

<sup>123</sup> *Kiely v Carrig* High Court DPIJ (Trinity & Michelmas 1996) at 209 – see further McMahon and Binchy *Irish Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) at 1147 footnote 160.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

5.009 He concluded that unemployment assistance did fall within the terms of section 2(b):

“I am satisfied that if the accident had not happened, the plaintiff probably would have found employment in the meat trade soon after the collapse of his own business and the question of claiming any social welfare benefit would not have arisen. It follows therefore that within the meaning of section 2(b) of the 1964 Act, the weekly unemployment assistance received by the plaintiff was a benefit ‘payable in consequence of the injury’ sustained by him in the accident and accordingly ought **not** to be taken into account in assessing his loss of earnings to date.”<sup>126</sup>

5.010 Thus the position seems to be settled that the phrase “other like benefit” in section 2(b) encompasses social welfare assistance.

### **Part C            The Impact of the ‘Paid for’ and ‘Social Welfare’ Arguments on Social Welfare Payments**

5.011 As indicated in the previous Part, the general legislative principle established by section 2(b) of the *Civil Liability Act 1964* is that the amount of any welfare benefits should *not* be deducted from an award of damages. In this Part we shall consider whether this law can be justified on policy grounds. The cardinal policy consideration considered in the insurance chapter is whether the payment of double compensation can be justified on the basis that the plaintiff had ‘paid for’ the collateral benefit. The Commission has considered whether this argument applies in the context of social welfare benefits, dealing first with social welfare assistance and then social insurance benefits. However, we should note that there has been a re-appraisal of the law in this area, in the form of the *Social Welfare (Consolidation) Act 1993*, which has substantially uprooted this principle. We shall postpone consideration of the 1993 Act until Part D.

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<sup>126</sup> *Kiely v Carrig* High Court DPIJ (Trinity & Michelmas 1996) at 209 (Our emphasis).

**(i) Social welfare assistance**

5.012 White has argued that, even if social assistance did not fall within section 2 it would still be non-deductible at common law, by analogy with charitable assistance.<sup>127</sup> He relied on comments by Lord Reid in *Parry v Cleaver*<sup>128</sup> in this regard:

“It would be revolting to the ordinary man’s sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. 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.**”<sup>129</sup>

5.013 However, twenty years later, Lord Bridge in *Hodgson v Trapp*<sup>130</sup> considered 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. Lord Bridge looked at the realities of the situation and came to the following conclusion:

“...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 policyholders, 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.”<sup>131</sup>

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<sup>127</sup> White *Irish Law of Damages* (Butterworths 1989) at paragraph 4.10.16.

<sup>128</sup> [1970] AC 1.

<sup>129</sup> *Parry v Cleaver* [1970] AC 1 at 14. (Our emphasis).

<sup>130</sup> [1989] AC 807.

<sup>131</sup> [1989] AC 807 at 823. (Our emphasis).

5.014 The Commission regards Lord Bridge's view of the analogy between social welfare payments and charitable donations as more in keeping with contemporary reality and justice than the earlier view.

5.015 Social welfare assistance payments are not funded by employee contributions or even employer contributions but are paid by the State and, in other words, are financed by the public generally through taxation. These payments are not in the same category as charitable payments.

*5.016 Since social welfare assistance is not funded by either employee or employer contributions, the Commission believes that the argument that the employee has directly or indirectly 'paid for' the social welfare assistance through his/her labour is inapplicable. The Commission also rejects the argument that an analogy should be drawn between social welfare assistance and charitable donations. From a policy point of view, the Commission recommends that social welfare assistance should be deducted from awards of damages.*

5.017 In any case, from a practical point of view, the significance of double recovery in the context of social welfare assistance may be somewhat reduced by two circumstances:

5.018 In the first place, many recipients of social welfare assistance will not have been in employment immediately before qualifying for that payment. Therefore, awards of damages for personal injuries to such persons might not include an award for loss of earnings, on the basis that, even had he not been injured, the plaintiff would have continued to be unemployed. Any social welfare assistance that is paid in such circumstances, is, of its nature, not to be regarded as a collateral benefit.

5.019 Secondly, the use of a means test to determine entitlement to social welfare assistance is significant. In assessing means for this purpose, account is taken of the person's capital as well as their income, capital being interpreted to include any award of damages. Therefore, a plaintiff who receives an award of damages is less likely to satisfy the means-testing criterion, and may lose the right to receive social welfare assistance.<sup>132</sup> However, this argument is weakened by

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<sup>132</sup> 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

the fact that a substantial amount of social welfare assistance is usually paid before the damages are awarded or the case is settled. Consequently, the longer the case takes to come to court the greater the gain to the plaintiff, in terms of double recovery.

**(ii) Social insurance benefits**

5.020 Some of the considerations which arose in the chapter on private insurance are also relevant in the context of social insurance benefits.<sup>133</sup> The first of these is the so-called “double compensation” argument. In this regard, Cane submits that

“the strongest argument against duplication is that tort damages and social benefits (whether contributory or not) are paid for by much the same group of people (that is, a significant section of the public), and there is no justification for paying double compensation for the same loss at the expense of the same group.”<sup>134</sup>

5.021 The second argument that is relevant is the so-called ‘paid-for’ argument. It has been urged that payments by the employee in the form of Pay Related Social Insurance (“PRSI”) payments should be treated in a similar fashion to insurance premiums: the social insurance benefits ought not to be deducted, by virtue of the fact that the plaintiff has in some sense ‘paid for’ these payments. In support of this view, MacKenzie J criticised section 237 of the *Social Welfare Act 1993* (which allows deduction in particular circumstances) on the basis that the payments in question are usually paid to the plaintiff as a result of his or her PRSI contributions:

“Why should the insurance company take advantage of those payments? A man who gets disability or disablement is in fact **getting his own money back**; it strikes me as grossly unfair

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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.*

<sup>133</sup> See Chapter 1.

<sup>134</sup> Cane (ed) *Atiyah's Accidents, Compensation and the Law*, (6<sup>th</sup> ed Butterworths 1999) at 326-327.

and to a degree contrary to natural justice to “attack the money he is getting for suffering.”<sup>135</sup>

5.022 Indeed, the introduction of the forerunner to section 75 of the 1993 Act was justified by the then Minister for Social Welfare Mr. Boland, by reference to the method of financing the occupational injuries scheme. He stated that the occupational injuries scheme was “entirely financed by the employer”.<sup>136</sup> The Minister responded to an opposition amendment by observing that “if 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.”<sup>137</sup>

5.023 In the case of occupational injury benefits, it is the employer who in effect pays the entire amount of the contributions. In such a situation, it cannot be argued that the employee paid directly for the benefit. However, it has been argued in this context, as it was in relation to insurance proceeds, that the employee indirectly paid for the benefits through his work:

“Why allow an employee, who has not paid any part of the insurance premium, the full benefit of both social insurance and private law forms of redress? It is possible to meet these arguments by looking upon the occupational injuries scheme as a part of the consideration paid by an employer to his workforce. This idea is compatible with a concept known to economists as “the social wage.”<sup>138</sup>

5.024 To appreciate these arguments, we need to appraise the character of social insurance benefits. Social Insurance, by definition, combines: (a) features of State income maintenance schemes, based on the ‘principle of solidarity’ and (b) features of commercial insurance, in which entitlement to benefits is related to contributions paid.

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<sup>135</sup> *O’Loughlin v Teeling and Anor* [1988] ILRM 617 at 619. This statement was made in the context of commenting on the fact that under section 237, deduction is not just in relation to loss of earnings but in respect of general damages.

<sup>136</sup> *Dáil Debates* Vol 220 col 1108.

<sup>137</sup> *Dáil Debates* Vol 219 col 138.

<sup>138</sup> Clark “Damages and Social Welfare ‘Overlap’” (1984) *Ir Jur* 40 at 44.

5.025 The ‘principle of solidarity’ means, in effect, that there is no proportionate link between the likelihood that a person will suffer unemployment, occupational accidents, disease or permanent incapacity to work and the contributions a person is required to pay. Social welfare benefits are principally related to an insured person’s circumstances (eg whether she or he has a dependent spouse or children). Benefits are based to a lesser extent on a person’s previous income and the level of PRSI contributions which they have paid. The view has been expressed by some, although not without dissent, that Social Insurance is just another tax.<sup>139</sup>

5.026 These arguments bring us back, in the end, to the basic question of whether and to what extent a plaintiff has paid contributions and to what extent the payments were in fact made by an employer. As can be seen from the following table, employees as a group pay only a relatively small portion of total PRSI receipts and

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<sup>139</sup> *Social Insurance in Ireland* (1996) paragraph 4.3-4.3.11. The *Commission on Taxation* (CoT) took the view that Social Insurance contributions are a tax, largely because, in their view, there was an insufficiently close relationship between Social Insurance contributions and benefits. In the CoT’s view, Social Insurance contributions conform to two distinguishing characteristics of taxation because “they are compulsory payments to central and local authorities and [secondly, because] benefits do not necessarily accrue in proportion to [contributions]”. CoT *First Report of the Commission on Taxation* (Stationery Office 1982). Next, the *Expert Group on the Integration of the Tax and Social Welfare Systems* did not explicitly characterise Social Insurance either as tax or insurance. However, they noted that: “a move to an entirely tax based system would involve abandoning the contributory principle ... (and) ... reached a consensus, in the context of the integration of tax and social welfare, that the contributory principle should be maintained”. The *Commission on Social Welfare* (CSW) disagreed with the conclusions of the *Commission on Taxation* (CoT) on this topic. The CSW regarded the system of Social Insurance contributions as “having a significant insurance dimension which is not outweighed by the absence of an actuarial link between benefits and contributions”: - *Report of the Commission on Social Welfare* (Stationery Office 1986) Chapter 12 at 273. In the view of the Department of Social, Community and Family Affairs, the Social Insurance system is fundamentally different to taxation precisely because it operates on the contributory principle. The system provides specific benefits to individuals and their families based on the contributions they have made. These benefits are not available to those who have not paid Social Insurance contributions. *Integrating Tax and Social Welfare (1996), Report of the Expert Working Group on the Integration of the Tax and Social Welfare Systems* (Stationery Office 1996) paragraphs 7.13 and 7.16.

approximately 19% of the total combined employer and employee receipts.

**Breakdown of PRSI receipts by employer (ER), employee (EE) and self-employed (SE) in 2001 and 2002:<sup>140</sup>**

<b>2001 (Provisional):</b>		<b>2002 (Projected):</b>	
ER	75%	ER	77%
EE	20%	EE	19%
SE	4%	SE	5%

5.027 From an international perspective, the rates payable by both employees and the self-employed in Ireland are significantly lower than in most Member States of the European Union. While direct comparisons of social security contributions and the benefits available are difficult due to the wide variety of systems operated, it appears that the Irish system is more heavily reliant on contributions from employers than most.

5.028 There are a number of points that arise from the respective contributions paid by employers and employees towards social insurance benefits in Ireland. The first point which is relevant to this Report is that the amounts paid by the employees are relatively small. These figures undermine the relevance of the ‘paid for’ argument to these benefits. However, there are strong arguments against the application of the ‘paid for’ argument (see Chapter One) and the Commission accordingly takes the view that the ‘paid for’ argument is not persuasive in the context of social insurance benefits.

5.029 Admittedly, it should be noted that the figures are aggregate and the proportion of the contributions may be higher in the case of particular individuals, such as well-paid employees or the self-employed. In theory, this could justify the establishment of a “two-tier regime” with double compensation being allowed on condition that the plaintiff paid a certain minimum proportion of the social welfare contributions, such as 50%. A solution of this sort is complicated to apply and moreover, its application in this context could favour the higher-earning contributors, by allowing only those who make sufficient contributions to make double recovery. The

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<sup>140</sup> Information supplied by the Department of Social and Family Affairs.

Commission believes it should not complicate the law or make it appear to be tilted in the direction of the better-off, by recommending a ‘two-tier’ regime with only those in higher salary brackets being allowed to make double recovery. The ‘paid for’ argument is therefore inapplicable in the context of social insurance benefits.

5.030 A second point that arises from the above figures is that a substantial proportion of the receipts are paid by employers. This could give rise to the ‘social wage’ argument. However, we reached the view, in Chapter 1 that the ‘social wage’ argument does not justify double compensation in the context of private insurance. The same approach applies here.

5.031 Thirdly, as noted above, as our population ages, it is predicted that the contribution income will no longer be sufficient to meet the cost of social insurance benefits and the Exchequer will be required to recommence making a contribution to the Social Insurance Fund.

5.032 *Thus, the Commission recommends that the principle of "no double compensation" should apply across the board to social welfare payments.*

## **Part D            The Statutory Exceptions**

5.033 In the previous Part, we considered the general principle of whether social welfare benefits should be taken into account in the assessment of damages. The reality is that the majority of social welfare benefits that could result in double recovery are covered by statutory exceptions and the general principle against deductibility therefore applies in relatively few cases. The two statutory exceptions that are relevant here are (i) section 75 of the *Social Welfare (Consolidation) Act 1993* which deals with the deduction of Injury Benefit and Disablement Benefit, in the context of occupational accidents; and (ii) section 237 of the *Social Welfare (Consolidation) Act 1993* which deals with the deduction of Disability Benefit and Invalidity Pension, in the context of road traffic accidents.

### ***(i)      History of the statutory exceptions***

5.034 Section 75 states:

“Notwithstanding section 2 of the *Civil Liability (Amendment) Act 1964*, ...in an action for damages for personal injuries (including any such action arising out of a contract) there shall in assessing those damages 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, the value of any rights which have accrued or will probably accrue to him therefrom in respect of injury benefit...or disablement benefit...for the 5 years beginning with the time when the cause of action accrued.”

5.035 The provision originated as section 39 of the *Social Welfare (Occupational Injuries) Act 1966*. This 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. This provision was justified by the Minister for Social Welfare at the time, Mr. Boland, by referring to the method of financing the occupational injuries scheme. He stated that the occupational injuries scheme was “entirely financed by the employer”<sup>141</sup> and therefore it was felt that not to take the payments into account would essentially result in a double charge on employers.

5.036 Section 237 provides that:

“Notwithstanding section 2 of the *Civil Liability (Amendment) Act 1964*, ...in assessing damages in any action in respect of liability for personal injuries not causing death relating to the use of a mechanically propelled vehicle..., there shall be taken into account the value of any rights arising from such injuries which have accrued, or are likely to accrue, to the injured person in respect of disability benefit or invalidity pension...for the period of 5 years beginning with the time when the cause of action accrued.”

5.037 The origins of section 237 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 could be entitled to disability and pay-related benefits which could result in up to 180%

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<sup>141</sup> *Dáil Debates* Vol 219 col 1108.

of lost earnings being replaced. The Committee suggested that this placed an unreasonable burden on contributors to the system.<sup>142</sup> They therefore recommended that one of the ways in which motor insurance premiums might be reduced would be to allow a defendant to offset the damages payable by reference to social welfare payments received by the injured plaintiff.

**(ii) Possible deficiencies in these two statutory exceptions**

5.038 Four features of these two provisions are worth emphasising, when considering whether reform is necessary. The first feature is that the maximum period for which both provisions allow social welfare payments to be set off against damages is five years. This aspect of the provisions will be considered in Part E.

5.039 The second relevant feature of the two provisions is that they are each restricted to a particular type of accident. While section 75 is not confined expressly to occupational accidents, it is in effect, as the benefits to which it applies are paid only after an injury at work. Section 237 is limited to motor accidents. While these two categories capture the great majority of serious accidents, the fact remains that the categorisation is the product of the historical origin of the legislation, rather than any rational policy. It seems to us that it is invidious to give an advantage to a person injured in a motor-cycle accident over one injured by a bicycle, for instance. There is no advantage to ‘compartmentalising’ the law in this way. It is perfectly possible, as will be shown below to draft a provision which applies to any type of accident.

5.040 *Accordingly, the Commission recommends that the statutory rule embodied in sections 75 and 237 should apply equally to all types of accident.*

5.041 The two remaining features take longer to explain. They are:

- (a) The fact that the decision whether to deduct depends on whether one of the benefits specified in the relevant statutory provision is involved; and

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<sup>142</sup> Note that the later abolition of pay-related benefit means that the percentage of 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 section .306A into the *1981 Consolidation Act*.

(b) The fourth feature of interest relates only to section 237. This is the fact that section 237 allows social welfare benefits to be off-set against awards of damages generally, not just against an award for loss of earnings. These latter two points will now be addressed in more detail.

(a) *Named benefits:*

5.042 The welfare benefits caught by section 75 namely Injury Benefit and Disablement Benefit, form part of the *Occupational Injury Benefits* scheme, which comprises a range of payments for employees who are injured or disabled in the course of their work or while travelling to or from work. Many of the benefits available under the Occupational Injury Benefits scheme mirror the ordinary social insurance benefits which are available to workers generally. However, unlike other social insurance payments which require a certain level of PRSI contributions to be paid, the Occupational Injury Benefits schemes operate even if the claimant is lacking in contributions.

*Injury benefit*

5.043 Where a person is unable to work following an accident at work **Injury Benefit** is paid and can continue to be paid for up to six months. If a person is still unable to work at that stage and has paid sufficient contributions, they can apply for **Disability Benefit** under the general social insurance system. If the incapacity lasts for more than one year and becomes a permanent incapacity to work, then **Invalidity Pension** may be paid instead of **Disability Benefit**.

5.044 Alternatively, if a person who is unable to work for longer than six months does not have sufficient PRSI contributions to qualify for **Disability Benefit**, he may qualify for **Unemployability Supplement**, which is paid as an addition to **Disablement Benefit**. Unemployability Supplement is paid at the same rate as Disability Benefit and can continue to be paid for as long as the loss of faculty persists and the person continues to be incapable of working.

*Disablement benefit*

5.045 **Disablement Benefit** is paid where a person suffers loss of physical or mental faculty as a result of an accident at work or where they contract an occupational disease. The level of the payment

awarded depends on the degree of disablement, which is medically assessed. Assessments of less than 20% are normally paid by way of a once-off lump sum (known as a **Disablement Gratuity**) and assessments of 20% or more are paid by way of a pension (known as **Disablement Pension**). **Disablement Benefit** is not normally paid for the first six months. However, if the disablement is only of a minor nature which does not render the person incapable of working, **Disablement Benefit** can be paid earlier. The Disablement Benefit scheme differs from most other social welfare payments in that it is not an income maintenance payment, but rather a payment to compensate for loss of faculty. Depending on the particular circumstances, a person who qualifies for **Disablement Benefit** may be able to continue to work. The **Disablement Benefit**, is therefore, paid **regardless** of whether the person continues to work or qualifies for any other social welfare payment. There are also two additional increases paid with Disablement Benefit – Unemployability Supplement (see above) and Constant Attendance Allowance. The Constant Attendance Allowance is specifically excluded from the deductibility provisions contained in section 75.

5.046 In view of this wide variety of benefits, it is curious that section 75 of the 1993 Act only provides for **Injury Benefit**, **Disablement Benefit** and **Unemployability Supplement** payments to be taken into account in assessing damages for personal injuries arising from an **occupational accident**. For instance, where a person is injured in an occupational accident and continues to be incapable of working beyond the first 6 months and becomes entitled to either **Disability** or **Invalidity Pension**, these payments are not currently deductible.<sup>143</sup> However, it is understood that, in seeking details of the benefits paid for the purposes of section 75, legal representatives request details of all social welfare payments paid and so the amounts of any Disability Benefit or Invalidity Pension payments are also provided.<sup>144</sup> It is not clear whether these payments are also taken into account by the legal representatives or the courts in determining awards in occupational accident cases.

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<sup>143</sup> If a person is injured in a road traffic accident during the course of their employment, the **Disability Benefit** and **Invalidity Pension** would also be deductible.

<sup>144</sup> Information supplied by the Department of Social and Family Affairs.

5.047 Another point which emerges from this account is the variations over time in the social welfare benefits which may be paid to an accident victim. The “name-tags” on the benefits are not static. Therefore, while an individual may initially qualify for a particular benefit, this may change. The change may only be due to the fact that a certain time has elapsed, and not that there has been any other change in circumstances of the individual.

5.048 This results in the operation of the deduction system on a very *ad hoc* basis, since deductibility depends upon whether the benefit sought to be deducted from an award of damages is one of the types identified specifically in the statutory provision. Section 75 provides that any **Disablement Benefit** must be taken into account in assessing damages for **loss of earnings** arising from an occupational accident. However, **Disablement Benefit** itself is not a payment in respect of loss of earnings.

5.049 In the Consultation Paper (paragraph 9.35) the Commission proposed 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...” Following the principle of no double compensation unless there is particular justification for it, we remain of the same view.

5.050 *The Commission recommends that any social welfare payment, including a health allowance, should be deductible, if it amounts to a collateral source of compensation.*

(b) *Welfare benefit is set off against damages generally*

5.051 In contrast to section 75, the provisions of section 237 are not limited to offsetting the relevant social welfare benefits against loss of earnings, but apply to the assessment of damages generally. McKenzie J in *O’Loughlin v Teeling*<sup>145</sup> was very critical of this aspect of the section:

“...the Act<sup>146</sup> [the precursor of section 237] made a very substantial and dramatic alteration in that not only is disability benefit [deducted] from what already had been paid in the past

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<sup>145</sup> *O’Loughlin v Teeling* [1988] ILRM 617 (*ex temp* High Court).

<sup>146</sup> *Social Welfare Act 1984*, section 12(1).

but from which may probably be paid in the future, and not only in relation to loss of profits and earnings, but also in respect of **general damage**. This appears to me to be such a dramatic and unfair piece of legislation as to be contrary to natural justice - that is in my opinion.”<sup>147</sup>

5.052 In a similar vein, White remarks that:<sup>148</sup>

“...applying the basic principle governing the deductibility of compensating benefits which requires that, where deductible, benefits received should only be set off against those losses for which such benefits are intended as compensation, it is submitted that the deduction required by section 237(1) is **only against damages for loss of earnings or profits, past or prospective** and that no deduction falls to be made from any sum referable to damages for expenses or for non-pecuniary loss.”

5.053 This passage seems to the Commission to be correct in principle. The evil with which we are concerned here is double compensation. But no double compensation occurs where there is a social welfare payment and also a court award for general damages (other than loss of earnings). Consequently, there is no justification for setting off the social welfare payment against the general damages award.

### ***Recommendation***

5.054 *All social welfare payments which arise in consequence of injury and compensate for loss of earnings or profits should be deducted but only from damages for loss of earnings or profits.*

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<sup>147</sup> *O’Loughlin v Teeling* [1988] ILRM 617 (*ex temp* High Court) at 618-619. (Our emphasis).

<sup>148</sup> *White Irish Law of Damages* (Butterworths 1989) at paragraph 4.10.22.

## **Part E            The Five Year Rule**

### ***(i)        The operation of the five year rule***

5.055 There is a practical difficulty with the deduction of social welfare payments which sets them apart from the other collateral benefits. The difficulty arises from the fact that social welfare payments are periodic payments. Thus, as well as being paid up to the date of the court award, the benefit may continue to be paid beyond the date of the award. Thus, it is not possible for the court to know with certainty the total amount of social welfare payments which will be paid. This uncertainty is due to a variety of factors including inflation, social welfare increases, changes in eligibility for payments due to changes in the nature of the injury, statutory regulations and even government policy.<sup>149</sup> It is presumably with these factors in mind and with an eye on the analogous English provisions,<sup>150</sup> that a maximum period of deductibility of five years was set and enacted.

5.056 Section 237(1) allows for the setting off of "...the value of any rights arising from such injuries which have accrued or are likely to accrue to the injured person in respect of [the benefit in question]...for the period of 5 years beginning with the time when the cause of action accrued." Section 75(1) is worded slightly differently, as we shall see when we come to consider drafting below. However, the two cases that have been decided in this area and which are considered below focussed upon neither the form of statutory words in the sections nor the differences between them. Accordingly, we shall not deal with these differences at this point.

5.057 The result of the sections is that, where an individual receives specified social welfare benefits as a result of a tortious accident, the amount of benefit which has been paid or which is likely to be paid, up to a maximum period of five years, is taken into account when assessing damages. The significant point to note is that, even *if* it is anticipated that the plaintiff will be in receipt of these benefits after

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<sup>149</sup> See Clark "Damages and Social Welfare 'Overlap'" (1984) Ir Jur 40 at 43.

<sup>150</sup> Section 2(1) of the (English) *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 the action.

the expiration of the five-year period, double recovery is permitted to occur in respect of the latter period.

5.058 Two alternative situations are possible. First, if the case comes to court after the expiration of the five-year period, the deduction of the benefits for the previous five years is straightforward. Secondly, if the case comes to the court **before** the five-year limit has expired, the judge is required to assess whether or when the plaintiff will be returning to work. If, for example, the case is heard during the third year of absence from work and the judge determines that the plaintiff will be able to work in the fourth year, the plaintiff will not be expected to receive social welfare payments in consequence of the injury for longer than four years. Therefore, only four years' benefit, rather than five, are deducted from the award of damages.

*(ii) Judicial interpretation of the five year rule*

5.059 It follows from what has just been said that the most difficult aspect of these statutory exceptions concerns the application of the phrase "...or are likely to accrue to the injured person". This has led to different outcomes. First, in *O'Loughlin v Teeling*<sup>151</sup> the plaintiff was injured in a road traffic accident in September 1985 and as a result of his injuries, he had not returned to work at the time of the trial of the action in April 1988. The benefit at issue was disability benefit which is deductible in accordance with section 237 of the *Social Welfare (Consolidation) Act 1993*. Because this case came to court before the expiration of the five-year period, the Court was called upon to speculate as to the likelihood of the plaintiff returning to work before the expiration of the five year period. MacKenzie J acknowledged at the outset "not only does Disability Benefit come from what has already been paid in the past but from which may probably be paid in the future..."<sup>152</sup> The judge went on to look at the circumstances of the case in deciding whether the benefit would continue to be paid in the future. He inferred from the surrounding circumstances that the jury, in awarding damages for future loss of earnings, was making a finding about the plaintiff's future prospects

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<sup>151</sup> [1988] ILRM 617.

<sup>152</sup> *Ibid* at 618.

of work to the effect that he would be capable of employment within a short period of time. MacKenzie J continued:<sup>153</sup>

“In those circumstances it appears to me the Social Welfare Department could, if confronted with that evidence, cut off the Disability Benefit; therefore *I cannot say with any probability to be fair to the plaintiff* that beyond a couple of weeks from now he will be in receipt of such a benefit. The matter then involved would be *so trivial as not to be worth taking into account.*”

5.060 In the later case of *O’ Sullivan v Iarnród Éireann*,<sup>154</sup> the meaning and operation of the five-year rule again came under scrutiny. Here, the plaintiff was injured in an accident at work. The relevant provision at the time was section 75. Four and a half years had passed between the date of the accident and the date of trial. This meant that only six months’ future benefit was in question. It was argued by Counsel for the plaintiff that there was no evidence before the Court as to what might happen as regards the *Disability Benefit* after the conclusion of the litigation and that only the benefits accrued to date could be taken into account. However Morris J rejected this interpretation of how the five-year rule operated and stated:

“In my view, this does not represent the correct application of the section in this case. At the present time the Plaintiff is in receipt of disablement benefits and has been so since his occupational injury benefit ran out on the 24<sup>th</sup> March 1990. There is **no indication, so far as I am aware of any intention on the part of the Department of Social Welfare to alter this status.** During the course of the evidence, reference has been made to the ruling of the Department as to his disability and incapacity for work. **In my view, the onus, in the circumstances of this case, lies on the plaintiff to**

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<sup>153</sup> However, as is pointed out in McMahon and Binchy *Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) paragraph 44.136: “It is somewhat difficult to understand how the jury could have awarded the plaintiff £50,000 for future loss of earnings if they considered that the plaintiff was likely to obtain work (after over two and a half years of unemployment) within a fortnight”. It is possible, however, that this sum might have been based on the view that the plaintiff would immediately return to work but at a reduced level of income.

<sup>154</sup> High Court (Morris J) 14 March 1994.

**show that there is in the Department's contemplation an intention to alter the status quo...**<sup>155</sup>

5.061 Although neither decision was based on the respective wording of section 75 or section 237, (so that it is not relevant that *Teeling* involved section 237, while *O'Sullivan* concerned section 75) it is plain that the two judges had different ideas as to how the five-year rule should be applied, particularly as to which party should bear the burden of proving that the benefit would continue to accrue should lie. In *Teeling* any uncertainty as to what may happen in the future in terms of receipt of benefit was interpreted to the advantage of the plaintiff. On the other hand, in *O'Sullivan*<sup>156</sup> Morris J adopted the approach that he would assume the benefits would be continued unless the plaintiff could prove to the contrary by showing some reason why the Department might be likely to discontinue paying the benefit in question. It is worth noting that Mackenzie J's judgement in *Teeling* commences with the following statement: "I suppose one should reserve judgement on what is an important point but I think it would be very unfair to the plaintiff in this case if he was left in any suspense about the matter."<sup>157</sup>

5.062 The Commission prefers Morris J's approach. In the nature of things, a welfare benefit is likely to continue to be paid unless the claimant's circumstances (usually his medical condition) change. If, as Mackenzie J would prefer, the onus be put on the defendant to prove that there is likely to be no change, then the defendant would be left in the difficult position of having to prove a negative.

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<sup>155</sup> High Court (Morris J) 14 March 1994 at 13-14. (Our emphasis).

<sup>156</sup> The facts of *O'Sullivan* also show how the five-year rule operates to place the plaintiff in a very curious position from the point of view of arguing his case: on one hand, he could argue that he will be out of work for a long time so as to inflate his future loss of earnings. However, this type of argument will curtail the plaintiff from arguing that he may return to work within the five-year period to reduce the amount of deduction of future social welfare benefits. A higher earner would not attempt this line of argument, as his loss of earnings would be more significant than the social welfare payment. However, someone who is in a low-paying job might be more concerned with arguing that their future entitlements may be cut off in the near future so as to cut down on the amount of deductions.

<sup>157</sup> [1988] ILRM at 618.

## ***Recommendation***

5.063 In the ordinary course of events, a judge may be called upon to make a decision as to when the plaintiff is likely return to work for the purposes of awarding damages for future loss of earnings. We believe, therefore, that the task of the judge in the context of payment of social welfare payments is not much different from the task that arises in assessing damages generally, in which the judge is called upon to assess future probabilities. Broadly speaking, the sort of uncertainties just noted are the reason for the recommendations of the Commission in the Report on structured settlements,<sup>158</sup> which dealt with cases in which it is uncertain at the time of the judgment how the plaintiff's injury will develop in the future.

5.064 It has been argued that the deduction of social welfare benefits is particularly uncertain because of the doubt as to the continued payment of the benefits. One type of change that could occur is a change in eligibility due to changes either in the nature and severity of the injuries, or even death. When considering such uncertainties, one must take into account the fact that if, for example, a plaintiff makes an unexpectedly good recovery, with the result that he loses a welfare benefit which it was anticipated he would receive, this would mean that the gross figure of damages was also assessed without the unexpected recovery of the plaintiff being taken into account. Thus, the gross sum as well as the deduction from it, would each have been too high, and the two inaccuracies would cancel each other out to some extent.

5.065 It is also argued that uncertainties arise from national political or economic factors such as inflation, the economic climate in general or changes in welfare law reflecting budgetary and other government policies. However, the reality is that the rates and conditions of payment of social welfare benefits in Ireland, have at worst remained the same and, over a long enough period, have consistently improved in real terms.

5.066 However, until a system of structured settlements is in place, some cut-off point is considered to be necessary because of the difficulty of foretelling the future. Otherwise, an injured plaintiff could possibly find himself/herself in a situation where his/her

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<sup>158</sup> Law Reform Commission *Report on Personal Injuries* (LRC 54 - 1996).

entitlements have been stopped; notwithstanding the fact that his/her damages have been reduced on the basis of these future entitlements.

5.067 Accordingly, it is accepted that although the five-year rule is an arbitrary compromise,<sup>159</sup> the Commission recommends that this rule be retained at least for the present time.

## **Part F            Drafting**

5.068 The object of this Part is to consider, in the light of certain matters some of which were discussed in earlier Parts of this Report and some of which are raised for the first time here, what changes, if any, need to be made in the drafting of a successor to section 75(1) and 237(1) of the *Social Welfare (Consolidation) Act 1993*. Seven distinct points need to be addressed in this regard.

5.069 First, in Part E we examined the problem that courts face in attempting to predict what, if any, welfare benefits may be paid to an individual after the trial terminates. In order to devise a suitable statutory formula, we ought to compare the equivalent elements of section 75(1) and 237(1). Section 237(1) refers to “the value of any rights...which have accrued, or are likely to accrue”; whereas section 75(1) refers to “the value of any rights which have accrued or probably will accrue....” The one material difference between these two formulations is that the wording “probably will accrue” in section 75(1) is conventionally regarded as setting a higher standard of certainty than the words “are likely to accrue” as appears in section 237(1).

5.070 The Commission is anxious to minimise the risk of loss to the plaintiff. The Commission therefore favours the use of the phrase “or will probably accrue”, as this requires a higher level of certainty than the expression “or are likely to accrue”. However, as explained above, the Commission believes that the onus of proof should remain on the plaintiff to establish that it is less than probable that the welfare

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<sup>159</sup> “Until the Irish courts are permitted to make conditional awards to review the quantum of damages in order to take account of inflation or changes in the physical condition of the victim, the assessment of general damages will be mainly a speculative and unscientific process. ...the five-year limit is arbitrary and leads to imprecise deductions if the case comes to trial before the five-year period elapses...” Clark “Damages and Social Welfare ‘Overlap’” (1984) Ir Jur 40 at 47.

benefit will continue to be paid at the same level as it is paid at the time of judgment.

5.071 As already noted, Morris J in *O'Sullivan* adopted the common sense view that, regardless of the precept that he who asserts must prove, where a plaintiff is receiving a benefit it can be assumed that payment of this benefit will continue until five years after the time of the accident, unless circumstances are shown by the plaintiff which suggest the contrary. We do not recommend altering the wording of section 75 since Morris J's judgment of the present text accords well with our view of what the law should be. We would therefore retain the wording of section 75.

5.072 Secondly, as mentioned above, the Commission believes there is no reason for the principle enshrined in sections 75 and 237 to be confined to a particular type of accident. The words that limit these provisions in that manner should be removed. In drafting terms, this is just a matter of leaving out words.

5.073 Thirdly, the Commission has recommended that the policy of deduction enshrined in sections 75 and 237 should be extended to all social welfare benefits. The Commission further believes that there is no reason to confine this policy to benefits paid by the Irish government and it should also apply to welfare payments made by another State.<sup>160</sup> Accordingly, we include in the draft provision the phrase "equivalent payments made by any foreign State".

5.074 *The Commission recommends that the new provision should refer to "all social welfare payments and health allowances, as well as equivalent payments made by any foreign State".*

5.075 Fourthly, the Commission believes that it is a fundamental principle that deductibility should be permitted only where there is an overlap with the *appropriate* head of damages. If such an overlap does not exist, the benefit is not *collateral* to a head of damages. As regards the present provisions: section 75 seeks to achieve this objective by identifying two particular social welfare benefits ("injury benefit or disablement") and providing that their value may be set off

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<sup>160</sup> See eg *McKenna v Best Travel Ltd t/a Cypriana Holidays* High Court 17 December 1996; McMahon and Binchy *The Irish Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) paragraphs 14.140-142.

against “any loss of earnings or profit”. By contrast, while section 237 is confined to two particular benefits, money paid for these benefits may be set off against any head of damages. In other words, there is no requirement that the benefit be collateral to the particular head of damages, an omission of which the Commission is critical.

5.076 The question for discussion here is how we most effectively express in legislation the requirement that a benefit received by a plaintiff must be collateral to a particular head of damages before it can be deducted from the damages. There appear to be two possible ways of achieving this result. The first would be to specify each social welfare payment individually and the head of damages from which it may be deducted. This is the method adopted in the equivalent law in Britain.

5.077 The alternative would be simply to enunciate the principle of deductibility where there is a collateral benefit, while leaving it to the courts to identify the situations in which it would operate. The form of words would allow for deductibility from any “appropriate” head of damages, with “appropriate” being defined along the following lines: “compensating in whole or in substance for a similar or equivalent loss, harm or deprivation to that which the social welfare payment or health allowance in question is designed to cover”.

5.078 The relative merits of the two alternatives are fairly straightforward. The first alternative, a detailed tabulation of social welfare benefit against the particular head of damages, carries the advantage of greater predictability which is very important, given the fact that settlements out of court in this area are the norm and that, as noted, precedents are rare. It should be noted that this option would require the Department to adjust the collateral benefits legislation under discussion here, each time that a social welfare payment was adjusted. However, under the existing state of the law, when a new social welfare payment scheme is introduced or an existing payment scheme is discontinued, renamed, or otherwise altered, the necessary amending Social Welfare Act also amends any other provisions contained in the Social Welfare (Consolidation) Act which makes reference to such payments. In this way, where there is a change to any of the payment schemes which are considered to be collateral benefits, then in making the necessary legislative changes,

amendments to the table of benefits which are deductible against a particular head of damages would also be made.<sup>161</sup>

5.079 The second option would leave some discretion to the court and therefore some room for uncertainty, until such time as a line of precedent had been built up. It should be noted that precedents are rare in this field. The second option would also have the drawback that it could lead to the Department becoming involved in proceedings in which a dispute arises between the parties as to the nature of the particular social welfare benefit. Moreover, and at a fundamental level, this is a difficult area, in that it involves comparing and reconciling concepts from historically and ideologically distinct worlds: tort and welfare law.

*5.080 The Commission recommends that the first option, that of specifying each social welfare payment individually and the head of damages from which it may be deducted, is the best option in this area. The table of social welfare benefits, the heads of damages from which they should be deducted and the department/agency that administers each such benefit, are listed in the Schedule to this Report for the purposes of this recommendation.*

5.081 A fifth point to note is that section 75(1) contains the phrase “including any such action arising out of a contract”. The Commission would retain this wording in its draft to include cases of personal injuries arising from a breach of contract. The plaintiff should not be able to evade the section, merely because it is possible to him to cast his claim in contract rather than tort.

5.082 The sixth point is that section 237(1) confines its scope to “personal injuries not causing death...” whereas section 75(1) contains the following proviso, “disregarding any right in respect of injury benefit payable by virtue of section 210, after the death of the injured person”. The Commission is of the view that this issue needs to be addressed within the context of social welfare policy generally and is not appropriate for consideration in this Report.

5.083 Seventh, we have focussed upon subsection (1) of each of sections 75 and 237. We turn now to subsection (2) of these

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<sup>161</sup> Information supplied by the Department of Social and Family Affairs.

provisions, which are substantially similar to each other. Section 75(2) reads as follows:

“The reference in subsection (1) to assessing the damages for personal injuries shall, in cases where the damages otherwise recoverable are subject to reduction under the law relating to contributory negligence or are limited by or under any Act or by contract, be taken as referring to the total damages which would have been recoverable apart from the deduction or limitation.”

5.084 The effect of this provision can best be shown by example. Assume that the relevant damages are €100,000 but are reduced by a 50% finding of contributory negligence. Assume too that there is a social welfare payment of €10,000 which must be taken into account. The effect of the provision just quoted is that the starting point for the calculation is a hypothetical figure, namely "the total damages which would have been recoverable apart from the deduction...", *ie* €100,000. Next, the €10,000 figure is deducted, giving an interim figure of €90,000. Afterwards, the 50% reduction is made for contributory negligence. Thus, the final result is €45,000. Without any such provision, the alternative way of making the calculation would be not to “gross up” but to start from the amount actually awarded *ie* €50,000. Next, the figure of €10,000 is deducted, leaving a net result of €40,000.<sup>162</sup>

5.085 The difference in the two results stems from the hypothetical assumption contained in subsection (2). This means that, without the subsection, the effect of the contributory negligent would have been to reduce the damages from €90,000 to €40,000, *ie* by €50,000. But as a result of the subsection, this reduction is only €45,000, *ie* it is diminished by €5,000. This difference is achieved by allowing the plaintiff an element of double compensation.

5.086 *Given the basic policy of avoiding double compensation unless there is some strong countervailing policy, the Commission prefers the second alternative. We recommend, therefore, simply omitting subsection (2) of sections 75 and 237 of the Social Welfare (Consolidation) Act 1993.*

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<sup>162</sup> See White *op cit* at 223 footnote 372

5.087 *As a result of the recommendations made in this Part, the Commission recommends that sections 75(1) and 237(1) of the Social Welfare (Consolidation) Act 1993 should be repealed and replaced with the following subsection:*

*“Notwithstanding section 2 of the Civil Liability (Amendment) Act 1964, ...in an action for damages for personal injuries (including any such action arising out of a contract) there shall in assessing those damages be taken into account, against the appropriate head of damages, as set out in the First Schedule, the value of any rights which have accrued or probably will accrue to him therefrom in respect of any social welfare payment or health allowance, including any equivalent payments made by a foreign state...for the 5 years beginning with the time when the cause of action accrued.”*

## **Part G           Who Pays?**

### **(i)       General**

5.088 We have already considered the question of double recovery. We have also seen that, in a majority of cases, social welfare payments are covered by the statutory exceptions to section 2, leaving sections 75 and 237 of the 1993 Act unaffected by the provisions of section 2. These sections introduce a policy of deduction. The net result is that the Department pays the plaintiff social welfare payments in the aftermath of the accident and usually these payments are usually deducted from the amount of damages<sup>163</sup> which the defendant has to pay. Thus the Department (and the Exchequer) is shouldering part of the burden, which arguably should properly be borne by the defendant. If the recommendations made by the Commission are adopted, the element of double compensation will be further reduced, making the question of whether it should be the defendant or the Department who bears the burden of compensating the victim even more significant.

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<sup>163</sup> With regard to section 75 *re* loss of earnings and with regard to section 237 regarding damages in general.

**(ii) *Administrative costs in relation to sections 75 and 237 of the 1993 Act***

5.089 Before turning to the substantive issue outlined in the previous paragraph, we should note that the present system naturally means that the Department has to administer the arrangements which are necessary to facilitate the reduction of the defendant's liability. This means that Departmental time and resources have to be expended for this purpose. At present, in the region of 5,000 to 6,000 solicitors' letters are received by the Department of Social Community and Family Affairs each year, requesting details of social welfare payments made. Of these enquiries from solicitors, in the region of 500 to 600 would result in subpoenas being issued or the Department being put on notice that a subpoena was about to be issued. Arrangements are made in about 100 of these cases for an officer either to be on standby or actually to attend the court case. (Although it is only on a very rare occasion that the officer would be actually called to give sworn evidence). In addition to information regarding payments, many officers may be required to furnish further information of claims, *eg* details of medical referrals, disallowance of benefit etc. Tentative estimates<sup>164</sup> suggest that the total staff costs involved in responding to solicitors' letters and in attending court in connection with cases involving damages for loss of earnings would be in the region of €250,000 annually.

5.090 Therefore the *existing* provisions relating to deductibility of certain social welfare payments impose a sizeable administrative cost on the Department. Since the Commission recommends that a general policy of deduction should be operated in this context, the implementation of this policy would cause the administrative burden on the Department to be somewhat increased.

5.091 It may be worthwhile for the Department to consider charging the defendant a fee for this service. However, it seems to the Commission that this relatively minor issue is part of a bigger question of whether the public sector should charge for giving information to the public, whether as part of legal proceedings or

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<sup>164</sup> The Department has no information on the level of social welfare payments taken into account in assessing damages for loss of earnings. The Department is not directly involved in the proceedings, and is not notified of the outcome. Many of these cases are settled out of court. Estimates of figures are from the Department.

generally. We do not think it appropriate for us to go into this subject in the context of this Report. Accordingly, the Commission is making no recommendation on the issue of whether the Department of Social and Family Affairs should charge fees for the provision of information and evidence for use in legal proceedings.

**(iii) Reimbursement**

5.092 We turn now to consider the larger, substantive question of whether some mechanism should be available to the courts to provide for the recovery from the defendant's insurance company of social welfare benefits paid out by the Department of Social and Family Affairs.<sup>165</sup>

*The British experience*

5.093 While the British laws applicable to recovery of collateral benefits from tortfeasors started with what was essentially the present Irish position, they have since moved through several stages of evolution and now have several years' experience of the operation of a recovery system, which tends to dispel certain preconceptions. It is therefore worthwhile summarising these developments in a little detail.

*(a) Political Origins*

5.094 We commence with the Pearson Royal Commission which was set up in 1973 in the wake of the Thalidomide disaster to consider to what extent, in what circumstances and by what means compensation should be paid for personal injury. Its report, published five years later, stated that the tort and social security systems should continue to operate side by side but that the relationship between them should be significantly altered.<sup>166</sup> Social security should be recognised as the principal means of compensation and double compensation should be avoided by offsetting the *full*<sup>167</sup> value of

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<sup>166</sup> *Report Of the Royal Commission On Civil Liability And Compensation For Personal Injury* (Cmnd 7054 1978).

<sup>167</sup> *Cf Law Reform (Personal Injuries) Act 1948*. This Act provided that half of certain social security benefits paid or likely to be paid in the five years, running from when the cause of action accrued should be deducted from damages

benefits against any damages awarded. The Commission considered giving the DHSS [*ie* the United Kingdom's Department of Health and Social Security] a right of subrogation to reclaim the benefits from tortfeasors, but rejected the idea because of practical difficulties, and because it considered that this would increase administrative and litigation costs and cause delay.

5.095 However, further comment was invited and this produced the response that the recovery option should not be abandoned without more investigation. For instance, in 1986 the National Audit Office criticised the DHSS for failing to investigate the feasibility of putting a cost-effective recovery scheme in place. It called for detailed research which led to the commissioning of management consultants Touche Ross to report on the feasibility of a recovery scheme. They reported in 1988 in favour of such a scheme. However, their proposals met with almost unanimous opposition. Opposition came from the Law Society, the Association of British Insurers and even certain judges who made public their view that the changes might make settlements harder to achieve. Both sides of industry – the Confederation of British Industry and the TUC – expressed their concern at the proposed scheme. Only the National Audit Office and the House of Commons Public Accounts Committee supported them. Nevertheless, recoupment would mean that there could be a substantial gain to the exchequer at relatively little cost. Accordingly, despite the widespread opposition, the Government passed legislation in 1989 to permit the DHSS to recover the cost of benefits from the defendant.<sup>168</sup>

(b) *Legislation*

5.096 The deductibility of most social security benefits is currently governed by statute. Originally, following the report of the Monckton Committee in 1946, section 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 commencing when the cause of action accrued should be deducted from damages for loss of earnings.<sup>169</sup> Other payments, which were

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<sup>168</sup> Lewis *Deducting Benefits From Damages For Personal Injury* (Oxford 1999) at 113-119

<sup>169</sup> This section was, in effect, a compromise, as the Monckton Committee had recommended that all social security payments, past and future, should be

not listed as deductible, fell to 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.<sup>170</sup> 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* as amended by the *Social Security (Recovery of Benefits) Act 1997*.

5.097 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 three limitations:

- (i) In order to be deductible, the particular benefit had to be included in the list of “relevant benefits”<sup>171</sup> set out in paragraph 2(1) of the *Social Security (Recoupment) Regulations 1990*,<sup>172</sup>
- (ii) The total benefits had to have a value in excess of £2,500;<sup>173</sup>
- (iii) 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.

5.098 *The Social Security (Recovery of Benefits) Act 1997* repealed Part IV of the 1992 Act, which included both the small payments

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deducted. The proposition, however, encountered severe opposition. Consequently, this ‘half-way house’ was enacted.

<sup>170</sup> Section 2(1) of the 1948 Act was amended by paragraph 4 of Schedule 4 to the *Social Security Pensions Act 1975* and by paragraph 1 of Schedule 4 to the *Health and Social Security Act 1984*.

<sup>171</sup> Section 81(2) of the *Social Security Administration Act 1992*.

<sup>172</sup> SI No 322 of 1990.

<sup>173</sup> 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* footnote 62 at paragraph 1650. The small payments limit was subsequently abolished by the *Social Security (Recovery of Benefits) Act 1997*.

limit<sup>174</sup> and the stipulation that benefits be deducted from damages in general. This last point is important (not least in the Irish context): Schedule 2 of the 1997 Act provides that the value of a particular type of benefit can only be set off against a specified head of compensation. In particular, damages for ‘pain and suffering’ are effectively “ring-fenced”, in that there is no category of benefit which can be used to diminish them. In addition, the new list of benefits is much wider than that which existed under the 1948 statutory scheme.<sup>175</sup> 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.<sup>176</sup>

5.099 To help implement the compulsory deduction of benefit a new centralised bureaucracy was established. The DSS ‘Compensation Recovery Unit’ was set up to operate the new system, communicate with lawyers and give rapid and accurate statements of the recoverable benefits involved in all accident cases of which it was notified. Previously, information as to benefits received was haphazardly obtained by lawyers from local benefit offices, and was often inaccurate and slow in forthcoming. With the new Unit, the deduction and repayment of benefit became a routine part of the settlement of the great majority of personal injury actions. By 1994-95 it was recovering £110 million a year. By 1998-99, this had grown to £201 million (the equivalent of €20 million in the Irish context). The DSS bureaucracy confounded its critics by establishing a unit which works with remarkable efficiency. Litigation has not been unduly delayed and nor has the cost of administration proved excessive. However, as Lewis pointed out, the significance of these figures should not be over-emphasised. Within the larger picture, the savings involved are not enormous. In the year to the end of September 1998, benefits were only recovered in 20 per cent of the 309,711 cases which were notified as being settled during that period. Where benefits were recovered, the amount on average was about £3,000.

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<sup>174</sup> The Act does, however, state that a small payments limit can be provided for by regulation, but this has not yet happened.

<sup>175</sup> 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 at 30 and Vol 94 No 42 at 33.

<sup>176</sup> See paragraphs 4.46-4.70 above.

5.100 The new British scheme changes have been attacked on ideological grounds. Professor Luntz has described it as “the ‘so-called economic rationalism, with its concerns for principles of ‘user pays’ and privatisation of costs, so that they do not appear in government budgets, even if, overall, the cost to the community is greater, prevailed.”<sup>177</sup> Lewis<sup>178</sup> has made the point that recoupment reasserts the primacy of the tort obligation, with its attendant support for individualism, and the policy of punishing wrongdoers – no matter how difficult it may be to identify them or make them (as opposed to their insurers and thus, indirectly, all of us) pay. We have already given our fairly unfavourable view of this policy.

### ***Recommendation***

5.101 Drawing from the British experience in this area and the recommendations made elsewhere in this Report, the Commission makes the following observations.

5.102 First, the Commission notes the arguments in favour of establishing a system of recovery of collateral benefits by the Department of Social and Family Affairs. In line with these British developments and in anticipation of them Clark has argued in favour of reimbursement by the defendants of the Social Insurance Fund:

“To allow a tortfeasor or insurer to obtain a large discount on damages payable for an act or default clearly weakens the incentive to adopt and supervise safe and effective work-practices, particularly in regard to activities for which no compulsory method of employers’ liability insurance exists. In such a case, the employer does not even have the danger of an increased insurance premium, should a successful claim be brought, to galvanise the employer into looking after the safety and health of employees.”<sup>179</sup>

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<sup>177</sup> Luntz *Assessment of Damages for Personal Injury and Death* (3<sup>rd</sup> ed Butterworths 1990) at 397-398.

<sup>178</sup> Lewis *Deducting Benefits From Damages For Personal Injury* (Oxford 1999).

<sup>179</sup> Clark “Damages and Social Welfare ‘Overlap’” (1984) Ir Jur 40.

5.103 A second point is that the absence of a reimbursement system increases the burden on the public funds, while cutting down on the amount of money the insurance companies have to pay out. In net terms, therefore, reimbursement would mean a gain for the taxpayer and a loss for the insurance companies.

5.104 It might be objected that, economically speaking, all that reimbursement could mean at the end of the day is only that the taxpayer has to pay out slightly less, (possibly in the form of reduced PRSI) but the policyholder has to pay out slightly more. However, this observation seems to us to contain a number of unwarranted assumptions. In the first place, while optimists might expect that the absence of re-imbursement should mean a 'trickle down' of benefit in the form of a reduction of premiums, insurance companies may be impervious to such trickles. Secondly, it should be recalled that claims against employers make up about a third of personal injuries claims and employer-policyholders who may benefit from the present absence of reimbursement machinery, make up a very small minority of the community, in comparison with taxpayers.

5.105 There is another point regarding reimbursement. In the chapter on insurance payments, we were sceptical about the extent to which insurance companies would actually utilise a recoupment machinery, if one were provided. The reason for this scepticism was that cases could arise, for example, in which Company A and B had insured the plaintiff and defendant respectively. A recovery mechanism would have the effect that money would be transferred from B to A.

5.106 In this situation, one might expect that insurance companies would not use recoupment machinery on the basis that the losses and gains would cancel out. The situation is different as regards the payment of social welfare, however. Reimbursement of social welfare payments would mean that the flow of money would be in the same direction in every instance, namely from an insurance company and to the Department of Social and Family Affairs.

5.107 Furthermore, we have been struck by the way the British thinking on this subject began with a complacent acceptance of a situation similar to that which appears to pertain in Ireland at present. After a period of scepticism at the possibility of change, the British

system has developed to the present position, which ensures an efficient transfer of funds.

5.108 To state a straightforward principle: it seems to the Commission to be wrong for the Department (and beyond it, the taxpayer) to have to foot the bill for what might be regarded as a business expense of the insurance companies who have taken premiums to insure a negligent defendant. There seems to us to be no practical or other reason not to require the insurance company to shoulder its own business expense.

5.109 The practical design of a system of reimbursement is very much a matter of specialised public administration to be settled by the Department, in consultation with the insurance companies, bearing in mind both the British model and the sophisticated information technology which is now in use in both the insurance industry and the Department. Accordingly, we say nothing further about the design of the reimbursement system.

*5.110 The Commission recommends that the Department give consideration to the setting up of a reimbursement system under which the amount by which a compensation award has been reduced, by virtue of the payment of social welfare payments including health allowance, should be reimbursed by the defendant to the Department of Social and Family Affairs or a Health Board, as appropriate.*

## Summary of Recommendations in Chapter 5

- (1) Since social welfare assistance is not funded by either employee or employer contributions, the Commission believes that the argument that the employee has directly or indirectly ‘paid for’ the social welfare assistance through his/her labour is inapplicable. The Commission also rejects the argument that an analogy should be drawn between social welfare assistance and charitable donations. From a policy point of view, the Commission recommends that social welfare assistance should be deducted from awards of damages. [paragraph 5.016]
- (2) The Commission recommends that the principle of "no double compensation" should apply across the board to social welfare payments. [paragraph 5.032]
- (3) The Commission recommends that the statutory rule embodied in sections 75 and 237 of the *Social Welfare (Consolidation) Act 1993* should apply equally to all types of accident. [paragraph 5.040]
- (4) The Commission recommends that any social welfare payment, including a health allowance, should be deductible, if it amounts to a collateral source of compensation. [paragraph 5.050]
- (5) All social welfare payments which arise in consequence of injury and compensate for loss of earnings or profits should be deducted but only from damages for loss of earnings or profits. [paragraph 5.054]
- (6) The Commission accepts that although the five-year rule is an arbitrary compromise, it should be retained at least for the present time. [paragraph 5.067]
- (7) The Commission recommends that any new provision should refer to “all social welfare payments and health allowances, as well as equivalent payments made by any foreign State”. [paragraph 5.074]

- (8) The Commission recommends that specifying each social welfare payment individually and the head of damages from which it may be deducted is the best option in this area. [paragraph 5.080]
- (9) Given the basic policy of avoiding double compensation unless there is some strong countervailing policy, the Commission recommends simply omitting subsection (2) of sections 75 and 237 of the *Social Welfare (Consolidation) Act 1993*. [paragraph 5.086]
- (10) As a result of the recommendations made in this Part, the Commission recommends that section 75(1) and 237(1) of the *Social Welfare (Consolidation) Act 1993* should be repealed and replaced with the following subsection:  
“Notwithstanding section 2 of the *Civil Liability (Amendment) Act 1964*...in an action for damages for personal injuries (including any such action arising out of a contract) there shall, in assessing those damages, be taken into account, against the appropriate head of damages, as set out in the First Schedule, the value of any rights which have accrued or probably will accrue to him therefrom in respect of any social welfare payment or health allowance, including any equivalent payments made by a foreign state...for the 5 years beginning with the time when the cause of action accrues.” [paragraph 5.087]
- (11) The Commission recommends that the Department give consideration to the setting up of a reimbursement system under which the amount by which a compensation award has been reduced, by virtue of the payment of social welfare payments, including health allowance, should be reimbursed by the defendant to the Department of Social and Family Affairs or a Health Board, as appropriate. [paragraph 5.110]



## CHAPTER 6      FATAL INJURIES

### Part A      Introduction

6.01 Part IV of the *Civil Liability Act 1961* deals with fatal injuries. The penultimate provision of that Part, section 50 reads as follows:

“In assessing damages under the Part account shall not be taken of:

- (a) any sum payable on the death of the deceased under any contract of insurance;
- (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the death of the deceased.”

6.02 It is clear that this provision mirrors section 2 of the *Civil Liability Act 1964*. The legislative history of section 2 confirms this. It therefore needs to be considered whether the changes recommended in this Report with regard to section 2 should also apply to section 50 of the 1961 Act. In light of the similarity between the two provisions, it appears likely that the same recommendations should apply to both, unless there is some distinctive policy that requires a differentiation to be made. We should consider changing one if we are changing the other.

#### **(i)      ‘Wrongful death’ and ‘survival’ actions**

6.03 There are two possible causes of action that may be pursued after the death of the victim of a tortious accident. The essential difference between the two is that the first type of action is a cause of action that vests in the dependants of the deceased, whereas the second action, as will be seen, involves the personal representatives of the deceased pursuing a cause of action which vested in the deceased prior to his or her death. The latter is therefore governed by the same rules as would have applied to the action taken by the deceased during his or her lifetime. The first action, and the one that is relevant in the context of this Chapter, is an action for wrongful death. This type of

action is governed by Part IV of the *Civil Liability Act 1961* and will be addressed in more detail below. The other possible cause of action, which is governed by Part II of the 1964 Act is a so-called 'survival action'. The latter is essentially a cause of action that vested in the deceased prior to his or her death, and can thereafter be pursued on behalf of the estate of the deceased. A survival action can arise either from the incident that ultimately caused the death of the victim or from another unrelated tortious incident that was actionable by the deceased during his or her lifetime.<sup>180</sup> A 'survival action' is pursued on behalf of, and for the benefit of, the estate of the deceased. While there is some overlap between actions for wrongful death and survival actions, the legislation is structured to avoid duplication of damages awarded.

6.04 Section 7(2) of the *Civil Liability Act 1961* describes certain limitations on the damages that are recoverable in a survival action. There is no specific provision for deductions to be made from such an award of damages. The personal representatives are placed in the same position as the deceased would have been in for the purposes of this action. While the changes proposed in this Report would have an effect upon the calculation of damages, this effect does not differ from the effect upon an award to a plaintiff directly and there is therefore no need to discuss this issue separately in this context. Part II of the 1961 Act is not therefore of direct relevance to this Report.

6.05 Section 50, on the other hand, deals with wrongful death actions and its terms mirror those of section 2 of the 1964 Act. The Commission therefore considers it necessary to address this provision in more detail.

**(ii) *Scope of Section 50***

6.06 At the outset, it is important to clarify the scope of section 50 of the 1961 Act. In particular, issues such as the actions to which Part IV of the 1961 Act applies, the appropriate plaintiff under that Part of the Act and what payments can be considered to be collateral benefits within the meaning of that Part, need to be addressed at the outset.

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<sup>180</sup> See White *Irish Law of Damages* (Butterworths 1989) at 281.

### *Cause of Action*

6.07 Section 48(1) of the 1961 Act describes the type of legal action to which Part IV applies as follows:

“[w]here the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased.”

### *Appropriate Plaintiffs*

6.08 Sections 47(1) and 48(3) of the 1961 Act define the persons entitled to bring an action under the Act. An action for damages for wrongful death may be taken by the personal representatives of the deceased or by all or any of the dependents, if no action is taken by the personal representatives within six months.<sup>181</sup> “Dependants” are defined in section 47(1) as follows: “..any member of the family of the deceased who suffers injury or mental distress.” “Member of the family” is further defined in that subsection to include the spouse, parents, grandparents, grandchildren, children, siblings, step-parents, stepchildren, half-brothers and half-sisters of the deceased.

### *Relevant Collateral Benefits*

6.09 As with section 2, only payments made in consequence of the accident that caused the fatality qualify as collateral benefits. Where the fatality occurred sometime after, albeit as a result of, the accident the deceased may have received payments before his or her death. The deceased may have received insurance payments, pension payments, sick pay, social welfare payments or charitable payments in consequence of the accident. However, these sums may have been spent during the deceased’s life or bequeathed upon death to persons other than the persons entitled to claim damages as a result of the fatal injury. For this reason, the Commission considers that payments that were made to the deceased during his or her lifetime are not considered to be collateral benefits for the purposes of this Report. Payments that the deceased received before his or her death are

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<sup>181</sup> Section 48(3) *Civil Liability Act 1961*.

therefore not to be deducted from an award of damages for fatal injuries.

6.10 This approach is consistent with the existing wording of section 50, which refers to sums "...payable on the death of the deceased" and benefits payable "...in consequence of the death of the deceased." Section 50 clearly does not contemplate payments that were made in consequence of injury, prior to the death of the victim. The Commission does not, therefore, recommend that any change be introduced to the scope, as opposed to the substance of section 50.

## **Part B           Background**

6.11 Section 50 of the 1961 Act was enacted to bring the law applicable to fatal injuries into line with the law applicable to personal injuries. Subsequent decisions of the House of Lords caused confusion in the area of personal injuries and section 2 of the 1964 Act was therefore enacted to bring the law in respect of personal injuries back into line with the law applicable to fatal injuries.

6.12 This was confirmed by the following statement of Geoghegan J in the case of *Green v Hughes Haulage Ltd*:<sup>182</sup>

“[I]t would seem likely .. that the whole purpose of section 2 of the *Civil Liability (Amendment) Act 1964*, was to provide a corresponding statutory provision for personal injury actions to section 50 of the *Civil Liability Act 1961*, which provided for equivalent non-deductions in fatal injury claims.”<sup>183</sup>

6.13 However, we must consider briefly the impact that the proposed changes to section 2 would have on section 50 of the 1961 Act.

6.14 In *Green v Hughes Haulage Ltd*<sup>184</sup> Geoghegan J analysed the similarities between the treatment of insurance payments in the case of fatal injuries and in the case of personal injuries generally. He observed that:

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<sup>182</sup> [1997] 3 IR 109

<sup>183</sup> *Ibid* at 117.

<sup>184</sup> *Ibid*.

“section 50 of the Act of 1961 is largely a re-enactment of earlier statutory provisions in the interpretation of which the courts have held that the deceased need not be a party to the contract of insurance and need not have paid the premiums. It seems reasonable in the circumstances to assume that section 2 of the Act of 1964, was intended by the Oireachtas to be interpreted similarly to section 50 of the Act of 1961, and therefore, as I see it, the Oireachtas would not have intended that the injured party had to be a party to the contract of insurance or that the injured party had to be the person paying the premiums.”<sup>185</sup>

6.15 Geoghegan J also considered the expression “under any contract of insurance” that appears in section 50 of the 1961 Act and concluded that there was “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.”<sup>186</sup>

6.16 Against this background, we now turn to consider the recommendations made earlier in this Report in respect of section 2 of the 1964 Act and how these recommendations affect section 50 of the 1961 Act.

## **Part C            Individual Collateral Benefits**

### ***(i)    Insurance payments***

6.17 In Chapter 1 the Commission recommends that insurance payments should be deducted from awards of damages unless the plaintiff/beneficiary paid the entirety of the insurance premiums. In the case of a fatal injury, the insured is not the beneficiary of the insurance payments. If we apply the rule recommended in Chapter 1 to section 50 in a literal sense, this would result in all insurance payments being deducted from damages for fatal injuries, even if the deceased paid the insurance premiums. For instance, where a husband pays premiums under his own life insurance policy for the

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<sup>185</sup> [1997] 3 IR 117.

<sup>186</sup> *Ibid* at 120.

benefit of his wife or pays premiums on her life insurance policy for his own benefit, the insurance payments would need to be deducted.

6.18 However, the rationale behind the recommendation in Chapter 1 is that an insured person who pays the premiums payable under a policy of insurance is entitled to receive the benefit of that insurance policy. In the event that an individual pays insurance premiums for the benefit of his or her estate, it is consistent with the policy underlying the recommendation in Chapter One that these payments should not be deducted from an award of damages.

6.19 While the Commission agrees with the Geoghegan J's proposition that section 50 and section 2 should be interpreted similarly, the Commission's recommendation regarding deduction of insurance payments from awards for personal injury would result in the deduction of all insurance payments from awards for fatal injuries. It may be possible to widen the recommendation contained in Chapter 1 in order to alleviate this possible injustice. One way of doing this would be to provide that insurance payments should not be deductible from damages for fatal injuries where the premiums are paid by a person for his own benefit and that of his estate.

**(ii) Charitable payments**

6.20 In Chapter 2, the Commission recommends that charitable donations should not be deducted from an award of damages unless the donor states specifically at the time of the donation, that the money should be deducted from an award of damages. The recommendation that charitable donations should not be deducted from an award of damages should therefore also apply in the context of section 50. In this case, the charitable donation and the damages would both go to the family of the deceased, except for the case in which the charitable payment was made to the deceased person before his death, in which case the remainder, if any, would be distributed as part of the estate of the deceased.

**(iii) Pension payments**

6.21 In Chapter 3, the Commission recommends that pension payments should continue not to be deductible from an award of damages. At present section 2(b) and 50 each provide that "any pension" shall be ignored in the assessment of the plaintiff's damages. In the case of an action within section 50 the claimant would be in

receipt of a widow's pension or an orphan's pension. There appears to be no good reason to treat these pensions and occupational pensions differently. The Commission therefore recommends that pension payments received in respect of fatal injuries should not be deducted from an award of damages.

**(iv) Sick pay**

6.22 In Chapter 4, the Commission makes recommendations regarding the deductibility of sick pay from awards of damages. As explained at the beginning of this chapter, the only benefits that need to be considered as collateral benefits in the context of fatal injuries are benefits that were payable to the heirs or successors of the deceased as a result of the accident that caused the fatality. Sick pay is not such a benefit and the recommendations in Chapter Four are therefore clearly not applicable in the context of section 50.

**(v) Social Welfare Payments**

6.23 In Chapter 5, the Commission recommends that the rule against double compensation should apply fully in the context of social welfare payments. The issue which arises in this context is whether social welfare payments that were received by the plaintiffs in consequence of the fatality, should be deducted from an award of damages. In this regard, it must be borne in mind that most social welfare payments are covered by specific legislation which would have to be amended if such payments are to be taken outside of the scope of section 50 of the 1961 Act.

**Recommendation**

6.24 There are benefits to applying the same legal rules to the deductibility of collateral benefits from awards of damages for fatal injuries and from awards of damages for personal injuries. Applying uniform rules is more certain and avoids anomalies that could result if there was a personal injuries and fatal injuries action arising from the same incident. There is also no reason, of logic or of policy, not to apply the same rules in respect of fatal injuries and personal injuries.

6.25 *The Commission therefore recommends that the recommendations contained in this Report apply equally in the case of fatal injuries. Section 50 of the Civil Liability Act 1961 should be amended accordingly.*



7.01 The Commission recommends that the distinction between indemnity based and non-indemnity-based contracts of insurance should not be relevant to determining whether a payment under a contract of insurance should be deducted from an award of damages. [paragraph 1.44]

7.02 The Commission recommends that double recovery should be barred in respect of permanent health insurance and payments received under such insurance policies should be deducted from awards of damages. [paragraph 1.49]

7.03 The Commission recommends that no change should be introduced as regards medical health insurance. [paragraph 1.53]

7.04 The Commission recommends that, in the case of a personal accident insurance policy, a plaintiff who has paid the entirety of the insurance premiums payable under such contract directly and independently and in his or her own name should be allowed to make double recovery. [paragraph 1.56]

7.05 The Commission recommends the following amendment to the wording of section 2 of the *Civil Liability Act 1964*:

“In assessing damages in an action to recover damages in respect of a wrongful act...resulting in personal injury, account shall be taken of any sum payable in respect of the injury under any contract of insurance, subject to the exception that account shall not be taken of payments made under a contract of insurance where the plaintiff has paid the entirety of the insurance premiums, directly and independently, and in his or her own name. Insurance payments under the *Health Insurance Act 1994* and regulations promulgated thereunder, are not subject to this provision.” [paragraph 1.60]

7.06 The Commission recommends that no form of statutory recoupment clause should be introduced. The policy of allowing the loss to lie where it has fallen, coupled with the qualified removal of section 2 would have the aggregate effect that there would be less double recovery, which should benefit the defendant's insurance company and its policyholders, not the provider of the collateral benefits. This does not affect rights of recoupment and subrogation that exist under contractual arrangements. [paragraph 1.80]

7.07 The Commission believes that there is a clear public interest in treating charitable benefits as non-deductible. We believe that this rule is justified in the public interest, in order not to discourage spontaneous acts of social solidarity. The Commission thus recommends that, in general, charitable benefits should not be deducted from an award for damages. [paragraph 2.05]

7.08 The Commission recommends that a charitable gift should not be deducted unless the donor stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages. [paragraph 2.08]

7.09 The Commission recommends that the proposal regarding the non-deductability of charitable benefits should apply irrespective of the form of the charitable benefit. [paragraph 2.11]

7.10 The Commission recommends the following draft legislation:

“...[P]rovided that, where a charitable gift (whether in the form of money or in kind) has been given to the plaintiff in response to the incident that also gave rise to the cause of action, the gift or its value shall not be deductible, subject to the following:

(i) where the charitable benefit was paid by the defendant, it shall be deductible only if the donor-defendant stipulated in writing at the time of the donation, that he or she intended the donation to be deducted from any subsequent award of damages; and

(ii) where the donation takes the form of sick pay, it should be deductible from an award of damages (sick pay being interpreted to include any series of payments made by an employer to an injured employee, that resemble the employee's regular remuneration in frequency, amount of payment, or both). [paragraph 2.12]

7.11 The Commission does not recommend that there should be a right to double recovery in respect of a proportion only of pension. [paragraph 3.17]

7.12 The Commission recommends that the defendant should not be allowed to deduct the value of any pension from the amount of damages. The rule contained in section 2, that pensions are not deductible from awards of damages, is not altered. [paragraph 3.24]

7.13 For the purposes of this Report, the Commission recommends that no differentiation should be made between the accrued pension payment or any enhanced pension payment that a plaintiff received. [paragraph 3.28]

7.14 The Commission recommends that, where a pension scheme provides for the discretionary enhancement of pension payments, the principle that pensions are not deductible from an award of damages, is not affected by the fact that the enhancement depends upon an exercise of discretion by the trustees of the pension. [paragraph 3.30]

7.15 The Commission recommends that no change be introduced to the law applicable to post-retirement pension rights, as the present law is satisfactory. [paragraph 3.37]

7.16 The Commission recommends that, in the context of sick pay, the law should state clearly that (so far as there is any at present) there should be no double compensation. We would achieve this result by providing in statute that:

“In assessing damages, ... account shall be taken of any sick pay paid in consequence of the injury; save that no account shall be taken where the sick pay gives rise to a legally enforceable debt or where the sick pay is a charitable donation.” [paragraph 4.36]

7.17 The Commission considers that one straightforward option for reform would be to highlight to employers that the mechanism of conditional sick pay is a legally recognised mechanism available to them to protect their interests. The Commission recommends therefore, that the Law Society of Ireland and employers' organisations consider issuing a circular to bring this option to their members' attention. [paragraph 4.46]

7.18 The Commission does not recommend the creation of a statutory presumption that sick pay is advanced on the condition that it will be repaid if the employee recovers an award of damages. [paragraph 4.51]

7.19 Since social welfare assistance is not funded by either employee or employer contributions, the Commission believes that the argument that the employee has directly or indirectly 'paid for' the social welfare assistance through his/her labour is inapplicable. The Commission also rejects the argument that an analogy should be drawn between social welfare assistance and charitable donations. From a policy point of view, the Commission recommends that social welfare assistance should be deducted from awards of damages. [paragraph 5.016]

7.20 The Commission recommends that the principle of "no double compensation" should apply across the board to social welfare payments. [paragraph 5.032]

7.21 The Commission recommends that the statutory rule embodied in sections 75 and 237 of the *Civil Liability Act 1961* should apply equally to all types of accident. [paragraph 5.040]

7.22 The Commission recommends that any social welfare payment, including a health allowance, should be deductible, if it amounts to a collateral source of compensation. [paragraph 5.050]

7.23 All social welfare payments which arise in consequence of injury and compensate for loss of earnings or profits should be deducted but only from damages for loss of earnings or profits. [paragraph 5.054]

7.24 The Commission accepts that although the five-year rule is an arbitrary compromise, it should be retained at least for the present time. [paragraph 5.067]

7.25 The Commission recommends that the new provision should refer to “all social welfare payments and health allowances, as well as equivalent payments made by any foreign State”. [paragraph 5.074]

7.26 The Commission recommends that specifying each social welfare payment individually and the head of damages from which it may be deducted is the best option in this area. [paragraph 5.080]

7.27 Given the basic policy of avoiding double compensation unless there is some strong countervailing policy, the Commission recommends simply omitting subsection (2) of section 75 and 237 of the *Social Welfare (Consolidation) Act 1993*. [paragraph 5.086]

7.28 As a result of the recommendations made in this Part, the Commission recommends that section 75(1) and 237(1) of the *Social Welfare (Consolidation) Act 1993* should be repealed and replaced with the following subsection:

“Notwithstanding section 2 of the *Civil Liability (Amendment) Act 1964*...in an action for damages for personal injuries (including any such action arising out of a contract) there shall, in assessing those damages, be taken into account, against the appropriate head of damages, as set out in the First Schedule, the value of any rights which have accrued or probably will accrue to him therefrom in respect of any social welfare payment or health allowance, including any equivalent payments made by a foreign state...for the 5 years beginning with the time when the cause of action accrues.” [paragraph 5.087]

7.29 The Commission recommends that the Department give consideration to the setting up of a reimbursement system under which the amount by which a compensation award has been reduced, by virtue of the payment of social welfare payments, including health allowance, should be reimbursed by the defendant to the Department of Social and Family Affairs or a Health Board, as appropriate. [paragraph 5.110]

7.30 The Commission recommends that the recommendations contained in this Report apply equally in the case of fatal injuries. Section 50 of the *Civil Liability Act 1961* should be amended accordingly. [paragraph 6.25]

**APPENDIX A**

**FIRST SCHEDULE AS REFERRED TO  
IN CHAPTER 5 “SOCIAL WELFARE  
PAYMENTS”**

Head of Compensation	Relevant Collateral Benefit	Administered by
<p><b>Compensation for earnings lost during the relevant period</b></p>	<ul style="list-style-type: none"> <li>• Disability Benefit</li> <li>• Invalidity Pension</li> <li>• Injury Benefit</li> <li>• Increase of Disablement Benefit on account of Unemployability</li> <li>• Disability Allowance</li> <li>• Blind Person’s Pension</li> <li>• Infectious Diseases Maintenance Allowance</li> <li>• Blind Welfare Allowance</li> <li>• Supplementary Welfare Allowance</li> <li>• Unemployment Benefit</li> <li>• Unemployment Assistance</li> <li>• Pre-Retirement Allowance</li> <li>• One Parent Family Payment</li> <li>• Back to Work Allowance</li> <li>• Back to Education Allowance</li>   <li>• FAS Training Allowance</li> <li>• Community Employment</li> <li>• Income tax credit for blind persons</li> </ul>	<ul style="list-style-type: none"> <li>• DSFA<sup>187</sup></li> <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li>   <li>• DSFA</li> <li>• DSFA</li> <li>• Health Boards</li>   <li>• Health Boards</li> <li>• Administered by Health Boards on Behalf of DSFA</li>   <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li>   <li>• FAS</li>   <li>• FAS</li>   <li>• Revenue Commissioners</li> </ul>

<sup>187</sup> Department of Social and Family Affairs.

Head of Compensation	Relevant Collateral Benefit	Administered by
<i>Compensation for cost of care incurred during the relevant period</i>	<ul style="list-style-type: none"> <li>• Carer's Benefit</li> <li>• Carer's Allowance</li> <li>• Increase of Disablement Benefit where Constant Attendance is needed</li> <li>• Prescribed Relative's Allowance</li> <li>• Domiciliary Care Allowance</li> <li>• Respite Care Allowance</li> <li>• Nursing Home Subvention</li> <li>• Personal Assistance Services</li> <li>• Income Tax Credits/ Allowances for – <ul style="list-style-type: none"> <li>- employing a carer for an incapacitated person</li> <li>- home carer</li> <li>- dependant relative</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li> <li>• DSFA</li> <li>• Health Boards</li> <li>• Either DSFA or Health Boards</li> <li>• Health Boards</li> <li>• ?????</li> <li>• Revenue Commissioners</li> </ul>
<i>Compensation for loss of mobility during relevant period</i>	<ul style="list-style-type: none"> <li>• Mobility Allowance</li> <li>• Motorised Transport Grant</li> <li>• Disabled Drivers and Passengers Tax Concessions Scheme</li> <li>• Disabled Person's Grant</li> </ul>	<ul style="list-style-type: none"> <li>• Health Boards</li> <li>• Health Boards</li> <li>• Revenue Commissioners</li> <li>• Local Authorities</li> </ul>
<i>Compensation for pain and suffering and loss of amenity sustained during relevant period</i>	<ul style="list-style-type: none"> <li>• General Health Services</li> <li>• Medical Card</li> <li>• Aids and appliances</li> <li>• Long-term illness scheme</li> <li>• Drugs refund scheme</li> <li>• Medical Care under the Occupational Injury Benefits Scheme <ul style="list-style-type: none"> <li>• Treatment Benefit (for dental, optical and aural benefits)</li> </ul> </li> <li>• Income tax relief on medical expenses</li> </ul>	<ul style="list-style-type: none"> <li>• Health Boards</li> <li>• DSFA</li> <li>• DSFA</li> <li>• Revenue Commissioners</li> </ul>

**APPENDIX B            PARTICIPANTS AT THE COLLOQUIUM  
TO DISCUSS THE LAW REFORM  
COMMISSION CONSULTATION PAPER  
ON COLLATERAL BENEFITS ON  
THURSDAY 4 MAY 2000**

The Hon Mr Justice Keane, Chief Justice of Ireland

Paul Kenny, Irish Pensions Trust

Enda Flynn, Department of Social Welfare

Michael Burke, Law Agent's Office, Dublin Corporation

Michael Carroll, Solicitor's Office, CIÉ

Chris O'Toole, Office of the Attorney General

Piers Segrave Daly, Actuary

John Logan, Actuary

Anthony Hanahoe, Solicitor, Michael T Hanahoe & Co

Bruce Antoniotti, SC

Brian Ingoldsby, Department of Justice, Equality and Law Reform

Robert Browne, Department of Justice, Equality and Law Reform

Dr Thomas Leigh, Senior Medical Claims Handler, The Medical  
Defence Union, London

Judge David Anderson, District Court

Michael Horan, Irish Insurance Federation

Peter Jones, Department of Finance

Owen McIntyre, Law Reform Committee, Law Society

Gerry Dwyer, Department of Defence





# The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

## APPENDIX C LIST OF LAW REFORM COMMISSION PUBLICATIONS

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Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
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