The victim of an accident may receive compensation from one or more of a number of sources. A possible source is a defendant in a tort action brought by the victim-plaintiff. But there are numerous other sources. The tort source is probably relied upon in only a minority of cases. If the tort source is the only one relied upon then there is, in the present context, no problem. But if the tort source is relied upon together with other sources then the collateral benefits problem emerges, and that is this: "How are the courts, in the assessment of the plaintiff's tort damages, to take account of the compensation received by the plaintiff from these other 'collateral' sources? Are they to ignore it? Or are they to reduce the plaintiff's tort compensation on account of it?"

The fortunate position of the victim-plaintiff was perhaps most clearly stated by Lord Wilberforce in the House of Lords in *Parry v. Cleaver*.¹ "The injured plaintiff", he said,² "may be protected by an elaborate structure of social welfare arrangements entitling him to industrial injuries benefit, unemployment pay, sickness benefit and other payments of constantly changing nature and amount. Apart from any private insurance he may have taken out, he may be covered by an 'insurance' scheme in his employment. This may be compulsory, contributory or non-contributory; it may be partly transferred from a previous employment and may be transferable to a future employment: the true element of insurance in the arrangements may be considerable or very slight. If he is injured in a large-scale catastrophe, and sometimes even when he is not, a fund may be raised by public subscription out

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of which he may receive very large sums indeed. He may receive help from private benefaction. . . . In many cases even now, and possibly in most cases in the future, the whole of his loss, so far as measurable in money terms, may be covered, independently of any claim against the 'wrongdoer'".

The purpose of this article is to assert a principle for determining in what circumstances compensation received from these collateral sources can and should be considered as replacing part of the tort damages; and therefore a principle on which to determine when tort damages should be reduced on account of collateral benefits—that is when there should be deduction of collateral benefits from damages. What will be suggested is that in some circumstances, but in some circumstances only, the compensation from two separate sources—the tort source and the collateral source—overlap, rendering one or other of these sources unnecessary in a given case. It will be contended that there is a crucial distinction to be made in this respect between benefits which are intended to compensate a specific pecuniary loss (which should be deducted) and benefits intended for other purposes, such as to compensate non-pecuniary loss, (which should not be deducted); and that this distinction is born out by both principle and authority, and is further given considerable support by the decision of the House of Lords in Parry v. Cleaver. The latter part of the article will then concern itself with the question—which arises when there is deduction because the benefit and damages overlap—of whether or not the defendant tortfeasor should ultimately pay for that part of the plaintiff's loss covered by the benefit, by in some way reimbursing the donor of the benefit.

Courts throughout the Commonwealth have experienced considerable difficulty in dealing with the problem of collateral benefits. For a long period, following the decision in Bradburn v. Great Western Ry. Co.,\(^3\) collateral benefits of any type were normally disregarded in the assessment of damages. In the case itself the court held that there should be no deduction of private accident insurance moneys from a plaintiff's damages. However, in 1956 there came the decision in British Transport Commission v. Gourley\(^4\) which was concerned with the related question of collateral liabilities, and in which the House of Lords reaffirmed the compensatory principle in assessing damages.\(^5\) Following this decision the courts were persuaded in a number of cases that a new


\(^{5}\) The principle that in assessing pecuniary loss "the tribunal should award the injured party such sum of money as will put him in the same position as he would have been in if he had not sustained the injuries", per Earl Jowitt, \textit{ibid.}, at pp. 197-198 (A.C.).
approach to the collateral benefits problem was required, and they deducted various types of benefit. The most important of these decisions was perhaps that of the English Court of Appeal in *Browning v. War Office.* In that case a sergeant in the United States Air Force serving in England was injured in an accident and thereby became entitled as of right to a disability pension amounting to the equivalent of almost half his pre-accident wage. In a tort action the Court of Appeal deducted the value of the pension from the damages for loss of earnings. There was, however, a powerful dissent by Donovan L.J. Then in 1969 the pendulum swung in the opposite direction. By a bare majority the House of Lords held in *Parry v. Cleaver* that a police disability pension should not be deducted from a plaintiff's damages for loss of earnings. *Bradburn's* case was approved on its narrow point (that insurance moneys should not be deducted) although the old causal arguments often used to justify the decision were discredited by the majority of their Lordships. It was conceded, however, that there were some types of collateral benefit which should be deducted.

It is submitted that, with the causal arguments now discarded, the way is left open for a fuller analysis by courts in common law jurisdictions of all benefits accruing to plaintiffs; and that whether these benefits must be deducted should depend upon a new principle which emerges from the decision in *Parry v. Cleaver* and from some of the Commonwealth cases which their Lordships relied upon in coming to that decision.

I. *The Principle on which Deduction Should Be Made.*

The basic principle which emerges is that there should be deduction when, and only when, the benefit received by the plaintiff is intended to compensate him for a specific pecuniary loss, a loss in respect of which, in the absence of the benefit, he would have a claim against the defendant. Sick pay, unemployment benefit and the provision of or payment for medical services are benefits of this nature. They are intended to compensate the plaintiff for a pecuniary loss. If following the receipt of a benefit of this character the plaintiff does in fact claim tort damages in respect of that loss, it cannot be said that he is claiming "compensation", and recovery would be against the underlying principle of the law of damages.

The plaintiff has, in respect of that loss, already returned to the

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7 Supra, footnote 1.
8 These causal arguments had already received severe criticism at the hands of academic writers. See in particular, Ganz, *Mitigation of Damages by Benefits Received* (1962), 25 Mod. L. Rev. 559; McGregor, *Compensation Versus Punishment in Damages Awards* (1965), 28 Mod. L. Rev. 629.
9 As explained in *Gourley*, see *supra*, footnote 4.
position he would have been in but for the accident, and it cannot therefore be said that the damages will return him to that position because he is already there. It is, of course, crucial to this well rehearsed argument that the benefit was intended to compensate the particular loss claimed in the damages, because otherwise it can be said that it was the damages which compensated that loss and that the benefit was intended for other purposes. It will later be demonstrated that this argument cannot be applied with such rigour outside the field of pecuniary loss.

The principle involves that the intention behind the benefit be examined. It might be contended that such intention is not of importance, but that the effect of the benefit is decisive. To this it can be answered that the effect of the benefit is unascertainable because the plaintiff is unlikely to earmark the moneys received from one particular source and spend them specifically on relieving a particular loss; and secondly that the courts in awarding damages assess them according to particular heads which they intend to be compensated. Furthermore, it has been held by the High Court of Australia, in the leading case there on collateral benefits,\(^{19}\) that the intention behind the benefit is of paramount importance in determining whether benefits should be deducted. The point was put most clearly by Windeyer J. He concluded that "the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for [where the benefit is contractual] . . . , and in the other by the intent of the person conferring the benefit [where the benefit is benevolent or statutory]. The test is by purpose rather than by cause".\(^{11}\) Windeyer J.'s judgment was one with which Dixon C.J. agreed and from which his own judgment naturally followed,\(^{12}\) and it was these two judgments which were heavily relied upon by the House of Lords in Parry v. Cleaver.\(^{12}\)

It is, of course, a prerequisite of deduction within the principle suggested that the benefit is a true benefit and will remain so. Excluded from deduction, therefore, are benefits which are in the nature of a loan. Such is the case where there is a legal or moral obligation to repay the third party benefactor if the plain-

\(^{19}\) The National Insurance Co. of New Zealand v. Espagne (1961), 105 C.L.R. 569.

\(^{11}\) Ibid., at p. 600. Italics supplied.

\(^{12}\) Ibid., at p. 574: "Before writing the foregoing I have had the very great advantage of reading the judgments of Windeyer J. in this case and in Paff v. Speed (1961), 105 C.L.R. 549 . . . and I agree generally in them upon this question."

\(^{13}\) Supra, footnote 1.
In these cases there is really no benefit at all but merely an alleviation of the plaintiff's circumstances until such time as they are remedied by the defendant. The damages are not, in effect, awarded to the plaintiff himself, but to the plaintiff acting vicariously for the third party benefactor. This is recognized by the courts and sometimes enforced by demanding an assurance from the plaintiff that he will repay the third party benefactor. The cases are familiar. No question of double recovery arises and the compensatory principle of the law of damages is not offended.

It should be noted at this point that deduction of the value of a benefit from the tort damages is only one method of ensuring that the plaintiff does not recover compensation twice over. In the cases adverted to above an alternative method of avoiding double compensation has been used. Instead of holding that tort damages should not be paid in respect of that part of the loss covered by the benefit, in these cases the court has held that the damages should indeed be paid but that the benefit should be returned; that the compensation should come from the tortfeasor but not from the third party benefactor. The result of deduction is, of course, the reverse: because compensation has come from the third party benefactor the court holds that it should not come from the tortfeasor. The alternative solution is sometimes automatic, if the benefit is clearly in the form of a loan, but sometimes the court has imposed an obligation to repay the benefit on the plaintiff, using this technique as a device, alternative to deduction, to avoid double compensation. Whether some such device, rather than deduction, should be used to avoid double recovery is the concern of the latter part of this article. The point is noted in the present context because cases where the court has adopted a device of this kind are used in this part of the thesis to support the operation of deduction in the context of those cases. They indicate the court's clear reluctance to allow the plaintiff to retain both the benefit and the damages.

As has been pointed out, sick pay, unemployment benefit, and the provision of or payment for medical services are benefits within the field of pecuniary loss which fall within the principle suggested for deduction. Their purpose is to compensate for particular pecuniary losses. It is significant that both English and Commonwealth decisions have refused double recovery to plaintiffs where these benefits have come under consideration.

That sick pay cannot be claimed over again by a plaintiff has

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14 The position where the third party benefactor is subrogated to the rights of the plaintiff can also be looked at from this point of view.

rarely been contested in the English courts, perhaps because the conclusion is taken for granted. The case most in point is *Lind v. Johnson.* Here the plaintiff's employer continued to pay the plaintiff's wages after an accident instead of taking the alternative course of terminating his employment. The court automatically reduced the plaintiff's damages on this account. Then in *Dennis v. L.P.T.B.* the plaintiff's loss of earnings had been gratuitously made up by sick pay and a pension from two statutory bodies both of which expected to be repaid by the plaintiff if he was awarded damages. There was only a moral and not a legal obligation on the plaintiff to repay them. Denning J. allowed recovery of loss of earnings only on the plaintiff's undertaking that he would repay the statutory bodies. Double recovery was thereby avoided. Furthermore, in numerous cases, not least amongst them *Parry v. Cleaver,* it was generally accepted that no such claims would be allowed.

Recent Commonwealth decisions follow a similar pattern. In Canada, if the plaintiff has received sick pay as of right through a contractual arrangement, then the courts have deducted from his damages the amount of such payment. If the payments have come by way of benevolence, either as an *ex gratia* payment from the plaintiff's employer or from an independent third party, then the courts have either deducted the sums received if there was no evidence of any moral obligation to repay or alternatively allowed the plaintiff damages on the understanding that the money would be paid back to the benefactor. They have sometimes enforced this by demanding an assurance following the English decisions, but in other cases they have left the plaintiff and the third party to work out their respective rights themselves. The Australian position is governed by *Graham v. Baker* where the issue was fully discussed by the High Court of Australia. It is substantially the same as that in Canada. The courts will not allow

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16 [1937] 4 All E.R. 201.  
17 Supra, footnote 15.  
18 Supra, footnote 1.  
20 *Dell v. Vermette* (1963), 37 D.L.R. (2d) 101 (Ont.). It was found, on appeal, that the "ex gratia" payment was received by the plaintiff as of right.  
the plaintiff recovery for loss of earnings for that period in which he has received sick pay under the contract of employment. On the other hand, if the payment is gratuitous the plaintiff is allowed to recover without the court's demanding an undertaking that the money should be repaid to the donor; but it is on a policy of leaving the plaintiff himself to decide whether he satisfies a social or moral obligation to repay the gratuitous benefactor. Even in America the rigid "collateral source rule" has given away in some jurisdictions to prevent the plaintiff recovering loss of earnings where he has received sick pay under contract.

The Canadian and Australian cases are complicated by the system of "cumulated sick leave entitlement" which appears to be prevalent in these countries. This is a system whereby employees are allowed full sick pay for a specified number of days each year (often twenty-one days). If, however, the employee is not sick, and therefore does not use up his "sick leave entitlement", he can cumulate the number of days of such entitlement over a period of years. Eventually, after many years of employment, a sick employee may find himself with a lengthy period during which he has a right to full pay from his employer during illness. In some schemes the value of the cumulated sick leave entitlement can be claimed as a lump sum when the employee terminates his employment. The question has arisen of what effect a scheme of this kind has on the deduction of sick pay from a plaintiff's claim for loss of earnings, because, although under these schemes the plaintiff is receiving sick pay during his disability (and thereby apparently making no "net" loss of earnings), he is doing so at his own expense by using up his sick leave entitlement.

The logical answer is still to deduct the sick pay from his claim for loss of earnings, but to allow him a separate claim for loss of sick leave entitlement. This is, in fact, what the courts have done. It was pointed out in Graham v. Baker that in America the "extinguishment of the plaintiff's sick leave credits" has "resulted in a well defined financial loss". While, therefore, deducting sick pay, the

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28 This is explained by Windeyer J. in Paff v. Speed (1961), 105 C.L.R. 549, at p. 566: "A plaintiff entitled to be paid by his employer ... while incapacitated, and who when recovered returned to work in his old position, may nevertheless have suffered some compensatable loss by his absence. If, for example, he was by the terms of his employment permitted only a certain number of days sick leave on pay during the year, he would incur some loss if those days were used up in an absence caused by the defendant."
29 Supra, footnote 23, at p. 351.
courts in Canada\textsuperscript{30} and Australia\textsuperscript{31} have allowed a claim under this head. Since the two sometimes cancel out, the courts may sometimes give the \textit{appearance} of not deducting sick pay and allowing double recovery;\textsuperscript{32} but that is not the true position.

Another source from which an English plaintiff may replace his lost earnings is unemployment benefit. Unemployment benefit is clearly designed to compensate for loss of earnings. (It is designed to compensate for loss of earnings on a number of contingencies, only one of which is an accident depriving the breadwinner of his normal resources.) It must therefore be deducted from a plaintiff's damages for loss of earnings, being analogous to sick pay but coming from a different quarter. The cases support both the principle and the analogy. The English Court of Appeal deducted unemployment benefit from damages for wrongful dismissal in \textit{Parsons v. B.N.M. Laboratories Ltd.},\textsuperscript{33} despite strong dissent from the decision in \textit{Browning's case}\.\textsuperscript{34} Harman L.J. said: "I feel that unemployment pay, no less than sick pay or payment of wages during disability under the contract of employment must be brought into account."\textsuperscript{35} In an earlier case, \textit{Lindstedt v. Wimborne Steamship Co. Ltd.},\textsuperscript{36} where accident damages were in issue, Cassels J. felt he could not allow the plaintiff "to get full compensation . . . and at the same time unemployment benefit".\textsuperscript{57} The two decisions were followed in \textit{Foxley v. Olton}.\textsuperscript{58} These cases, it is submitted, must stand, and, indeed, were left standing by Lord Reid in \textit{Parry v. Cleaver} for future consideration.\textsuperscript{59} They fall within the principle suggested.

So also do the cases where the plaintiff has received free medical care, or where a third party has paid expenses, medical or otherwise, which the plaintiff had reasonably incurred as a result of the accident. Here again both English and Commonwealth courts have refused to allow the plaintiff double recovery. In \textit{Lindstedt's case}\textsuperscript{40} Cassels J. took account of the fact that the National Health Service would provide for the plaintiff any improvements or repairs to his artificial leg without cost to the plaintiff himself; and in \textit{Harris v. Brights Asphalt Contractors Ltd.}\textsuperscript{41} it

\textsuperscript{32} \textit{See Cossitt v. C.P.R.}, [1948] 4 D.L.R. 461 (Ont.).
\textsuperscript{33} [1964] 1 Q.B. 95.
\textsuperscript{34} \textit{Supra}, footnote 6.
\textsuperscript{35} \textit{Supra}, footnote 33, at p. 131.
\textsuperscript{36} (1949), 83 L.I.L. Rep. 19.
\textsuperscript{37} \textit{Ibid.}, at p. 21.
\textsuperscript{38} [1965] 2 Q.B. 306.
\textsuperscript{39} \textit{Supra}, footnote 1, at p. 562.
\textsuperscript{40} \textit{Supra}, footnote 36.
\textsuperscript{41} [1953] 1 Q.B. 617.
was held that no claim could be made for nursing and medical attendance where the plaintiff had opted for treatment under the National Health Service. Equally in Oliver v. Ashman\(^a\) account was taken of the fact that the plaintiff child would probably spend a considerable part of his remaining life span in a state institution, so reducing nursing expenses. In two cases in 1960\(^b\) expenses had been incurred by friends or relatives in the transport of plaintiffs from the country in which the accident occurred to their home country, and these expenses the plaintiff was allowed to recover only on the understanding that they would be repaid to the benefactors. In a third case\(^c\) medical expenses incurred by the husband of the plaintiff (expenses which he was legally liable to pay) were actually deducted from the plaintiff's damages, but the husband here had a claim against the defendant in the action *per quod servitium amissit*.

Canadian cases reveal equally clearly that the courts are reluctant to allow a plaintiff double recovery of medical expenses, and that in the absence of any other means of preventing this they will deduct from the plaintiff's damages. There is in Canada no National Health Scheme, but in a number of cases the third party benefactor, a hospital insurance scheme, was subrogated to the plaintiff's rights under legislation governing the particular provincial hospital insurance scheme, and no question of double recovery arose.\(^d\) In the absence of such subrogation the courts have disallowed the plaintiff's claim for medical expenses on the reasoning that, through the benefit scheme, he has suffered no loss.\(^e\) They have, on the other hand, rightly allowed recovery where there was a moral\(^f\) or legal\(^g\) obligation to pay for the medical care, even though that obligation was unlikely to be enforced by the third party. In one case an assurance was asked from the


\(^{44}\) Gage v. King, [1961] 1 Q.B. 188.


\(^{46}\) Schaeffer v. Mish, [1950] 4 D.L.R. 648 (Sask. C.A.); Falherty v. Hughes, [1952] 4 D.L.R. 43 (B.C.C.A.); Moore v. Day and Nugent (1959), 16 D.L.R. (2d) 371 (Nfld). These cases follow the earlier decision in Carroll v. Baker, [1924] 2 D.L.R. 452 (Sask. C.A.) where a claim for nursing expenses was disallowed because there was no evidence of any legal liability on the plaintiff to pay his resident housekeeper for the nursing and attendance she had given him.


plaintiff that he would repay the third party, the plaintiff's son, but sometimes the damages are allowed merely on the understanding that there will be repayment. Only where the medical expenses have been paid through a private accident insurance policy have the courts, reluctantly in one case, allowed double recovery, following the decision in *Bradburn v. Great Western Ry. Co.*, which, it was felt, could not be avoided. It is submitted that these last cases should not be followed, and that there is a clear distinction between an accident insurance policy, which provides for a lump sum on the contingency of an accident, and one which provides for the payment of medical expenses. The former cannot be said to be intended to compensate a specific pecuniary loss, but is designed to alleviate the plaintiff's losses in a more general way, but the latter is within the principle suggested for deduction, and if no deduction is made the plaintiff clearly recovers his medical expenses twice over.

In Australia the leading case on the deduction of medical expenses is *Blundell v. Musgrave*. In that case the plaintiff, a naval rating, had received medical treatment in a naval hospital. Regulations under the Navy Defence Act 1910-1952 provided for free medical attendance for naval personnel, subject to a discretion vested in the Navy Board to disallow such free medical attention in circumstances where they considered the cost should not be born by the Department. The Navy Board decided to charge the plaintiff for his medical treatment if, and only if, he was awarded damages from the defendant. It was held by the majority of the High Court of Australia that this gave rise to an unqualified obligation on the plaintiff to pay for the treatment, and therefore that the claim for the medical expenses should be allowed. However, the minority thought that there should be deduction because in the event of damages not being awarded there would be no obligation on the plaintiff to pay for the treatment. Be that as it may, the whole case was argued on the footing that if the medical treatment could be regarded as free, then there should be no award of damages in respect of it. The case is thus in support of the principle suggested. There are, furthermore, statements elsewhere

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49 *Sweida v. Martin et al.* (1969), 3 D.L.R. (3d) 426 (Sask.). The medical expenses had been paid under a British Columbia hospitalization plan and the Saskatchewan court assumed that there would be repayment. The plaintiff had stated that he was prepared to repay his benefactor.


51 *Stead v. Elliott and Caulfield Motors Ltd., ibid.; Sweida v. Martin et al., supra, footnote 49.

52 This point will be more fully considered later.

53 (1956), 96 C.L.R. 73.

54 The very real difficulty which arises where the award of damages, on the one hand, and the award of the benefit, on the other, are found to be conditional on each other (as the minority interpreted the facts in *Blundell v. Musgrave*), is dealt with later.
in the Australian authorities to support deduction of medical expenses where they have not been incurred by the plaintiff himself. The most important, perhaps, is to be found in the judgment of Windeyer J. in *Paff v. Speed*\(^{55}\) (in the passage quoted by Lord Wilberforce in *Parry v. Cleaver*\(^{56}\)) in which he says: "If the plaintiff claims that he has incurred expenses for medical treatment or for an artificial limb, the defendant can show that these things were provided for him without charge."

The truth of the matter is that where there is a specific pecuniary loss and a benefit which compensates for that very loss, the analogy with damage to property cannot be avoided. The analogy has, of course, often been used in argument. The courts have never allowed double compensation where property is concerned. They have used the device of subrogation to put the money back into the hands of the third party benefactor, the insurer. Even if there were not subrogation, it is unlikely that the courts would allow double compensation. They would deduct, because the effect of the benefit would so clearly have been to put the plaintiff back into the position he was before he suffered the loss. Few would argue that they should do otherwise.\(^{57}\) It is interesting that where the courts have been faced with a claim for special damages concerned with losses before trial (where the plaintiff must prove his loss with exactness), they have been more ready to concede that there is in effect "no loss" when the plaintiff has already been compensated for his initial loss through the receipt of a benefit from a third party.\(^{58}\) It then becomes clear that to allow the plaintiff to recover again from the defendant will be to allow him to make a profit at the expense of the defendant. That this is clear not only to the courts but also to the layman is evident from the concern in American courts on the admissibility of evidence of collateral benefits for some other purpose than that of deduction. Their concern is that, contrary to the American "collateral source rule", a jury will reduce the damages they award to the plaintiff on account of his receipt of a collateral benefit.\(^{59}\) The layman can readily appreciate that the plaintiff may make a profit at the expense of the defendant. Where, therefore, there is a specific pecuniary loss under consideration it cannot be said that "it would

\(^{55}\) Supra, footnote 28, at p. 567.

\(^{56}\) Supra, footnote 1, at p. 581.

\(^{57}\) There is a suggestion that the learned author of a casenote in (1962), 68 L.Q. Rev. 150 might think otherwise.


be revolting to the ordinary man's sense of justice" to deduct the amount of a benefit received from a third party.

It is extraordinary that where there is a single pecuniary loss the courts have not approached the problem as one of alternative remedies. It has been approached from this point of view by would-be law reformers and in America. The question becomes one of whether the courts will allow a cumulation of remedies for the same loss. In other fields where there is the possibility of alternative remedies for the same loss the courts force the plaintiff to elect between his remedies and sometimes apportion liability between alternative defendants. Thus where there are concurrent tortfeasors, or indeed concurrent wrongdoers (where, for example, the same damage is caused through the breach of contract of A and the tort of B), each is severally liable for the whole damage, but satisfaction by one discharges all or if part of the damages is paid by one there is satisfaction pro tanto. Double recovery is in any event prevented; and as between concurrent tortfeasors there is normally a readjustment of the loss through a right of contribution. The analogy with a plaintiff who has a right of action against the defendant and the right to a benefit is striking but not complete, because the plaintiff's right to a benefit will be under the provisions of a contract or statute (debt), rather than through a breach of contract or non-performance of a statutory duty causing the loss (damages). A further analogy arises in property insurance where there are concurrent indemnity policies for the same loss; and the law solves this problem in a similar way to that of the concurrent tortfeasors. There is certainly no "double recovery" even though the insured has paid two insurance premiums.

Where there is a single pecuniary loss the collateral benefits problem may therefore be considered as one of alternative remedies, and the law should not allow the plaintiff to cumulate his remedies for the same loss. Whether the law should solve the problem in the same way as that of concurrent wrongdoers or concurrent indemnity policies will be considered later. It is first necessary to indicate those cases where recovery by the plaintiff of both the tort damages and the collateral benefit should be allowed.

60 Supra, footnote 1, at p. 558, per Lord Reid, when he was dealing with the deduction of gifts.


63 Glanville Williams, Joint Torts and Contributory Negligence (1951), p. 33. The terminology here is that of Professor Williams.

64 Ibid., Ch. 4.

II. Where Deduction Should not be Made.

It is submitted here that the logical argument in favour of deduction of collateral benefits breaks down and cannot be applied (1) if the benefit is intended to compensate the plaintiff for matters in respect of which he cannot recover against the defendant; or (2) if the benefit is intended to compensate non-pecuniary losses. It is further submitted that it is for one or both of these reasons that reluctance has been shown by the courts to deduct the proceeds of accident insurance policies and private benevolence, and that similar reasoning swayed the majority of the House of Lords in Parry v. Cleaver against deducting moneys from a police pension fund. It will be shown that to refuse deduction in these situations is not inconsistent with the policy of the law of damages, nor with public policy in general. The submission put forward here is, of course, a corollary of the principle suggested for deduction.

(1) If the benefit is intended to compensate the plaintiff for matters in respect of which he cannot recover against the defendant, then there is no ground for deduction at all. There are many losses which result from an accident and for which a plaintiff is unable to recover. Such losses may be of a pecuniary or non-pecuniary character. The distress of the victim's relatives—of the family circle—which surrounds an accident is a loss for which the law provides no compensation. It is frequently the victim's relatives, his wife in particular, who suffer the greatest mental strain, sometimes resulting in permanent mental or physical damage. Again, a child's education within the home, and indeed without, may seriously suffer as the result of an accident to one of his parents. There may be consequential financial loss to members of the family circle pressed into care of the plaintiff at home. There may be other small, but significant, economic losses within the family of which the law tends to take no account: the victim may have been in the habit of driving to a central shopping area to cut down the family budget; he may have spent much of his spare time maintaining his car in first class condition; he may have depended on his relationship with colleagues at work to help him in maintaining his house and garden in good repair, either free or at a markedly reduced fee. In short, there are many matters, in-
direct though they may be, for which the law awards no compensation, and if a benefit can be said to have been intended to compensate for these, rather than the losses for which he is claiming against the defendant, there is no ground for deducting it. Thus it may be such collateral matters for which the plaintiff provided by insurance, or that private or public benefactors intended to alleviate by forwarding a benefit to the plaintiff. The same could be said of some pension schemes. Certainly some of these benefits can be said to have contemplated in part at least the additional indirect losses resulting from an accident.

That this is of significance in the refusal by the courts to deduct moneys from accident insurance policies was readily appreciated by Lord Morris in *Parry v. Cleaver*. Referring to a person who has taken out an accident insurance policy, he said: “He may be one in whose case there is already some provision against sustaining economic loss. He may feel that in the event of accident befalling him he would welcome the receipt of a sum of money to compensate him in ways that would not be possible as a result of a successful claim at law.”\(^7\) Again, in *Redpath v. Belfast and County Down Ry.*\(^8\), a case heavily relied on to deny deduction of moneys received by way of benevolence, the first reason put forward by Andrews L.C.J. against the deduction of moneys from a distress fund was that “the payments were made purely as a compassionate allowance to mitigate distress” and that there was no evidence that they were paid to satisfy “loss of earnings” as head of damage.\(^9\)

(2) The second situation in which a plaintiff should be allowed to recover both benefit and damages is where the benefit is designed to alleviate non-pecuniary loss. There is no clear overlap of compensation in such circumstances, but merely a cumulation of compensation in respect of the same type of loss. It is true that an argument of some substance can be put forward in favour of deducting such benefits. Statutory social insurance schemes, either implemented or proposed—schemes which have covered the area of non-pecuniary as well as pecuniary loss—have often disallowed double recovery by one means or another. Thus the Workmen’s Compensation Acts forced the potential plaintiff to elect between his remedies. The Saskatchewan automobile insurance scheme provides for deduction, preserving an action for negligence to recover

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\(^{7}\) *Supra*, footnote 1, at p. 572.


\(^{9}\) Ibid., at p. 170. It may be that the learned Chief Justice was referring to the distress of the victim alone, in which case it is against deduction where the benefit is designed to mitigate non-pecuniary losses of the victim; see *infra*. 
damages in excess of the scheduled compensation. The Columbia automobile plan would have made a remedy under the scheme the sole and exclusive one. The Monckton Committee proposed total deduction of benefits under the National Insurance scheme in England, although this recommendation was not, of course, implemented. It can equally be argued, therefore, that at common law there should be no double recovery of compensation for non-pecuniary loss whatever the source of the benefit.

But the argument in the area of non-pecuniary loss is not so straightforward as with pecuniary loss. There is no loss capable of exact financial calculation. It can never be said that, in retaining moneys from a benefit to compensate non-pecuniary loss as well as the damages from the defendant, the plaintiff is making a profit. He is receiving more than he would have done without the benefit. He is receiving fuller compensation for his loss. But he is not making a profit. This point was put forward by Windeyer J. in The National Insurance Co. of New Zealand v. Espagne, when, in a consideration of the reasons why gifts are not normally deducted, he said: "For, if voluntary pecuniary aid may not be set off against pecuniary loss [under Lord Campbell's Act], then even more surely it should be disregarded in reckoning damages which include compensation for pain and suffering and for deprivation or diminutions of what life has to offer . . . . The compassion, kindness and sympathy of friends and the gifts of charitable persons cannot be weighed against pain and suffering. True it is that a defendant may show that a plaintiff, prevented by his injuries from carrying on his previous vocation, has nevertheless found other, and perhaps more remunerative, employment. A man who loses an arm may earn afterwards more money than he did before; but he has always lost, among much else, the capacity to work in any occupation in which two hands are needed. The victim of a tort is never in the eye of the law a gainer. The balance of account is never in favour of the wrongdoer." It can be argued that the plaintiff is making a profit only if the damages he is awarded by the courts for his non-pecuniary loss are confidently regarded as adequate to put him back in the position he was before the accident. Even the courts admit that the figures awarded are arbitrary. Public policy might nevertheless demand recognition of the figures

72 This is argued by Atiyah, Collateral Benefits Again (1969), 32 Mod. L. Rev. 397, at pp. 403-404.
73 Supra, footnote 10.
74 Ibid., at pp. 597-598.
which the courts arrive at to the extent of not allowing any further compensation to come the plaintiff's way through benefits from other sources. Such public policy, however, would reveal a confidence, which, it is submitted is lacking, that as the result of awards by the courts for non-pecuniary loss plaintiffs are happily restored to their former position, and are not still the losers, in the end, by the accident. On the contrary, where a plaintiff who, either by his own foresight or the foresight of his employers, or through the benevolence of his friends, is more adequately compensated in respect of his non-pecuniary loss than he otherwise would have been, public policy should surely allow him to retain that extra compensation.\footnote{The argument for deduction is stronger where the benefit is one which accrues under a statute and to which most persons on suffering a disability will be entitled. In this case there is merely another organ of the State assessing compensation for non-pecuniary loss—the State has duplicated its assessment of the plaintiff's loss and is in effect raising the overall assessment. If this is realized, and double recovery still allowed, then it must be assumed that the policy of the law is for the higher assessment where someone can be found to meet the bill (i.e. a defendant).}

It is submitted, therefore, that a benefit designed to alleviate non-pecuniary loss should be left in the hands of the plaintiff together with damages. It is further submitted that moneys received from accident insurance policies and from benevolence, if not intended to compensate the plaintiff for matters in respect of which he cannot recover against the defendant, are normally intended to compensate for non-pecuniary loss. It is extraordinary that arguments put forward to deduct these kinds of benefit have been arguments to deduct them from the head of pecuniary loss. Perhaps the reason is that the true nature of these benefits is disguised because they normally come in a pecuniary form. Being then faced with a benefit which reached the plaintiff in a pecuniary form, the courts have tended to deal with them under the head of pecuniary loss. Recognition that accident insurance moneys have more relevance to the field of non-pecuniary loss is to be found in the judgment of Diplock L.J. in Browning v. War Office, where he said: "They are not paid or received in respect of any pecuniary loss sustained by the plaintiff through inability to follow a particular gainful occupation and are irrelevant to the assessment of damages under the head of 'pecuniary loss'. If they are to be taken into account at all, it would be in respect of the general damages awarded for pain and suffering physical disabilities or loss of the amenities of life."\footnote{He went on to say that similar...}
considerations would apply to cases of charitable gifts.

Accident insurance moneys may perhaps be looked at as being in the nature of a "bonus". The accident is chosen as the contingency on which the insured receives his "bonus". The agreement has some of the characteristics of wager. But that an accident was chosen as the contingency, and that the agreement is one of "insurance", indicate that there is clearly a compensatory (or perhaps consolatory?) element in the contract. Undoubtedly the "bonus" will further assist the victim in facing the mental consequences of the accident. Though the moneys might be applied to compensate the victim's loss of earnings, they are more fairly treated as unspecified in their intended application, and as relief in a more general non-pecuniary way. The same is true of most private benevolence. It is on this account, therefore, and to some extent on the one previously mentioned, that normally neither of these types of benefit should be deducted. It is worth noticing that even in countries where it is recognized that social insurance covers the same loss as tort law, and double recovery is normally prevented, private accident insurance is an exception and compensation from that source can be cumulated with tort damages.

An argument similar to the one put forward here in relation to non-pecuniary loss has been voiced in America in support of their "collateral source rule" and in favour of double recovery. It asserts that double recovery should be allowed because legal compensation does not fully compensate. The argument incorporates both categories of cases put forward in this article for non-deduction: "legal compensation" may fall short in two respects, either in that it does not allow recovery for some items of loss, or in that its damages for non-pecuniary loss are not proven to be adequate. It has been suggested that if legal compensation is unsatisfactory to allow double recovery is not the answer. But there are many reasons why the law cannot extend its boundaries of compensation for accidents, not least its understandable reluctance to entertain numerous actions for pure pecuniary loss by relations of the victim or by persons in a contractual relationship with the victim, and the impossibility of fixing exact pecuniary compens-

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78 See Diplock L.J. in Browning's case, ibid., at p. 769 (Q.B.).
79 This is so in France: see André Tunc, Traffic Accident Compensation in France (1965-66), 79 Harv. L. Rev. 1409, at p. 1417; and in Russia: see Samuels, Damages in Personal Injuries: A Comparative Law Colloquium Report (1968), 17 I.C.L.Q. 443, at p. 463. But compare the position in Germany, ibid., at p. 457, where subrogation has been made part of the general conditions of accident insurance policies.
80 See op. cit., footnote 27, at p. 750.
81 The argument cannot, of course, be used where there is a specific recoverable pecuniary loss unless it is asserted that tort damages are for some reason inadequate here also. This may, indeed, be the position in America due to inadequate awards of costs to cover very high legal fees.
sation for non-pecuniary loss. While these inadequacies remain, therefore, there is no reason to disallow further recovery where it is provided for by a benefit.

The decision in Parry v. Cleaver

What, therefore, of pensions and the decision in Parry v. Cleaver? It will be recalled that in this case the House of Lords decided that a police disability pension should not be deducted from the plaintiff’s damages for loss of earnings. The contention here is that it was crucial to the decision that the pension was not intended to compensate the plaintiff for his lost earnings, but was designed to compensate for other losses. Both Lord Pearce and Lord Wilberforce stress this point at the end of their judgments. Lord Pearce: “Moreover, one of the aspects of a service pension, and even more so of a policeman’s pension, is that they are not intended necessarily as any substitute for the capacity to earn. The familiar pattern is that a man may earn in a civilian employment when his service ends (whether prematurely or not) and thus enjoy both his pension and his civilian wage. His pension is thus a personal benefit additional to anything that he may be able to earn by way of wages.” Lord Wilberforce: “The appellant’s pension, called an ‘ill-health award’ is payable . . . to a regular policeman who retires from the force on the ground that he is or was permanently disabled. . . . Disablement, in this context, must mean disablement which prevents him from continuing to work as a policeman, and it must often be the case, and be contemplated, that such disablement does not prevent him taking other paid employment. This may be for a wage which falls short of, equals, or exceeds his former policeman’s pay, but there is nothing, in any of these events, to prevent him from drawing both his new wage and his pension. If, therefore, his earning capacity is reduced by his injury, there would seem no good reason why he should not recover damages for loss of earning capacity as well as receiving his pension.” It is clear from these passages that neither of their Lordships considered the pension as designed to substitute any loss of earnings which might be suffered as the result of the disability. The pension must therefore have been designed to alleviate other losses either of a non-pecuniary nature or of a kind for which the plaintiff could not have recovered against the defendant. The House of Lords, of course, never considered the question of deduction from the head of non-pecuniary loss. They were not asked

83 Supra, footnote 1.
84 Ibid., at p. 578. This passage was quoted by Park J. in Hewson v. Downs, [1969] 3 All E.R. 193, where he held that a retirement pension paid by the Ministry of Social Security should not be deducted from a plaintiff’s damages.
85 Ibid., at p. 582.
to. The damages for non-pecuniary loss had been settled. But if they had been asked to consider the point it is submitted that they would not have deducted the pension, and rightly so for the reasons given above.

That this conclusion is fairly drawn from the decision in *Parry v. Cleaver* is borne out by an examination of the Australian decisions relied upon by the majority opinions in that case. The High Court of Australia had come to the same conclusion as regards the deductibility of pensions in *Paff v. Speed* and *The National Insurance Co. of New Zealand v. Espagne*. That the reasoning of Windeyer J. in those cases supports a number of the contentions in this article has already been indicated. In the *Espagne* case the whole issue of collateral benefits was fully discussed and the conclusions of Windeyer J. and Dixon C.J. were that the crucial determining factor as to deduction should be whether the benefit was intended to be independent of, and cumulative upon whatever right of redress against others the plaintiff might have. Dixon C.J. said of benefits which should not be deducted that they have “this distinguishing characteristic, namely that they are conferred on [the plaintiff] not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him”. Windeyer J. thought that so far as any general principle could be deduced it was that benefits should not be deducted “if: (a) they were received or are to be received by [the plaintiff] as the result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages”. The crucial consideration, therefore, was an intention that the benefit was to be enjoyed independently of any right of action the plaintiff might have and therefore, implicitly, of any compensation he might receive through his right of action.

It might be said that such an intention is different from that forwarded in this article for distinguishing those benefits which should not be deducted; but on closer analysis it will be found to be the same. If a benefit is intended to be enjoyed in addition to the compensation which will be derived from a right of action

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66 Supra, footnote 28.
67 Supra, footnote 10.
68 Ibid., at p. 573. The passage is reproduced in Lord Pearce's judgment in *Parry v. Cleaver*, supra, footnote 1, at p. 578.
69 Ibid., at pp. 599-600.
against the tortfeasor it cannot be intended as compensation for a specific pecuniary loss compensable by the tortfeasor, since the compensation for that loss is already there. “Compensation” for pecuniary loss puts the plaintiff so far as possible back into the position he would have been but for the accident, and if a benefit is intended to be enjoyed in addition to a right of action for a pecuniary loss, a right of action which will produce damages, which themselves put the plaintiff back into that position, the benefit cannot be intended also for that purpose. The benefit cannot, therefore, be intended as compensation for that loss. Therefore benefits which are said to be intended to be enjoyed irrespective of a right of action must be intended as further compensation for non-pecuniary loss, or as compensation for matters outside the scope of the right of action; and it was into this category that the High Court of Australia held that the pensions under consideration in *Paff v. Speed* and the *Espagne* case fell, and that they therefore should not be deducted.

It should be noted that, in the writer’s submission, not all pensions (or, for that matter, insurance moneys or benevolence) will escape deduction for the reasons given. There undoubtedly are pensions the purpose of which is to compensate for loss of earnings twice. Such it is submitted, was the nature of the pension considered in *Browning v. War Office.* Here was a pension which gave to the plaintiff after the accident the equivalent of almost half his normal pre-accident wage. The pension was deducted by the Court of Appeal from his damages for loss of earnings. It is not entirely clear whether the majority of the House of Lords in *Parry v. Cleaver* intended to overrule the decision. Certainly Windeyer J. in the *Espagne* case envisaged pensions which might be deducted, for he said, after enunciating his general principle, that “the questions that arise can never be determined in the abstract. Each must depend on the terms of the particular contract, pension scheme, charitable benefaction of statute governing the benefit conferred”. Thus, it is to be hoped that the courts will examine closely the character of particular pension rights and set off any which are intended to compensate the plaintiff for his loss of earnings, in the same way as they should examine the true nature of insurance moneys or benevolence to determine whether they are intended to compensate for an otherwise recoverable pecuniary loss or not.

The conclusion of this article thus far is therefore that a valid distinction may justifiably be made between benefits such as sick pay, unemployment benefit and the provision of medical care,

90 *Supra*, footnote 6.
91 Lord Pearce, for example, appears to confine his decision to the particular pension in question: *supra*, footnote 1, at p. 578.
92 *Supra*, footnote 10.
which are intended to alleviate a pecuniary loss and should be deducted, and, on the other hand, benefits such as private accident insurance, most benevolence and some pensions which are not intended to be applied in relief of any particular pecuniary loss and which should not be deducted. The distinction is crucial and the solution supported by both principle and authority.

III. Possible Readjustment of the Loss.

Financial injustice

Where there is no deduction the result is that the plaintiff gathers compensation from two sources, from the defendant tortfeasor and from the third party benefactor. No conflict between two potential sources of compensation arises. Each source pays for a separate loss or a separate portion of the whole loss. The tort damage will be met initially by the defendant, but will probably be spread amongst a wide section of the community either through insurance or through the familiar loss-spreading processes of large-scale organizations. On the other hand the cost of the benefit will be born by those who contribute to the benefit or benefit scheme. These may include the plaintiff himself, if he contributed to a pension scheme or held an accident insurance policy. The financers of a benefit may be a very large number of people. Be that as it may, if there is no deduction the plaintiff's compensation is spread through two channels, through the defendant and through the third party benefactor.

Where, however, double compensation cannot be allowed in respect of a particular pecuniary loss, the compensation might be spread through either of the two channels. There is a conflict between two potential sources of compensation. The deduction principle operates to spread it through the third party benefactor. It burdens the third party benefactor with the loss to the effective relief of the defendant tortfeasor. The tortfeasor is relieved of what would have been his burden because another compensation channel exists, paid for by the financers of the benefit. If there had been no benefit the law would have burdened the tortfeasor's channel with the compensation. Thus the financers of the benefit appear to have paid needlessly. Their finances, it appears, have been applied to purchase something which the law would otherwise have provided at the expense of the tortfeasor. There is an even greater appearance of injustice where the plaintiff himself is one of the financers of the benefit, either through insurance premiums or contributions. If the plaintiff has not financed the benefit directly he may have earned it through his employment by accepting a lower wage. It was thankfully appreciated in Parry v. Cleaver\(^6\) that for

\(^6\) Supra, footnote 1, at pp. 559, 577, 581.
this reason no distinction could be made between contributory and non-contributory pensions. They are all paid for in some way by the defendant.\textsuperscript{96}

This apparent injustice to the financers of the benefit gave rise to a formidable argument against deducting at all, particularly where the plaintiff was one of the financers. The argument is a familiar one. It is that the plaintiff has paid for the benefit, and should not be deprived of the fruits of his payments. It was used by Bramwell B. in \textit{Bradburn's case}\textsuperscript{96} against the deduction of accident insurance moneys, and by Andrews L.C.J. in \textit{Redpath's case}\textsuperscript{97} for benevolence. It was adopted by Lord Reid in \textit{Parry v. Cleaver}\textsuperscript{98} against the deduction of both these two types of benefit, and by analogy against the deduction of pension moneys. It is a potent argument, but that is not to say that it cannot be fairly and forcefully answered.

The argument is not answered by a reminder that, even where there is deduction, the plaintiff does still receive what was bargained for by the financers of the benefit—he receives his benefit—and what he does not receive is the damages from the defendant.\textsuperscript{99} The financers of the benefit have still paid for something which was, as things turned out, unnecessary—they have paid while the defendant has not, and in effect relieved him of liability to that extent.

Nor is the argument answered, but only reduced in potency, if it is pointed out that in the case of most benefits the financers of the benefit will have contemplated other circumstances than those under discussion—circumstances where the victim would not anyway have had a claim against a defendant tortfeasor. Thus insurance policies, pension schemes, benevolent funds, sick pay schemes and medical schemes all contemplate circumstances where there may be no possibility of recovery from a defendant. Most of these schemes are primarily designed to protect against illness. They also cover non tort-caused accidents, and there is always the possibility that even if an accident is tort-caused the defendant will be uninsured. In these circumstances the benefit is necessary. Where the benefit scheme provides also for such circumstances, only a proportion of the financers’ money will go towards benefits which turn out to be unnecessary. But there still is this proportion

\textsuperscript{96} That this has so been recognized for some time. See also Goodhart (1967), 83 L.Q. Rev. 492, at p. 496; Finnemore J., in \textit{Judd v. Board of Governors of Hammersmith, West London and St. Mark's Hospitals}, [1960] 1 All E.R. 607, at p. 608.

\textsuperscript{97} \textit{Bradburn v. Great Western Ry. Co.}, supra, footnote 3, at p. 2 (Exch.), 196 (All E.R.).

\textsuperscript{97} \textit{Redpath v. Belfast and County Down Ry.}, supra, footnote 68, at p. 170.

\textsuperscript{98} Supra, footnote 1, at p. 558.

\textsuperscript{99} Cf. Atiyah, \textit{op. cit.}, footnote 72, at pp. 402-403.
of the money which, from their point of view, is unnecessarily paid, and which in effect relieves the defendant of liability. Besides, there remain cases where the whole of the benefit was unnecessarily provided by an individual third party.

**Readjustment of the loss**

One solution to the problem is to find some means whereby the third party benefactor recoups the value of the benefit at the expense of the defendant; who would in any event have paid had there been no benefit. The position then becomes the same as if there had been no benefit in the first place. Not only is double recovery by the plaintiff prevented, but the defendant will then not have reaped any advantage from the third party benefactor. Furthermore, where the benefit is derived from a scheme to which a large number of people contribute, recovery by the scheme of the value of the benefit will reduce the cost of contributions towards the scheme to the very extent required. Insurance premiums or pension contributions will be reduced to the extent that they will then only go towards those benefits which are necessary (where there is no defendant tortfeasor involved). The defendant will then bear the loss which he would have borne had there been no benefit.

There are a number of possible methods whereby the law could, and sometimes does, allow the third party benefactor to recoup the value of a benefit and thereby transfer the loss into the hands of the defendant. Some of these possibilities have been considered elsewhere, and it is not therefore necessary to subject them to further detailed analysis.

1. In the first place the law might give to the third party benefactor a separate right of action against the defendant for the value of the benefit—a claim for economic loss resulting from the accident. The action *per quod servitium amisit* is of this character but it is of limited scope. The Law Reform Committee has, in fact, recommended its abolition in favour of a separate action by a victim’s relatives and his employer. Recovery under the proposed action would include the value of benefits forwarded to the victim. Other possibilities are (a) an action in quasi-contract for money paid to the defendant’s use—but attempts by employers to recover sick pay from the defendant have proved unsuccessful—and (b) an action in the tort of negligence for economic loss, but at present such a claim would undoubtedly fall beyond the boundaries imposed by the concepts of “duty” and “remoteness” and the limitations of recovery for pure economic loss.

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1. See in particular, McGregor, *op cit.*, footnote 8.
(2) The second possibility is the doctrine of subrogation. It is now, of course, settled that in property cases the insurers are normally only indemnifiers and that they are subrogated to the rights of the plaintiff as against the defendant, so that damages awarded to the plaintiff in his tort action are held in trust for the insurers. The insurers thereby recoup the loss for which they had made themselves potentially liable. It is, however, almost certainly too late for the courts to bring this doctrine into operation in person injury cases even where the loss covered by the benefit is a specific pecuniary one. But the solution might well have been adopted by the legislature. Thus the National Health might have been subrogated to the rights of the plaintiff to the extent of the value of any free medical care the plaintiff received. As has been seen, most of the provincial medical insurance schemes in Canada are subrogated in this way; and so are some state pension schemes in America. Equally it would have been possible for the National Insurance organization to be subrogated to the plaintiff's rights. It would have avoided the present compromise of half-deduction and would have answered the charge that deduction deprives the workman of the fruits of his contributions.

(3) The third possibility is to extend the practice of demanding an undertaking from the plaintiff that he will repay the third party benefactor the value of the benefit. The use of this device has already been noted. The English and Canadian courts have employed it where there was a moral obligation on the plaintiff to repay the third party benefactor. The Australian courts, on the other hand, have refused to demand an undertaking from the plaintiff, but have nevertheless awarded damages (not deducted) on an understanding that there would be repayment. Application of the device could be extended by the courts to cover any case in which it was felt that deduction would operate unjustly to burden the third party benefactor with the loss to the relief of the defendant tortfeasor.

(4) The fourth possibility is for the law to allow full scope to the operation of what may be termed "the conditional benefit". Some benefits have a built-in mechanism to prevent double recovery. The receipt of the benefit is made conditional on the potential recipient's not being awarded damages in respect of the loss for which the benefit is intended to compensate. This is nor-

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103 This possibility was canvassed by the Committee on Alternative Remedies, op. cit., footnote 61, paras 5, 41, 47, 52.
104 See also McGregor, op. cit., footnote 8.
105 Dennis v. L.P.T.B., supra, footnote 15; Schneider v. Eisovitch, supra, footnote 15. In Allen v. Waters & Co., supra, footnote 15, the obligation had originally been a legal one but it had become statute barred.
106 Myers & City of Guelph v. Hoffman, supra, footnote 21; Rawson and Rawson v. Kasman, supra, footnote 47.
mally achieved through a discretion, vested in the third party benefactor under the terms of the benefit. The discretion is either to disallow the benefit or to reduce its value if the potential recipient is awarded damages. If this device is allowed to operate it burdens the defendant with the loss. The third party benefactor, rather than recouping the value of the benefit from the defendant, relieves himself of any liability to forward the benefit, and the plaintiff then recovers damages in respect of the loss from the defendant. It may appear in another form. The benefit itself may not be conditional, but a legal obligation to repay may be imposed under the terms of the benefit if the recipient recovers damages. Since, however, a benefit which gives rise to a legal obligation to repay may be treated as no benefit at all for the purposes of deduction, the two forms of "conditional benefit" are, in essence, of the same character.

"Conditional benefits" present the courts with a dilemma. On the one hand, the courts might award damages without deduction in the knowledge that by doing so the plaintiff will not receive the benefit; or on the other hand, they might refuse to award damages (deduct the benefit) in the knowledge that the plaintiff will then have the loss compensated for by the benefit. In Johnson v. Hill the English Court of Appeal was considering the deductibility of a "conditional benefit", a discretionary pension, from damages under the Fatal Accidents Acts. Du Parcq L.J. expressed the difficulty in the following way: "... the tribunal which is assessing compensation finds itself obliged to make an allowance for the payment of an amount which will itself vary according to the quantum of compensation awarded by that tribunal. Logically, the problem seems to be insoluble." Again, in Blundell v. Musgrave, Fullagar J. illustrated the difficulty by taking the example of a plaintiff who agrees with his doctor that he will pay the doctor a reasonable fee if he recovers the amount as part of his damages from the defendant, but that otherwise no fee is to be charged. Fullagar J. pointed out that in such a case: "The recovery of damages is the condition of his liability to the doctor. But his liability to the doctor is the condition of his right to recover the damages." Viewed in isolation perhaps the problem is logically insoluble. But when the effects of deduction, or alternatively non-deduction, are considered, the answer may more clearly emerge. The effect of deduction being to burden the third party benefactor with the loss, and of non-deduction to burden the defendant with the loss,
the answer depends upon whom the courts wish to bear the loss. Where, therefore, a conditional benefit is under consideration it is open to the courts to transfer the loss to the defendant by allowing the claim for damages on the ground that by doing so the plaintiff will not receive the benefit; and the third party benefactor would then be relieved of payment rather than the defendant.

The English courts, however, have tended to compromise when faced with discretionary or “conditional” benefits by taking into account “the reasonable expectation of their continuance”.

On this basis they have made some deduction, but not a full deduction, of the value of the benefit. The practice was one which met with the approval of Lords Reid, Morris and Pearson in *Parry v. Cleaver.* But the position is not yet settled. Earlier in *Payne v. Railway Executive* the English Court of Appeal had refused to make any deduction of a discretionary pension partly on the ground that the benefit was of a conditional nature. On the other hand, Lord Pearce in *Parry v. Cleaver* was inclined towards the opposite conclusion and to deduct almost totally, depending, however, on whether the reduction of such benefits because of the damages was “a real practical danger or (as in most cases) a mere theoretical danger.” The leading Australian decision on whether deduction should be made in the case of a “conditional” benefit is *Blundell v. Musgrave.* That was the case of a naval rating who received treatment in a naval hospital, payment for which was made conditional on his receiving damages. The High Court of Australia held by a bare majority that there should be no deduction and that the plaintiff should recover damages for the medical expenses which he became legally liable to pay only on their award of damages. The device of the conditional benefit was thereby successful in burdening the defendant with the loss and recouping the value of the benefit for the third party benefactor, the naval hospital. Dixon C.J. and Fullagar J. dissented. In a later case the learned Chief Justice commented on the use of the

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112 *Supra*, footnote 1, at pp. 561, 569, 592.


114 *Supra*, footnote 1, at p. 576.

115 *Supra*, footnote 26. Per Dixon C.J. at pp. 79, 80: “... it cannot be enough to entitle the plaintiff to recover from a defendant in respect of money still to be paid such as the medical expenses that the plaintiff is liable to pay if and only if he recovers a corresponding amount from the defendant. His liability or the necessity of meeting the expenditure must be independent of his recovery from the defendant.” Fullagar J. dissented on similar grounds, viz. that there must be liability to repay antecedent to, and not arising after, the claim for damages.

conditional benefit by employers to the effect that it was “a device for recovery [by employers] in effect in the name of the employee”, and that it had the same result as a separate action by the third party benefactor against the defendant for the value of a benefit, that is the action per quod.\textsuperscript{117} Be that as it may, it is submitted that it is open for third party benefactors in conjunction with the courts to use the conditional benefit to relieve the third party benefactor of the cost of his benefit where the plaintiff has a tort action against a defendant for the same loss, and to shift the burden of the loss onto the defendant. It is, furthermore, always possible for the third party benefactor to achieve this result by imposing a legal obligation on the recipient of the benefit to repay in any event, but to enforce that obligation only if the recipient recovers damages. In such a case the courts could not deduct the benefit because of the legal obligation to repay.

If any one of those devices is allowed to operate there is an effective answer to the contention that “the third party (and/or the plaintiff) has paid for the benefit to the eventual relief of the tortfeasor”. The third party recoups the value of the benefit. The position is as it would have been had there been no benefit in the first place. The financial injustice is resolved. The solution to the problem appears at the outset an attractive one. Certainly where the benefit is the product of benevolence it provides the desired answer, and there is undoubtedly scope for its development by the extended use of one or other of the devices if the benevolence is of such a character that double recovery should be avoided.\textsuperscript{118} But where the benefit is of any other kind the solution is less satisfactory.

\textit{A question of alternative remedies}

If the benefit arises under contractor statute the solution which readjusts the loss is open to a number of objections. In the first place it ignores the fact that the third party was under a legal obligation also. Indeed, from one point of view the third party benefactor could be considered under a greater obligation to pay for the loss than the defendant. The third party’s obligation is either imposed by statute or was undertaken by agreement, whereas the defendant’s is likely to have been imposed on him unwillingly and in respect of some involuntary (unintentional) act. In short, the solution ignores the true nature of the problem. The problem is that there is a loss for which two persons have made themselves in one way or another potentially liable. It is a problem of alternative remedies. The point was made earlier to show that the plaintiff

\textsuperscript{117} Ibid., at p. 404.

\textsuperscript{118} The alternative solutions hereafter suggested are therefore not intended as applicable to benefits of a benevolent character.
should not be allowed to recover twice in respect of the same pecu-
niary loss. The questions here are: “Given that the plaintiff should
not be allowed to recover twice, from whom should he be allowed
to recover? Which of two persons who have made themselves po-
tentially liable should be regarded as primarily liable to pay the
loss? Which remedy is the victim’s primary one? That against the
defendant? Or that against the third party?”

In the area of property insurance the problem was looked at in
this very way by Lord Mansfield in 1782 in Mason v. Sainsbury.\(^{119}\)
The issue which the court there faced was in a form which is now
familiar. The plaintiff’s house had been damaged by a mob, and
his insurance company had paid out the loss to the plaintiff. The
insurance company then brought an action through the plaintiff
against the defendant tortfeasor. It was argued for the defendant
that the plaintiff could not recover the loss twice, that he elects
between his remedies, and that it was a question of satisfaction
and the plaintiff had already received satisfaction. Alternatively
it was argued that the insurance company, if the plaintiff recovered
for them, would in effect be keeping the premium and not paying
the loss. For the plaintiff it had been contended that the insurance
company stood in the shoes of the plaintiff (which is now, of
course, the established position in this situation). Lord Mansfield,
casting his mind beyond the formulistic distinctions of the law, saw
the question as one of “who is first liable?” and held that the
defendant, as a wrongdoer, rather than the insurance company was
“first liable”. This decision is for our purposes of value not for the
result but for the statement of the problem. On whom did the pri-
mary liability rest? And Lord Mansfield answered, for the now
obsolete reason, that it rested on the wrongdoer. He nevertheless
appreciated that two persons had made themselves potentially lia-
ble for the same loss, one a tortfeasor and the other a contractor.

The problem took on a new dimension when the principle of
deduction emerged, and it was the conflict between the doctrine of
subrogation and the principle of deduction with which the court
was faced in Yates v. Whyte.\(^{120}\) This was again a case of property
insurance. Damage to the plaintiff’s ship had been caused in a
collision, and they recovered some of their loss under an insurance
policy. They then sued the defendants, the owners of the other ship
involved in the collision, for damages. The question arose as to
whether the insurance moneys already received by the plaintiffs
should be deducted. If property insurance moneys were deducted
as a collateral benefit the doctrine of subrogation in such cases
would, of course, collapse. Nevertheless it was argued strongly for
the defendants that they should be deducted. Some of the argu-

\(^{119}\) (1782), 3 Dougl. 60.
\(^{120}\) (1838). 4 Bing N.C. 272.
ments in Mason v. Sainsbury\textsuperscript{121} were again used, but in this case the defendants brought into argument some telling analogies. They argued that the position was the same as the satisfaction of a debt by a third party; that there was an analogy with the deduction of a gift given in satisfaction of a debt; that where there was an alternative claim in contract and tort the plaintiff could only claim once; and that there was even an analogy with the position where there are several tortfeasors and the damages have already been satisfied by one. Most important, however, was the realization by counsel for the plaintiff that if deduction operated the court (that is the defendant) would be acting as an indemnity, and it was argued that the court could not also be an indemnity if the insurers already were, because the two would then cancel out. Ultimately it was held by the court that, following Mason v. Sainsbury,\textsuperscript{122} the defendant was "first liable" because the insurers were an indemnity.

The case of Yates v. Whyte\textsuperscript{123} exposes the real nature of the problem with which we are concerned; that there is a real issue as to who should pay between the defendant and the third party benefactor, and that \textit{the issue may be between two parties both of whom claim to indemnify the plaintiff only}, to be liable to pay only his net loss rather than his gross loss. Thus the operation of the deduction principle by itself makes the defendant liable only to indemnify. On the other hand, if they are allowed to operate, each of the devices mentioned which serve to transfer the eventual loss to the defendant has the effect of making the third party an indemnifier. Who, then should bear the loss?

The conclusion that the collateral benefits problem is very often one of alternative remedies might lead one to suggest that the answer lies in apportionment. That is to allow the plaintiff to elect between his remedies initially,\textsuperscript{124} and then to apportion liability between the defendant and the third party by contribution. This has the effect of holding neither primarily liable, and neither a mere indemnity. The solution was canvassed earlier. It is the one normally adopted where there are concurrent wrongdoers, but the truer analogy is with property insurance law where there are concurrent indemnity policies for the same loss.\textsuperscript{125} Here either of the insurers is bound to pay to the assured the full amount for which he would be liable if his policy stood alone; but having paid he is entitled to

\textsuperscript{121} Supra, footnote 119.
\textsuperscript{122} Ibid.
\textsuperscript{123} Supra, footnote 120.
\textsuperscript{124} The election would, of course, only operate for that proportion of the loss which is potentially covered by both parties. If the third party benefactor has not agreed to cover the whole of the plaintiff's pecuniary loss, then should the plaintiff choose to claim from the third party benefactor first, he would still be left with a remedy against the defendant for the remainder of his pecuniary loss.
\textsuperscript{125} See MacGillivray, \textit{op. cit.}, footnote 65, pp. 901, 902.
an equitable contribution from his co-insurer on the same principle as co-sureties are bound to contribute *inter se* when any one is called upon by the creditor to pay. It is generally accepted that the proper basis of contribution is according to the amounts insured upon the property.¹²⁶

This solution could readily be transferred into the field of personal injury to settle the issue as between the defendant and the third party benefactor, and the contribution could be made according to the amount for which either party has made himself initially liable. Thus the defendant has made himself one hundred per cent initially liable, but the third party benefactor might have limited his liability to a proportion of the pecuniary loss actually suffered by the plaintiff, say fifty per cent. The defendant would then pay sixty-six per cent of the plaintiff's loss, and the third party benefactor thirty-three per cent. The courts are quite used to such apportionment. A similar compromise solution is in effect the one which has normally been reached by English courts when faced with a "conditional benefit". By deducting in part the value of the benefit the burden of the loss is divided between the third party benefactor and the defendant. Such a compromise is then the second alternative solution (the first being to allow the third party to recover the value of the benefit from the defendant). It has all the merits of a fair compromise, but it ignores amongst other things the loss shifting processes of the law of torts.

*The argument against readjustment of the loss*

The third alternative is to make no readjustment of the loss, either in part or in whole, and to hold the third party benefactor primarily liable to pay for the loss, and the tortfeasor only an indemnifier; to select the contractual or statutory remedy as the primary one for a loss potentially covered also by the tortfeasor. It is achieved by endorsing the principle of deduction despite the apparent financial injustice. There are many arguments in favour of this solution.

(1) The third party will normally be in at least as good a position to spread the loss as the tortfeasor. Very often the third party will be in a better position. The two alternative channels through which the loss might be spread have already been outlined. It is true that the defendant may be himself a loss-spreading agency

¹²⁶ That this solution is not automatic is evidenced by the difficulties which the courts have experienced in America when faced with a similar problem in the field of third party insurance. See "Other Insurance" Clauses in Automobile Liability Policies (1952), 52 Col. L. Rev. 1063. Various conclusions have been reached by the courts: that it depended on which policy was first taken out; that the different wording of the policies was significant; and that it was the insurance which covered the primary tortfeasor which should pay.
A Collateral Benefits Principle

(such as an employer) or be insured against third party risk (as motorists must be). But this will not always be so. Defendants are not selected only on the basis of their loss-spreading ability. On the other hand the third party is almost certain to be in a position to spread the loss. The very essence of most benefit schemes is that they spread losses amongst contributors. It is their business. Statutory benefits are usually financed by the community at large. Contractual schemes will normally be undertaken only by those who can either absorb the loss themselves (such as employers) or organize a loss-spreading system (such as insurers). If, therefore, the third party is burdened with the loss to the relief of the tortfeasor the impact is unlikely to be noticed by any individual; but if the contrary, it may fall solely on the shoulders of the defendant tortfeasor.

(2) The use of one or other of the devices mentioned must normally mean a retransfer of the loss. Benefits are usually paid more speedily than damages from a tortfeasor. Indeed, one of their chief advantages is that they are received by the victim of an accident in the immediate post-accident period when they may be most needed. Therefore there will normally be an initial transfer of the loss from the victim to the third party loss distributing agency. A further transfer of the loss to a defendant is cumbersome and unnecessary in most cases. The view has been advanced that the loss should lie with the initial loss distributing agency and not be shifted from one to another. Shifting the loss will normally involve either another legal action, or the joining of another party in the victim's claim against the tortfeasor, depending on which device is adopted. But the law has sensibly set its face against a duplication of legal actions in respect of a single accident—particularly actions for pure economic loss—and the joining of third parties in claims against tortfeasors is likely to make recovery of compensation in respect of accidents more complex.

(3) There is a strong economic argument against readjusting the loss. The operating costs of running any compensation scheme are heavy. It appears that social insurance is least expensive in this respect, so that, for example, the cost of shifting the burden of medical expenses to the National Health, or of recouping a portion of lost earnings through unemployment benefit is minimal. The overheads involved in private (plaintiff) insurance are greater, but still far below the cost of tort law. To employ two of these media in the process of compensating a single pecuniary loss is economically ludicrous, and it is the second transfer of the loss

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128 A full argument is presented by Conrad, op. cit., ibid.
over to the defendant tortfeasor which is the expensive process. In one way or another the public will eventually pay these costs. Therefore any financial injustice which may result to the financiers of a benefit by not readjusting the loss is offset by the enormous saving in avoiding the second loss shifting process. It is this saving which is recognized by insurance companies when they operate “knock for knock” agreements between themselves.

(4) Finally, a readjustment or retransfer of the loss will in most cases be of little consequence to those who eventually pay. It would merely mean that the cost of third party liability insurance would be marginally raised and that of the various forms of plaintiff insurance reduced. Since most members of society contribute in one way or another to both, then a reshifting of the loss is from their point of view virtually irrelevant and therefore almost totally unnecessary. 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 a loss from the first category of plaintiff protection to the second of defendant protection will probably make no financial difference to him at all. True enough a readjustment may lead to a marginal shift of certain losses from one section of the community onto another (for instance from employers, and therefore employees, onto motorists), but even if this is desired a costly reshifting of losses through legal actions is not the most economic method of achieving the result. A simple and marginal tax adjustment is all that is necessary.

The conclusion of this part of the article is therefore that in those cases where double recovery must be avoided the principle of deduction should be endorsed and there should be no readjustment of the loss. The third party should be held primarily liable and the tortfeasor only an indemnity; this despite the financial injustice which might appear from simply deducting. An exception should remain, however, where the third party is not a loss-distributing agency. Only cases of benevolence are likely to fall into this latter

129 Conrad, op. cit., ibid., at p. 311: “Probably a large number of the health insurance policyholders are also liability insurance policyholders, who have their costs doubled by subrogation without any increase in their benefits. The principal beneficiaries of the shift are insurance companies and lawyers.”
category, and in these cases some means of readjusting the loss should be adopted.

Conclusions

The underlying conclusions of this article are as follows:

(1) Despite the decision in Parry v. Cleaver there remain a large number of cases where double recovery of a collateral benefit and tort damages should not be allowed.

(2) The intended purpose of the benefit is the crucial factor in determining whether there should be double recovery or not. If it is intended to compensate a specific pecuniary loss for which, in the absence of the benefit, the plaintiff would have a claim against the tortfeasor, then there should be no double recovery. If, on the other hand, it is intended for some other purpose, such as to compensate for non-pecuniary losses, the plaintiff should be allowed to recover both the benefit and the damages.

(3) The financial injustice which might appear from deducting a benefit falling in the first category can be met through readjusting the loss by allowing the third party benefactor to recoup the value of the benefit from the defendant; but

(4) Such a readjustment involves a costly and normally unnecessary reshifting of the loss, and therefore the deduction principle should be endorsed as the most satisfactory method of avoiding double recovery.