REDUCING DAMAGES CLAIMS FOR BENEFICIAL EVENTS

Comparative Thoughts in
German Civil Law and Common Law

Ulrich Hermann Wolff

Institute of Comparative Law
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REDUCING DAMAGES CLAIMS FOR BENEFICIAL EVENTS

ABSTRACT

An act giving rise to an obligation to indemnify, be it in tort or in contract, can cause not only losses but benefits as well. This thesis explores the extent to which these benefits influence the amount of damages payable by the defendant in German civil law and common law.

It concentrates firstly on cases where actions taken by the plaintiff, which go beyond a duty to mitigate, gave rise to the benefit. Secondly, situtations are examined in which the benefit consists in the improved condition of the damaged objects after the defendant has paid for their repair.

Differences in the treatment observed in the two legal systems under comparison are suggested to be accountable for and explainable by differences in legal traditions in the field of assessment of damages, the treatment of unsolicited benefits, unjust enrichment and *negotiorum gestio*.

SOMMAIRE

Un événement engendrant une obligation d'indemnisation à cause d'une responsabilité, soit délictuelle soit contractuelle, peut donner lieu non seulement à des dommages mais aussi à des bénéfices. Ce mémoire explore comment ces bénéfices influencent le montant des dommages-intérêts que le défendeur est obligé de payer en droit civil allemand et en *common law*.

Dans un premier temps, des cas sont etudiés dans lesquels les gestes du demandeur qui vont au-delà d'une obligation de minimiser les dommages ont donné lieu à un bénéfice.

Dans un deuxième temps, des situations sont examinées dans lesquelles le bénéfice résulte de la condition améliorée des objets endommagés, suite à des réparations entreprises et payées par le défendeur.

Dans un dernier temps, il est suggéré que les différences décelées dans les deux systèmes juridiques faisant l'objet de la comparaison sont dûes à des différences de traditions juridiques dans le domaine de l'évaluation des dommages ainsi que de l'enrichissement sans cause et de la gestion sans mandat ou *negotiorum gestio*.

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AbgO	*Abgabenordnung*
AcP	*Archiv für die Civilistische Praxis*
AKB	*Allgemeine Bedingungen für die Kraftverkehrsversicherung*
Art.	*Artikel*
AtomG	*Atomgesetz*
BauGB	*Baugesetzbuch*
BBauG	*Bundesbaugesetz*
Bd.	*Band*
BGB	*Bürgerliches Gesetzbuch*
BGBl.	*Bundesgesetzblatt*
BGH	*Bundesgerichtshof*
BGHSt	*Entscheidungen des Bundesgerichtshofes in Strafsachen*
BGHZ	*Entscheidungen des Bundesgerichtshofes in Zivilsachen*
BLeistG	*Bundesleistungsgesetz*
BSchiffG	*Binnenschiffahrtsgesetz*
BVerfG	*Bundesverfassungsgericht*
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts*
FamRZ	*Zeitschrift für das gesamte Familienrecht*
GG	*Grundgesetz*
GSZ	*Grosser Senat Zivilsachen*
GVG	*Gerichtsverfassungsgesetz*
HaftpflG	*Haftpflichtgesetz*
HGB	*Handelsgesetzbuch*
Int.Enc. Comp.L.	International Encyclopedia of Comparative Law
JuS	*Juristische Schulung*
JW	*Juristische Wochenschrift*
JZ	*Juristenzeitung*
KG	*Kammergericht*
Landesbeschaffungs G	*Landesbeschaffungsgesetz*
LG	*Landgericht*
LuftVG	*Luftverkehrsgesetz*
NJW	*Neue Juristische Wochenschrift*
OGHZ	*Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Zivilsachen*
OLG	*Oberlandesgericht*
Orderlagerschein VO	*Orderlagerscheinverordnung*
Para.	*Paragraph*
RabelsZ	*Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*
RG	*Reichsgericht*
RGBl.	*Reichsgesetzblatt*
RGSt	*Entscheidungen des Reichsgerichts in Strafsachen*
RGZ	*Entscheidungen des Reichsgerichts in Zivilsachen*
RZ	*Randzeichen*

S.....*Seite*
SchutzberG.....*Schutzbereichsgesetz*
SGB.....*Sozialgesetzbuch*
StGB.....*Strafgesetzbuch*
Stgt.....*Stuttgart*
StVG.....*Strassenverkehrsgesetz*
VersR.....*Versicherungsrecht*
VVG.....*Versicherungsvertragsgesetz*

Chapter 1

GENERAL PART

1. Chapter 1: General Part

1.1. Introduction and Scope

An event which causes a loss can also generate profits or benefits. The courts have therefore repeatedly been called upon to deal with benefit-yielding events which have to be credited against a damages claim.

Consider these examples. The lot of land on which a house stood before the arsonist burnt it down is worth more without the building because the dwelling was protected as a heritage building. Again, a dismissed employee finds a job which is better paid than the old one. Other examples are the car accident that triggers payment by an insurance company and the contract-breaking buyer who refuses to take the goods but whose seller is able to resell them at a profit. Finally, a damaged machine is worth more after the repair with new spare parts for which the wrongdoer had to pay.

In all these cases we have to address the question of the extent to which this benefit influences a damages award. Should we disregard it as wholly or partially irrelevant or should we reduce the damages by the amount of the benefit?

This paper presents arguments and aspects raised by the above cases in both German and common law.

The common law, when it addresses these issues at all, deals with them under the label of the "collateral source rule", if the benefit comes from third parties, or of "betterment", when the benefit is created by compensation in the form of repair. If the benefit was created by the plaintiff's own actions, it is seen as a question of mitigation and the rule as to avoided losses comes into play. This rule stipulates that any loss avoided goes in mitigation, i.e. in reduction of the loss.

While on the face of it, and in particular for a common lawyer, these areas of law may not seem to be related, they can be treated together for several reasons. In all cases, in one way or another, a loss was eventually avoided, and in all cases this raises the question whether the accrued benefit has to be accounted for in reduction of the damages.

Both breach of contract and the commission of a tort give rise to a duty to compensate. The question of accounting for benefits could be seen as a mere component of what it means to compensate. It would then become a question of definition of the concept of compensation used in all the cases mentioned above.

Taking a somewhat different view, we can approach the question of accounting from a different angle. Who, if anyone, is entitled, or more entitled, to keep a benefit that has accrued through an event which also has given rise to a loss. Seen from this perspective, the focus would lie more on the question of unjust enrichment. Would the plaintiff be unjustifiably enriched if he kept the benefit as well as the normal amount of loss?

This unjust enrichment approach would also link together all the cases mentioned above, regardless of the area of law they arose in. My starting point is therefore the factual situation of a simultaneous loss and benefit.

A short introduction to the German law of damages and to the accounting problem will be given in order to allow the common law reader to follow the comparative parts of the paper (chapter 1).

The second chapter of this thesis will then serve as an illustration. Four typical situations are presented in which the problem of accounting for benefits arises. Their respective solutions and the arguments used therein will be discussed in both German and common law.

This part is followed by two chapters (3 and 4) which will deal with two groups of cases in which German and common law take opposing views. I have

chosen to deal with these situations in more depth because it seems that the differences, and a comparison thereof, succinctly reveal the issues involved in this area of law. These two chapters respectively deal with benefits obtained through efforts beyond any duties owed to the defendant (chapter 3 - own efforts) and through the repair of a damaged thing (chapter 4 - "new for old").

In these last two chapters, an attempt will be made to connect the cases and evaluations used in the reasoning leading to their solution. It will be argued that the interests involved are similar to those in the broader area of unjust enrichment and that the differences between the two legal systems can be traced back to fundamentally different understandings of the principle of unjust enrichment and of what compensation means.

To a certain degree, these basic understandings or biases may often be unreflected. I shall therefore refer to them as legal traditions. Consistently applied, the law will reflect the differences in legal traditions in all areas in which they surface as determinative factors.

It should be noted that the duty to mitigate in common law actually consists of at least three subrules. Firstly, only damages which could not have been avoided through reasonable efforts can be recovered by the plaintiff. Secondly, reasonable expenses made during these efforts can be recovered as part of the damages and thirdly, once a loss has been avoided, i.e. it has not materialized, this will go in reduction of the award as well. The last rule (the rule as to avoided loss) will be the primary concern of this paper.

Mitigation refers to what the plaintiff should do or, in the case of the rule as to avoided loss, to what he did. The problem of "collateral benefits" on the other hand, refers to benefits received from a third party source. I will deal with both these rules because they appear to be closely related. In both instances, we have to establish criteria enabling us to determine whether benefits caused by a tort or a

breach of contract should be included in the assessment of damages or not. I therefore find it essential to compare the consistency of the law when dealing with these two subjects and to treat both rules in this thesis. Indeed, they are but two sides of one coin.

It seems undisputed that the duty to mitigate can only arise after the breach of a contract or the breach of a duty in tort.[1] Being a subproblem of the duty to mitigate, benefits arising before a breach are generally to be disregarded. On the other hand, it has to be noted that deciding which benefit accrued before the damage-producing event and which occurred later is not without difficulties. For the purpose of this paper, I shall assume that the issue of the benefits having to be a result of the event that brought about the damages is clear.

Some writers seem to take certain judicial statements[2] in the area of mitigation to be conclusive evidence for the assumption that the test applied by common law courts in all cases in which an injurious event also caused benefits is a mere "but for test".[3] This would mean that any benefit, as long as it is in fact caused by the tort or the breach of contract, would go in reduction of the damages. Although this is obviously the most clear cut solution, it is not the one adopted by the courts. The simple example of the father who pays for his injured daughter's

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[1] *White and Carter (Councils), Ltd. v. McGregor*, [1962] A.C. 413 (H.L.); *Canadian Western Natural Gas Co. v. Pathfinder Surveys, Ltd.* (1980), 12 Alta. L.R. (2d) 135 (C.A.).

[2] Cf. for example *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385; *Karas v. Rowlett*, [1944] S.C.R. 1; *Weber v. R. G. Steeves Construction Co., Ltd.* (1981), 32 B.C.L.R. 31 (S.C.); in the U.K.: *Lavarack v. Woods of Colchester, Ltd.*, [1967] 1. Q.B. 278 (C.A.); the exact meaning of Lord Haldane's words "arising out of the transaction" in *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways of London, Ltd.*, [1912] A.C. 673 (H.L.) is not entirely clear to me.

[3] Cf. Jeffrey G. MacIntosh, David C. Frydenlund, "An Investment Approach to a Theory of Contract Mitigation" (1987), 37 U. T. L. J. 113 at 120 f.

medical bills shows this. The damages awarded will clearly not be reduced because of this. Of course, had the daughter not been injured by the tortfeasor, the father would not have paid the daughter's debts. No court, however, would hold this to be sufficient to establish that the amount paid had to be accounted for in reduction of the damages payable by the wrongdoer.

Although no satisfactory answer as to exactly why the test is insufficient is given, courts have made it clear that in both "collateral source" cases and in mitigation cases, they take into account a much broader array of factors than mere causal consequence.[4]

Turning to the subject of accounting for benefits under common law, one can distinguish tort and contract cases. Although this seems to be the tendency of the courts, one finds a number of statements to the effect that the same principles apply in both contract and tort.[5] Although not an analytical or constructive argument in itself, but rather a mere statement of consequences, this is somewhat revealing because it logically departs from a presupposition. This is that, once we agree that the same rules apply, we reject a solution of the problem of reduction of damages claims for beneficial events via the argument of remoteness or causation. The tests of foreseeability as well as the standard and dates being so different in tort

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[4] The "but for test" was clearly rejected as a conclusive criterion in *Parry v. Cleaver*, [1970] A.C. 1 (H.L.) at least for the insurance cases. Cf. also RGZ 80, 155, 160 or BGHZ 81, 271, 275. Even the doctrine in Germany seems to agree on that point cf. Dieter Medicus in Günther Beitzke, *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, Buch II*, 12th ed. (Berlin: J. Schweitzer Verlag Walter de Gruyter, 1983) [hereinafter *Staudinger*] section 249 BGB para. 143.

[5] Cf. for example *Redpath v. Belfast and County Down Railway*, [1947] N.I. 167 at 172.

and contract,[6] it follows that once we accept the statement that the rules are similar the solution can not be found in the area of remoteness alone.

Compensation being the common aim and end of both tort and contract law, this makes a lot of sense if we consider the rules of mitigation, and in particular the rule as to benefits, as a question of the definition of damages in a broader sense. In not drawing the distinction between tort and contract in the following discourse, we have to presuppose that there is at least some truth in the statement that remoteness and causation are not the key to the solution and that the problems we are dealing with here are on a different level or represent another step in the analysis.

Another way of structuring the following is to look at the source of the benefit, i.e. at who in fact pays, or at where the cash flows from. This requires one to suppose that this factor is significant. Law is not so superficial as to disregard all factors in order to concentrate on the exterior aspect of where the cash flow occurred. The actual transfer of funds is only superficially relevant. It cannot be stressed enough, however, that what really matters is the legal relationship that gave rise to the transfer. This might be what Lord Reid meant when he said:

> "[S]urely the distinction between receipts which must be brought into account and those which must not must depend not on their source but on their intrinsic nature."[7]

I will take the way of examining the issue of accounting for benefits by looking at similar fact patterns (or better *topoi*). The danger in this approach can be seen in the following anecdote recounted by Justice Holmes:

> "One mark of a great lawyer is that he sees the application of the broadest rules. There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice

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[6] Cf. *Parsons (Livestock), Ltd. v. Uttley Ingham & Co., Ltd.*, [1978] Q.B. 791 (C.A.), *Czarnikow, Ltd. v. Koufos*, [1969] 1 A.C. 350 (H.L.) with regard to just how different the rules are.

[7] *Parry v. Cleaver*, *supra*, note 4 at 15E.

took time to consider, and then said that he had looked through the statutes and could find nothing about churns and gave judgment for the defendant. The same state of mind is shown in all our common digests and textbooks."[8]

In our case, however, this technique reveals the advantage of following legal as well as factual criteria for grouping the relevant problems and cases. If we keep in mind that we are attempting to find the "broadest rule", we will not risk being compared to the Vermont justice.

In addition, this manner of structuring the following material facilitates a comparison within as well as between the two systems treated, in that it enables us to consider fact patterns with the same distribution of interests between the parties involved.

1.2. Use of the Comparative Approach

Comparative law, as I want to approach it, should not be studied with the expectation of finding the "better solution" or the one that is "more just" or "makes more sense".

Having been brought up in one legal system as most lawyers are, "crossing the border" is a dangerous venture. It is probably quite natural to encounter new things with a certain amount of skepticism. This skepticism can very easily turn into rejection, or even worse, into an attitude of superiority which is probably more often a mechanism to protect oneself than the fruit of reasoned criticism or actual legal xenophobia.

Much as this can happen on a real trip to another country, the same danger lurks behind every step you take in another legal system. And just as we look

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[8] As cited in Clarence Wilfred Jenks, *The Prospect of International Adjudication*, (Dobbs Ferry, N.Y.: Oceana Publicaitons, 1964) at 265 who unfortunately fails to give a reference.

at people and how they are used to and determined by their traditions when we travel[9], so shall we have to cope with "legal traditions" which are often basic beliefs shared by a community and which tend to surface very often disguised as a particular institution or method of solving conflicts.

Once this is acknowledged, insight may spread quite quickly.

When we travel, we can come back without having seen anything if we approach the experience with preconceptions that have been implanted in our minds over many years.[10] Studying comparative law, like travelling in another country, can therefore only be of any use if it is done in order to discover and point out inner connections, links and motives for looking at things differently. Comparing in this sense is therefore not done with a view to finding the "better solution" for a problem. This would be a useless exercise anyway because it could only be the better one on the basis of my views and preconceptions as well as in view of the ends I

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[9] The travel metaphor has been used in a much more dramatic form by Ernst Rabel, "Deutsches und Amerikanisches Recht" RabelsZ. 16 (1951), 340 at 340: "*Rechtsvergleicher sind gewohnt, in fremde Dickichte einzudringen, und darauf gefasst, dass unter jedem Busch ein Eingeborener mit Pfeilen lauert.*" I think this conqueror-like image reveals the dilemma of comparativists in the last decades who, because they were not humble visitors trying to integrate before comparing, were threatened by the "arrows of the aborigines" who probably had all the right in the world to feel insulted by the value judgement of conceited tourists on their legal photo safari. Recently, the metaphor was taken up by Günther Frankenberg in an interesting attempt to reevaluate the position and use of comparative law and its links to cultural backgrounds, see, "Critical Comparison: Re-thinking Comparative Law" 25 Harv. Int'l L.J. 411 (1985).

[10] This is often revealed by the terminology. For example McKinnon, L.J. in *Fibrosa Société Anonyme v. Fairbairn Lawson Combe Barbour, Ltd.* (1941), [1942] 1 K.B. 12 (C.A.), (reversed in [1943] A.C. 32 (H.L.)) at 28 and *per* Lord Wright at 61 "[...] it is clear that any civilized system of law is bound to provide remedies for [...] unjust enrichment" this shows a state of mind which is surprisingly wide spread and found also e.g. in Jerome E. Bickenbach, "Unsolicited Benefits" (1981), 19 U.W.O.L.Rev. 203 at 209 "obviously, in a civilized legal system, neither of these standards is acceptable".

feel should be pursued. Doing this will effectively lead to nothing more than a conceited value judgement.

A comparativist should therefore be like a good tour guide. He should be able not only to state things as they are but also to try to explain why these things are the way they are. This entails linking them up with their environment. This step is one that connects with the traditions a phenomenon is embedded in. It is the attempt to rationalize the impact of culture understood as a consensus on the way to look at things in a given community.[11]

Comparative law as I perceive it is therefore necessarily quite descriptive and expository. Why things should be different is a second step which is very apt to end up as a simple relapse into the value system we grew up in.

This is why I eventually want to concentrate in chapters three and four on two areas of the rule as to avoided loss even though it is dealt with in quite a different manner in commmon law and in German civil law. Comparing the same solutions is - like comparing the same things - quite boring for the comparer as well as annoying for the reader.[12] Therefore, after a short overview of the law as it generally deals with the cases in which the issue surfaces, such overview being designed to put the issue in a broader context, I shall concentrate on the points of "new for old" or "betterment" and on the cases in which the benefit was achieved

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[11] See, although with a view to the question of "borrowing" legal institutions and the effects of this process, the discussion between Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Mod.L.Rev. 1 and Alan Watson, *Legal Transplants; an Approach to Comparative Law*, (Edinburgh: Scottish Academic Press, 1974) and Alan Watson, "Legal Transplants and Law Reform" (1976) 92 L.Q.R. 79.

[12] Cf. as to the treatment of differences and similarities in Comparative law: Konrad Zweigert, Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, Bd. I, Grundlagen*, 1st ed. (Tübingen: J. C. B. Mohr (Paul Siebeck), 1971) at 36 ff who is prepared to talk about a general "*praesumtio similitudinis*" in Comparative law.

through the personal efforts of the plaintiff, in which cases the solutions and attitudes seem to differ radically between common law and German civil law.

1.3. Overview of Relevant Parts of German Law

The following parts of this first chapter are designed to introduce the reader who is not trained or otherwise familiar with the German legal system to the basic elements and legal concepts as they pertain to the issues dealt with later. In addition to briefly treating the way damages are computed (1.3.1.) and the application of the duty to mitigate (1.3.2.), sources of further reading available to the non-German speaking reader are provided in the footnotes. Finally, an overview of the treatment of accounting for benefits (*Vorteilsausgleichung*) by German courts is presented (1.3.3.).

1.3.1. Legal Framework and the Law of Damages

To explain the German law of damages, we have to start with the question of how the German Civil Code (hereinafter BGB[13]) decides whether damage has occurred or not, and how it is computed. The issue, which I shall argue accounts for a number of differences between German and common law in the field that we are concerned with, is addressed in in s. 249 BGB.[14]

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[13] For Bürgerliches Gesetzbuch dating from August 18, 1896 (RGBl. S. 195, BGBl. III 400-2 last change 8.12.86). A short introduction in English can be found in B.S. Markesinis, *A Comparative Introduction to the German Law of Tort*, (Oxford: Clarendon Press, 1986) at 15 with further bibliographical references to quite unsatisfactory works for the anglophone reader *id.* at 21.

[14] The subdivisions of the BGB are called *Paragraphen* and are abbreviated by a special sign. For reasons of convenience for the anglophone

(Art und Umfang des Schadensersatzes)

(1) Wer zum Schadensersatze verpflichtet ist, hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatz verpflichtende Umstand nicht eingetreten wäre.

(2) Ist wegen der Verletzung einer Person oder wegen Beschädigung einer Sache Schadensersatz zu leisten, so kann der Gläubiger statt der Herstellung den dazu erforderlichen Geldbetrag verlangen. (emphases added)

[**(Manner and extent of Compensation)**

(1) A person who is obliged to make compensation shall restore the situation which would have existed, had the circumstance rendering him liable to make compensation not occurred.

(2) If compensation is required to be made for injury to a person or damage to a thing, the creditor may demand instead of such restoration the sum of money necessary for such restoration.][15]

This section is found in the general part of the law of obligations. It therefore applies to both contract and tort law as well as to all other situations in which an obligation to pay damages may arise. It spells out the maxim of restoration in kind. Although a first reading may suggest that the normal situation contemplated by the code is that the person under the obligation to compensate would take care of undoing the harm personally, solving these cases is presently not the most important aspect of the provision. Today this provision is much more important as a determination of the adequate measure of damages than as the actual statutory basis for ordering the wrongdoer to repair or to do an equivalent act. A recent decision[16] of the German Supreme Court for Civil and Criminal Matters (hereinafter BGH[17]), in which the owner and builder of a model of the Torpedoboat "Dachs" of the

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reader and because the "hardware" does not print the sign I will use the English equivalent of "section" for *Paragraph*, "subsection (subs.)" for *Absatz* and "clause" for *Satz*.

[15] The English versions of the BGB throughout the text are based on the following translations: Chung Hui Wang, *German Civil Codes - Translated and Annotated*, (London: Stevens, 1907) and Ian S. Forrester, Simon L. Goren, Hans-Michael Ilgen, *The German Civil Code (as Amended to January 1, 1975)*, (Amsterdam: North-Holland Publishing, 1975). Some minor changes were made for the sake of accuracy.

[16] BGHZ 92, 85 ("*Torpedoboot Dachs*").

[17] For *Bundesgerichtshof*. An overview of the German judicial system is contained in B.S. Markesinis, *supra*, note 13 at 1 ff.

German navy could only recover its value as determined by the court, does not qualify or change the law. On the contrary, it shows that the relevant reference point of the comparison to be made between the situation before and after the act leading to the duty to compensate is not merely an economical one. What has to be compared are onthological situations, not sums of money.[18] The main argument in that case was that the self-made boat was a unique object. The rebuilding by a professional model builder as the normal measure of damages according to s. 249 would not reflect what the boat in fact represented. Having been built by the plaintiff, and nobody else, it was a unique object which could therefore be presented in exhibitions to the relevant public. Thus, recreating the ship which the tortfeasor would be under the obligation to do according to s. 249 BGB was impossible. In these cases s. 251 subs. I BGB stipulates that the value which the court is relatively free to determine according to 287 of the Code of Civil Pocedure (herinafter ZPO[19]) has to be paid in compensation.

This, of course, cannot and does not mean that restoration (*Wiederherstellung*) is only possible in cases in which the exact same position can be achieved again. This would logically never be possible.[20] The demolished car can never be restored to its pre-demolition state. Still, restoration within the meaning of s. 249 is possible. All that can be and was meant is that the injured party should be put back into substantially the same position. This is a position that can objectively be considered to be equivalent, an evaluation left to the judge as a matter of fact.

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[18] This seems to be generally accepted, although some writers still understand the difference between before and after as a mere matter of arithmetics. Cf. statement of the problem in BGHZ 43, 378, 381.

[19] For *Zivilprozessordnung*.

[20] This has been expressed with unusual openness by Lord Reid in *British Transport Commission v. Gourley*, [1956] A.C. 185 (H.L.) at 212.

Section 249 BGB is in fact most often used to rebut the argument frequently made by defendants that the hypothetical test of value as the measure of damages is an adequate way of compensation. Section 249 BGB settles questions that have been and still are discussed in common law, namely is the compensation effected by handing over the difference in value between the plaintiff's position now and the one that would have prevailed without the event that brought about the duty to indemnify (hereinafter the "event") or by actually restoring it?[21] Two cases which address the problem and represent the opposite positions best illustrate what is at stake here. They are taken from the common law because it is more familiar to the reader. On the one hand, there is *Joyner v. Weeks*[22], a case in which a lessee failed to deliver up the premises in a state of good repair. After the lessor had relet to a third party who undertook to perform alterations and renovations, he sued the first lessee for breach of his covenant. The court awarded not only nominal damages but decided that the ordinary rule is that the cost of repair, i.e. performance by putting the plaintiff in the required position, is the measure of damages. On the other hand,

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[21] This is addressed again *infra* chapter 4. This formulation ("event") is chosen deliberately because for the purpose of this paper, I am of the opinion that the problems are of the same nature in tort as well as in contract. The only difference is that the hypothetical situation that has to be compared to the *status quo* is in one case determined by the two parties through the definition of the contract (i.e. their position had the contract been performed and not their position had the contract never been made) and in the other case by the law as applied by the court. In this sense, a tort also never puts a person back into a former position but rather into a new position that should as closely as possible resemble, i.e. be equivalent to, the old situation. Just as it is impossible for a contract to go back, the relationship created by a tort can only develop in one direction - forward. Cf. also *supra*, note 20.

[22] [1891] 2 Q.B. 31 citing older case law at 37. See also with the same result *Sunnyside Nursing Home v. Builders Contract Management, Ltd.*, [1985] 4 W.W.R 97 and *Radford v. De Froberville* (1977), [1978] 1 All E. R. 33 (Ch.D.) although in that case the rule that the difference in value is determinative was confirmed. The case is also frequently cited for the assessment of the mitigation point.

there is *Wigsell v. School of Indigent Blind*[23], where the defendant who had agreed to build a wall to separate his land from his neighbour's was held to be required to pay only the difference in value between the plaintiff's ground with and without the wall.[24]

Of course, it might be arguable that the common law, in order to prevent overcompensation, refuses to give this problem an abstract solution and inquires, *inter alia*, whether the plaintiff genuinely wanted the work to be done, rather than the monetary equivalent of the work. On the other hand, this aspect and the inquiry into the intent of the plaintiff is never explicitly made a part of the general rules stated in the cited cases. In addition, in *Joyner v. Weeks* the money could not even have been used to do the work because the third party, i.e. the next lessee, had already performed the renovations.

To sum up, the significance of section 249 BGB is that it decides the point in favor of the solution found in *Joyner v. Weeks*.

The actual test applied in Germany in computing the loss is the so called *Differenzhypothese* (doctrine of difference). This doctrine calculates damage

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[23] (1882) 8 Q.B.D. 357. Clearly with this result, which seems to be much more widespread Reginald G. Marsden, *The Law of Collisions at Sea*, 11th ed. by Kenneth C. McGaffie (London: Stevens, 1961/Supplement 1973) para 467 ff and literature cited therein; *O'Brien v. Underwood McLellan & Associates, Ltd.* (1979), 5 Sask. R. 337 (Q.B.); *Hawkins v. McGee* 84 N.H. 114; 146 A. 641 (1929); *Jacobs & Youngs v. Kent*, 129 N.E. 889 (1921); *Peevyhouse v. Garland Coal & Mining Co.* 1962, 382 P. 2d 109 (S.Ct. of Oklahoma), cert. denied 475 U.S. 906, 84 S.Ct. 196, 11 L. Ed. 2d 145 (1963); *Eldon Weiss Home Construction, Ltd. v. Clark*, (1982), 39 O.R. (2d) 129, *Olson v. New Home Certification Program of Alberta* (1986), 44 Alta.L.R. (2d) 207; *Cotter v. General Petroleums, Ltd.*, [1951] S.C.R. 154 *per* Kerwin J. For intermediate solution see, *Ideal Phonograph Co. v. Shapiro* (1920), 58 D.L.R. 302 (cost of repair or actual financial loss whichever is less).

[24] In *Tito v. Waddell (No. 2), Tito v. Attorney General*, [1972] 3 All E. R. 129 (Ch.D.) Megarry adressed this problem as one of principle, although in the end he seems to have evaded it by grounding the differences in case law and on the subjective intentions of the plaintiff.

by comparing the financial situation as defined by the actual state and composition of the assets or estate (*Vermögensstand*[25]) with the one that would have prevailed had the damaging event not taken place. In keeping with the intent underlying s. 249 BGB, these points of comparison are the actual positions or situations, not two numbers.[26] This does not hide or deny that it is, as is already expressed in s. 249 I BGB, a hypothetical situation with all the uncertainties necessarily linked thereto.

Stopping here would automatically lead to discounting for all kinds of benefits, as unrelated as they might be to the events in question. Any money acquired by the innocent party would have to be accounted for in reduction of the damages award.

Although the BGB does not contain an express rule, there exists a consensus that such an easy solution can not be right.[27] It leads neither to equitable results nor does it fulfill the aim of most rules that order compensation, namely that the wrongdoer is supposed to compensate for his acts without such compensation leading to the other party's benefit or to undercompensation[28]. This seems to be evident in cases where the victim was insured. Applied in this manner, any insured person would be open to injury without any civil remedy or sanction. Although the common law seems to take a much more lenient approach on this point, it appears

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[25] *Vermögen* corresponds quite exactly to the French term *patrimoine*.

[26] Cf. for a quite instructive article, Dieter Medicus, "Normativer Schaden" JuS 1979, 233 at 235.

[27] The BGH took that view but did not provide thorough reasoning in its decision BGHZ 55, 329, 333 [1971] (Omnibus hits car of driving school).

[28] Even in common law, undercompensation or overcompensation seem to be accepted. Lord Wilberforce for example accepts it as a result of social security in *Jobling v. Associated Dairies, Ltd.*, [1982] A.C. 794 at 803 (H.L.) where he also says that we do not live in a world "governed by the common law and its logical rules", a quality which he himself stated it did not have two years earlier in *Pickett v. British Rail Engineering, Ltd.*, [1980] A.C. 137 (H.L.) at 146.

even more problematic to have the repudiating party benefit from moneys that the injured party acquires through and by his own efforts after the injury is done. This solution puts the injured person himself into a legal relationship that is akin in its effects to a *negotiorum gestio*, without offering a valid justification for the fact that the injured party should be working and risking his own money for the account of the wrongdoer. This situation becomes even clearer when we are dealing with efforts or investments which do not meet the reasonableness test of expenses in mitigation of damages. Why should the injured party risk not getting reimbursed for expenses incurred, but if the venture happens to turn out well be obliged to hand over the benefits just as though he were an agent?

The law of damages is always in a state of flux. The theory of difference has been criticized from different directions and its application has been modified by the BGH itself in recent years. In 1968 the *Grosse Zivilsenat* (extended senate for civil law of the BGH)[29] for the first time used the term *normativer Schaden* (normative loss),[30] in commenting on a line of cases in which the BGH had allowed damages to a husband for the loss of his wife's help in the house, even if he had decided not to hire a housekeeper as a substitute. Allowing this, according to the *Senat*, was already a rejection of the pure difference doctrine. The focus on the subjective and particular situation of the plaintiff was justified as a corollary of the normative notion of loss.

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[29] This is a special senate, sitting with 9 judges which is created by s. 132 *Gerichtsverfassungsgesetz*. It hears the cases in which one senate wants to deviate from an earlier decision of another senate (s. 136 GVG). A similar senate which unites judges from the 5 Supreme Courts of Germany sits if one Supreme court wants to deviate from the other. It is one means of reaching uniformity of law without a strict doctrine of *stare decisis*. These decisions have an amplified force and are considered extremely binding. An English desciption can be found in Markesinis, *supra*, note 13 at 1 ff and in particular at 2.

[30] BGHZ 50, 304 ff (GSZ).

This concept was subsequently used in a rather inconsistent way. In order to be accurate, only a very general definition can be given and it may be expressed as follows: Normative loss is a concept of damages which departs from the difference theory but is extended through a legal evaluation in certain areas by including typified losses even if they did not in fact occur. It includes a focus on the subjective. In briefer but perhaps not as exact terms we could say that a circumstance is "normative", if it does not appear as a loss from a "natural" viewpoint, but only after we assumed an evaluative perspective. These short definitions merely sum up and cover very different groups of cases and policies.[31]

This concept has been widely used in cases of continuing payment of wages after injury to an employee. Starting with BGHZ 7, 30 ff, in which it was considered a question of accounting for benefits, the BGH increasingly expanded the recoverable loss using this normative concept.[32]

It was further used for example in a case, in which a child C. was injured by I. and had to be treated in a hospital. C. sued I. in damages. A reduction of the award by the amount of costs saved for not living at home was difficult because C.'s parents, not C. himself, were economically affected by the event. A judicial evaluation quasi "created" the loss and the benefit having occurred for C.[33]

Another example is the claim of an injured housewife for lost labour. The problem here was that no legally protected interest of the husband was affected when the wife was injured. On the other hand, the wife, whose physical integrity was affected, did not actually lose anything economically in terms of labour, due to

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[31] Dieter Medicus in *Staudinger*, *supra*, note 4 para 40 before s. 249 BGB and Dieter Medicus, *supra* note 24.

[32] Today even a portion for lost holidays corresponding to the time one was injured can be recovered from the employer; Cf. BGHZ 59, 109 ff, 154 ff with further references.

[33] Cf. OLG Celle, NJW 1969, 1765.

the fact that she could not look after the household. This is particularly true if no substitute employee is hired. A normative notion of loss saw a recoverable loss for the wife in her impaired ability to work in the house.[34]

How difficult and problematic all this is, and how close we come to the situation in which precedents or mere formulations start to haunt us, became quite obvious in the following passage of a decision by the BGH:

> *"[Der normative Schaden ist] was der Verletzte [...] trotz [des zeitweiligen Ausfalls seiner Arbeitskraft] tatsächlich nicht verliert"*
>
> "[The employee should get as normative damages] what despite [his disability or inability to work], he in fact did not lose."[35] (emphasis added)

This sounds like quite the opposite of what we originally stated to be "compensation". It also entails a deviation from a concept of "subjectified" loss in that it typifies losses that "should" or could have occurred but for certain actions from which we do not want the wrongdoer to profit.[36] In subsequent years the term "normative loss" has come up in different contexts. It is quite unclear what it exactly means. Some understand it as a concept which denotes deviation from the normal every day understanding of loss. Others argue that it means any deviation from the theory of difference. Both these understandings are incoherent, because they simply group a variety of very different things under one term. It has also been suggested

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[34] BGHZ 50, 304, 306 (GSZ); see also BGHZ 51, 109; 54, 45. There are some cases in which in common law damages were allowed for loss not actually suffered by the plaintiff. These might be comparable to those German decisions which allowed damages for loss suffered by third parties, which I would consider to be a distinct problem from the one of normative loss because after all there existed a real loss somewhere and we only allow liquidation by a third party. Cf. *Jackson v. Horizon Holidays, Ltd.*, [1975] 1 W.L.R. 1468 (C.A.); *Beswick v. Beswick*, [1968] A.C. 58 (H.L.) at 88 both discussed in *Woodar Investment Development, Ltd. v. Wimpey Construction U.K., Ltd.*, [1980] 1 W.L.R. 277 (H.L.).

[35] BGHZ 43, 378, 381.

[36] BGHZ 63, 182, 184; 54, 82, 85 and BGH NJW 1969, 1477, 1478. For a critique of the doctrine of difference Keuk, *Vermögensschaden und Interesse*, 1972, S. 52 ff.

that normative loss is the same as a rejected deduction of benefits from a damages award. But this too would only amount to relabelling an old problem without adding any aspect to its solution. The actual meaning of the term is probably one of the most treacherous areas of the German law of damages.

For our purposes though, it will be enough to know that the concept of "normative loss" accepts the introduction of corrections to the notion of loss through legal evaluations. Medicus is probably right in saying that the major achievement of this trend is that it facilitates a disregard for the fact that in certain situations the burden of a loss will always fall on third parties, often because of corrections of the compensatory system made by public or social laws. In these situations, we often can not talk about a loss which is subsequently erased or set off, for which set off we might order accounting.

Understood as simply a corrective for this restricted class of cases, the term normative loss can be of some help. Otherwise, we would run the risk of eliminating all limits to the duty to indemnify, a danger which is impending in the unqualified language of BGHZ 43, 478, 481 cited above.

1.3.2. Mitigation in German Law

The German system splits up the rules that are found as subheadings of the common law term mitigation in a different way. "Functional equivalents" can be found scattered all over the legal system and the BGB.

The German doctrine of mitigation presents itself as being settled and straightforward. In recent years, neither a great deal of academic work nor any new developments by way of case law have occurred.

Looking at the immediate practical application of the rules, however, it is discernible that a rationalisation of the different principles and institutions that

cover the field of what a common lawyer would consider part of mitigation has not yet taken place.

The starting point is s. 254 BGB[37] found in the second book entitled *Schuldverhältnisse* (relationships of indebtedness or obligations) whose subsection II is considered to be *sedes materiae*[38]. As the systematical position of any given section within the BGB is designed to determine the scope of its application and is a factor to be considered in applying and interpreting it,[39] I will cite the whole section.

> *Zweites Buch: Recht der Schuldverhältnisse*
> [Second book: Law of obligations]
>
> *Erster Abschnitt: Inhalt der Schuldverhältnisse*
> [First section: scope of obligations]
>
> *Erster Titel: Verpflichtung zur Leistung*
> [First title: Obligation of performance]
>
> **Paragraph 254 BGB**
>
> *(1) Hat bei der Entstehung des Schadens ein Verschulden des Geschädigten mitgerwirkt, so hängt die Verpflichtung zum Ersatze sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teile verursacht worden ist.*
>
> *(2) Dies gilt auch dann, wenn sich das Verschulden des Beschädigten darauf beschränkt, dass er unterlassen hat, den Schuldner auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder kannte noch kennen musste, oder dass er unterlassen hat, den Schaden abzuwenden oder zu mindern. Die Vorschrift des Paragraphen 278 findet entsprechende Anwendung.*
>
> **[Section 254 BGB**

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[37] For a comparative description of the "Failure to Avert or Minimize the Harm" with reference to basic German case law in a tortious context, A. M. Honoré, Causation and Remoteness of Damages: Int. Enc. Comp. L. XI Torts, René David *et al.* ed., vol. I (Tübingen and The Hague: J.C.B. Mohr (Paul Siebeck) and Martinus Nijhoff, 1983) ch. 7 ss. 153 ff.

[38] The position of the legal problem within the system of law.

[39] An overview in English of West German law in general and of the Code as the centerpiece of its private law in particular can be found in: Dieter Medicus, in Victor Knapp ed., Int. Enc. Comp. L. I National Reports, (Tübingen, J. C. B. Mohr (Paul Siebeck), without date) under F1 ff.

(1) If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.

(2) This also applies even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of an unusually serious injury which the debtor neither knew nor ought to have known, or in an omission to avert or mitigate the injury. The provision of s. 278 applies *mutatis mutandis*.]

S. 254 BGB has been in the Code in its present form since 1900 when the Code came into force. The first part dealing with contributory fault did away with the old rule of the German common law (*Gemeines Recht*) which was identical to the old common law rule, namely that contributory fault extinguishes any claim in damages, tortious as well as contractual.[40]

It seems to be the prevailing opinion that the principle of apportionment of damages according to the extent of fault in s. 254 is a corollary of the principle of *venire contra factum proprium*[41]. This maxim is considered one of the main parts of sec. 242 BGB, which sets forth the famous principle of good faith (*Guter Glauben*). S. 242 BGB reads rather matter-of-factly:

Paragraph 242 BGB (Leistung nach Treu und Glauben)
Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.
[The debtor is bound to effect performance according to the requirements of good faith, ordinary usage being taken into consideration.][42]

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[40] *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Bd. II Recht der Schuldverhältnisse*, Amtliche Ausgabe, 2nd ed. (Berlin: J. Guttentag, 1896) [hereinafter *Motive*] at 23f and Mugdan, *Die gesamten Materialien zum BGB*, 1899 vol II at 13.

[41] Cf. the abundant treatment of literature cited in *Staudinger*, *supra*, note 4 s. 254 BGB para. 4 and recently quite a critical analysis in Hans Wieling, "*Buchbesprechung zu H. W. Dette, venire contra factum proprium nulli conceditur*" AcP 187 (1987), 95 who criticizes that we lack an explanation for the fact that the party is bound not to contradict himself in his behaviour. He offers a contractual explanation.

[42] Although systematically restricted to performance of obligations, it is established that it is a principle that is applicable throughout the BGB

Considered as the enactment of a general requirement of good faith[43], its application is affected by the development of groups of cases (*Fallgruppen*) which deliver a set of subrules, one of which is the said principle of *venire contra factum proprium*. It is basically the same idea that underlies the common law principle of estoppel.

Stated briefly, a person can be barred from exercising his rights if this could be contrary and in opposition to to his prior conduct.[44]

Applied to s. 254, the argument runs as follows. The plaintiff does not contravene s. 242 by the fact that he himself was (partly) responsible for the injury to his legally protected interests (*Rechtsgut*) but he is considered to act against good

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(in conjunction with s. 157 or s. 826 BGB) and even beyond the Code to other areas of law. Cf. Helmut Heinrichs in *Palandt, Bürgerliches Gesetzbuch*, 46 ed. (München: C.H. Beck, 1987) [hereinafter *Palandt*] s. 242 BGB para. 1.

[43] Generally for a short introduction to the principle in English see Norbert Horn, Hein Kötz and Hans G. Leser, *German Private and Commercial Law: an Introduction*, (Oxford: Clarendon Press, 1982) p. 135 ff. and Uwe Diederichsen and Karl-Heinz Gursky, "*Principles of Equity in German Civil Law*" in Ralph A. Newman ed., *Equity in the World's Legal Systems, A comparative Study Dedicated to René Cassin*, (Bruxelles: Etablissements Emile Bruylant, 1973) at 277 ff. RGZ 85, 108, 117 (1914) und BGHZ 58, 146, 147. A consise bibliography of the vast literature on this principle can be found in J.Schmidt in *Staudinger, supra*, note 4 *sub "Schrifttum zu Para. 242 BGB"*. For a canadian comparative viewpoint, Michael G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Can. Bus. L. J. 385 with comments by E. Allan Farnsworth (id. at 426) and Maurice Taucelin (*id.* at 430).

[44] Cf. e.g. Riezler, *venire contra factum proprium*, (1912). Hans Joseph Wieling, "*Venire Contra Factum Proprium* un Verschulden Gegen Sich Selbst" AcP 176 (1976), 334 takes a critical attitude towards this in general in suggesting that these cases are in fact cases of waiver of rights by conduct (*schlüssiges Verhalten*) which under German civil law does not create any consideration problems. This point of view has the advantage that it consistently explains even cases in which reliance on the contradictory and inconsistent earlier conduct has not (yet) taken place. This will generally be the case when we deal with cases of s. 254 II BGB which we want to explain in terms of a *venire contra factum proprium* analysis. This line of argument even takes into account and explains cases that are in fact unilateral.

faith (treuwidrig)[45] if he then nevertheless claims full compensation from the wrongdoer who is only partly responsible.[46]

Although Staudinger argues that this is an explanation that does not prove anything and is just a policy statement, it may be that this is the only way to reduce the amount of compensation without touching the theory of causation and denying a causal relationship between the act of either party and the damage.

1.3.3. *Vorteilsausgleichung* (Adjustment of Benefits)

We already mentioned that part of the common law theory of mitigation is the rule as to avoided loss, which is considered to be different from the collateral source rule[47]. The German equivalent thereto is again split into two legal problems: one is the *Vorteilsausgleichung* (or adjustment of benefits) and the other is the *Abzug neu für alt* (or accounting new for old).

The names chosen by the different legal systems in this field are already very revealing. Whereas the common law often seems to consider the question of the source of the benefit to be the most important factor in deciding whether it should be taken into account in reduction of the award, the German law focusses on

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[45] For a definiton of the concept of *Treuepflicht* (duty to allegiance, duty of good faith, duty of mutual help) Helmut Heinrichs in *Palandt*, *supra*, note 42 s. 242 BGB para. 4Bf.

[46] Cf. Wieling, *supra*, note 44, at 349 and BGHZ 36, 329; 56, 57. In quite an extreme way BGHZ 57, 137, 151 f implicitly states that s. 254 is redundant because the same results could be reached with s. 242 alone. The principle may loosely be compared to the idea of "equitable fraud" in connection with equitable misrepresentation in common law contract, although the scope of the German principle is much broader.

[47] Substantially the same thing exists in connection with third parties with the collateral source rule. Cf. e.g. ABA Journal March 1987. Other expressions are used, such as rule as to avoided loss, by Harvey McGregor, *McGregor on Damages*, 14th ed. (London: Sweet & Maxwell, 1980) [hereinafter McGregor] at para. 245 ff..

the quality of the benefit itself, thereby revealing a proximity to the law of unjust enrichment.[48]

This difference can be readily seen in the Canadian case of *Weber v. R.G. Steeves Const. Co.*[49]. In this case, the plaintiff had entered into a contract to buy the defendant's house. The defendant subsequently refused to close the original transaction. Thereupon the plaintiff buyer purchased another house as a replacement. He could only do this because the repudiation on the defendant's part had freed funds. The replacement house was sold with a profit and the question arose whether this should be taken into account in "mitigation" i.e. reduction of the damages award. The Supreme Court of British Columbia answered the question in the affirmative, arguing that but for the breach the plaintiff would not have been able to buy the house and would not have realized the profit.[50] Although labelled differently, this is a pure *conditio sine qua non* argument.

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[48] The so-called *aufgedrängte Bereicherung* or enrichment forced upon the enriched. This is a theory submitted here and does not necessarily reflect the prevailing opinion in Germany.

[49] (1981),32 B.C.L.R. 31 (S.C.), BGH NJW 1981, 1834 concerned the parallel case of a vendor's claim in damages in which the selling out after the breach lead to a profit. This had to be accounted for because although there was no obligation to sell to a third party, the market price (*Verkehrswert*) was held to be the relevant measure. The price he sold it for was not higher than this market price.

[50] Although the result was different on the particular facts the same line of argument was followed in *Apeco of Canada Ltd. v. Windmill Place*, *supra* note 2 at 388 by the Supreme Court of Canada *per* Ritchie, J.. Generally the rule which seems to have been applied in other cases was that anything that could not have been acquired without breaching the contract must be accounted for in reduction or the damages award. Cf. *Dawson v. Helicopter Exploration Co., Ltd.*, (1958), 12 D.L.R. (2d) 1 (S.C.C.) also *Trans-Canada Forest Products., Ltd. v. Heaps, Waterous Ltd. at al., Hoff v. Heaps Waterous, Ltd. et al.*, [1952] 1 D.L.R. 827 (B.C.S.C.).

The BGB does not contain an express general rule dealing with adjustment or accounting for benefits. This was done on purpose, [51] since the solution of these problems was meant to be left to the Courts and to the doctrine.

Today, nearly 90 years later, the development of the law has not led to a single coherent solution but has rather considered different aspects and used them as *topoi* in the process of finding the solutions to particular single cases.

The objectivity that the *Differenztheorie* purports to give is in fact a myth because the theory itself can not help us in any way to find criteria which enable us to decide which points to include and which to exclude in computing the actual damage.

Therefore, during the last 30 years the belief has gained ground that the notion and concept of loss and damage are not at all "pre-legal", that is, they do not preexist outside the law, but rather, like any application of legal rules, they are a process of applying given values (*Wertungen*).

Seeing the problem is the beginning of overcoming it. The right application, forgotten frequently, does not mean that we are schematically comparing values or the plaintiff's balance sheet in the two relevant moments.[52] Understood correctly, the theory of difference looks at the situation or status as such, the real circumstances of life of the plaintiff at the relevant moments. Then there is an evaluation of the costs according to s. 249, moving him from the status quo into the status he would be in had the event not occurred. Status here is not equal to

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[51] *Motive*, *supra*, note 40 vol II. at 18f.

[52] See for example BGHZ 43, 378, 381 where this view is mentioned. *"Schadensberechnung auf dem Boden rein rechnerischer Überlegungen"* [Assessment of damages on the basis of purely arithmetical aspects].

financial situation, which view is the one permissible and frequently taken under common law[53] and which is rejected by the BGB within the scope of s. 249.

Although the BGB does not explicitly address the problem of how to deal with the benefits accruing in connection with a loss, some individual provisions in the code and in other statutes call for a consideration of benefits in the damages award,[54] while others exclude it.[55]

The fact that we do not find a general section in the BGB addressing the issue of accounting for benefits does not mean that we are dealing with a regular *lacuna* in the sense of an inadvertent ommission by the Legislator. On the contrary, the legislative history reveals in an oft cited passage of the "Motive"[56], which are the commentaries of the first commission published together with the first draft of the BGB in 1888, that the solution should be left to the courts and the doctrine.[57]

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[53] But see S.M. Wexler," The Impecunious Plaintiff: Liebosch Reconsidered" (1987) 66 Can. Bar Rev. 130 at p. 132 for a critical assessment of this question.

[54] In public law, in relation to expropriations, this is ordered in ss. 93 subs. III BBauG today 93 subs. III BauGB; 17 subs. II LandbeschaffungsG; 32 subs. I BLeistG; 13 I SchutzberG; sections 430, 658, 659 HGB; 19 subs. V OrderlagerscheinVO, 26 BSchiffG, 642 subs. II BGB and for primary claims for performance sections 324 subs. I clause 1, 552 clause 2, 615 clause 2, 616 subs. I clause 2, 649 clause 2 subclause 2 BGB. See also BGHZ 91, 206.

[55] Section 843 subs. IV is the most important one because several sections in other statutes refer to it and the argument was made that this provision contained a general principle of law that was applicable by way of anology (at least for cases of delict) RGZ 92, 57; BGHZ 9, 179, 191 (GSZ), RGZ 65, 162; 132, 223 and sections 844 subs. II; 8 subs. II HaftpflG; 13 subs. II StVG; 38 subs. II LuftVG; 30 subs II AtomG 816 subs. III BGB.

[56] *Motive*, *supra*, note 40 vol. II at 19.

[57] See the summary given in BGHZ 8, 325; these too seem to perceive the issue as a subproblem of the idea of good faith dealt with *supra*, text at notes 40 ff. Cf. BGHZ 91, 357 and BGHZ 60, 353, 358.

The current approach of the courts seems to be a two step test.[58]

The first step concerns the question of causation (*Zurechnung*, literal translation: ascription of a result to a cause). A causal link is required between the event that lead to the damage on the one hand (breach of contract or the tort) and the benefit on the other. The relevant causal test is the one generally and uniformly applied in German Civil law for both contractual and tortious liability, namely that not every cause is weighed as being of the same importance or "equivalent" (*Äquivalenztheorie*), but rather there must be a so-called adequate causal connection (*adäquater Kausalzusammenhang*).

In German law the questions of causation and remoteness are dealt with as one of the problems of the General Part (*Allgemeiner Teil*) of the BGB. They are therefore to be answered in the same way, regardless of whether we are dealing with tortious or contractual liability. Questions of cause in the sense of attribution or imputation of a legal effect as the result of the action of a certain person, and therefore the theory of adequacy, surfaces twice. Once with the human conduct and the requirement of the rule ordering compensation (human action has to cause the breach of the contract), and a second time to link up the first effect of the human conduct (for example late delivery) with the actual loss claimed (the breach has to cause all the monetary loss - *haftungsausfüllende Kausalität*).[59]

Starting from the *conditio sine qua non* formula, as is the case elsewhere in the world, the theory had to find criteria to limit the vast and virtually unlimited scope of this test so influenced by "scientific" notions. The *sine qua non* formula is called the theory of equivalent causation ("*Äquivalenztheorie*") because any

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[58] BGHZ 81, 271 in particular at p. 275 where earlier cases of BGHZ 8, 325; 10, 107; 30, 29 and 49, 56 are cited to back up this view.

[59] For a treatment of these problems of causation in German law cf. B.S. Markesinis, *supra*, note 13 at 63 ff and the case law that he introduces at 298 ff.

event that leads to the given result is equivalent, in the sense that we indiscriminately treat all causes as equally important.[60] In order to limit this, the theory of adequate cause is now accepted in private law.[61]

The controversy as to whether this theory is still part of the theory of causation in a strict sense, or if it is an additional test totally independent therefrom, is futile because it makes no difference either in the application of the two step test[62] or in the result.

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[60] See very generally but from a comparative point of view A.M. Honoré, *supra*, note 37 ch. 7 s. 106 ff. This theory is used in German criminal law because there it is mediated by the general requirement of criminal intent (Vorsatz) that corresponds to a certain degree with the common law notion of *mens rea*. There in criminal law, it is formulated so that anything is a cause that can not be logically eliminated (*hinweggedacht*) without doing away with the effect (*ohne dass der Erfolg entfiele*) - an early decision on the point is RGSt 44, 244; later BGHSt 1, 332; 2, 20, 24; 7, 112. See for details of the application of the "*Aquivalenztheorie*" and its discussion in doctrine and courts: Eduard Dreher and Herbert Tröndle, *Strafgesetzbuch und Nebengesetze*, 40th ed. (München: C.H. Beck, 1981), para 17 ff before s. 1 StGB. A third theory to determine a correlation ("*Zurechnung*") between actions and results is used for example in the public accident law, war victims law and vaccination law. This is the so called "*Relevanztheorie*" (theory of relevent cause). The much too broad onthololegical concept of causation is replaced by a test that takes into account all the relevant causes, i.e. legally relevant are all events (not only actions) irrespective of their (abstract) foreseeability, that participated in a relevant way to bringing about the concrete effect. Relevant because of their special relationship to the result. This is only determined *ex post*. Cf. the short introduction given by Hans J. Wolff and Otto Bachof, *Verwaltungsrecht* I, 9th ed. (München: C.H. Beck, 1974) at 259 f.

[61] Cf. very general treatments in English from a comparative perspective A.M. Honoré, *supra*, note 37 ch 7 s. 80 ff and the discussion on causation in B.S. Markesinis, *supra*, note 13 at 63. The latter has to be read quite carefully because he tends to generalize ("The Germans", "The English" "The French") and in my view too readily sets English terms as equivalent to German legal terms he tries to explain. For example on p. 67 he translates *haftungsausfüllende Kausalität* with remoteness, which is in this generality simply wrong.

[62] BGHZ 2, 138 also for example BGHZ 57, 137, 141.

Once it is established that an event is the cause of an effect within the theory of equivalent causation, we have to ask the further question whether it is an adequate cause. The definitions given vary slightly. It was formulated in negative terms in earlier decisions[63] and may be summarized by the following formula used by the BGH[64]:

> *"Adäquat kausal ist eine Bedingung dann, wenn das Ereignis im allgemeinen und nicht nur unter besonders eigenartigen, unwahrscheinlichen und nach dem gewöhnlichen Verlauf der Dinge ausser Betracht zu lassenden Umständen geeignet ist, einen Erfolg dieser Art herbeizuführen."*
> [An event is an adequate condition or cause of a result, if the event is apt in general and not only under extremely particular, unlikely and, according to the general course of things, neglectable circumstances to produce the result.]

This is an objective test to be judged from the standpoint of the most prudent and exceptionally perceptive man.[65] It therefore has less to do with any foreseeability than with a judgement of probabilities by an idealized human prototype. It is a so-called "*objektive nachträgliche Prognose*" or objective *ex post* prognosis.[66]

Although the test of adequacy is widely used as one step by the courts,[67] most doctrinal writers reject the test, arguing *inter alia* that it is useless and can not determine the limits of accountability. It should be noted, however, that this criticism seems generally to be based on disregard of the second step used by the

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[63] RGZ 142, 397, 401; 169, 84, 91.

[64] BGHZ 57, 137, 141 (Fraudulent seller of used car was considered to have been causal for a subsequent car accident which the buyer was solely responsible for).

[65] See for the different solutions and opinions with respect to the kind of person that is taken to assess the probabilities A. M. Honoré, *supra*, note 37 at ch.7 s. 82.

[66] BGHZ 3, 261, 266, which is a very instructive decision on the point. The BGH, while discussing various other formula points out that what is really at stake is a useful reduction of the scope of the scientific theory of cause.

[67] BGHZ 49, 56, 61; 81, 271, 275.

courts, namely that of the pupose of the norm providing for a damages award. This test will be the object of the following paragraphs.[68]

After the causation stage, the second step in determining whether a benefit should be accounted for is the requirement that the taking into account of the benefit has to conform to, and further the purpose of, the norm awarding the damages ("*Sinn und Zweck des Schadensersatzrechts*").[69] In addition, the crediting of the benefit is not supposed to result in undue relief (*Unbillige Entlastung*) for the party under the duty to compensate.[70]

The following case portrays a typical situation in which the issue of accounting for benefits arises and depicts how a German Court dealt with it.[71]

The MS "Cap San Lorenzo" caused a collision which damaged the MS "Helena Oldendorff" (hereinafter Oldendorff). The Oldendorff had to be in the shipyard for 35 days for repair of the damage. The owner claimed damages for this period of inactivity. At the same time, that is without causing further delays, the owner of the Oldendorff had various other repairs done, which saved him the yearly overhauling and checking that normally takes about 3.5 days.

The Court held that, as long as a ship has to be kept in a shipyard as a consequence of repairs required because of the collision, and simultaneously the owner decides to undertake other required repairs that save lost profits for a time of docking that would have been done later, the lost profits for those days saved cannot

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[68] Cf. Dieter Medicus in *Staudinger*, *supra*, note 4 section 249 BGB para. 145 and Wolfgang Thiele, "Gedanken Zur Vorteilsausgleichung" AcP 167 (1967) 191, 193 and 196.

[69] Cf. A.M. Honoré, *supra* note 37 at ch. 7 ss. 97 ff who ascribes the development of this element to Rabel and Green.

[70] BGHZ 10, 107 at 108 or, as the BGH puts it only "*im Rahmen der Zumutbarkeit* " [whithin the limits of what can reasonably be imposed on] the plaintiff.

[71] BGHZ 81, 271.

be claimed from the party responsible for the collision. The lost profits so saved go in reduction of the damages award. The Court found an "adequate causal connection" between the collision as the event causing the damage and the 3.5 days saved, notwithstanding the fact that the independent decision of the owner lies in fact at the basis of the benefit.

Following the definition of the tests mentioned above, the Court found that it is not unusual and is actually quite common that the occasion for repair subsequent to damage done to a ship by third persons is used by the shipowner to do his annual repairs.

The Court did not address the question, brought up in a number of other German as well as common law decisions, whether the owner of the Oldendorff was under a duty to have the repairs done simultaneously to mitigate the overall damages.[72] The causal connection was established by the fact that it is not out of the ordinary for a shipowner to use the days a ship is docked as a result of a third party's tort for the required annual repairs.

As to the second step mentioned obove, the Court found that the reduction did not contravene the purpose of the tortious liability and did not relieve the tortfeasor in an unreasonable and unjustified way.

Before we discuss the application of these principles in particular cases, a short overview of the development of the tests will be given. This will enable us to show the direction the courts have chosen and which arguments they have adopted from time to time.

It seems that the *Reichsgericht* (the Supreme court of the German Reich and predecessor of the BGH, hereinafter RG) based its decisions mostly on the previously mentioned theory of causation often expressed in a way that the same

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[72] Cf. *infra* chapter 3.

event had to cause both loss, and benefit.[73] After having required the damaging event to be the *sole* cause for the benefit, the theory of adequate causal connection was readily adopted after its development around the turn of the century,[74] although the point can be made that reasons other than detached judicial evaluation of probabilities are lurking under the surface of the reasoning.[75] The aspect that was to become the second step of the two-tiered test later came up in the form of focusing on the purpose pursued by benefits conferred on the injured party deliberately or benevolently (*freiwillige*) and without legal obligation by a third person.[76]

The BGH, whose opinion will be discussed in greater detail later, took up the criterion of adequate causal connection and coupled it with the "purpose of the obligation to compensate" while emphasizing that all circumstances have to be considered in weighing the interests of the parties involved" (*Gesamtschau der Interessenlagen*).[77] This formula reminds us of the words used in connection with the

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[73] Cf. Klaus Cantzler, "Die Vorteilsausgleichung beim Schadensersatzanspruch, AcP 156 (1957), 29 at 33 ff and the following decisions: RGZ 10, 50; 40, 172; 54, 237; 65, 57; 64, 350.

[74] See RGZ 80, 155.

[75] So Hermann Lange, *Handbuch des Schuldrechts, Bd. 1. Schadansersatz* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1979) at 302 under citation of *inter alia* RGZ 87, 282; 102, 348; 84, 386; 133. 221 (public sale); 98, 341; 136, 83; 146, 287; 148, 154; 151, 330; 153, 264; 155, 186 (insurance) and 92, 57 (benevolent payments).

[76] See RGZ 146, 287 where the employer of a deceased husband had insured all employees. This resulted in the widow receiving payments on the death of her husband caused by the wrongdoer. Insurance benefits where not credited towards the wrongdoer on the basis of the ends pursued by the employer when he insured. For a critical evaluation thereof Alfred Werner in Günther Beitzke ed., *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, 10/11th ed. (Berlin: J. Schweitzer, 1967) at para. 108 before section 249 BGB.

[77] BGHZ 30, 29 in connection whith a case "new for old" see *infra*, chapter 4.

application of the principle of unjust enrichment in s. 812 ff BGB.[78] At the same time, the Court in one decision[79] required a "certain closeness" of the relation between wrong and benefit but, except for one decision[80] where this was interpreted as a closeness in time, this criterion does not seem to have been followed. Another guideline which arises occasionally is that unreasonable or unfair exoneration of the wrongdoer should be avoided.

The concrete application seems, at least according to the BGH, to be reducable to the underlying idea (*Wertungsgesichtspunkt*) that losses and gains are "linked to a single assessment unit"[81] or "detriments which are in a qualified connection".[82]

It is nevertheless highly debatable whether this has any value as a formula for giving us any lead in solving the particular case before us, because what is given as a test is in fact already the solution, leading to a certain circularity in the argument. The doctrine seems to suggest that it does not help.

One important preliminary comment should be made. While some years ago it was current to talk about the crediting of benefits being the rule, it seems to be obvious that such a *prima facie* presumption for or against the application of such a rule can not be maintained in either direction. In all the groups of cases that will be dealt with, the application or nonapplication of this rule needs a separate justification and reasoning. Although attempts have repeatedly been made to

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[78] "*Es verbietet sich jede schematische Lösung*" [Any schematic solution is to be rejected].

[79] BGHZ 30, 29, *supra*, note 77.

[80] BGH VersR 1967, 187.

[81] "*Zu einer Rechnungseinheit verbunden*", BGHZ 91, 206, 210.

[82] BGHZ 77, 154 (*Nachteile die in einem qualifizierten Zusammenhang stehen*) see also Thiele, *supra*, note 68 at 201 und BGH NJW 1982, 326 (*unlösbarer innerer Zusammenhang*).

establish such a handy *prima facie* rule for or against crediting of benefits,[83] such a rule does not reflect what is going on before the courts.[84]

As to procedure, the burden of proof, as in common law[85], lies with the defendant. He who is under the obligation to indemnify has to prove the prerequisites for a reduction of the "normal" award.[86] In this sense, one could speak of a *prima facie* rule against a deduction of the benefit.

The benefit is accounted for by the operation of law much in the same way as set-off or *compensation* in the civil law systems of the French tradition,[87] that is there need not be an additional declaration by the defendant.

Many writers seem to be convinced that the tests mentioned above are but empty words that need concretization by case law before being able to offer any

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[83] For example the RG, starting from questions of causation and attempting to solve the problem using the theory of difference, seems to have advocated a *prima facie* rule for the deduction of benefits. Hermann Lange, *supra*, note 75 at 303 and 304.

[84] Dieter Medicus in *Staudinger*, *supra*, note 4 at s. 249 BGB para. 146; Lange, *id.* at 302 and 307; but see Thiele, *supra*, note 68 at 197 ff who argues for turning around the old rule in favour of a *prima facie* rule for non-deduction of benefits. Clearly against any such rule BGHZ 8, 325, 328 and Heinrichs in *Palandt*, *supra*, note 42 para. 7A)d) before s. 249 BGB.

[85] *Andros Springs (Owners) v. World Beauty (Owners) (The "World Beauty")*, [1970] P. 144, [1969] 1 Lloyd's Rep. 350 (C.A.); cf. also *Garnac Grain Co. v. Faure & Fairclough*, [1968] A.C. 1130 (H.L.).

[86] BGHZ 94, 195, 217, BGH NJW 1983, 1053.

[87] See for example Art. 1188 of the Civil Code of Lower Canada or Artt. 1290, 1291 of the Code Civil des Francais. In Germany: BGH NJW 1962, 1909; 1970, 760 and BGHZ 27, 241; 248 in connection with the technicalities. Interesting problems arise when there is a quota to compensate for e.g. in cases of contributory negligence - BGH NJW 1970, 461 (accounting of only a quota of the benefit) but BGH NJW 1983, 2316 (accounting only insofar as the benefits exceed the part of the loss to be taken by the plaintiff).

guidance.[88] This is particularly true of the last criterion, that of the purpose of the norm givng rise to the cause of action, which was "discovered" by Rabel and applied in so many other areas [89].

For this reason, I will follow the same path as most authors when dealing with the compensation of benefits. I will form groups of cases (*Fallgruppen*) which will be used to illustrate and structure the areas of application.

In an oft-cited article, Thiele has tried to summarize the law as it pertains to the problem.[90] All he can offer in the end is a criticism of the BGH for its use of the criterion of "reasonableness" (*Zumutbarkeit*), a purpose test for awarding damages, and an argument that there should be neither inequitable benefits on the plaintiff's part nor too lenient a treatment on the wrongdoer's.[91]

He argues that the BGH has moved away from an objective way of assessing losses. He fears "individual and elastic solutions" will result from such an approach.

He himself, on the other hand can not offer a "positive reason and justification" (*positive Rechtfertigung*) although he talks about underlying "principles for accounting" (*Anrechnungsgrund*).

It is not clear at all how he can argue that we can not reduce the solutions to one underlying idea, but two pages later he is able to come up with his

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[88] Dieter Medicus in *Staudinger*, *supra*, note 4 s. 249 BGB para 246 sounds like a civilian's plaidoyer for the common law way of approaching the law.

[89] See *supra*, note 69.

[90] Wolfang Thiele, *supra*, note 68.

[91] *Id.* 195.

test, which is that an "indissoluble inner connection" (*unlösbarer innerer Zusammenhang*) has to be required between loss and benefit.[92]

Cantzler in an earlier article on the issue[93] tried to advocate the idea that we should examine which of the two, accounting or nonaccounting, furthers the injured party's "legally protected interests" more effectively.[94]

A more detailed discussion of German law does not seem to be required at this stage. The foregoing discussion was designed to enable the non-German reader to follow the arguments used by the BGH and to appreciate the Court's position in the context of the German legal system.

Other arguments and reasonings of the judiciary will be discussed throughout the course of this paper in the appropriate context and it is hoped that the background provided thus far will permit an understanding of the more complex and in depth discussion to follow in the next four chapters.

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[92] A criteria which is frequently cited and used by the BGH as a quasi-reasoning. Cf. e.g. recently in BGHZ 91, 357 at 363 involving a widow who lived in quasi-marriage and got money from her new partner - no reduction; widows and their duty to work after the death of their husbands cf. BGHZ 4, 170; interesting also as an example of how the case law concerning s. 242 BGB readjusted to the new democratic values and the freeing of the law from nazi ideas; BGH NJW 1982, 326.

[93] Klaus Cantzler, *supra*, note 73.

[94] *Förderung der verletzten Vertragspflicht oder des verletzten Rechtsgutes, id.* at 52.

Chapter 2.

SELECTED EXAMPLES OF FREQUENT FACT PATTERNS

2. Chapter 2: Selected Examples of Frequent Fact Patterns

Although chapters three and four, *infra*, will be devoted to a detailed discussion of two specific areas in which deductions for benefits arise, this chapter will present a general overview of the main areas in which the issue plays a role.

Four typical groups of cases (2.1. - 2.4.) will be presented and the arguments invoked and solutions offered in German law and in the common law of Canada and the United Kingdom will be discussed with occasional references to other jurisdictions.

Rather than divide every part into two subheadings, one dealing with the German law and the other with the common law, both systems will be discussed within the same section. In addition to being less awkward, this approach has the advantage of reducing duplication of material in those areas which are handled similarly by both legal systems.

The following four parts will seek to raise the basic issues involved when addressing the topic of accounting for benefits and the remainder of this thesis will then focus on broader reflections of a more general nature relevant to the same topic.

2.1. Benevolent Payments

The first of the groups of cases which involve the accounting for benefits are those in which a third party, for whatever reason, decides to help the party who has suffered damages. The third party's assistance may come in the form of payments of bills, of providing of money or of help in other ways. One thinks of the kindly neighbour who cooks for or nurses the victim who suffered personal

injuries. The golden thread weaving through these cases is that the benefactor had no legal duty whatsoever to take the benevolent action.

For the sake of brevity, I shall call all these acts and benefits "benevolent payments" even if they do not involve the transfer of money *per se* but rather the offering of services with a monetary value.[1]

These benevolent payments need not, as a rule, be accounted for. This is so generally accepted in both legal systems that the statement seems trivial.[2] Let us nevertheless reconsider the reasons which lead to this result in order to better appreciate the underlying argument and to determine to what extent the particular reasoning can be generalized to apply to other situations. It may well be that the material treated here lends itself to the extraction of more general principles.

One argument generally brought forward when we deal with gifts is that the legal relationship is determined by the donor.[3] His will should determine the legal results. The aim pursued in both situations of gifts and of benevolent payments is generally to ameliorate the situation of the donee and of the injured party respectively and in the latter case, to take the burden of the mishap off his shoulders.[4]

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[1] This term "payment" is the one also used by the Civil Code of Lower Canada, cf. Art. 1138 and 1139. The terminology differs widely in this area. Some simply talk about "gifts" some about "charity". I adopted Lord Reid's choice of words in *Parry v. Cleaver*, [1970] A.C. 1 (H.L.) at 14.

[2] See e.g. as examples RGZ 92, 57 (benevolent maintenance payments); BGHZ 10, 107 (elevator in a Café caused injury - benevolent payment of the employer); BGHZ 21, 112 117; 91, 357 363 (payments of partner in a *de facto* marriage); BGH·NJW 1970, 95 (relatives and partners do the injured party's share of work in a partnership); K.D. Cooper, "A Collateral Benefit Principle" (1971), 49 Can. Bar Rev. 501 seems to detect more problems.

[3] RGZ 92, 57; BGHZ 21, 112 117.

[4] The clearest statemet to the effect that the intention in these cases should be determinative is found in *Redpath v. Belfast and County Down*

Ordering an accounting for allowances made without legal or moral obligation by third persons would mean that we prohibit the amelioration of the aggrieved's position. It would amount to a ban on helping him. We would find ourselves in a situation in which the wrongdoer and not the victim would always end up as the real recipient of the help.

An immediate conclusion to be drawn from this is that the tests of foreseeability and of causation or remoteness can not serve in these cases. This puts the validity and usefulness of these criteria in general into doubt if they are to be more than a mere minimum requirement that the benefit has to be at least causal if it is to be considered for deduction.[5]

In all the benevolence cases, the event which led to the injury is obviously the cause for the help. Quite naturally, therefore, we can state that the aggrieved would not have received the payment in any other form but for the breach of the duty on the part of the defendant. Since it is by no means unusual that help is given to friends and relatives who suffer losses, the fact itself is neither too "remote" nor "inadequately" causally connected within the meaning of the German test. It is common knowledge that third parties may come to help the person who suffers losses and this can certainly not be qualified as unusual or unlikely.[6]

The concepts of remoteness and causation were generally developed as limits on recoverability. They were designed to link up acts and results with a view

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Railway, [1947] N.I. 167 and *Hay v. Hughes*, [1975] Q.B. 790 (C.A.). In Canada: *Vana v. Tosta*, [1968] S.C.R. 71.

[5] Cf. Harvey McGregor, *McGregor on Damages*, 14th ed. (London Sweet & Maxwell, 1980) [hereinafter McGregor] at para. 88, where he, although in a somewhat different context, places contributory negligence, remoteness and mitigation in a kind of hierarchy.

[6] The causality argument was therefore consistently rejected by the majority in *Parry v. Cleaver*, *supra*, note 1. Cf. as to earlier criticism G. Ganz, "Mitigation of Damages by Benefits Received (1962), 25 Mod. L. Rev. 559 and Harvey McGregor, "Compensation v. Punishment in Damages Awards" (1965), 28 Mod. L. Rev. 629.

to preventing too onerous a duty to indemnify on the part of the wrongdoer and they can not simply be transferred to areas of law in which they were not meant to serve, i.e. the linking up of event and benefits instead of event and losses.[7]

A transfer of property, goods, money or services never exists in isolation or in a legal vacuum. Most human actions are means to attain an end or have some purpose (*zweckgerichtet*). For example, the payment of a sum of money from A to B does not in itself tell us anything legally relevant. Only the aims pursued determine and reveal whether this payment constitutes the performance of a contract or the payment of a debt or a mistaken payment.

The motives that drive a person to a disposition are attached to and follow the subsequent flow of the assets and continue to determine the future of the payment. They determine in particular whether the payee is entitled to keep the money. This calls to mind the problem of the "justification" ("*ungerechtfertigt*" or "*ohne Rechtsgrund*") that prevails in the law of unjust enrichment,[8] in that the future and "validity" of a transfer are determined by the motives leading to it as communicated by the transferor. It is the element of "*sine causa*".

Following this line of thought, German courts decided a range of cases in which they consistently held that there is no accounting where a third

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[7] This idea surfaces in a somewhat differnt context in Dieter Medicus in Günther Beitzke ed., *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, Buch II*, 12th ed. (Berlin: J. Schweitzer Verlag Walter de Gruyter, 1983) [hereinafter *Staudinger*] section 249 BGB para. 145 and Klaus Cantzler "Die Vorteilsausgleichung beim Schadensersatzanspruch" AcP 156 (1957), 29.

[8] Cf. *County of Carleton v. City of Ottawa* (1965), 52 D.L.R. (2d) 220; *Re Spears* (1974), 40 D.L.R. (3d) 284. See generally Robert Goff and Gareth Jones, *The Law of Restitution*, 2d ed. (London: Sweet & Maxwell: 1978) 116 ff and for the German law the discussion concerning the notion of "*Leistung*" in s. 812 BGB, e.g. BGHZ 50, 227 and recently Franz Schnauder, "Leistung ohne Bereicherung? - Zu Grundlagen und Grenzen des Finalen Leistungsbegriffs" AcP 187 (1987), 142 and Georg Thielmann, "Gegen das Subsidiaritätsdogma im Bereicherungsrecht" AcP 187 (1987), 23.

person out of his own free will and, without obligation, made payments to the party who incurred the loss.[9]

The same principle applies to personal injury cases and is set forth in s. 843 BGB subs. 4, a norm located within the sections dealing with delict (sections 823 ff BGB):

> **Paragraph 843 BGB. [Geldrente oder Kapitalabfindung]**
> *(1) Wird infolge der Verletzung des Körpers oder der Gesundheit die Erwerbsfähigkeit des Verlezten aufgehoben oder gemindert oder tritt eine Vermehrung seiner Bedürfnisse ein, so ist dem Verletzten durch Entrichtung einer Geldrente Schadensersatz zu leisten.*
> *(2) [...]*
> *(3) Statt der Rente kann der Verletzte eine Abfindung in Kapital verlangen, wenn ein wichtiger Grund vorliegt.*
> *(4) Der Anspruch wird nicht dadurch ausgeschlossen, dass ein anderer dem Verletzten Unterhalt zu gewähren hat.*
> **[S. 843 BGB. (Money annuity or lump sum)**
> (1) If, in consequence of injury to the body or health, the earning capacity of the injured party is destroyed or impaired, or there is an increase in his needs, compensation shall be made to the injured party by payment of a money annuity.
> (2) [...]
> (3) Instead of an annuity the injured party may demand a settlement in a lump sum, if serious cause exists.
> (4) The claim is not barred by the fact that another person has to furnish maintenance to the injured party.]

Subs. 4 permits an *argumentum a fortiori* or *a majore ad minus*: if a deduction is not to be made even if the third party is under the obligation to pay, then as a matter of course we can not reach a different result in the cases in which no such obligation exists to compel the helper. This section, however, is not to be used as the basis for a general analogy because it only regulates a special conflict in

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[9] RG JW 1935, 3369 (collection for widow of a victim of a collapse of a bridge); RGZ 141, 173; BGHZ 10,107 (payments of the employer); BGH VersR 1973, 84 (help from relatives); BGH NJW 1970, 95 (work done by relatives of an injured co-shareholder); *contra*, in a case where members of the family helped out in a family business: BGH FamRZ 1960, 97.

an area in which the law of delicts and family law will regularly lead to clashes and overlaps.[10]

Common law takes much the same position in benevolent payment cases as does German law. *Parry v. Cleaver*[11], a decision which was taken by a bare majority, involved various kinds of payments from different third parties[12] after the plaintiff had been injured in a car accident negligently caused by the defendant (collateral in the real sense). Both the majority and the minority agreed that gratuitous payments made to assist the plaintiff are not to be deducted from the damages to be paid.

The main argument was that the wrongdoer should not benefit from such payments. This pure policy statement is probably the real reason for the results and supports the view that the very notion of damages is loaded with values and evaluations which are themselves digested policy decisions.

The rhetorical technique used by Lord Reid in that case, however, should not necessarily be ascribed general application. It may have been an oversight when he wrote that:

> "[Reducing the damages by the benevolent payments would] be revolting to the ordinary man's sense of justice, and therefore contrary to public policy [...]."[13] (emphasis added)

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[10] The BGH still derives from this a general principle of law (*allgemeiner Rechtsgedanke*) that the benevolent payments, which according to their nature should not benefit the wrongdoer, should be kept out of the computation. Cf. BGHZ 54, 269 with reference to earlier case law and more recently BGHZ 91, 357 at 364.

[11] *Supra*, note 1 reversing [1968] 1 Q.B. 195.

[12] It is arguable whether payments which the plaintiff quasi "bought" either by earlier employment or the payment into funds, can in fact be qualified as payments from third parties. Cf. treatment of this *infra*, chapter 3.

[13] *Parry v. Cleaver*, *supra*, note 1 at 14.

Firstly, it is certainly not the "ordinary man's" view or even his sense of justice that determines what public policy is and secondly, a judge in such a situation should admit that he is pursuing certain ends. Referring to this obscure notion of the "ordinary man" is just an attempt to enhance the force of one's own views, without being open enough to state the reasons which lead to the opinion. This tactic of veiling instead of revealing reasoning is certainly neither the task of judges nor the idea behind reasoned judicial opinions.

The classic statement of the law as it refers to benevolent payments is found in *Redpath v. Belfast and County Down Railway*[14], a case from Northern Ireland. There we find both the arguments of freedom and the arguments based on the policy decision to further and not to deter help by means of gratuitous payments.

In that case the public voluntarily supported a fund for victims of railway accidents. In referring to the relevant British judgments, Andrews, L.C.J rejected the tort committed by the railway as a "*causa causans*". He held that the benevolent payment "whilst admittedly a sequence [...] was not a consequence."[15]

The policy decision behind rejecting it as a proximate cause of the tort was expressed as follows.:

> "In these circumstances common sense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrongdoer as compensation to the victims for their loss. Why, one may well ask, should the defendants' burden be lightened by the generosity of the public. [...] The creation of the fund was a circumstance of a wholly independent or collateral character to the defendants' negligence."[16] (emphasis added)

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[14] [1947] N.I. 167; See also *Bowers v. Hollinger*, [1946] 4 D.L.R. 186 (H.C.J.).

[15] *Redpath v. Belfast and County Down Railway*, *id.* at 172 f.

[16] *Id.* at 175. See also *Dalby v. India & London Life-Assurance Co.*, (1854), 15 C.B. 365: "plaintiff does not receive the money from the insurance company because of the accident, but because he has made a contract providing for the contingency.".

2.2. Insurance Benefits

The other type of benefits arising very frequently out of an event that gives rise to a claim in damages is of course insurance benefits. These are "bought" precisely in the event that the damage occurs. For example, collision insurance is bought for protection in the event of an accident. We can look at insurance benefits as benefits coming from third parties, but we can just as well consider them as the result of one's own efforts. These "own or personal efforts" are the regular payments made before the event arose. This latter point was expressed in *Dalby v. India & London Life-Assurance Co.*[17] Therefore, we will address the issue of private insurance benefits again in chapter three which deals exclusively with benefits arising from one's own efforts.

The issue is dealt with in Germany with respect to all social security benefits, in s. 116 *Sozialgesetzbuch, zehntes Buch* (Social Code, 10th book hereinafter SGB-X)[18] and for other insurance benefits, in s. 67 *Versicherungsvertragsgesetz* (Insurance Contract Act, hereinafter VVG). Both sections provide for a subrogation, or an assignment by operation of law, of rights which the aggrieved (the beneficiary of the insurance) has against the wrongdoer.

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[17] *Ibid.*, see also BGHZ 70, 102, 109; 19, 94, 99; 25, 322, 328 and Dieter Medicus, "Normativer Schaden" JuS 1979, 233.

[18] This is the successor provision of s. 1542 *Reichsversicherungsordung* (or Insurance Act of the German Reich). It incorporates in a lengthy and complicated wording much of the case law that had been accumulated since the original enactment. S. 116 SGB-X 1980 came into force on the first of July 1983. See, e.g. among others Maximilian Fuchs, "Der Ersatz von Sozialversicherungsbeiträgen im Rahmen von Schadensersatzansprüchen" NJW 1986, 2343, 2346; with respect to the new enactment and the history of the provision Bernd v. Maydell, Joachim Breuer, "Zum Übergang des Schadensersatzanspruches auf den Sozialversicherungsträger gemäss Paragraph 116 SGB X" NJW 1984, 23 and Helmut Heinrichs in *Palandt, Bürgerliches Gesetzbuch*, 46th ed. (München: C. H. Beck, 1987) [hereinafter *Palandt*] para. E before s. 249 BGB.

Although s. 116 SGB-X is extremely important and poses difficult problems in its application and interpretation,[19] a complete discussion lies beyond the scope of this thesis. Instead, I shall briefly discuss its equivalent for private insurance:

> **Paragraph 67 VVG (Gesetzlicher Forderungsübergang)**
> *(1) Steht dem Versicherungsnehmer ein Anspruch auf Ersatz des Schadens gegen einen Dritten zu, so geht der Anspruch auf den Versicherer über, soweit dieser dem Versicherungsnehmer den Schaden ersetzt.*
> **[S. 67 VVG (Subrogation by operation of law)**
> (1) If the insured has a claim against a third party to be indemnified for the loss, this claim is assigned by operation of law to vest in the insurer, inasmuch and insofar as the insurer indemnifies[20] for the loss]

The provision does not state a solution or even comment expressly on the question of accounting for the benefits which are paid by the insurer. In fact, the question we are interested in is not even mentioned. All the provision does is enact a change in the relationship in which the obligation to indemnify exists. Logically, however, it is precisely this mere change of "position" of the claim which presupposes that it still exists. What would be the use of stipulating a subrogation or assignment triggered by the payment of insurance moneys, if the same payment extinguished the claim? By logical implication it means that accounting does not take place.

From a doctrinal point of view, it is a pity that the provision does not mention the accounting problem and only leads us to the result. This means we can not infer anything for the solution of other cases and for the development of a more general principle. Sections 116 SGB-X and 67 VVG leave us in the dark as to why damages are not reduced. Is it simply the statement of a general rule or the expression of an exception due to the special fact that the case involves a private insurance contract?

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[19] See *Palandt, id.*

[20] In s. 116 SGB-X the obligation to pay insurance benefits is already enough to trigger the subrogation.

The section applies to all private insurance against all forms of damage such as fire, theft, collision and also to transport or freight insurance (*Schadensversicherung*). A limit is imposed in that the losses have to be congruent with the risk insured,[21] a criterion that also has to be fulfilled in the case of s. 116 SGB-X.

Although s. 67 VVG is not applicable in cases in which a fixed sum has to be paid if the event that is insured against occurs, for example in cases of life insurance, (*Versicherungsfall bei Summenversicherung*), it is settled beyond dispute that in these cases too, a reduction of the damage award does not occur. The reason given for this is the purpose of the insurance. The result of private foresight, it is designed to help the injured and not to benefit the person causing the injury. Therefore, the BGH[22] decided that neither the capital sum nor the interest on it had to be accounted for.[23]

Consistent with the argument that the purpose for which the insurance was entered into is decisive, the BGH applies this principle to the victim as well.

In one case,[24] the wrongdoer had insured the passengers of his taxi against accidents. In an accident for which a third party was responsible, a client of the taxi company was injured. The company argued that it was not obliged to claim insurance moneys for the passenger who, so it argued, had already been fully conpensated by the other party to the accident. In such cases of insurance of third parties, the German law stipulates that the right to the insurance moneys and the

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[21] BGHZ 25, 340; 44. 383 and *Palandt*, *supra*, note 18 para. E)2)b) before s. 249 BGB.

[22] BGHZ 73, 109.

[23] BGHZ 39, 249 (excluded savings made in form of insurance) reduced award was overruled by BGHZ 73, 109. See also BGHZ 19, 94, 99; 25, 322, 328; NJW 1957, 905 (yield of a heritage, see *infra* 2.4.).

[24] BGHZ 64, 260, 266.

right to enforce and claim them are split up. The legal structure is very similar to that of common law subrogation.[25] The situation can be compared to a trust but it is actually only designed this way so that the taxi company in the case cited above does not get an economic advantage from claiming the insurance moneys without being obliged to turn them over to the injured party.

The Court reasoned by way of deciding the hypothetical situation in which the taxi owner would have been responsible for the injury. It argued that under these circumstances, the purpose of the insurance policy was to perform the obligation to indemnify through the insurance payments. Therefore, it would be legitimate to reduce the amount of the damages award by the payment "bought" through the premiums.[26] If so, the Court held that the taxi company, as the party to the insurance contract, would be entitled to deduct from its obligation to indemnify, the insurance benefits that it initiated and actually paid for through the payment of the insurance premiums. Therefore the BGH held that if the taxi driver was not even responsible for the accident, he could withhold his consent to claim the insurance benefits for the plaintiff who was already indemnified by a third party tortfeasor.

The above case can be cited in support of the argument that insurance moneys should be treated as benefits derived from one's own efforts rather than as a result of payment from third parties or collateral sources.

To sum up, the decisive factor is the determination of for whose benefit the insurance was taken out. It is *prima facie* not to benefit the wrongdoer, except in cases in which the person who is actually paying for the premiums does so

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[25] Sections 179 VVG, 75 subs. I clause 1 VVG, 76 subs. I VVG, 3 subs. II AKB; cf. BGHZ 64, 260 at 261 ff.

[26] BGHZ 64, 260, 266.

with the intention of lowering the effect of the risks he is running in his activities.[27] As a more general hypothetical test, we may ask whether we would reduce the amount of damages if the person who contracted for the insurance and paid for it had in fact made the payment of the insurance moneys himself. Seen in this light, we would stress the fact that the payment is made by the person who took out the insurance. This person's motives therefore determine the legal relationship just as in the case of benevolent payments.

Much the same results and arguments as those discussed above have been used in common law since the famous case of *Bradburn v. Great Western Railway*[28], in which the insured plaintiff was held to be entitled to recover full damages in addition to insurance benefits because his own money and his prudence should not benefit the wrongdoer.[29]

Ever since *Bradburn v. Great Western Railway Company*[30], there has been unanimity that benefits from private insurance should benefit only the person who made the payments. An argument in support of this position is for example that the insurance benefit is the result of actions taken before the event. Therefore, the benefit can not as a matter of principle be taken into account. This alone is not very convincing given the fact that the common law does not draw the line of accounting there where the duty to mitigate stops.[31]

Another argument very similar to the reasoning in the German taxi case is that the defendant should not benefit from the plaintiff's providence.

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[27] BGHZ 80, 8 (person to indemnify was son of the owner of the car who had insured the passengers of the vehicle which his son drove in the accident that eventually killed the plaintiff).

[28] *Bradburn v. Great Western Railway*, (1874) L.R. 10 Ex. 1.

[29] Cf. as a modern comment on the case, *Parry v. Cleaver*, *supra*, note 1.

[30] *Supra*, note 28.

[31] See *infra*, chapter 3.

Waddams[32] dismissed this argument on the ground that all kinds of precautions which the plaintiff takes and which prevent the loss from arising altogether lead to a benefit for the wrongdoer. Therefore, he argues, the fact that we are dealing with providence can not be decisive. In his search for another explanation for not deducting private insurance benefits Waddams then goes on to suggest that:

> "[I]nsurance does not prevent the loss; it is simply an arrangement for the sharing of its financial consequences."[33]

Although it is certainly true that insurance does not prevent the loss, this statement seems to presuppose that a deduction for benefits is dependent upon the nonoccurrence of a loss. This makes the accounting for benefits problem a question of definition of what a loss is rather than of a second step whereby the loss is erased or the claiming of compensation prevented through subsequent events. Logically, this would mean that once we have a loss at a certain point, subsequent benefits would have no effects on the award, a suggestion which is conceptually not tenable. Furthermore, the above citation only takes the form of an argument without in fact being one. It only restates what insurance is. It describes without explaining why we should derive legal consequences from the description.

The rejection of the argument that the defendant should not benefit from the plaintiff's providence is not well founded either. Firstly, it is based on a totally different notion of benefit. In this context, the term is used by Waddams as the non-realisation of a chance or a risk of loss, a notion that does not lead anywhere and does not help us in any way because of its broadness. Secondly, Waddams' rejection is based on an inappropriate argument *a fortiori*.[34] The prevention of a loss (and the providence applied here) is an entirely different

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[32] Stephen Michael Waddams, *The Law of Damages* (Toronto: Canada Law Books, 1983) at para. 482.

[33] *Ibid.*, see also *id.* at para. 1274 f.

[34] Or *a majore ad minus*.

category from a subsequent minimization. The former prevents the legal norms from giving rise to a claim generally, whereas the latter deals with the situation where a claim has already arisen. Since the two situations are not comparable, it is all the more inappropriate to treat them as being simply quantitatively different when they are in fact qualitatively different.[35]

2.3. Taxation

An area of dispute in which solutions diverge within the common law itself concerns the deduction of tax advantages triggered by the breach of duty (tort or breach of contract). Most of the relevant cases deal with saved income tax on damage awards for lost income or lost profits. The benefit in question is created by the fact that the income is taxable whereas quite often compensation for the loss of such income is not.[36]

The Supreme Court of Canada took up its own independent course in 1966 with *The Queen in right of Ontario v. Jennings*[37]. Since this decision it has been held that, if tax legislation decides to treat a damage award differently from the transaction for which indemification has to be made, then as a rule, this advantage of tax legislation is not passed on to the wrongdoer by reducing the damages he has

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[35] As *majus* and *minus*.

[36] The factual prerequisites necessary for the problem to arise were discussed at length in *British Transport Commission v. Gourley*, [1956] A.C. 185 (H.L.). See the general discussion of that case and the issue at large with extensive bibliographical references, Gordon Bale, "*British Transport Commission v. Gourley*, Reconsidered" (1966) 44 Can. Bar. Rev. 66. A more detailed discussion of *Gourley's* case will be found *infra* at the end of section 2.3.

[37] [1966] S.C.R. 532.

to pay. The law of Canada has since been well settled by a long line of consistent cases.[38]

The German position with respect to saved taxes was laid down in BGHZ 53, 132[39], a case in which it was held that any tax advantage arising out of the breach of duty or the compensation, has to be deducted from the recoverable loss. At the same time, the limits of this rule were determined when it was held that the objectives pursued by the tax legislation could prevent a deduction. This latter rule, encountered quite frequently, openly introduces a policy aspect and has proved to be a general limit on accounting.

The facts of the case which gave rise to the above rule were as follows. The plaintiff P and his brother B had a partnership, the profits of which the two partners shared equally. The partnership agreement stipulated that after B's death, his widow should be entitled to 40% (30% after two years and 25% for another two years) of B's half of the profits. After B's death, the defendant (who was the tax accountant for the business that was now carried on alone by the plaintiff, B's brother) continued to do all the accounting, including the computation

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[38] *Guy v. Trizec Equities, Ltd.*, [1979] 2 S.C.R. 756 further, *Arnold v. Teno*, [1978] 2 S.C.R. 287 and *Thornton v. Prince George School Board*, [1978] 2 S.C.R. 267; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. Cf. also for example unjust dismissal cases in which the problem tends to arise frequently: *Harte v. Amfab Products Ltd.* (1970), 73 W.W.R. 561 (B.C.S.C.); *Ofstedahl v. Cam-set Mechanical Contractors Ltd.* (1973), 42 D.L.R. (3d) 116 (Alta. S.C. App.Div.), different for the English law cf. *Parsons v. B.N.M. Laboratories Ltd.*, [1964] 1 Q.B. 95 (C.A.).

[39] See also BGH NJW 1967, 1462 recently NJW 1986, 245 and following cases: BGH NJW 1980, 1788 (payments of public accident and unemployment insurance); BGH NJW 1983, 2137 (tax credits for interest payments); BGH NJW 1984, 2524 (tax advantages from losses in partnership). The reasons for and purposes of the non taxation or tax deduction can lead to the assumption of a legislative intent ordering deduction of such advantages from the damages. So for example in NJW 1986, 345; BGHZ 74, 104, 116; NJW 1980, 1788; BGH 53; 132 (statute barred tax claim); BGH NJW 1986, 983. The last decision on the point seems to be BGH NJW 1987, 1814 which cites most of the relevant literature and case law on the point.

of profits. In doing so, he interpreted the partnership agreement wrongly and based the widow's share on the aggregate profits instead of only on B's half.

The defendant's liability was undisputed, as was the amount of 47.000 DM that had been overpaid. An action was taken against the accountant who argued that P saved 19,178.70 DM in taxes and had to deduct those from the 47,000 DM.

The fact that the benefit was based on public (tax) law was held to be irrelevant and a deduction was admitted as a general rule in all cases where an adequate causal link between the defendant's act and the saving of tax could be discerned.

On the other hand, according to the Court, the tax administration's right to subsequently claim taxes so saved prevents a deduction. This was the case here.[40] Since a tax bill can be altered and corrected if new facts arise later, a different treatment is justified in cases in which such a correction can still be made.

After finding that such a late claim could be made here, the Court went on to look into the effects of the claim possibly being statute barred. Whether prescription had in fact taken place was left open by the Court because it was of the opinion that this could not affect the result in any case. Even if the claim by the tax authorities was statute barred, this would be too detached from the event (i.e. wrong interpretation by the tax accountant) and its effect (overpayment to the widow). In addition, according to the judge, the result would be unfair. The defendant should not be allowed to take advantage of a "newly-arising and subsequent" benefit.:[41]

> *"Der Grund, warum der Geschädigte sich auf seinen Schaden den durch das Schadensereignis gleichzeitig erzielten Vorteil anrechnen lassen muss, liegt darin, dass er aus dem Schadensereignis keinen Gewinn ziehen soll. Deshalb ist er auch berechtigt, eine Steuerersparnis auf den Schaden anzurechnen, soweit eine Steuerschuld weder entstanden ist noch entstehen wird. Wenn aber - wie hier - ein vorhandener oder in Ausssicht stehender Steueranspruch infolge Verjährung (oder aber auch aus einem anderen Grunde) entfällt oder sich*

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[40] S. 222 subs. 1 Nr.1, 223 AbgO.

[41] BGHZ 53, 132 at 137.

vermindert, so geht dieser Vorteil zu Lasten des Steuerfiskus. In einem solchen Falle würde aber der Schädiger, wenn man zu seinen Gunsten die Voraussetzungen einer Vorteilausgleichung bejahen wollte, aus der Verjährung des Steueranspruches ebenso wie der Geschädigte einen unberechtigten Gewinn ziehen. Dann erscheint es aber angemessen, nicht dem Schädiger, sondern dem Geschädigten den Genuss dieses Gewinns zuzubilligen."

[The reason why the advantages gained by the injured party must be set off against the damages sustained is that no benefit should be drawn from the event causing the damage. Therefore, he is entitled to set off the tax saving inasmuch and insofar as a tax liability neither exists nor will come into existence in the future. When, however, as in the case at hand, an existing tax liability or one that is about to arise is extinguished or reduced because it is statute barred (or because of any other reason), then this advantage is to the detriment of the state. Were a deduction in favour of the party causing the damage to be allowed in such a case, this party, just like the injured party, would derive a benefit to which he is not entitled. In this situation it seems adequate to give the profit to the injured party and not to the party causing the injury."]

Arguments similar to these and particularly to the last one were also advanced in *Gourley's* case which we will deal with later.[42]

The arguments brought forward correspond to the way in which one looks at the three parties involved. If we look only at the two people involved and leave out the state as a third element, we will have to make a deduction because the plaintiff has in fact only lost the net amount, not the part of the award which would have been taxed anyway. This excludes any policy aspect from the decision. If, on the other hand, we include in our perspective the revenue service as a party, we reach a different result. Then, starting with the assumption that in any case there is going to be a loss on the state's side, we have to decide who we ascribe the corresponding gain to, the wrongdoer or the injured party. In fact, Parliament gives up a source of income in deciding not to tax damages awards in the same way as it would tax the moneys derived from the transaction without the damaging event. The argument which was also made by the Supreme Court of Canada in *Jennings*[43] is that

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[42] See at the end of this section. The *Gourley's* decision was recently cited with approval by the House of Lords in *Dews v. National Coal Board*, [1987] 3 W.L.R. 38.

[43] *The Queen in right of Ontario v. Jennings*, *supra*, note 37.

the decision as to who should have the benefit from the "investment" which the government makes is to be determined by the legislative intent. This is in fact exactly the same analysis which is also made in the benevolent payment cases and generally in all cases in which a third person confers benefits out of his own pocket. In most instances, this question of determining the intent of the legislator is answered quite easily in favour of the plaintiff. The defendant's behaviour being already rejected by the legal system as unlawful or in some instances wrong, he will not be made the beneficiary of lenient tax legislation.

The situation in common law differs from country to country.

In *The Queen in right of Ontario v. Jennings* [44] Judson, J. of the Supreme Court of Canada makes quite an interesting conceptual analysis. Starting with the notion of compensation as restoration of a situation (not just a payment of a sum of money), a point which resembles the German view explained by Medicus above,[45] he argues that what is compensated for, *inter alia*, in personal injury cases is not the earnings themselves but rather the earning capacity. This is in fact the only thing which the plaintiff lost. Judson J. suggests that from this perspective, a lump sum settlement in damages is nothing more than the restoration of the capital asset (earning-capacity) which is subsequently used to yield income, which in turn is the actual salary lost:[46]

> "The plaintiff has been deprived of his capacity to earn income. It is the value of that capital asset, which has to be assessed."[47]

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[44] *Supra*, note 37 at 543 ff.

[45] *Supra*, chapter 1, note 26.

[46] How this is computed in reality is illustrated in *Poh Choo v. Camden and Islington Area Health Authority*, [1980] A.C. 174 (H.L.) in particular at 192 ff.

[47] *The Queen in right of Ontario v. Jennings*, *supra*, note 37 at 546.

Although this could be taken as an argument for deduction of tax advantages, the judgment goes on to elaborate on what the dollar amount of the supposed "earnings" consists of.

> "[That] the award is not reduced by an amount equivalent to the tax [...] merely reflects the fact that the state has not elected to demand payment of tax upon the kind of a receipt of the money"[48] (i.e. the lump sum)

This result is seen as one of "tax policy". The Court tries to determine what the policy is and acts accordingly to give effect to it. The argument is similar to the purpose argument used in connection with benevolent payments and in a number of other cases too. In interpreting the rule, the Judge then found that it was not Parliament's intent to tax this particular income to benefit the plaintiff rather than the defendant.

Judson,J. ends his judgment by backing up the result with the difficulties that would arise out of the uncertainties of future tax laws and the difficulties in judicial administration of any other view. This last point is not very convincing from a conceptual point of view. Only those who tend to generally justify the application of an easier and thereby more economic rule instead of a more difficult but more equitable one, might approve of the argument. To my mind, difficulties of proof do not warrant the change of a substantive rule. These difficulties should generally be solved by the application of the law of civil procedure and the distribution of the burden of proof, not by rejecting a rule which might be more just but which depends upon more contingencies in its assessment than does the other. Cases in which too complicated a rule would regularly lead to difficulties for one party could then be handled by shifting the burden of proof, a technique which is used in quite a few areas and in most legal systems.[49]

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[48] *Id.* at 546.

[49] The classic example being the cases of product liability in several western countries. See in more general terms with respect to the shifting of the burden of proof, Ernst Rabel, "Umstellung der Beweislast,

In England, the legal situation is determined by the decision of the House of Lords in *British Transport Commission v. Gourley*.[50]

The rule stated in this case, similar to the one used by the German courts, overruled earlier decisions of the Court of Appeal.[51]

The facts are as follows. The plaintiff had been injured in a railway accident for which the defendant was liable. As a result of this accident, he suffered loss of income during the period of recovery and later because of his physical condition which only allowed him to take part on a reduced scale in the business which he ran together with other persons as a partnership.

The trial judge awarded 37,720 pounds for loss of earnings, without taking into account that this amount, had it been earned, would have been taxed in the hands of the plaintiff.

The majority judges analyzed this as a question of remoteness and thereby closed the doors to the kind of policy reasons and aspects of equality brought forward by Lord Keith who very convincingly rendered a separate dissenting opinion on reasons similar to those described in the Canadian case. Leaving aside the difficulties in assessing the quantum of damages, the arguments can be reduced to the following. Because everybody and not only this particular plaintiff is subject to a regime of general application, it is a necessary consequence

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Insbesondere der Prima Facie Beweis" reprinted in Hans G. Leser ed., *Ernst Rabel Gesammelte Aufsätze*, (Tübingen: J. C. H. Mohr (Paul Siebeck), 1965) vol. I at 374 ff.

[50] *British Transport Commission v. Gourley*, *supra*, note 36. McGregor, *supra*, note 5 offers an extensive discussion of this case at para. 410 to 440. Cf. also G. Bale, *supra*, note 36, recently although without references to other jurisdictions and mainly concerned with the question which tax rules concerning damages awards should be used, William Bishop, John Kay, "Taxation and Damages: The Rule in Gourley's Case" (1987), 103 L.Q.R. 211. *Parsons v. B.N.M. Laboratories, Ltd.*, [1964] 1 Q.B. 95 (C.A.) and *Dews v. National Coal Board*, *supra*, note 42.

[51] *Jordan v. Limner & Trinidad Lake Asphalt Co., Ltd.*, [1946] K.B. 356 and *Billingham v. Hughes*, [1949] 1 K.B. 643.

of the receipt of funds as earnings that they be reduced by taxation. Such taxation is therefore not collateral. The surprising part of the judgment is that Lord Reid[52] admits that although one can not define remoteness, this is clearly a case where the benefit is not too remote. Analytically this is equivalent to offering the result as an argument.

It is clear, however, that the focus in *Gourley's* case was reduced to only two parties involved and that Parliament, on behalf of the Revenue Service, (the body who in fact makes a payment by renouncing a source of income) is left out of the account.

It seems difficult to reconcile this case with the benevolent payment and the insurance cases. In these, many of the benefits were foreseeable and not too remote but we did not limit ourselves to these tests. In addition, consistent application of the argument used in *Gourley's* case would force us to reduce damages by the amounts paid by health insurances, at least as long as they are compulsory and therefore of general application. The benefit would then not be something "purely personal" and would "apply to all" to use the words of Lord Reid.

2.4. Death and Inheritance

The final group of cases dealing with the problem of benefits and losses which shall be discussed here is the group involving the death of another person. In particular circumstances, both the common law jurisdictions and the German law allow close relatives or dependents of a victim to claim compensation from the wrongdoer who caused the death. From a theoretical standpoint, it can be debated whether these claims are in fact compensation for the economic interest of

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[52] *British Transport Commission v. Gourley*, *supra*, note 36 at 214.

the dependent party[53] or exceptional cases allowing the plaintiff to claim damages in his own name for the infringement of a legally protected interest of a third party (i.e. the deceased).[54] Regardless of the solution adopted, we will encounter a problem of accounting for benefits. In the most typical cases, we have to deal with the argument that the plaintiff benefits from becoming heir or beneficiary of a legacy through and with the death of the relative and that such "benefit" should be set off against any compensation awarded

In Germany, these claims can be based on s. 844 BGB which is interesting insofar as it also provides for the accounting of certain benefits by referring to s. 843 subs. 4. The relevant parts of these sections read as follows:

Paragraph 844 BGB (Ersatzansprüche Dritter bei Tötung)

(1) [betrifft Beerdigungskosten]

(2) Stand der Getötete zur Zeit der Verletzung zu einem Dritten in einem Verhältnisse, vermöge dessen er diesem gegenüber kraft Gesetzes unterhaltspflichtig war oder unterhaltspflichtig werden konnte, und ist dem Dritten infolge der Tötung das Recht auf den Unterhalt entzogen, so hat der Ersatzpflichtige dem Dritten durch Entrichtung einer Geldrente insoweit Schadensersatz zu leisten, als der Getötete während der mutmasslichen Dauer seines Lebens zur Gewährung des Unterhalts verpflichtet gewesen sein würde; die Vorschriften des Paragraphen 843 Abs. 2 bis 4 finden entsprechende Anwendung.[...]

[Section 844 BGB (Third party claims in case of death)

(1) [concerns funeral expenses]

(2) If the deceased at the time of the injury stood in a relationship to a third party by virtue of which he was or might be bound by law to furnish maintenance to such third party, and if in consequence of the death such third party is deprived of the right to claim maintenance, the person bound to make compensation shall compensate the third party by the payment of a money annuity, insofar as the deceased would have been bound to furnish

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[53] Even under Section 1 (1) of the Fatal Accident Act (1976) (U.K.), c. 30 this still seems to be a tenable position.

[54] So e.g. BGHZ 7, 30. This latter view seems to be the logical consequence of decisions at common law which held that the right to bring an action depends on the deceased's right insofar as it is barred if the deceased (in his own right) had already been indemnified or could not have sued out of other reasons at the time of his death. *Williams v. Mersey Docks and Harbour Board*, [1905] 1 K.B. 804 (C.A.); *Murray v. Shuter*, [1972] 1 Lloyd's Rep. 6 (C.A.); *Pickett v. British Rail Engeneering, Ltd.*, (1978), [1980] A.C. 136 (H.L.) in particular at 152 *per* Lord Salmon.

maintenance during the presumable duration of his life; the provisions of s. 843 (2) to (4) apply *mutatis mutandis*. [...]]

Paragraph 843 Abs. 4 BGB

(4) Der Anspruch wird nicht dadurch ausgeschlossen, dass ein anderer dem Verletzten Unterhalt zu gewähren hat.

[Section 843 Subsection 4 BGB

(4) The claim is not barred by the fact that another person has to furnish maintenance to the injured party.]

Section 845 BGB [compensation for loss of services]

[provides a similar provision for the loss of services of the injured or killed person.]

The interference with dependency claims, involving mere economic loss, is not generally protected by the German law of delicts. This is because they are outside the definition of an "absolute right" or a right which can be invoked against everybody.[55] Under German law, only these can be the subject matter of a tort under s. 823 ff BGB.[56]

Greater detail in respect of the technicalities of these obligations and claims is not needed for our purposes.

The persons that s. 844 BGB has in mind are generally those who inherit the deceased's estate.[57] For the purposes of accounting for the value of the estate which accrued simultaneously with the death, German law distinguishes between the capital value of the estate (*Stammwert*) and its yield. The latter is

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[55] A concept similar to a right *in rem* although the expression is misleading because it has nothing to do with a *res* or thing.

[56] **[Section 823 BGB (Duty to compensate for damage)**

(1) A person who wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other rights of another is bound to compensate him for any damage arising therefrom.

(2) [...]]

These "other rights" have been judicially interpreted to be rights similar in nature to those listed immediately before in the same subsection. These similar rights are the "absolute rights" referred to in the text.

[57] Cf. s. 1924 BGB for the definition of who are the legatees in an intestate succession.

generally deducted from the claim in damages pursuant to s. 844, whereas the former is not.

The argument advanced in favour of this position by the BGH, is presented in a case where a daughter sued the owner of the horse which had killed her father in an accident.[58] The Court held that the bulk i.e. the capital value of the estate, would eventually have found its way to the plaintiff's estate in any case.

The finding that there existed an adequate causal link between the death and the accruing of the inheritance, which the Reichsgericht had rejected in earlier decisions on its rigid test of the identity of the injurious event and the benefit[59], was not followed by the BGH. This, according to the Court, would be contrary to expectations as well as to the result which we want to reach (*angestrebtes Ergebnis*).

After that stage of the analysis, which only means that the possibility of a deduction is not excluded *a priori*, according to the BGH, we need to separately justify in every case that the making of a deduction corresponds to the purposes, policies and ends pursued by the duty to compensate.

The plaintiff and her deceased father who had to support her, used to satisfy their monetary needs out of a pension and the yield of the asset. The Court therefore held that allowing a deduction of the value of the estate for the benefit of the tortfeasor would amount to an obligation to diminish the estate (*Vermögen*) which the daughter would have received, albeit only some years later, in an unreduced form.

Her only benefit is that she received the estate earlier, not that she received it at all. This is quite an interesting view because it is clear that the heir

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[58] BGHZ 8, 325, 328.

[59] RGZ 10, 50; 64, 350 - adequate causal link only if identity of the two events.

under German law has no right until the death. There is no "equitable" right in such a situation. On the other hand, and unlike most legal sytems, Germany does not allow the total disinheritance of certain classes of relatives. The paradigm example of these relatives is children. According to s. 2303 subs.1 BGB, they have to receive at least half of the share they would get in the case of intestate succession[60], a provision which was recommended for insertion in a similar form in the new Civil Code of Quebec.[61] By way of contrast the British Inheritance (Provision for Family and Dependants) Act 1975 (U.K.)[62] provides only for a discretionary remedy in s. 2. In the case of the BGB we were dealing with a right which is not subject to any discretion by the courts or any "reasonableness of the financial provision". Because of this situation, courts in Germany are probably prepared to assume a certain degree of crystallisation of the position of the legatee prior to the death occurring.

Starting from the assumption that the plaintiff would eventually have received the estate anyway, consistency requires that we make a deduction only if it can be proven that the maintenance payment has or would have been made out of the capital and that one of the following condition applies.: the capital would not have been there any more, or the deceased would have disinherited (as far as is

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[60] This is the so called *Pflichtteilsrecht* in s. 2303 ff BGB.

[61] Cf. Office de révision du Code Civil, *Rapport sur le Code civil du Québec, vol. II, tome* 1, *livres 1 à 4, Commentaires*, (Québec: Éditeur officiel, 1977) at 241-242, 261 and Germain Brière, *Les Successions Ab Intestat*, 9th ed. (Ottawa: Éditions de L'Université d'Ottawa, 1985) at 74 ff.

[62] Ch. 63.

allowed) the claimant,[63] or the claimant had a shorter life expectancy than the deceased.[64]

These arguments are valid only for s. 844 BGB. In one case the plaintiff was injured in a car accident in which his brother was killed. The argument presented was that the award should be reduced because now the brother was the sole heir to the estate of his mother, who died some years later.[65]

This argument was rejected by the BGH on the grounds that the plaintiff had sued for compensation for his injuries and not for the death of a person he was dependent on. The "event" is therefore only his injury which the death of his brother had nothing to do with. This death was only accidentally related (*zufällig*) to the injury. Two separate legally protected interests just happened to be affected by the same event. Accounting for benefits, according to the Court, requires that one and the same injurious event (*Schadensereignis*) produced both benefit and loss.

A different regime is applied with respect to the yield of the inheritance.

If capital gains, for example the profits of profit yielding chattel or the rent payments of tenants, would have been dissipated by the deceased had he lived on, the courts refuse to disregard this fact. They deduct from the damages award the amount of presumed yield and profits of the estate during the period between the time of the death of the deceased under normal circumstances and the

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[63] So Wolfgang Thiele, "Gedanken zur Vorteilsausgleichung" AcP 167 (1967), 192 at 232.

[64] Hermann Lange, *Handbuch des Schuldrechts, Bd: 1, Schadensersatz* (Tübingen: J. C. H. Mohr (Paul Siebeck), 1979) para. 9 IV 2a; slightly different BGH VersR 1967, 1154.

[65] BGH NJW 1976, 747.

actual time of death.[66] These deductions have been made on a net basis[67] i.e. including deductions of reasonable expenses for the time and money spent in the administration of the estate by the heir during the period in question.[68] In one interesting case, the BGH rejected the deduction of a yield which the deceased would have used and invested to increase his estate.[69]

In summary, in these cases the BGH tried to deduct all advantages which the heir obtained through the earlier death and not simply through the death itself. In more general terms, it seems that the starting point which the Court takes is to make sure that the benefit corresponds to the reason why the interest is compensated. In the case of section 844 subs. 2, it is expressed that this compensation is not effected just because the death occurred but because as a consequence of the defendant's interference, it occurred earlier.[70]

The situation in common law jurisdictions is quite similar to the one described above.

As common law itself did not give a right of action in wrongful death cases,[71] in England it is only since 1846 with the introduction of the Lord Campbell Act that a statutory right exists enabling certain surviving relatives to recover losses

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[66] NJW 1974, 1236; 1979, 706.

[67] BGH VersR 1962, 323.

[68] BGHZ 58, 14.

[69] BGH NJW 1974, 1237.

[70] This legislative intent is expressed in s. 844 subs. 2 BGB in the words "during the presumable duration of his life". The text of the provision is reproduced *supra*, in text preceding note 55.

[71] Cf. *Admiralty Commissioners v. S.S. Amerika*, [1917] A.C. 38 (H.L.) and for Canada *Monaghan v. Horn* (1882), (1884), 7 S.C.R. 409. An intersting article on the general question of the justification of a claim of the survivor in his own name also reveals the development since the enactment: Stephen Michael Waddams, "Damages for wrongful death: Has Lord Campbell's Act outlived its usefulness?" (1984), 47 Mod. L. Rev. 437.

for the death of a person.[72] Similar acts were enacted in the Canadian common law provinces and were generally broader than s. 844 BGB, in that the claim they introduced was not restricted to those who would have had rights as dependents against the deceased.[73]

It is established by abundant case law that any benefit which accrued as a consequence of the death has to be accounted for in reduction of the claim.[74] On the other hand, here too the courts do not simply look at the whole estate. In cases in which the plaintiff would eventually have received the deceased's estate, the courts take into account that what was gained was only the fact that the plaintiff came into possession earlier than expected.[75] The courts deduct the value of the acceleration, not the fact that the plaintiff is the heir. Although common law courts call this element the acceleration, they mean exactly the same as the German courts. The money which the estate yields between the death and the pre-accident remnant of the deceased's life is what is actually gained. Only this and not the capital value is therefore deductible.

In reference to our previous discussion on insurance benefits, it is of interest to note that accounting for insurance moneys is generally excluded under the

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[72] This was introduced by the Fatal Accidents Act, 1846 (U.K.), 9 & 10 Vict. c. 93, known as Lord Campbell's Act, in the U.K. now replaced by the Fatal Accidents Act 1976 (U.K.) c. 30.

[73] As to the scope of the statutes and the leading cases in Canada see Waddams, *supra*, note 32 at para. 685 ff.

[74] Only Prince Edward Island enacted a special provision in s. 7 (1)(h) of the Fatal Accidents Act P.E.I. excepting the accounting. Cf. case law cited by Waddams *supra*, note 32 at para. 722 at note 142.

[75] Extremely interesting *Sakaluk v. Lepage*, [1981] 2 W.W.R 597 (Sask. C.A.). Cf. generally *Goodwin v. Michigan Central Railway Co.*, (1913), 14 D.L.R. 411 (Ont.S.C.App.Div.); *Clement v. Leslies Storage, Ltd.*, (1979), 97 D.L.R. (3d) 667 (Man.C.A.).

fatal accident statutes.[76] This was implemented after early cases decided under Lord Campell's Act[77] had held that there should be accounting.[78] Although this is often forgotten, we should keep this legislative history in mind in interpreting the provisions of the various fatal accident statutes. The criticism of the case law which led to the change in the statutes is more closely connected to the next chapter which shall deal with benefits arising from one's own personal efforts.

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[76] Cf. e.g. Family Law Reform Act (R.S.O. 1980, c. 152) s. 64 (1). The statutes wanted to do away with the interpretation given to the fatal accident legislation by cases like *Grand Trunk Railway Co. of Canada v. Jennings*, (1888), 13 App. Cas. 800 (P.C.).

[77] *Supra*, note 72.

[78] *Grand Trunk Railway Co. of Canada v. Jennings*, *supra*, note 76.

Chapter 3

BENEFITS AS A RESULT OF OWN EFFORTS

3. Chapter 3. Benefits as a Result of Own Efforts

The cases and fact patterns described in the preceding chapter showed that the solutions as well as the arguments and the issues involved in the question of accounting for benefits are considered to be quite similar in both the German and the common law systems. The relative similarity is in sharp contrast to the divergence which is reflected in the two groups of cases to be discussed in this and in the following chapter.

After describing the cases and the different approaches taken by the systems, an attempt will be made to explain dissimilarities in terms of fundamental differences in the evaluations and choices made by both systems in areas we suggest are at least implicitly involved and related to the solution of these problems. The repercussions of these evaluations and choices will then seen when we examine cases dealing with "own efforts" situations. These basic evaluations pertain to the treatment of unjust enrichment in general and *negotiorum gestio* in particular and to the notion of damages and the definition of compensation itself.

The cases I want to deal with in this chapter can be summarized as having the following features.

Firstly, the event causing the loss has already occurred. This takes the cases out of the scope of the principle that mitigating events can not occur before this date and also outside the scope of *Parry v. Cleaver*[1] where it was emphasized that an investment before the occurrence of a tort can not be taken into account in reducing the damages. To do so would amount to punishing the person with foresight, by putting him in a worse situation than the one who did not insure himself against the event.

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[1] [1970] A.C. 1 (H.L.).

Secondly, the plaintiff uses the situation or the assets freed by the act giving rise to the duty, to compensate to gain a benefit. A minimum causal link between the injury and the benefit is therefore present in all the cases.

Thirdly, the plaintiff's actions which led to the benefit could neither have been required nor claimed by the defendant in the sense of a real duty or obligation, nor was the plaintiff's act required under a "burden" to mitigate. The term "burden" is used here to denote what is usually called a "duty to mitigate". It reflects its unique character, which is that no action can be required from the plaintiff and no claim ensues upon the breach of the duty. In this respect, it is similar to the structure of the "burden" of proof. The same legal phenomenon can be found in cases of contributory negligence where we could talk about a burden to use reasonable care in one's own affairs.[2]

3.1. German Solution

The leading case in Germany, and one that is still considered good law in the matter of benefits arising through the plaintiff's own efforts, is BGHZ 55, 329. At first glance, this case does not seem to fit into this context at all.

The facts are as follows:

One of the defendant's buses caused an accident with the plaintiff's driving school car. There was no dispute as to liability but the defendant argued that

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[2] In German, the term *Obliegenheit* is frequently used in this context. What is meant is judicially expressed by Goff, J. in *Koch Marine Inc. v. D'Amica Societa Di Navigazione A.R.L. (The "Elena D'Amico")*, [1980] 1 Lloyd's Rep. 75 (Q.B.Com.Ct.) at 88 and by Pearson, L.J. in *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.) at 1075. Cf. generally with respect to legal terminology and comparative law and also with respect to German, Bernhard Bergmans, "L'Enseignement d'une terminologie juridique étrangère comme mode d'approche du droit comparé: l'exemple de l'allemand" 1987 R.I.D.C. 89 with abundant literature.

the plaintiff had not suffered a loss of profits. He based his argument on the following facts. During the nine days of repair there had been 108 scheduled lessons that would have yielded a net income of 1,570 DM. Although it was not possible to rent a replacement vehicle, because of the special built-in equipment required for the purposes of a driving school car, the plaintiff, by working overtime, had made up for all the cancelled lessons by the time of the judgment (which is the relevant time for the assessment of damages under German law[3]). In fact, no negative effects on the business could be established.

The Court started from the observation that there was no damage according to the strict "theory of difference"[4] (except for the damage to the car which was not in dispute). Any award of damages had to have the effect of an evaluative correction of the normal measure of damages provided by the difference theory.[5] In so holding the Court stated that making up the lost lessons through the plaintiff's own efforts was beyond the scope of his duties (*überpflichtmässige Massnahmen*) and had therefore to be left out of the calculation of damages. The lower Court saw this as a question of accounting for benefits in the technical sense (*Vorteilsausgleichung*). The BGH expressed doubts as to the evaluation and asked whether we were in fact dealing with a case of a loss that had actually occurred and

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[3] Cf. Albrecht Zeuner, "Schadensbegriff und Ersatz von Vermögensschäden" AcP 163 (1964), 380 *sub* V at 400. A distinction is made between the procedural point of assessment which is the time of the last instance of fact and the substantive point. The former determines which events up to that point have to be taken into account in this trial (litigation) and which events should be dealt with in a new litigation, BGHZ 27, 181, 187 ff. Another question is the point in substantive law which might be limited by things like statutes of limitation or the death of the claimant. Cf. BGHZ 29, 393, 398, an instructive case dealing with lost profits (s. 252 BGB) in which it was also held that the perspective of the *ex post* objective bystander (*nachträglich objektiver Beurteiler*) determined the assessment of damages - clearly a judgements on probabilities.

[4] See *supra*, chapter 1 text at notes 24 ff.

[5] BGHZ 55, 329, 331.

was already materialized but had been subsequently erased. The Court went on to suggest that this might in fact be a case without a loss at all.

Interestingly enough, the question was left open. In any event, according to the BGH, it would not (at least not in this case) lead to a deduction. Had the loss occurred and later been erased again, it is settled law that benefits arising out of the plaintiff's actions need not be accounted for if they go beyond the "burden" to mitigate laid down in s. 254 Abs. 2 S. 1 BGB[6]. The Court realized that this is not a direct consequence of s. 254 BGB itself, since that provision does not even address the question. No proper obligation to act in a real sense is created by that provision. The Court based its result on the application of the principles and values underlying section 254 BGB and which the BGH considered to be part of all private law of Germany.[7]

Even if the "benefit" were to be seen as just "one factor" in computing the loss itself, this would not automatically determine the outcome of the accounting problem. Consistent with the view that damages are not mathematically determinable and that the inclusion of each and every factor is the result of a judicial evaluation, the Court argued that on this basis there was no reason that would justify a different treatment from cases of "real " accounting of benefits. To test the consistency of the argument, the present case was compared to one in which the missed driving lessons would not have been made up. The plaintiff's award would only have been reduced to the extent that he would reasonably have been required to mitigate the damage.

The basic idea behind this decision is that s. 254 II BGB contains and is based on the principle of law that the defendant should not be relieved by

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[6] *Id.* at 333 f. The text of s. 254 BGB is reproduced *supra*, chapter 1 text following note 39.

[7] "*Sinngemässe Anwendung der in dieser Vorschrift zum Ausdruck kommenden Wertung*", BGHZ 55, 329, 334. Wolfgang Thiele, "Gedanken zur Vorteilsausgleichung" AcP 167 (1967), 193, 236.

behaviour that is not called for by any legal duty to mitigate.[8] This does not directly apply to the notion and definition of damages themselves, but only to benefits that accrued after the injury emerged.

The link between accountability and s. 254 BGB should ideally be explained in more detail than the Court provides. It is suggested that the underlying justification is perhaps to be found on a different level, which can be qualified as one of legal tradition. This suggestion will be explained in greater detail in section 3.3. *infra*. It certainly seems settled that the Common law does not at all subscribe to the reasoning put forward by the German BGH, although the duty to mitigate is dealt with quite similarly in both systems. The rule pertaining to benefits arising from one's own efforts, as well as the results, are the exact opposite in the two legal systems. In most cases such differences are a sign that fundamental rules and evaluations are approached in an absolutely different way. This should then find its corresponding expression in other fields of law as well.[9]

In *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways of London, Ltd.*[10], the leading British case in this

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[8] BGHZ 55, 329, 334 "*[...]dem Rechtsgedanken und der gesetzlichen Wertung des Paragraphen 254 Abs. 2 BGB [ist] zu entnehmen, dass eine Schadensverhinderung und -minderung durch überpflichtmässige Anstrengungen des geschädigten den Schädiger nicht entlasten sollen.*" ["It can be inferred from the idea of law and the statutory evaluation of para. 254 II BGB, that the prevention or reduction of loss by way of efforts going beyond the duty of the injured party should not alleviate the damaging parties burden"]. The case was then referred back to the lower courts for a reevaluation of the question of fact as to how far the duty in s. 254 BGB required efforts on the part of the plaintiff.

[9] I am thinking of the law of unjust enrichment and in particular *negotiorum gestio*. See Hermann Lange, *Handbuch des Schuldrechts, Bd I, Schadensersatz* (Tübingen: J. C. B. Mohr (Paul Siebeck), 1979) para. 9V at 315 ff.

[10] [1912] A.C. 673 (H.L.).

area,[11] although the problem was considered to be one of the measure of damages,[12] it was stressed that:

> "[...] when in the course of his business he [the plaintiff] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."[13]

Lange[14], the author of a treatise on the German law of assessment of damages, clearly identifies the underlying premises of this opinion. He states that in order to take the view of the House of Lords, one would have to accept an extension of the "duty" to mitigate to a duty to strive for benefits as *quasi*-agent and for the account of the party under the duty to compensate. The background to this is that, inasmuch as the plaintiff has to keep the damages down, he would also be compelled to actively strive for benefits. It is arguable whether this statement is not redundant since it would appear that the obligation to minimize damages includes that of striving for benefits. Is keeping damages down not striving for benefits?

The question of how far the duty to mitigate goes and to what extent profits derived from risky ventures have to be accounted for was decided by the *Reichsgericht* in a very instructive case,[15] interestingly enough in the same year in which *Westinghouse* itself was decided by the House of Lords.

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[11] This decision will be dealt with in more detail later, see *infra*, section 3.2.1.

[12] *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways of London, Ltd.*, *supra*, note 10 at 687 and 689.

[13] *Id.* at 689 followed by the reference to the illustrative case of *Staniforth v. Lyall* (1830), 7 Bing 169.

[14] *Supra*, note 9 at 316.

[15] RGZ 80, 155, but see *Cockburn v. Trust Guarantee Co.* (1917), (1918), 55 S.C.R. 264. In RGZ 80, 153, a case very similar in fact pattern and reported directly before, the RG rejected the argument that accounting for benefits could be applied against obligations to pay which are not damages.

The plaintiff, who wanted to invest money, hired a commercial middleman, the eventual defendant, to find a good and sound hypothec for him. The defendant finally found a hypothec and the plaintiff lent 35,000 *M.* Subsequently, the lot with an unfinished house had to be publicly sold because the hypothecary debtor could not meet his obligations. The plaintiff himself bought the house for 1,600 *M.*

The only issue involved was the quantum of the damages suffered by the plaintiff. The defendant argued that the difference between the actual market value of the house and the price paid by the plaintiff had to be taken into account in reduction of the damages award.

The plaintiff, seeking revision by referring to an earlier decision of the RG[16], advanced the argument that accounting should only be ordered if, "one and the same event led to both the benefit and the loss".[17]

He stated that the profit was effected through his buying the house, an independent action which was also quite risky (the dwelling involved was not completely finished), and was therefore not to be credited towards the defendant.

In accordance with the development described in chapter 1,[18] The RG distanced itself from its earlier view and held that the test that focuses on "one and the same event" is useless once we come to cases in which several acts interfered in the causal development that eventually led to the benefit.[19]

In the case at bar, the fact that the defendant had found and recommended the unsound hypothec was but one event, along with the plaintiff's buying of the lot, which led to the loss and the benefit.

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[16] RGZ 65, 57.

[17] *Id.* at 60 referring to cases before the BGB came into force in 1900.

[18] *Supra*, section 1.3. ff and in particular 1.3.3..

[19] RGZ 80, 155, 159.

After adopting the view that there must be an adequate causal link betweeen the defendant's negligence and the benefit, the Court held that because the purchase at the public sale was burdensome and risky and was the product of a new and independent effort by the plaintiff, this link could not be assumed in the case. A person who simply wants a secure investment does not normally anticipate ending up in a suddenly volatile real estate market.

A further point made by the Court is that s. 254 BGB does not permit one to help the defendant. In most of the cases, there is no obligation to buy the land on which a hypothec is taken because there can not be an obligation to further sacrifice money and be burdened with the financial risks of such a transaction. But this alone did not seem to be sufficient for the Court. The rule that the accountability of benefits is determined by the scope of the acts required by s. 254 BGB was only stated later.

The RG in this case engaged in an analysis of adequate causation,[20] finding that the subsequent actions of the plaintiff were not entirely outside the scope of those which an investor in a commercial hypothec would normally engage in. These actions were, on the contrary, within the limits of a reasonable commercial risk in a case where an unfinished house was the object of the dispute.

It was only some time later that the BGH started to move away from the adequacy criterion.[21] It is now only one test, along with the test of purpose of

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[20] RGZ 84, 386, 388; 148, 154, 164 just to name some. This was used for a long time as the sole test; cf. BGHZ 8, 325, 328 (death of father); BGHZ 10, 107, 108, later in BGHZ 53, 132, 134 (Tax consultant construed partnership agreement wrongly and handed out too big a share of profits to the widow of one partner), a tendency seems to have started that adequacy should not be the only and exclusive criteria.

[21] BGHZ 8, 325 at 329.

the norm, that gives the cause of action.[22] This case is one in which neither the action of the plaintiff nor that of the third party was the basis for the claim. Inasmuch as this might play a role, we might consider whether the two-tiered test should have application in the group of cases we are presently dealing with.

3.2. Solution of Common Law

Our examination of the common law treatment of benefits which arise from one's own efforts shall begin with the analysis of two important cases. These two cases are responsible for the belief that all that is required in Common law when dealing with accounting for benefits in general and with "own effort" situations in particular is the fulfillment of the "but for" test.

3.2.1. *British Westinghouse*

3.2.1.1. The Case

The first of these cases is *British Westinghouse Electric and Manufacturing Company, Ltd. v. Underground Electric Railways Company of London, Ltd.*[23]

The seller (Westinghouse) delivered machines which were not in accordance with the contract with respect to both their performance and fuel

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[22] In my view, this is actually the same argument as in the benevolent payment cases, *supra*, section 2.1., in an extended form. What we identified as the purpose (i.e. *causa*) in these latter cases corresponds to the legislative intent here. Seen from this angle, statutory provisions are equivalent to predetermined typifications of the will of the donee in the benevolent payment cases.

[23] *Supra*, note 10.

consumption. After having used them for a while and after several attempts to bring them up to the standards required had failed, the buyer replaced them by new turbines of a different make (Parsons). These were so much more advanced that even had the Westinghouse machines not been deficient it would still have been a pecuniary advantage to replace them because the fuel saved during the remaining lifetime of the machines, even if these were not defective, would have offset the new investment. The question arose as to the appropriate measure of damages.

The respondents, while entitled to an indemnity against all losses, should not make a profit from the transaction.[24] The problem amounted to whether the savings of fuel in subsequent years should reduce the damages that Westinghouse had to pay.

Viscount Haldane delivered the judgment of the House which was to become the leading opinion on the point of accounting for benefits in general.

The principle that was to be applied was set out as follows:

> "[The mitigation] principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."[25]

He then continued with a statement that is in sharp contrast to the German law in the field:[26]

> "But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual

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[24] This formulation and principle is found in the following cases cited by the appellants, *id.* at 679: *Erie County Natural Gas and Fuel Co. v. Caroll*, [1911] A.C. 105 (P.C.); *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301 (P.C.) at 308; *Wigsell v. School for the Indigent Blind* (1882) 8 Q.B.D. 357 at 364; *Hochster v. De la Tour*, (1853) 2 E. & B. 678. But the formulation defers the problem only to the definition of the term "profit" and "compensation".

[25] *Id.* at 689.

[26] See the discussion *supra*, text at note 3 ff.

diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."[27]

It is interesting to observe how this statement was reduced in subsequent cases by omitting qualifying formulae like "in the course of his business", "arising out of the transaction" or effecting an "actual" diminution.

To see what is really meant, i.e. where and on which step in the analysis this principle is to be considered, Viscount Haldane makes it clear that we are testing in two stages. First we look at the natural flow of the loss and then we go on to establish whether the principle of mitigation limits the actual loss. So mitigation does not take away from the quality of a loss itself, but is a second requirement for the recoverability. Mitigation therefore does not pertain to the notion of loss but rather to the question of recoverability, which is a separate step of legal evaluation.

Erie County Natural Gas and Fuel Company v. Carroll[28] and *Wertheim v. Chicoutimi Pulp Company*[29] are cited as illustrations and distinguished from the group of cases represented by *Bradburn v. Great Western Railway Co.*[30] which dealt with insurance payments, on the ground that in *Bradburn* it was not the event giving rise to the claim in damages which also gave rise to the advantage or benefit, but rather an insurance contract. This was therefore a "contract wholly independent of the relation"[31] which gave rise to the advantage.

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[27] *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways of London, Ltd, supra*, note 10 at 689. This case is still followed today virtually unanimously; see for example in Canada *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

[28] [1911] A.C. 105 (P.C.), *supra*, note 24.

[29] [1911] A.C. 301 (P.C.), *supra*, note 24.

[30] (1874) L.R 10 Ex. 1.

[31] *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways of London, Ltd., supra*, note 10 at 690 *per* Viscount Haldane.

From this it would follow that we need some element to link up the breach of duty and the benefit generating event. After *Westinghouse*, this link can not be a duty or a "burden to mitigate", because the House of Lords clearly stated that these were not relevant. It is somewhat difficult to grasp that although the omission to act would not lead to any consequences, an active gesture and its positive effects are linked up and incorporated into a relationship. In an attempt to clarify this situation, the House of Lords offers the formulation that in order to be taken into account in the reduction of damages, the benefit must arise "out of the transaction", i.e. be "the subject matter of the contract"[32].

Another class of cases mentioned by Viscount Haldane[33] is represented by *Joyner v. Weeks*[34], which follows the same fact pattern as a case decided by the German BGH[35]. A tenant was bound under the lease by a covenant to repair the premises. He breached this covenant and moved out. The landlord, after having found a new tenant who agreed to do the repairs that had remained undone, sued the tenant in breach for the cost of repairs. In *Joyner v. Weeks* it was held that the amount of diminution recoverable could not exceed the cost of repairs. The old lease had nothing to do with the dealings between the landlord and the new lessee, their dealings being *res inter alios acta*.[36]

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[32] *Id.* at 691.

[33] *Ibid.*

[34] [1891] 2 Q.B. 31 (C.A.).

[35] BGHZ 49, 56, with a note by Hadding, JuS 1969, 407 ff and Dieter Medicus, *Bürgerliches Recht*, 13th ed. (München: C.H. Beck, 1987) section 33VI para. 858. Interesting in this respect are recent cases with quite similar patterns such as BGHZ 77, 301; 92, 363 with a note by Sonnenschein JZ 85, 430 and BGHZ 96, 141 with a note by Sonnenschein in JZ 1986, 288 ff, which are solved by the BGH by mere interpretation (s. 157 BGB) of the lease agreement.

[36] The same result was reached in BGHZ 49, 56, *supra*, note 35. *Contra*, Joachim Rückert, "Ausgleich durch Auslegung, Schadensersatz oder

3.2.1.2. McGregor's Attempt to Explain *Westinghouse*

McGregor[37] attempts to interpret the scope and the meaning of *Westinghouse* and suggests a rule which provides that for deduction to take place, the benefit must arise out of what he calls the "act of mitigation". He points out that this was the case in *Westinghouse*. The reasonable steps which Underground took and which generated the benefit were, in McGregor's opinion, taken in mitigation. Therefore the House of Lords was dealing with a "consequence" of an "act of mitigation" which should therefore lead to a deduction.

Reading this, one ceases to wonder why McGregor himself complains about the fact that the law in this area is "not well worked out"[38]. The explanation for this is the fact that instead of "sketching what the law probably is", which McGregor claims to do[39], he stretches and turns it around to what he thinks it should be.

Of course Viscount Haldane talks about mitigation, but I think he makes it quite clear that it is irrelevant for the accounting whether the plaintiff is bound or not by the duty to mitigate to take the action in question.

In his well known quote summarizing James L.J.'s view in *Dunkirk Colliery*[40], Viscount Haldane says:

Kondiktion? Die Sog. Umbaufälle bei Schönheitsreperaturpflichten als Prüfstein der Schuldrechtsdogmatik" AcP 184 (1984), 106.

[37] Harvey McGregor, *McGregor on Damages*, 14th ed. (Sweet & Maxwell, 1980) [hereinafter McGregor] at para. 253 ff.

[38] *Id.* at 253.

[39] *Idem.*

[40] *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20 (C.A.) refered to in *Westinghouse*, *supra*, note 10 at 689.

> "[The principle] does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

Clearly, therefore, the decisive factor is not the "act of mitigation" as McGregor states but whether it can be qualified as "arising out of the transaction" or taking place "ordinarily in the course of his business". This view surfaces elsewhere in Viscount Haldane's speech when he states that the railway was "doubtlessly not bound to purchase machines".[41]

In McGregor's interpretation the "act of mitigation" is a step reasonably made to acquire a substitute. This, however, is exactly the step required by the duty to mitigate. It therefore seems unexplainable to me how he can state that in *Westinghouse* the benefit was generated by this reasonable act and therefore, whether designed to yield the exact benefits or not, went to the benefit of the party in breach.

Reading all of Lord Haldane's statements together, it seems that what is meant by the requirement that the action has to arise in the ordinary course of business, is a less rigid test than the one used to determine actions required by the duty to mitigate. In the latter case courts have been quite reluctant to impose too severe a duty on the plaintiff, especially with respect to spending and incurring risks with one's own funds.[42]

The test alluded to by formulations like "wholly independent of the relation" or "arising out of the transaction" sounds much more like a relevance test or

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[41] *British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways of London, Ltd.*, *supra*, note 10 at 688.

[42] Cf. *Lester Leather and Skin Co. v. Home and Overseas Brokers* (1948), 64 T.L.R. 569 (C.A.); *Jewelowski v. Propp*, [1944] K.B. 510; this of course does not mean that no spending is required at all. See also *Horlow & Jones, Ltd. v. Panex (Int'l), Ltd.*, [1967] 2 Lloyd's Rep. 509 (Q.B.) and *Caine v. Schultz*, [1927] 1 W.W.R. 600 (B.C.C.A.).

a test of the last proximate cause. This is always quite open to the introduction of policy decisions and judicial evaluations.

McGregor's interpretation of *Westinghouse*, although wrong, is very similar to the solution of German courts.[43] It is quite understandable that this German solution is appealing because of its symmetry. Actions within the scope of the burden to mitigate are at the defendant's risk in that he has to reimburse all reasonable expenses (i.e. make the investment), but therefore he will also have the benefit of them. Consequences outside the scope of this burden are at the plaintiff's risk for better and for worse. This symmetry or equilibrium is disturbed if all we require is that the benefit and the loss arise out of the transaction.

Even if McGregor's interpretation of *Westinghouse* might be possible, given some slightly equivocal formulations of the Court which allude to the reasonable course of business and which could remind us of the test for the burden to mitigate, it is certainly not the one adopted by common law courts in later decisions and not the way in which they understand the principle of *Westinghouse*. This is illustrated in the following section.

3.2.2. *Cockburn v. The Trusts and Guarantee Company* - Employment Contracts

Shortly after *Westinghouse*, the Canadian Supreme Court had the opportunity to comment on the issue of accounting for benefits arising from one's own efforts and to give its point of view in *Cockburn v. The Trusts and Guarantee Company*[44]. The case involved activities of an unjustly dismissed employee subsequent to a breach of an employment contract that yielded profits as well as

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[43] See *supra*, part 3.1..

[44] See *supra*, note 15. This decision is very short. Some information is to be gleaned from the trial judge's decision in 37 Ont. L.R. 488 and from the Appellate Division of the Supreme Court of Ontario in 38 Ont. L.R. 396.

losses. The Court claims to apply the principle set forth in *Westinghouse*. Its reasoning is, however, both counterintuitive and inconsistent. It rejects the above mentioned symmetry adopted by the German law. This decision is support for authors who argue that all there is to the collateral source problem and the accounting for benefits is a "but for" test. The whole issue is pushed towards the question of definition of a concept of damages in general, which, as far as I can see, has not evolved in common law.

The *Cockburn* case was an unjust dismissal case. The employment contract that had been entered into for a period of 5 years was breached by the employer after 3 years because he went into liquidation. Subsequently, in the first 66 days after the dismissal (period 1), the plaintiff bought assets of the company at the liquidation sale. He resold these assets with a profit of $11,000, more than he would have earned in the two years left under the contract.

Thereafter, (period 2) he formed a company that he joined as a sales-agent, a position in which he incurred a certain loss.

The defendant, who administered the estate of the guarantor of the salary, argued that the subsequent benefits from the sales should be applied against the damages award.

Reading the case, one gets the impression that the courts can not distance themselves from a "good paternalistic employer's" mentality[45], namely that dismissal is a fate that an employee has to take with a courageous smile. A man goes on with life and stops complaining. This attitude goes so far that the judges are not ashamed to contradict themselves in giving the defendant the benefit both ways. In the end the plaintiff had to account for the benefits earned by investing his money and taking risks that he was not required to take. This implies that had the risk

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[45] Cf. *Hussain v. New Taplow Paper Mills, Ltd.* (1986), [1987] 1 W.L.R. 336 (C.A.). The passage in which the expression is used is reproduced, *infra*, text at note 54.

taken by the venture materialized he would have had to bear the losses arising therefrom and could not have claimed them from the wrongfully dismissing employer.

The Supreme Court, following *Westinghouse*, held that the profits had to be accounted for because they arose out of the employee's relations with the employer. This assumption is hard to grasp if, firstly, the employer company is already liquidated when the alleged relationship is required and secondly, the contract has been repudiated by the employer, in which case normally the other party (here the employee Cockburn) is entitled to treat the contract as terminated. After this, the relationship to the employer was restricted to the one we have to assume in order to be able to legally construct a secondary liability in contract. I fail to understand how this "rest" of what used to be a contractual relationship should be the origin of the benefit in question and the basis for holding the plaintiff as a quasi-employee for all economic purposes.

Whether he was under an obligation to take the steps which were in fact taken, was considered irrelevant. Therefore, the existence of a duty to mitigate which obliges one to take the steps that later yield the profits, or more generally the benefits, is not a prerequisite for the taking into account of these benefits.

For Fitzpatrick C.J., it seemed to be sufficient that the plaintiff could not have earned the $11,000 if the contract had been fulfilled. This argument can only be convincing if he is talking about the exact same $11,000 from the exact same source. There is no detailed inquiry into whether there really was no other way of investing the money with a comparable profit. Instead, Fitzpatrick C.J. states that:

> "[T]he gain is directly dependent on the breach of the contract and would not have been made if it had not occurred."[46]

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[46] *Cockburn v. Trust Guarantee Co., supra*, note 15 at 266.

For him, the breach and the liquidation are one and the same. In fact, however, only the statement that the plaintiff would not have made the gain if there had not been a liquidation is correct. The liquidation, however, so we would argue, was *not the breach but only the occasion for* the breach. In other words, had the employer not breached the contract and offered to pay the outstanding salary, C would still have taken over the assets of the company and made the profits in question.

In the end, the Chief Justice himself seems to feel somewhat uneasy with his position, since he admits that the test is not an absolute one, but that it is sufficient to produce a solution for this case.[47]

This somewhat superficial reasoning takes into account only the result, namely that profits were made, and not the question of why they were really achieved. Duff, J. repeats this kind of reasoning when he states the fact that he would make allowance for unrelated reasons as long as they lead to the profits.[48] He seems to suggest that by treating the plaintiff as a quasi-servant for the breacher it might be fair to make allowance for the use of the plaintiff's own capital and the taking of independent risks. This idea is based on the fact that the efforts and the money invested indirectly benefit the wrongdoer by reducing his debt balance against the plaintiff.

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[47] *Ibid.* Translated into clear language, this seems to mean: we don't know what the test is, but it is clear that applied in the present case it leads to the following result.

[48] *Id.* at 268 where he also delivers an example of how judicial reasoning at the Supreme Court level can leave much to be desired: "Eventually the course taken by him was not one which would ordinarily be taken in the course of business by a reasonable and prudent man in his circumstances, still having done what he did, the whole of the facts may properly be looked at for the purpose of estimating damages provided that what he did was what a reasonable and prudent man might do properly 'in the ordinary course of business'." - mystic of words.

In my opinion, only Anglin, J.'s speech comes up with a consistent analysis that links breach and benefit. According to him, the decisive point is that the breach liberated the plaintiff's time and skills.[49] Now, not entitled to lie back, he is under the duty to use these assets. While Duff, J. and Fitzpatrick C.J. repeatedly emphasize that there was no duty to undertake this particular venture, they do not seem to realize that there was of course an obligation to use the time so liberated. As I read it, Anglin J. argues that the time and skill factor (i.e. the value of the labour) accounts for at least as much profits as the damages claimed by Cockburn, thus resulting in a set off. He must therefore necessarily have started from the assumption that Cockburn made a bad deal when entering into the contract of employment, because the market value of his time and skills (labour) was higher than his wages.

This approach could enable us to reach clearer criteria, at least for the group of contracts of exchange.[50] We would first establish what assets are liberated by the breach, i.e. those assets which the plaintiff is no longer obliged to exchange.[51] He is of course not entitled to keep these assets and get the remuneration for them at the same time. This follows from contract principles in conjunction with the duty to mitigate. Once he then starts capitalizing on the freed asset he has to account for the

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[49] This view that only the freeing and not directly the profits or wages earned in another employment were caused by the event was rejected for German law in BGHZ 4, 170, 171; RGZ 154, 236, 240. Not the freeing of her "*Arbeitskraft*" (power and ability to work) but only the actual work the widow did was considered the aspect "producing" the benefit. They could therefore not be taken into account. RGZ 154, 236 is interesting also insofar as it is an early decision which treats the burden to mitigate as the limit between accounting and non-accounting.

[50] The paradigm being a contract of sale. In a broader sense it is every contract that involves an exchange of equal values in the course of its performance. Equivalence here is not to be confused with consideration.

[51] Note that the value of the freed labour and not what the plaintiff does or gains with it would then be the measure of deduction from the damages.

part by which he is still enriched. This is the value of the freed asset (i.e. labour) or, if he is under a duty to reinvest it, the part of the profits corresponding to the investment portion of the freed and subsequently invested asset. This is in fact an argument directly based on the principle of unjust enrichment.

3.2.3. Insurance Benefits

Insurance cases were previously discussed in chapter two in connection with the effect such benefits have on the duty to mitigate and how they are treated in the process of the assessment of damages. Insurance can also, however, be analyzed in the context of personal efforts and taking of risks. We could make the arguments that no obligation to insure exists and that the payments are therefore the product and effects of one's own personal efforts.

The most frequent cases and the simplest in terms of the factual situations involved, are those dealing with insurance payments and benefits from public or quasi-public sources.[52] These cases seem to be responsible for the tendency of the courts to focus on the source of the payment rather than on its legal or economic basis. Although mostly concerned with tort actions, they reveal most of the arguments brought up in other contractual cases too.

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[52] The last case in this area was probably *Hussain v. Taplow Paper Mill, Ltd.*, *supra*, note 45, with abundant references to the case law. In Germany this group of cases is not comparable because of a provision in section 67 *Versicherungsvertragsgesetz* (VVG Insurance Contracts Act), which leads to a subrogation by operation of law that solves the problem of taking into account of benefits because it presupposes that they are not. This positively solves the problem insofar as it presupposes what the common law has to justify all the time, i.e. that the insurance should under no circumstances benefit the wrongdoer. On the other hand, and that is probably a question of public policy to keep down insurance costs, the insured will not benefit twice, because he is barred from recovering from the wrongdoer. Cf. *supra*, section 2.2.

In *Hussain v. New Taplow Paper Mills Ltd.*[53] the plaintiff, after suffering an accident at work, received payments in the form of "sick pay" from his employer. These payments were provided for under the contract. He obtained a judgment against his employer for negligence and breach of statutory duty in the amount of 96,870 pounds. The appeal dealt only with the lost earnings of the employee, in particular with the question whether payments under the "permanent health insurance scheme", which amounted to 34,688 pounds, should be taken into account in the reduction of the damages award. This scheme was designed to pay employees after the expiry of the "sick pay" benefits that the employer agreed to pay under the contract for the first 13 weeks of an illness. Unlike the sick pay, the payments in dispute under the permanent health insurance scheme were covered by an insurance policy that the employer had taken out. Nevertheless, it was the employer who made the payment to the employee for which he was later indemnified by the insurer. Eventually therefore, an insurance company had to bear the loss.

The trial judge interpreted the scheme as follows. The employee had a direct equitable interest in the sums that the employer received from the insurance company on the occurrence of an accident.

Lloyd, L.J. for the Court of Appeal however did not agree with this analysis. In interpreting the contract, he found that all the plaintiff had was a contractual right against the defendants to certain benefits. The defendants had in turn simply insured their liability to pay under a policy of the insurance company.

A further argument of the trial judge is a more interesting one and it reveals an idea that arises quite frequently. It might be called the "independently earned" argument and comes very close to an economic approach in its formulation:

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[53] *Supra*, note 45.

> "I am satisfied that the payments which the defendants made to the insurers form part of the attractive package deal of these paternalistic employers, and if they did not expend those large sums by way of premiums to insure the workers, that money would properly be paid to the workers rather than to the shareholders. [...] I consider that the premiums paid by the defendants form part of the plaintiff's wage structure."[54]

After this somewhat economic argument, he then turns to a teleological one:

> "The purpose [...] of this [...] scheme was to benefit the employee and not to reduce the employer's liability should the employee be injured [...]."

In the Court of Appeal, Lloyd, L.J. rejects the argument that the plaintiff quasi "earned" the benefits[55], paid by the insurance company, by making the following rather unconvincing *argumentum e contrario*. The first 13 weeks the company paid "sick pay" as continuous "wages" without being covered by insurance itself. It was agreed that those payments were to be applied towards the loss. Lloyd, L.J.'s argument is that there can not be a difference between the first 13 weeks (in which the defendant was not insured) and later payments (for which the defendant had taken out insurance). The underlying reasoning is that had it been "earned" by the employee, i.e. had the benefit been able to be traced back to his own personal efforts, it seems the judge would have been willing to award both "sick pay" and compensation.

Although I feel that this particular decision is correct, I am not sure whether the line of thought is consistent. The deduction is questionable in that it assumes that the two different sorts of payments have to be treated in the same way, i.e. in fact that the court assumes that the permanent health insurance scheme is meant as wages too.

Lloyd L.J. continues to say:

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[54] As cited by Lloyd, L.J. *id*, 344.

[55] An aspect which was held to be decisive in *Parry v. Cleaver, supra*, note 1.

"[...] The nature of the payments did not change after 13 weeks nor, indeed, did the source. the nature of the payment remained the same, namely, sick pay. The source remained the same, namely the defendants. All that happened after 13 weeks was that the defendants were covered against their subsequent liability by the policy which they had taken out with the N.E.L. [insurer]."[56]

If one wishes to infer a general principle from the above, one would have to find out who actually made the payments. It seems obvious that in determining this, one can not simply look at the flow of money from one party to the other, but rather to who in substance was the performing party. The problem is the same one that we run into when we try to determine how restitution should be made in tripartite situations of unjust enrichment.[57]

One approach might be to ask who wanted and intended to increase the assets of whom by the payment. This would again be a purposive test. Another approach would be to examine in which relationship an obligation, i.e. a claim-debt relationship, existed. Since we are dealing with a question of restitution in the sense of a prevention of double compensation, the evaluation must be parallel and therefore the latter test can not be conclusive.

When payments are made, there is always the bilateral understanding of a certain purpose for the payment. We normally agree when we transfer money

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[56] *Hussain v. New Taplow Paper Mills, Ltd.*, *supra*, note 45 at 345. This was the same argument advanced in the German taxi case, *supra*, section 3.1.

[57] This is one of the most controversial and intricate problems in the law of unjust enrichment in Germany. There is abundant literature on the point. Cf. e.g. recently Werner Flume, "Banküberweisung und Ungerechtfertigte Bereicherung" NJW 1987, 635 (Case comment on BGH NJW 1987, 185) and *id.* "Die Zahlungszuwendung im Anweisungs-Dreiecksverhältnis und die Problematik der Ungerechtfertigten Bereicherung" NJW 1984, 464; Georg Thielmann, "Gegen das Subsidiaritätsdogma im Bereicherungsrecht" AcP 187 (1987), 23; Franz Schnauder, "Leistung ohne Bereicherung? - Zu Grundlagen und Grenzen des finalen Leistungsbegriffs" AcP 187 (1987), 142.

whether this transfer is intended to perform an obligation and if so which one, whether it is a gift obligation, a payment of a purchase price, or salary.

The agreement that is entered into is the decisive factor. This was also expressed in *Hussain*:

> "There is no reason why an employer should not agree to make such payments in lieu of salary, [...]. If that is right, then, with all respect to the judge, I find it impossible to agree that these payments should be left out of account. They went directly to reduce the plaintiffs loss of salary."[58]

The surprising part of the Court's argument and the one which is most important in the context of personal efforts and in how far the wrongdoer should benefit from them, is contained in a dictum towards the end of the judgment. The plaintiff's counsel challenged Lloyd L.J.'s reasoning with an *argumentum ad absurdum*. He presented the hypothetical situation in which the person responsible for the accident was a third person and not the employer himself. Why should this person benefit from the fact that the victim had an advantageous employment, for which he in return had to work.

The response to this argument was the following, revealing the tendency encountered earlier in this chapter to disregard the issue of whose earnings or investments generated the benefits in question.

> "[T]he simple answer [...] is that no third party tortfeasor however negligent, is liable to compensate a plaintiff for more than he has lost. If the plaintiff has not in fact lost any salary, because he is entitled to sick pay, then the third party tortfeasor can count himself lucky. In this as in other respects, he takes his victim as he finds him. [59]

It is not at all certain that this statement reflects the law as it stands today. Decisions like *Parry v. Cleaver* shed doubt on this view because if the payment were part of a wage structure it would probably be treated like a private

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[58] *Hussain v. Taplow Paper Mills, Ltd.*, *supra*, note 45 at 345 f. The court then goes on to consider authorities to back up this view.

[59] *Id.*, at 346.

insurance and so exempted from deduction. Nevertheless, the statement remains a forceful expression of a strong tendency in common law.

I am not sure whether the judge realized that this is a relapse into a mere onthological, mathematical evaluation of causation and compensation. It is certainly interesting because it reveals the judge's attempt to consider the issue in as "objective" and *a priori* way as possible, namely as a mere arithmetical operation, the subtraction of two economic positions which is to reveal the most "value neutral" process.

One of the reasons this case was selected for discussion is because it indicates that courts often approach the problem of accounting for benefits, and in particular cases in which this benefit was generated by own efforts, without a coherent, rational plan. Within one decision, we find mutually exclusive concepts and reasonings.

3.2.4 Sale of Goods Cases - Evolution in a Different Direction?

The somewhat extreme position that damages are ascertained by deducting the plaintiff's present assets from the ones he had before the breach of duty, can not be maintained without exceptions. It is not sound law to hide behind the statement that the plaintiff has to be taken as he is found. This would inevitably lead to unlimited accounting for all kinds of benefits. Once we exempt certain advantages, which all systems seem to do at some point or other, we open the famous "can of worms". We then have to face considerable difficulties in distinguishing the cases in which it is clear that the benefits have nothing to do with the wrongdoer.

In two types of cases in which benefits are left out of consideration, i.e. in cases of insurance monies and those of "benevolent payments"[60], on the face of it the benefits could be qualified as coming from third parties.[61]

At some point, the link between the event or the relationship which gives rise to the duty to indemnify and the subsequent developments must be cut off. Although I could not find a general conceptual reason why we assume that such a cut off point has to exist, it seems quite clear to me that if we do not impose limits we will create a situation in which the defendant will benefit from all events. Let us asssume, for example, an unjust dismissal case. If we did not decide to stop accounting for positive events subsequent to the dismissal, the former employer would benefit, in the form of a reduction of damages award, not only from the employee's finding a better job, but also from working a better paid night shift or overtime which the employee had not previously done, from working in a different branch, or conceivably even from his meeting the rich spouse he always dreamt of.

Ultimately, through institutions such as remoteness, the theory of proximate cause, contributory negligence, objective foreseeability tests and of course the duty to mitigate, we would carefully protect the party in breach with bundles of doctrines combined and individually designed to shelter him from being held responsible for too extreme a development by limiting his liability. But at the same time we would make him the "magnet" for all benefits, however extreme and exotic they may be.

Another reason for the fact that we advocate a cut off in some fields might be that we do not want the plaintiff to be further bound to the wrongdoer and we do not want him to have to work for the account of the wrongdoer. This is, for

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[60] This group is sometimes called "charity" cases but I will follow the terminology adopted by Lord Reid in *Parry v. Cleaver*, *supra*, note 55 at 14A.

[61] This seems to be the way they are seen in Germany.

example, the case when the widow of a deceased is not obliged to account for the wages she earned in an employment she would not have had had her husband not been killed by the defendant.[62]

Accordingly, only benefits that arise from acts that are still "acts of mitigation" are accountable for. That being said, these acts are not necessarily acts motivated by or even within the ambit of the duty to mitigate. The term "act of mitigation" can only connote a minimum connection.[63]

It is interesting that in sale of goods cases[64], although not openly, this "act of mitigation" is defined very much in terms of the "symmetry" already encountered in German law.

A seller who breaches his obligation by delivering late or not at all or who delivers defective goods, may not argue a duty on the rejecting buyer's part to buy in substitute goods. As long as the latter does not want to claim for subsequent loss of profit[65] or other damages arising out of the fact that he does not have the goods in his possession, he is free to disregard the contract and claim the difference

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[62] Cf. BGHZ 91, 357 as opposed to BGHZ 4, 170, 176. Extreme OGHZ 1, 317 (Supreme Court of the British zone) who understood "putting back in the position" literally and refused accounting of any earnings of a widow who took up work after the death of her husband. Thereby the Court indirectly denied any duty to mitigate at all. Although quite an attractive idea because it has the merit of being simple and clear cut, it was overruled in BGHZ 4, 170, 173. The issue of being factually "bound" to work for the wrongdoer arises extremely in unjust dismissal cases, e.g. *Bremner Trend Housewares, Ltd.* (1985), 7 C.C.E.L. 272 (Ont.S.C. (H.C.J.)).

[63] *Jebsen v. East and West India Dock Co.* (1875) L.R. 10 C.P. 300.

[64] *Campbell Mostyn (Provisions), Ltd. v. Barnett Trading Company*, [1954] 1 Lloyd's Rep. 65 (C.A.), distinguished in *Pagnan & Fratelli v. Corbisa Industrial Agropacuaria Limitada*, [1970] 2 Lloyd's Rep. 14 (C.A.). This latter case is interestingly commented on in The *"Elena D'Amico"*, *supra*, note 2. See also *Jones v. Just* (1868), L.R. 3 Q.B. 197 (loss avoided by a buyer on a rising market), *Jamal v. Moolla Dawood, Sons & Co.*, [1916] 1 A.C. 175 (P.C.).

[65] Cf. obiter in *Henry Hope and Sons of Canada, Ltd. v. Richard Sheehy and Sons*, (1922), 52 O.L.R. 237 at 244.

between the contract price and the market price at the time of the breach. The same principle in reverse applies to the breaching buyer when the seller chooses to sue in damages instead of for the purchase price.[66] This, quite obviously, is an abstract way of determining damages. No real loss has to be proven, because the rule is detached from the concrete situation. The law just assumes, in a manner similar to a legal fiction[67], that the plaintiff bought in at the time of the breach, which is the time at which he wanted to have the goods.[68]

If he takes the other route and does in fact buy in, he goes beyond any duty to mitigate, even though this is clearly an act which continues the dealings under the contract and which is causally linked and not too remote. This of course also arises out of the transaction within the meaning of Lord Haldane's words. The Sale of Goods Act takes an attitude of detached disinterest as to the "real" development of the loss. We disregard all subsequent real consequences (benefits as well as further losses) arising out of the act of buying in, regardless at which point in time it will occur.[69] This is attributable to the measure of damages which is

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[66] The Following chart gives the sections of the Sale of Goods Act 1979 (U.K.) c. 54, of the Sale of Goods Act, 1893 (U.K.), 56 & 57 Vict., c. 71) and of the one in Ontario (R.S.O. 1980, c. 462). BB stands for "buyers breach" (non acceptance of the goods), SB for "seller's breach" (non-delivery/breach of warranty):

	BB	SB
U.K.SGA 1979	s.50(2)(3)	s.51 (2)(3)/53 (2)(3)
Ont.SG	s.48(2)(3)	s.49 (2)(3)/51 (2)(3)
U.K.SGA 1893	s.50(2)(3)	s.51 (2)(3)/53 (2)(3)

[67] The difference is of course the wording as a *prima facie* rule only.

[68] This is made clear by the Supreme Court of Canada in *Bainton v. John Hallam, Ltd.* (1920), 60 S.C.R. 325 where this was held to be true even in a case in which the difference was higher than the profit which could have been made on the sale.
The same "abstract" market price rule applies in the law of chartering of vessels; cf. *"Snia" Societa di Navigazione Industria et Comercio v. Suzuki & Co. and Feikoku Kisen Kaisha*, (1924), 18 Lloyd's Rep. 333; *Goldberg, Ltd. v. Bjornstad & Braekhus*, (1921), 6 Lloyd's Rep. 73

[69] *Jones v. Just*, *supra*, note 64.

offered by the *prima facie* rule in the Sale of Goods Act.[70] The abstractness of the assessment is reached by the fact that we do not ask whether or not there was a substitute transaction. This is generally not done in common law, but becomes more apparent and is even reinforced when one codifies such a rule, albeit as an exception, as was done in subs. 3 of the relevant provisions of the Sale of Goods Act.

The case which seems to contradict all this is *Pagnan & Fratelli v. Corbisa Industrial Agropacuria*[71].

The special feature of the situation in that case was that the plaintiff (buyer), subsequent to rejecting the goods because of a breach by the seller, bought them at a reduced price,[72] which was inferior to the prevailing market price.

There is no doubt that the buyer was not under any duty to renegotiate or to give his seller another chance. He would clearly have been perfectly entitled to walk away, leave the seller with the goods on his hands and claim damages. Nevertheless, the court tied the two contracts together and accounted for the benefits acquired outside the duty to mitigate.

This decision is problematic in different ways, although it is probably just a consistent application of *Westinghouse*. *Westinghouse* is a Sale of Goods case too, even though it has some distinct features. The normal Sale of Goods case involves a market and the opportunity to buy in. This is expressed in the provisions

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[70] Sale of Goods Act subs. 3 of the sections cited, *supra*, note 66. See *Jewelowski v. Propp*, *supra*, note 42 and *Centaur Cycle Co. v. Hill* (1903), 7 O.L.R. 110 (C.A.).

[71] *Supra*, note 64.

[72] This business decision does not seem to be unusual and can be based on reasons such as legal difficulties in changing terms and conditions of an existing contract under common law. Cf. fact pattern in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.*, [1975] 3 All E.R. 739 where the defective citrus pulp pellets, although originally rejected, eventually ended up in the buyer's hands as well.

dealing with the *prima facie* rules for the assesssment of damages. *Westinghouse* squarely deviates from this paradigm situation. Underground Railway had only one opportunity to purchase. The object was neither a commodity nor was there the chance to store machines not needed. There is an obvious difference from the commercial commodities dealer who has multiple opportunities to buy and sell. He is used to taking certain risks and laying out and investing money on a regular basis in the normal course of his business.

Even if we accept the rule in *Westinghouse* as equally applicable in normal Sale of Goods cases with repeated chances of buying and selling, which assumption is probably not even correct, the Court of Appeal in *Pagnan*[73] ignored the way these two particular parties structured their relationship. Appreciating the fact that he had breached the contract by the bad condition of the cargo under an already repeatedly altered contract to deliver Brazilian maize, and that the buyer was entitled to put an end to the relationship (which he did), the seller out of his own volition entered into a new contract of sale.

Although the price was very low, the position for the seller at this point must have presented itself as the best solution.[73] Otherwise, one questions whether he would have entered into the bargain. We can assume therefore, that the result leaves him better off than had he sold to a third party even on the same terms. Regardless of this, the court did not only effectively alter the bargain and set aside the second contract,[74] but also changed the first in that it told the plaintiff that the breach, although admittedly against the contract, would not have any consequences. The whole decision amounts to a judicial change of the contractual regime which the

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[73] A duress argument because of the sequestration of parts of the cargo was not made or at least not pursued at that stage of the litigation any more.

[74] In fact it was the third contract because the parties had altered the original contract, which agreement was then breached by the seller and brought to an end by the buyer's rejection.

court, in my view, is not entitled to make. The argument in favour of this result is that common law goes quite far in allowing reference to a contract that has been terminated by the acceptance of a repudiation. Therefore, although it is said that the contract is at an end apart from serving as a basis (*causa*) for contractual damages, it survives. The old contract survives for all purposes of damage assessment.[75] Even though the first contract was at an end after the buyer's rejection of the goods, it is therefore not unusual that in effect it was resurrected or in fact deemed to be still in force by the subsequent dealings.[76]

The predominant rule, as the last case to be discussed will demonstrate, is that in reality the aggrieved party should not be better off than had the "terminated contract" been fulfilled. In this respect, *Pagnan* reconfirms the rule and reminds us that the actual post-breach development must be compared to the expectations of the contract.[77]

Viscount Haldane's quite elastic formulae in *Westinghouse* were cited and it was held that anything that externally resembles a continuous dealing, regardless of the end of legal relationships, arises "out ot the transaction".

I do not quite see the sense in saying that someone is entitled to put an end to a contract, which is then considered to continuously govern the subsequent relationship. What really happens is that we resurrect the old contract within the framework of the law of damages with the magic words "continuous dealings". The

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[75] See Lord Diplock in *Photo Production, Ltd. v. Securicor Transport, Ltd.*, [1980] A.C. 827 (H.L.), but also *United States v. Zara Contracting*, 146 F.2d 606 (1944).

[76] In effect structurally this resembles *Bowlay Logging Ltd. v. Domtar, Ltd.*, (1978) 87 D.L.R. (3d) 325 (B.C.S.C.) aff'd 135 D.L.R. (3d) 179 (B.C.C.A.).

[77] [1970] 2 Lloyd's Rep. 14 at 18, therefore consistent that *Jamal v. Moola Dawood, Sons & Co, supra*, note 64 and *Campbell Mostyn (provisions), Ltd. v. Barnett Trading Company, supra*, note 64 are distinguished with the argument that they only dealt with cases in which the *prima facie* rule of s. 50, 51 SGA was applicable.

case reduces the connection required to not much more than a *conditio sine qua non.* From a policy point of view, it is particularly surprising that a buyer who is lenient and prepared to make a settlement, which will of course have disadvantages for the breaching party, and tries to readjust the situation by investing capital and time, will find himself worse off than he who simply leaned back and liquidated according to the prima facie market price rule.

This is particularly true because these dealings were in the end for the good of both parties, otherwise the breaching seller would not have entered into them.

For whatever reason, no reported cases were found following *Pagnan* on the point of law involved here. Although *Pagnan* purports to be in accordance with the general rule as to avoided losses as applied by common law subsequent to *Westinghouse*, I found no authority in Canada and in the U.K. for the adoption of the ideas laid down in that decision.

The situation which seems to be prevailing in sale of goods cases is summarized impressively in *Jamal v. Moolla Dawood, Sons & Co.*[78] Although the case concerned the sale of shares, the relevant passage was adopted and cited as applicable for the sale of goods as well by Somervell, L.J. in *Campbell Mostyn (Provisions), Ltd. v. Barnett Trading Company*[79]. It expresses quite clearly the symmetry which is rejected in cases which are subject to the general rules of law as opposed to the Sale of Goods Act:

> "The question therefore is the general question and may be stated thus: In a contract for the sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach - with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach - or is the seller bound to reduce the damages, if he can, by subsequent sales at

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[78] *Supra*, note 64 at 179.

[79] *Supra*, note 64 at 67. Cf. Ian F.G. Baxter, case note on *Campbell*, in (1954), 32 Can. Bar Rev. 577.

> better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profits if the market rises."[80]

Campbell Mostyn was a typical sale of goods case. The plaintiff seller had agreed to ship South African York hams in several installments to England. After the first shipment, the buyer refused to accept the subsequent ones. An arbitrator later found that the rejection was wrongful. After the date of breach, the market price for this particular brand of ham initially decreased and then, due to pending government intervention to restrict importation, rose again. The buyer appealed on the ground that in assessing the quantum, the subsequent developments should have been examined.

Although the judges in the end agreed and dismissed the appeal, they nonetheless emphasized that it was "curious" or "unusual"[81] that damages be awarded when "on the facts as we know them, [...] as the event finally proved, they suffered no loss at all"[82].

It is quite clear in the judgment as well as in the pleadings before the court that we are dealing with two different notions of loss. One is a "natural" perception of loss which is probably circumscribed by "being worse off", and the other a "legal" notion of loss which is not at all the same as the more common understanding of the term. The judges have quite a hard time justifying that they do

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[80] *Jamal v. Moolla Dawood, Sons & Co., supra*, note 64 at 179.

[81] *Campbell Mostyn (Provisions), Ltd. v. Barnett Trading Company, supra*, note 64 at 68 *per* Somervell, L.J.

[82] *Id.*, at 69 *per* Birkett, L.J..

not use this natural or normal concept of loss. A whole variety of other aspects are introduced and weighed before we can speak of a recoverable loss or loss in law.

Certainly the focus of the *prima facie* rule is on the market or current price. It would therefore seem to be designed for a commodities buyer rather than for a single contract buyer. This alone can not explain the difference because the subsection 3 rules do not really change the general rule. They should only facilitate its application. Nevertheless these rules express a certain bias for the idea that if the aggrieved party waits or buys in right away, it is his initiative, his investment and therefore his risk.

The judges in *Campbel Mostyn* made the following classical *argumentum e contrario*

If the seller can not charge the buyer with the loss caused by his waiting before selling subsequent to the breach, (a contention which follows from the application of the duty to mitigate) then the buyer can not turn around and require the benefit of the risk the seller took if he was lucky and the market price later rose.

Surprisingly enough, Atiyah talks about a trend in sale of goods law to make deductions for profits in order not to compensate for a "loss" which never occurred. I can neither discern this "trend" nor understand how he can cite *Campbell* of all cases for this contention.[83] The fact that he takes *Pagnan* to stand for the proposition that the law is different when the seller resells immediately upon breach is bewildering in the face of the fact that *Pagnan* does not deal with an immediate resale by an innocent seller. The superficiality with which this author seems to have read the cases forces us to disregard his statements about "trends" which are not even discernible in the two cases he cites to back up their existence.

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[83] Cf. P. S. Atiyah, *The Sale of Goods*, 7th ed. (Pitman: London, 1985) at 476.

A slight change in respect of benefits that are the result of actions taken by the plaintiff might be seen in the case of *Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.L. (The "Elena D'Amico")*[84] in which Goff J., relying on sale of goods cases like *Campbell Mostyn* and *Jamal*[85], summarizes his view of the law as follows.:

> "The position in law appears to be that generally speaking, if there is an available market for the goods in question at the time when they ought to have been delivered, then if the buyer decides not to buy in on that date, which he is fully entitled to do, he cannot visit the consequences of that decision upon the seller. If he buys in later he may, of course, either buy in the goods at a higher price or at a lower price than the available market at the date when they ought to have been delivered. But if he has to buy at a higher price he cannot, generally speaking, claim the extra cost from the seller; and if he makes a saving then that saving is not, generally speaking, to be brought into account to reduce the damages which are recoverable from the seller."[86]

The case itself was not even a sale of goods case but dealt with a time charter. The rules are taken out of the sale of goods context and applied by analogy. A review of the earlier cases and their different results is then made in search for an explanation.

Goff, J. analyzes the problem of mitigation in general and within that discussion he treats the rule as to avoided losses as a pure question of causation. Only acts which are not to be qualified as subsequent interferences of third parties are causally significant with respect to the loss. Correspondingly, he interprets Viscount Haldane's criterion of "arising out of the transaction" as a circumscription of causality between the wrong and the benefit and not as a test that stands for the inclusion of the act into the risk assumed under the initial transaction.

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[84] *Supra*, note 2.

[85] *Supra*, note 64.

[86] *Id. Koch Marine Inc. v. D'Amica Societa Di Navigazione, supra*, note 2 at 87.

This in the end is the question of whether the benefit could have been made but for the breach or but for the tort. Tests offered by Goff, J. are therefore:

> "Would it still have been possible for the buyer to make the same decision even without the breach, or was the breach just the occasion?[87]
> Was it his "own business decision,[88] independent of the wrong; and the consequences of that decision are his."[89]?
> "[Could] he have done it anyway"?
> Was it an independent transaction?
> Is his decision to do so in the context of the breach "triggered off"[89] by the fact that there has been a breach; but it is not caused by the breach?

This again reveals the symmetry argument, namely that he should bear the positive and the negative consequences of the decision. If we follow through with this line of thought, the symmetry principle is only relevant if the duty to mitigate does not apply to the action. If the plaintiff's action is beyond the duty to mitigate, it is only logical that he not bear the disadvantages which the action brings. This, it seems obvious, does not have too much to do with the rule in *Westinghouse* any more.

3.3: Attempt to Explain the Differences

"Comparative legal experience " tells us that, as a rule, legal systems with a tradition of reported and rationalized judicial reasoning do not randomly reach the opposite conclusions from other legal systems in comparable situations.

Even if they do, we will normally be able to determine at which point the judges switched the judicial train to a different track. Often the solutions offered by any given system are expressions or corollaries of a basic set of beliefs.

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[87] *Id.*, at 89.

[88] *Ibid.*

[89] *Ibid.*

In order to demonstrate this in the area of mitigation and to find the cryptic links to other parts of the legal order, let us elaborate further on the above statement.

3.3.1. Clear Starting Points

There is no doubt that any action, benefit or advantage acquired before the breach of duty (tort or contract) has no impact on the issue of deduction. The reasons are in part the results of a policy decision which seeks to encourage those who insure themselves and their families, and in part conceptual, in that those advantages and actions can not stand in any relationship with the wrong which occurs only later. This coincides with the fact that there can also be no duty to mitigate before a breach.[90] Furthermore, in the sale of goods context, the issue of accounting for benefits tends to be solved slightly differently than in other areas of law by application of the *prima facie* rules. The sale of goods is the paradigm example of a type of contract in which something is exchanged for money, in a situation which is usually coupled with markets and several opportunities to buy and sell. This latter fact might prove to be important in the explanation of the different tendencies observed in the law of mitigation and accounting for benefits. Furthermore, in sales we are regularly dealing with fungible goods or at least a market place which enables us to find a price or a value for the thing in question. It is a well known phenomenon that in most legal systems, the law of sale attracts the

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[90] Cf. generally with respect to the duty to mitigate before the breach: *Brown v. Muller* (1872) L.R. 7 Ex. 319; *Roper v. Johnson* (1873), L.R. 8 C.P. 167; *Melachrino v. Nickoll & Knight*, [1920] 1 K.B. 693; *White and Carter (Councils), Ltd. v. Mc Gregor*, [1962] A.C. 413 (H.L.).

minds of jurists because it is the most frequent transaction and therefore becomes most influential as a kind of archetype of a contract of exchange.[91]

3.3.2. Summarizing Thoughts

In summary, I believe we can discern a trend to withhold or a reluctance to award damages for a "loss which in one sense is purely notional."[92] As mentioned earlier in this thesis,[93] I find that this reflects a general attitude in common law, which is less strong in the sale of goods context. In addition, in the face of a long line of cases dating back several decades, I can not agree with Atiyah who limits this phenomenon to a "modern" trend.

We therefore find many cases in which benefits or profits had to be accounted for in reduction of the damages award simply because they were made subsequent to the wrong, although they were in fact due to the plaintiff's own personal efforts which went beyond his duties towards the defendant.

This shows that the common law is reluctant to award what for the purpose of our discussion will be called "abstract" damages. These are damages awarded regardless of the actual financial losses. Only in sale of goods cases and in transactions with a comparable structure such as *Campbell* and *Jamal*[94] do we see slight deviations therefrom. These are probably due to the force of a statute.

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[91] Cf. the influence of the UCC on the development of the modern American law or the influence of doctrines coming from Roman sales law on the developments of the general theories of contract in German law.

[92] Atiyah, *supra*, note 83 at 377.

[93] See e.g. *supra*, text at note 82.

[94] *Supra*, note 64 and cf. *Asamera Oil Corporation, Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 which was in fact a bailment case.

Although the starting point in sale of goods cases, as expressed in subsection (2)[95] of the sections dealing with the measure of damages, is the same as in common law generally, and though subsection (3) of the same sections provides the *prima facie* rule which is not intended to change the legal situation but rather to explain the application of subsection (2),[96] these statutory provisions in fact seem to change the judicial attitude towards the abstractness of damages. The rules only elaborate on the application of subs. (2) and on the fact that the relevant factor should be the value of the goods. It is therefore all the more surprising that there nevertheless seems to be less reluctance in the face of subs. (3) to compensate mere "notional" or "abstract" losses, as I prefer to call them, than in other instances. *Jamal* and *Campbell* clearly deviate from the tendency to apply the *Westinghouse* principle in a strict way. *Koch* reconfirms this for charterparties.

I find it quite difficult to rationalize this situation and to establish a coherent pattern from the various decisions and tendencies. Of course, there is always the chance that the different results are only attributable to the dynamics inherent in every legal system and to the idiosyncratic ways of its administration. Influential leading cases, special fact patterns which happened to have been litigated and have subsequently and accidentally been generalized, or other similar coincidences, can lead to the adoption of certain opinions.

In the face of the *Westinghouse* case and its aftermath, the foregoing explanation of the impact it had seems very appealing. Often, no real discussion of Lord Haldane's speech is embarked upon and judges cite it without attempting to put it into a framework in which the evaluations as well as the results are consistent.

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[95] The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of the events from the [...] breach of contract. So for example s. 48 (2) SGA (Ont.), see for the synopsis of the corresponding sections in other Sale of Goods Acts, *supra*, note.

[96] Cf. *Cullinane v. British "Rema" Manufacturing Co., Ltd.*, [1953] 2 All E.R. 1257 (C.A.) at 1261 *per* Evershed, M.R..

Beyond this admittedly rather unsatisfactory explanation, I suggest that there might be a deeper underlying reason for the legal situation as it pertains to the crediting of benefits which have been attained through actions beyond any duty to mitigate.

The common law proclaims and adheres to a notion of damages which is "concrete", that is the assessment is oriented towards an actual situation, a real change in the position of the wronged party. Loss is not "notional" in the sense in which Atiyah uses this term.

Common law takes care to make it clear that the focus is on the "economic" situation of the plaintiff. We want to place him, "as far as money can do", in the same "financial" situation. The aim of compensation is to reestablish a real position which used to exist. Choosing the mere economic or financial angle enables common law to have a "concrete" notion of damages. In fact, financially, the common law plaintiff is in the same position, not only in one which the Court, after a series of judicial steps of evaluation, considers to be "equivalent". Adopting this view is much more likely to create a more "scientific" or "arithmetical" impression, because the spell is not broken and we do not admit that we have to evaluate to determine losses. We thus find statements from common law courts which imply that it is possible to "compute", through an arithmetical operation, the amount of damages.[97] The language used is akin to a mathematical one and the underlying understanding seems to be that we declare the damages by merely discovering them.

This view, on the other hand, is no longer present in Germany, especially after the defeat of the school of *Begriffsjurisprudenz* and the general acceptance of the tenets of the school of the *Interessenjurisprudenz* and later of the *Wertungsjurisprudenz*. The latter proclaims that all application of law is the finding

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[97] See e.g. *R. v. CAE Industries, Ltd.*, [1985] 5 W.W.R. 481 at 521 *per* Stone; *Penvidic v. International Nickel*, [1976] 1 S.C.R. 267; *Parry v. Cleaver*, *supra*, note 1 at 22 *per* Lord Morris and 34C ff *per* Lord Pearce.

of results in accordance with underlying values. According to this view, legal norms are simply the short forms of prevailing evaluations determined by the legislator.[98]

Although probably not evident at first glance, the German view is quite different from the common law. From the very outset, the approach is rather abstract. The concept of damages originated in the idea that the wrongdoer must put the wronged party back into the position or situation he was in before the injurious event occurred. This is already an abstract notion, because it is in fact quite impossible to put someone back into the position in which he formerly found himself. No two positions are the same, except perhaps two monetary or financial situations, in which case the value character of money is the same and is the only relevant factor. A delivery which was late can not be made on time by compensation: a damaged painting can never be made undamaged again which would be the only way to really put the wronged in the position he was in. A burnt down barn, even if replaced, is not the barn which burnt down.

It is at this preliminary stage in German law that the first step of "abstraction" or evaluation has to be taken. This step consists of determining what the term "reparation" means in a "legal" sense. Already at this stage we have to satisfy ourselves with an "equivalent".[99] Holding something to be "eqivalent", however is part of a value oriented process which judges given aspects to be important or irrelevant, as the case may be.

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[98] See with respect to this development, Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 2nd ed. (Berlin: Springer, 1969) at 126 ff, Wolfgang Fickentscher, *Methoden des Rechts, Bd. III, Mitteleuropäischer Rechtskreis*, (Tübingen: J.C.B. Mohr (Paul Siebeck), 1976) at 382 ff and in *Bd. II, Angloamerikanischer Rechtskreis* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1975) at 136, the author tries to explain which Angloamerican tendencies and authors this development can be compared to.

[99] BGHZ 5, 109 and BGH NJW 1978, 2592.

Then, on a second level, we abstract again in German law in the sense that we typify the damage. Section 249 subs. 2 BGB[100] stipulates that in cases of injury done to persons and damages done to things, the wronged party is free to choose between having the wrongdoer repair (compensation in kind) and claiming the money required to have a third party do it. The reason for this is that we do not require the aggrieved party to put himself or his things into the hands of the wrongdoer. Therfore, the payment of money is considered a second way of effecting restitution in kind.[101] In a long line of cases, the BGH interpreted this to mean that the actual repair or restitution need not be carried out. It does not have to be done, or even be intended to be done, to fall within the meaning of s. 249 subs. (1). The plaintiff obtains a sum of money and can, as a result of his freedom, dispose of it as he wishes, even for totally unrelated matters.[102] He is "free" to do whatever he wants with this money in the literal sense of the word. In this respect, the principle of restitution in kind, as set forth in section 249 BGB, has in fact led to a different approach of the assessment of damages. It is more a provision which determines a special yardstick for the abstract and typified measure of damages than anything else.

It is suggested here that in German law the computation of damages is done from the outset in a more abstract fashion than in common law. We are

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[100] Reproduced *supra*, chapter 1 text at note 14.

[101] S. 249 (2) BGB still protects the *Integritätsinteresse*, i.e. the patrimony in its concrete composition but the debtor should pay the costs as opposed to *Wert oder Summeninteresse* i.e. compensation in money in s. 251: RGZ 71, 212, 214; 126, 401, 403; BGH 5, 105.

[102] For the prevailing opinion cf. BGHZ 63, 182; BGHZ 66, 239, at 242 f (lists most of the opinions voiced on the topic up to that point); BGHZ 76, 216, 221 and 61, 56, 58; BGH VersR 1978, 181. Different results seem to be found in personal injury cases as a result of policy decision LG Stgt. NJW 1976, 1797 not followed OLG Celle VersR 1972, 468; OLG Stgt VersR 1978, 188. See also BGH NJW 1958, 627 (Compensation for the price of prescribed drugs not taken).

prepared to disregard what the wronged party in his particular situation really does and how he uses the damage award and if he really changes his position. To a large extent, this is already a "notional" concept of damages in that we are not even initially interested in what is really going on. It must be acknowledged that what we are concerned with is more an evaluative process, in that the reference point (the position to which we want to restore the person) is itself notional.

The situation is quite different in common law where, by choosing a monetary i.e. a value approach, the position is attainable in reality.

The first step towards some degree of abstractness is taken in the sale of goods context in which the market purchase rule is strictly applied and we do not ask whether the plaintiff has gone to market. But this is a different degree of abstraction in that it still actually restores the real financial situation.

Let us go back to the issue of deduction of benefits in cases of own efforts. These basic differences in fundamental rules create different climates in the two systems. The German judge generally disregards several factors because the law itself has decided to exclude some and thus to restrict the vision of the courts. The law, by which the judicial system and its traditions and reactions are determined, recognizes the assessment of damages as an evaluative process of judicial abstraction from reality. It is therefore quite natural for a German lawyer to exclude from the evaluative process, and he is prepared to exclude, factors which have an obvious impact on the financial situation of the wronged party.

Not so in common law, where the basic rule calls for taking everything that naturally flows from the event into account. This explains why the judges in *Campbell* found it so "curious" that they were awarding damages for a "loss" which was not suffered at all and why Atiyah talks about "notional" loss.

Under the Sale of Goods Act, however, the measure of damages is not that of "being worse off" financially. On the contrary, we start from a hypothetical

or rather "notional" buying in or selling out, as the case may be, at the time of the breach. We do not care whether this transaction ever took place in reality or whether the wronged party was still interested in the goods at all.

Once we have taken this step, as the sale of goods cases show, we break the spell and are then able and forced to start a reasoned evaluation. We are free to look at arguments of risktaking and duties or burdens to bear the consequences for others. Only then are we able to open the way for judicial evaluation, of which the symmetry argument is only one example. Therefore the decisions in which we find these arguments in common law are precisely those sale of goods cases in which this more abstract starting point is taken.

I am aware that this analysis might not be an exhaustive account of all the reasons for the differences which exist between the two legal systems under study in the field of benefits realized through one's personal efforts. I believe, however, that we should recognize that the "abstraction" of damages runs parallel to a certain disregard of reality in assessing damages and that this in turn is at the root of at least one difference in the two legal systems. More than simply indicating varying attitudes or approaches to a problem, this difference leads to substantially different results, being in turn expressions of the difference in legal traditions.

Therefore, once we agree that an inner, structural connection of the kind just described exists between the basic notion of compensation and the treatment of the cases involved in this study, a change in the traditions in one area will necessarily have an impact on the others.

Let us take, for example, the decision in *Radford v. de Froberville*[103], where it was held that compensation in a contract case does not mean restoring a financial situation only. The plaintiff was awarded the amount of money needed to

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[103] [1978] 1 All. E.R. 33 (Ch.D.). Cf. *infra*, chapter 4.2.1.1.

obtain substitute performance or something equivalent.[104] This case might be the beginning of a general trend away from the assessment of damages as the concrete difference in values only. If so, this would probably trigger a change in a fundamental part of the legal tradition. In turn, we might as a consequence thereof witness a change in the treatment of benefits accruing because of acts lying beyond the duty to mitigate. The first step toward an evaluating abstraction would thus be made.

To show this connection between widely accepted traditions and their effects in areas not obviously connected with the fields of law in which these traditions seem to exist was the objective of this chapter.

Fundamental legal traditions, however, do not only differ in the area just described. The following chapter deals with another aspect of accounting for benefits as a result of an injurious event and establishes a connection between basic attitudes towards the officious intermeddler, as a subarea of unjust enrichment, and the assessment of damages.

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[104] The building of the wall was legally impossible so that the substitute was obviously only an equivalent.

Chapter 4

THE "NEW FOR OLD" PROBLEM

4. Chapter 4: The "New for Old" Problem

4.1. Introduction

The problem to be dealt with in this chapter can be summarized by the following example:

Hypothetical Case 1
Farmer B has an old barn on one of his meadows. D_1 negligently burns it down. The old barn was worth $10,000 which is the price to be paid on the market for a comparable barn. It would cost $50,000 to rebuild the barn which will then be valued at about $55,000. D_1 argues that
a) B is fully compensated by the payment of $10,000;
b) Even if the damage were $50,000, this amount should be reduced by $45,000 being the amount by which B is better off due to the fact that the barn is new.

The cases which can be grouped under the "new for old"[1] problem are characterized by the feature that it is not possible to put the plaintiff back into his former position without improving it. At least economically, B is better off after D has paid for the new barn. Factors like depreciation, old materials and the fact that the barn was used, diminish the market value even if for B the old thing did the job he wanted it to do just as well as a new barn would.

The problem is hidden in the argument which D advances under b). It does not arise if we deal with a case in which the measure of damages is the diminution of the economic value (D_1's argument under a)). In awarding the market

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[1] This is the term used by Harvey McGregor, *McGregor on Damages*, 14th ed. (London: Sweet & Maxwell, 1980) and by some courts. I have adopted it because it is the literal translation of the German term "*neu für alt*". Stephen Michael Waddams, *the Law of Damages*, (Toronto: Canada Law Books, 1983) at 162 para. 281 and Widgery, L.J. in *Harbutt's "Plasticine" v. Wayne Tank and Pump Co. Ltd*, [1970] 1 All E.R. 225 (C.A.) at 240e call it the "betterment" question, which term I do not like because it implies a judgment that new is better and it focuses on the pecuniary side only and not on the actual "situation" the plaintiff is in.

value, leaving B better off is not conceivable because the definition of market value itself would forbid this result. Here again, we have to find an answer to the question of why we want to reduce an award yielded by the normal measure of comparing before and after or alternatively why we do not.

It is arguable whether this is really still a problem arising under the rule concerning avoided losses in the technical sense.[2] The mode of undoing the harm and not the event producing and bringing about the harm accounts for the benefit.

On the other hand, we saw earlier that accounting problems also arose in cases in which an event other than the immediate event causing the damage was at the source of the actual benefit.[3]

In addition, it is a problem arising out of a desire repeatedly encountered in the course of this paper, not to use the loss as the occasion for the plaintiff to obtain benefits which he is not believed to be entitled to.

A final aspect which links the "new for old" situations to the duty to mitigate in general can be seen in the apparent contradiction that, on the one hand, the duty to mitigate is said not to include the obligation to risk and invest too much money of one's own[4], but on the other hand that it should be legitimate in "new for old" cases to refuse full compensation unless the aggrieved party invests considerable amounts of his own money. In the example given above, this critique is admittedly based on the belief that B is only "compensated" at the moment when he has a barn in which he can continue to store his machinery. In my view, if in our examination

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[2] Hermann Lange, *Handbuch des Schuldrechts, Bd. 1, Schadensersatz* (Tübingen: J.C.B. Mohr (Paul Siebeck, 1979) at 300 argues it is a different and distinct problem.

[3] See for example in own effort cases in general or in the insurance cases, *supra*, chapter 3 and 2.2..

[4] Cf. *supra*, chapter 3, note 42.

of the new for old problem we maintain the parallel to the duty to mitigate, the deduction of the $45,000 in solution b) of our barn case amounts to an investment requirement based on the duty to mitigate itself.

4.2. Legal Situation

4.2.1. Common Law

4.2.1.1. Measure of Damages

Cases dealing with the old for new issue only become problematic when the plaintiff is awarded the costs of repair as damages. This corresponds to the defense a) in our example cited above. In order to better understand this issue, we must briefly revert back to the general principles pertaining to the measure of damages in common law.

No general rule exists as to what the measure of damages is in cases of damage done to things.

Lord Denning in *Harbutt's "Plasticine" v. Wayne Tank and Pump Co., Ltd.*[5] states that the rule depends on whether we are dealing with cases of chattels or buildings.

In that case, the defendants contracted to design and deliver equipment for the plaintiff's factory. As a result of the installation of pipes which were not suitable for the purpose required, a fire broke out and destroyed the factory.

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[5] *Supra*, note 1 at 236. The case was followed and adopted in Canada by *The Ship "Dumurra" v. Maritime Telegraph and Telephone Co., Ltd.* (1977) 75 D.L.R. (3d) 766 (Fed. C.A.) leave to the Supreme Court refused 20.6.1977.

Lord Denning's argument is that, in the case of chattel replacement, buying in on the market is possible, which is not so in the case of buildings. This argument is quite weak because what he is in fact distinguishing is not real property and chattels but fungible property and unique property. A prefabricated house is a building but we can still go out in the market and replace it. For example, the late John Lennon's Rolls Royce fits Lord Denning's description of a chattel but there certainly is no market in which it could be replaced.

The attempted distinction can therefore only be between a thing that can be repaired, so as to put it in substantially the same state again, and one that is damaged beyond repair.[6] This is a question of fact which is to be determined by evaluating the interests of the parties, the use of the thing and the current practice and opinion of parties involved in the field; in short by an objectified test applied by the judge. This analysis seems to be reflected by the case law.

To complete our study of Lord Denning's analysis, in *Harbutt's* he argues that the plaintiff

"[...]can go into the market and get another second-hand car to replace it."[7]

Thus, for him the decisive feature is the market value determined by the price of an object that can in fact be bought to replace the destroyed one. It is submitted, however, that this is not convincing. Lord Denning does not elaborate as to whether in the case before him it would have been posssible to buy a replacement for the plant that had been burnt down by the defendant. Does he not mean that in

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[6] I try to avoid the term "destroyed" that is often used because the distinction is misleading . In *Bacon v. Cooper (Metals) Ltd.*, [1982] 1 All E.R. 397 (Q.B.) for example: Was the rotor destroyed or the fragmentiser damaged? Should the answer to this point make a difference? For the discussion of this case see, *infra*, 4.2.1.2. Cf. the uniqueness of second-hand cars in Lord Denning's eyes, in *Lazenby Garages, Ltd. v. Wright*, [1976] 1 W.L.R. 459 (C.A.) where no distinction between chattel and real property is made.

[7] *Harbutt's "Plasticine" v. Wayne Tank and Pump Co.*, *supra*, note 1 at 236e.

all cases in which the Court would grant specific performance if asked to do so, we would use the price of reinstating the former position as the measure of damages?

This would underline the connection between the contents of an obligation as defined by the sanction for non-performance and the measure of damages which in Germany is expressed in s. 249 BGB and its rule of reparation.

Lord Denning does not address the issue of whether the case of a destroyed object, such as the one he is dealing with, should be treated in the same manner as the case of a damaged object.

In the speech itself[8], authorities for both measures are mentioned.[9]

Widgery, L.J.'s opinion is much clearer, even though he stresses that each case has to be considered separately (and thereby tacitly contradicts Lord Denning who talks about all real property cases). Aiming to give abstract guidelines for the evaluation of similar situations, Widgery, L.J. holds the starting point to be to "restore" the "position". Then he states his rule:

> "[...,If] no substitute for the damaged (sic)[10] article is available and no reasonable alternatives can be provided, the plaintiff should be entitled to the cost of repair."

The dichotomy between repairable and non-repairable seems to be the criterion of distinction between value and cost of repair which common law courts generally use.[11] In support of my view on this issue, in *J. and E. Hall Ltd. v.*

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[8] *Id.* at 236d.

[9] *Philips v. Ward*, [1956] 1 All E. R. 874 (C.A.) and *Hollebone v. Midhurst and Fernhurst Builders*, [1968] 1 Lloyd's Rep 38 (Q.B.(Off.Ref.Ct.)).

[10] It is unclear why he suddenly considers the plant damaged when Lord Denning was so keen on calling it destroyed.

[11] For chattel, this is illustrated in *Darbishire v. Warran*, [1963] 3 All E. R. 310 (C.A.), where it is also established that if it is unreasonable from a business point of view to repair we will treat the situation like the one of chattel damaged beyond repair. See also *Owner of Dredger Liesbosch v. Owners of SS. Edison*, [1933] A.C. 449 (H.L.) which involved impecuniosity, making it clear (on p. 460) that mere convenience of administration may lead to a limitation of damages.

Barclay[12] it was held that even if repair was not possible, the price of reconstruction could still be the relevant measure of damages.

Much the same rules, and in particular the basic rule of *restitutio in integrum*, seem to apply in cases of damage to land such as in *Hollebone v. Midhurst and Fernhurst Builders, Ltd.*[13] This case also contained three new for old problems.[14]

Once it is established that the repair can be done and will be paid for by the defendant, the question of a reduction equal to the amount by which the plaintiff is now better off has to be addressed. This will be done in the following section.

4.2.1.2. "New for Old" in Common Law

Before we deal with the matter in this more theoretical way, let us look at some of the relevant cases and the reasoning behind the decisions in order to determine the factors of evaluation.[15]

In *Harbutt's*, Lord Denning, as is often the case, is content to state his result without elaborating on the reasoning that guides him.

> "True it is they got new for old, but I do not think the wrongdoer can diminish the claim on that account."

and he continues *obiter*

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[12] [1937] 3 All E.R. 620 (C.A.).

[13] *Supra*, note 9 at 40, although this case might lend itself to easy distinguishing on its facts because the court stresses the bonds to the particular community of the family whose house burnt down.

[14] They concerned new rafters and floors put in during the rebuilding of the house, see *id.* at 41.

[15] Waddams *supra*, note 1 at para. 281 points out that the two arguments (better economic position against no compulsion to invest) are not conclusive.

> "If they had added extra accommodation or made extra improvements, they would have to give credit."[16]

In the same case Widgery L.J., although he begins his argument from the result, is much more open about the policy underlying his point of view being the protection of the plaintiff's freedom to determine his affairs:

> "To do so [i.e. give credit under the heading of 'betterment'] would be the equivalent of forcing the plaintiffs to invest their money in the betterment of their plant which might be highly inconvenient for them."[17]

Inconvenience alone, although surely an important aspect, is certainly not a convincing argument against accounting. This, if taken as an absolute, would lead to the protection of all people who are unjustly enriched. It is probably inconvenient for anyone to disgorge money,[18] but this can not be the decisive factor. All the judges in *Harbutt's* make reference to a hypothetical situation in which deviations from the old factory layout lead to improvements. They all agree that the plaintiff in that case should account for a benefit. This shows that they all advocate a "subjective" way of looking at the affair. This means they take into account the particular use of the destroyed building and what is reasonable for the particular user to take as a replacement. If we used these criteria to an extreme, we would have to require evidence as to the real use of the improvement. The onus would then have to rest on the defendant. Although this solution may seem quite appealing, it would have the disadvantage of being largely procedural and quite difficult to administer. Still, a certain consideration of the subjective aspects and wishes of the plaintiff is

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[16] *Harbutt's "Plasticine" v. Wayne Tank and Pump Co.*, *supra*, note I at 236e.

[17] *Id.* at 240e.

[18] Protection against this is the idea that lies behind the protection of the *bona fide* enriched under German law (s. 818 BGB subs. 4) who, as long as he is not aware of the "unjustness" of his enrichment, is exonerated from handing it back if he no longer has it. For an account of this in English and a comparison with the American law of restitution cf. John P. Dawson, "Erasable Enrichment in German Law" 61 B.U.L.Rev. 271 (1981) and by the same author "Restitution Without Enrichment" 61 B.U.L.Rev. 563 (1981).

seen in the law of damages, and in the assessment of loss.[19] The focus on the particular situation of a recipient of benefits is common in the law of unjust enrichment. Therefore, it is submitted that a solution should be oriented to and consistent with cases that deal with unsolicited benefits. In that area too, the interests at stake are the freedom to determine when and where one wants to invest on the one hand, and the interest of the plaintiff to get back the defendant's enrichment that came from his assets or actions. In both instances it is clear that we are concerned about the enrichment (benefit) and not about loss. In asking the question in terms of enrichment, we can focus more easily on the subjective situation of the plaintiff and can include his interests, hopes and the risks he was prepared to take in the beginning.

Our concern about forced investment could lead to the inclusion of the cost of the investment into the award and we could shift the onus of proof, as Waddams suggests, to the party held to compensate. But this itself does not do away with the argument that the plaintiff is still forced to advance the capital itself and is free to use it for something else that may even be economically unreasonable.

Generally, although earlier cases cited by McGregor[20] allowed a reduction in a new for old situation, common law courts since *The 'Gazelle'*[21] seem to be of the opinion that generallly no allowance should be made in such instances.[22]

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[19] See e.g. *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 (Ch.D.) at 318g ff and also *Radford v. de Froberville*, [1978] 1 All E.R. 33 (Ch.D.) were the damages were assessed on the basis of merely personal priorities and wishes. It should be noted, however that this is probably not the prevailing opinion in common law.

[20] *Supra*, note 1 at para 14 citing e.g. *Lukin v. Godsall* (1795) Peake Add. Cas. 15 as an example. See also *id.* footnote 67 f for further references.

[21] (1844), 2 W.Rob 279, 166 E.R. 759.

[22] In Canada cf. e.g. *National Theatres, Ltd. v. Macdonalds Consolidated, Ltd.*, [1940] 1 W.W.R. 168 (Alta. Dist. Ct.); *The King v. Toronto Transportation Commission*, [1946] Ex. C.R. 604, rev'd on other

In keeping with the view expressed in *Harbutt's* recently the Court of Queens Bench in *Bacon v. Cooper (Metals) Ltd.*[23] went so far as to refuse reduction although it is explicitly spelled out that this refusal could lead to absurd results when applied in all cases.

The plaintiff was engaged in the trade of scrap metal. To this end, he used an expensive fragmentizer to process steel. The rotor of this machine was smashed in the course of processing a shipment of steel delivered by the defendant. The steel in question did not conform to the contract description and was not of merchantable quality. As a result of these defects, the metal was not fit for being fragmentized in the particular machine. Therefore after processing the defective shipment, the rotor which had an expected life span of seven years had to be replaced immediately, i.e. after it had been used for 3 3/4 years.

One of the questions the Court had to decide was whether deduction should be made for the advantage of having a new fragmentizer instead of one already 3 3/4 years old.

Cantley, J. dismisses the defendant's attempts to distinguish *Harbutt's "Plasticine"* as irrelevant on the ground that this case dealt with a building. He thereby implicitly holds that the principle in that case applies to replacement or repair of (wasting) chattels as well.

The advantage, in the judge's opinion, is not as obvious as the defendant purports it to be. He does not want to force the plaintiff into an investment (i.e. 3 1/4 additional rotor years equivalent to 19,268 pounds) which he might not even have wanted had the plaintiff not intervened. Several factors could have changed by 1983, the anticipated year in which the worn out old rotor would have been replaced under normal circumstances. The plaintiff might want to change

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grounds, [1949] S.C.R. 510; *T. Donovan & Sons Ltd. v. Baker* (1966), 53 M.PR. 113 at 114 (N.B.S.C. App. Div.).

[23] *Supra*, note 6 (Fragmentizer).

his line of business or replace the fragmentizer altogether for a more advanced model. As the plaintiff had no choice but to buy a new part to take up his profitable business as fast as possible, and as he was under a duty to mitigate in doing so, it was held that there was no valid reason to force an investment of nearly 20,000 pounds on him, particularly when there was no reason to assume he necessarily profited from or wanted the said new machine.

Adopting Dr. Lushington's view in *The 'Gazelle'*[24] the judge[25] therefore concluded that if there is no other way to indemnify or keep the loss down, the burden is on the wrongdoer and he can not be relieved from the unavoidable consequences of incidentally conferring a greater benefit than mere indemnification.

This is and has been the state of the law for quite some time now.[26] A question which arises and should be kept in mind is why, while the common law is so adamantly opposed to overcompensating in cases mentioned earlier[27], it seems to accept it almost matter of factly in the present group of cases.

Although Waddams sees the connection and similarity in structure of the new for old problem and the rule of avoided loss, he seems to draw the wrong conclusions.[28]

Starting from the statement that in *Westinghouse*, an accounting for benefits had to be made, he concludes that the application of this judicial statement

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[24] *Supra*, note 21 in 166 ER 759 at 760.

[25] In *Bacon v. Cooper (Metals); Ltd.*, *supra*, note 6 at 401.

[26] *The King v. Toronto Transportation Commission*, [1947] 1 D.L.R., varied on other grounds [1949] S.C.R. 510; *Donovan & Sons, Ltd. v. Baker* and *National Theatres, Ltd. v. Macdonalds Consolidated, Ltd.*, both, *supra*, note 22.

[27] See cases discussed *supra*, chapter 3.

[28] *Supra*, note 1 at para. 281 ff.

has to lead to the same result in the new for old cases. He therefore advocates the view that a reduction should be made in order to prevent the plaintiff from realizing benefits from the wrong against his person or his things. His argument is that in both instances the benefit could not have occurred in the absence of the wrong. Therefore, he infers, consistency in the law and its application requires that we deny the plaintiff the benefit in both cases. Waddams tries to explain the different result obtained in *Bacon v. Cooper* by putting much emphasis on the remark made by Cantley, J. concerning the possibility of technical progress which might make the machine obsolete by the time the advantage of a new rotor could be felt. The case is distinguished on the basis that the defendant, who according to Waddams carries the burden of proof, could not establish the value of the benefit.

Even if we disregard the fact that distinguishing one, admittedly important case, does not disqualify a whole line of cases of the same result, Waddams' opinion is based on the assumption that *Westinghouse*[29] and *Erie County Ntl. Gas and Fuel Co., Ltd. v. Carroll*[30] are rightly decided and take precedence over the cases to be decided here. This is a kind of *petitio principii*. To prove that one established line of cases is wrong because another line of established cases comes to a different result in a different area of law, as similar and closely connected as it may be, is, if we want to call it an argument at all, at best a weak one. Even if one agrees that *Westinghouse* is rightly decided, I have difficulties seeing a blatant contradiction of the *Harbutt's* line of cases, as Waddams seems to suggest. He argues that because in both cases the benefit would not have occurred without the wrong, they have to be decided in the same way.

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[29] [1912] A.C. 673 (H.L.); see the dicussion of this case *supra*, section 3.2.1. ff.

[30] [1911] A.C. 105 (P.C.).

First of all, this reveals his understanding that the decisive fact for accounting is the existence of a causal link between the benefit and the wrong, a submission which has repeatedly been shown to be erroneous earlier on in this paper.[31]

Secondly, Waddams does not advance further arguments for the comparability of *Westinghouse* and the new for old cases.

In the former case, damage that undoubtedly already existed was chosen to be reduced by the aggrieved party. He was under no compulsion and under no obligation to do so and remained free not to take action and buy new machines. One main argument for not holding the plaintiff obliged to mitigate in these cases is precisely that it is too onerous to require him to further invest money of his own.[32] It seems that in the *Harbutt's* situation, Waddams is prepared to disregard the issue of freedom from compulsion to invest one's own assets. In my view this aspect of freedom is already reason enough to cast doubt on the direct comparability of the two situations.

This brings us back to the point made earlier, that, on the one hand, the duty to mitigate cannot force anybody to risk money of his own, but that it is, on the other hand, legitimate to refuse full compensation[33] unless the aggrieved party invests considerable amounts of money.

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[31] See *supra*, chapter 2.

[32] Generally there is no duty to incur extreme risks with one's own money, cf. *supra*, chapter 3, note 42; *Jewewlowski v. Propp*, [1944] K.B. 510, a case which also stands for the symmetry argument, because the profits from the moneys risked were not deducted from the damages award because the act was beyond the duty to mitigate.

[33] As defined by "putting him back in the position" he was in, which in our example is to have a barn to store the hay and machinery. By going through the first step with the result that plaintiff should be granted the cost of repair in common law, we tacitly decided that compensation is not just a lump sum bacause that is not enough to "buy" an equivalent position.

Another argument against the prevailing opinion in common law with respect to a deduction in new for old situations, is that the plaintiff should not be allowed to manipulate his award by "categorizing" his case as one of repair rather than one of replacement.[34] According to this argument, one asks why the wrongdoer should be worse off if he damages a car than if he totally destroys it.[35]

The point is that the person whose property was destroyed will only be entitled to the value of the good whereas the owner of a thing that was merely damaged might be indemnified differently. This argument is not very convincing.

Firstly, there is no doubt that overcompensation should be avoided. Therefore the "repair" option under common law is only available if there is no other way to effectively indemnify. Confronted with the option of overcompensating or not being able to put the plaintiff back into the required position at all, common law understandably chose the former option. But this is in turn no reason to extend overcompensation to those cases which did not give rise to this conflict. The argument is not very convincing in a system in which the general rule is the same for repair and replacement and where repair is only an exceptional option in rare cases.

Secondly, the question of repair or replacement is really not for the plaintiff to "categorize". The court is not bound by the plaintiff's assessment, especially when contested by the other party. Of course, regardless of the plaintiff's view, it will be regarded as a case of destruction if it is one. This is what the judges

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[34] See e.g. Waddams, *supra*, note 1 para 288 with references to two Ontario cases.

[35] For example in a situation in which the car was worth $4,000 and the repair would cost $4,500. This assumes that it is still economically reasonable to repair. This is an argument that was made in *The "Clyde"* (1856). Swab. 23, 166 E.R. 998.

did in *Harbutt's* in a quite interesting manner[36], through certain dicta dealing with a "damaged car of popular make". Widgery, L.J., for example,[37] states that there is no automatic right to the cost of repair and that if replacement is equivalent only these costs are recoverable. This therefore can be compared to an "economic destruction".[38]

Finally, Waddams tries to give more weight to his argument by stating that it is "well established", that in cases of destruction the plaintiff will never recover more than the value of the thing.[39] This is simply not true. In *Harbutt's*, Lord Denning's use of the expression "completely gutted by fire"[40] was surely meant as a descriptive synonym for "destroyed". He was correct in taking that view since building restrictions in that case did not permit the same mill to be rebuilt or repaired. All that could legally be done was to replace it with a building of a totally different design. Still, the plaintiff was awarded more than the value of the old plant. He was awarded the cost of replacement for a destroyed property. Closer analysis reveals that the difference in compensation is not between the person who damages instead of "only destroying it", but between the one who wrongfully puts the innocent party into a position which can only be eliminated by repairing the old property instead of by buying a replacement.

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[36] They basically argued that more expensive repair equals destruction in the sense of "economic destruction".

[37] *Supra*, note 1 at 240d.

[38] A concept known in German law serving similar ends is the so called "*ökonomischer Totalschaden*" which is a legal device to determine the field of application of sections 249 and 251 BGB.

[39] *Harbutt's "Plasticine" v. Wayne Tank and Pump Co., Ltd.*, *supra*, note 1 at 230a and at 236d f where he talks of "destruction".

[40] *Supra*, note 1 at 288.

4.2.2. "New for Old" in German Law

The situation in Germany is affected by the interplay of two provisions. The basic rule of *restitutio in integrum* is set forth in s. 249[41] and s. 251 subs. 1 BGB which qualifies that principle as follows:

> **Paragraph 251 BGB (Schadensersatz in Geld ohne Fristsetzung)**
> *(1) Soweit die Herstellung nicht möglich oder zur Entschädigung des Gläubigers nicht genügend ist, hat der Erstazpflichtige den Gläubiger in Geld zu entschädigen.*
> *(2) [...]*
> **[Section 251 BGB (Compensation in money without laying down a period of notice)**
> (1) Insofar as restitution in kind is impossible or is insufficient to compensate the creditor, the person liable shall compensate him in money
> (2) [...]]

Since the intent of the rule in section 249 BGB is to protect the plaintiff's "integrity", the Courts seem quite reluctant to assume an "impossibility" pursuant to s. 251 subs. 1. This section is a direct exception to the general rule set forth in s. 249 subs. 1 and leads to compensation according to the "value interest" (*Wertinteresse*) and not according to the "integrity interst" (*Integritätsinteresse*).[42]

The leading case decided by the BGH[43] (on which the barn case described at the outset was modelled), adopted the view that, as a rule, the defendant is obliged to rebuild the destroyed barn which, in the case of s. 249 subs. 1, is done by the wrongdoer himself and, in the case of subs. 2, is accomplished by the payment of a sum of money. The Court went on to state that, as a rule, any advantage that is linked to the undoing of the harm has to be accounted for. In s.

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[41] *Supra*, chapter 1 text after note 14.

[42] For the particulars of the computation see Dieter Medicus in Günther Beitzke ed., *J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen, Buch II*, 12th ed. (Berlin: J. Schweitzer Verlag Walter de Gruyter, 1983) s. 249 BGB para. 17 and 31.

[43] BGHZ 30, 29.

249 subs. 1 cases this is done by the payment of the difference in value to the wrongdoer, and in subs. 2 cases by directly reducing the amount required to be paid over.

Although the code does not explicitly deal with the point, the Court based its finding on the legislative history and on the the same passage from the *Motive* as is cited in order to back up an accounting for benefits in other cases.[44] The judges took the view that, as the drafters of the code were well aware of and acquainted with the problem of accounting new for old as well as with earlier solutions adopted by courts at the time,[45] accounting "new for old" is an underlying principle of the code.[46] Therefore, the Court could leave open the question whether the specific provisions that expressly put forward the principle of accounting new for old[47] are simply special cases used as a departing point for an analogy, or merely special statutory expressions of an underlying principle of German law.

The court continues by clarifying that as a rule, an allowance for the advantage new for old has to be made. This shifts the burden of justification to the opposite position. We should, however, keep in mind that the defendant, i.e. the party who has to compensate, is as a matter of course responsible for proving the benefit.[48] Then the two-tiered test used by the BGH to solve accounting for benefit cases and mentioned above,[49] is applied. When one reaches the question of the limits

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[44] *Motive zum Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Bd II Recht der Schuldverhältnisse, Amtliche Ausgabe*, 2nd ed. (Berlin: J. Guttentag, 1896) at 18 f commentaries on s. 218 of the draft civil code.

[45] Cf. *Reichsoberlandesgericht* XXIII Nr. 16.

[46] BGHZ 30, 29, 32.

[47] Sections 710 subs. 3, 872 HGB; 86, 141 subs. 2 VVG and 85 BSchG are cited as examples.

[48] BGHZ 94, 195, 217; BGH NJW 1983, 1053.

[49] *Supra*, section 1.3.3.

of what can be equitably required from the plaintiff (*Grenzen der Zumutbarkeit*), the Court would be prepared to take into account conditions such as impecuniosity. The mere fact that an investment might be inconvenient and not freely incurred is not sufficient. The term "enrichment" is expressly used.[50] One could therefore think of relating these cases to the general problem of unrequested or forced enrichment (*aufgedrängte Bereicherung*) which corresponds to the term "unrequested improvements"[51] or "unsolicited benefits"[52].

Quite an interesting point is made by the BGH[53] when it states its position that accounting for benefits is not considered to be a limit on damages and recovery, as the common law has come to regard it, but rather still part of the notion and definition of the terms damages and loss themselves.

In the second part of the judgment, it is emphasized that it can not make a difference whether we deal with a wasting asset, such as was argued by the defendant in *Bacon v. Cooper*[54], or a long term investment asset. The German Court can justify this statement by simply pointing to the code, which, in keeping with its affinity for generalization, provides a unified concept of damages.[55] The argument

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[50] BGHZ 30, 29, 35.

[51] Term used by P. Matthews in a slightly more restrictive sense in, "Freedom, Unrequested Improvements and Lord Denning" (1981), 40 Camb. L.J. 340-58.

[52] Jerome E. Bickenbach, "Unsolicited Benefits" (1981) 19 U.W.O.L.Rev. 203.

[53] BGHZ 30, 29 at 32 at the end and the beginning of 33.

[54] *Supra*, note 6.

[55] This was done on purpose. The drafters of the code were all used to the finely tuned but somewhat absurd system of differentiations between several kinds of damages to different kinds of things and legally protected interests which had been put up by the pandectists. This situation, which evolved as a result of lacunae in this field in Roman and medieval law, resembled in some way the system of the common law where it is often held that a particular rule only applies to cars or chattel or real property or unique things etc. Cf. Medicus in *Staudinger*, *supra*, note 42 s. 249 ff BGB preliminary notes 25 ff.

was also rejected on its merits, however, and the Court held that there is no legal difference which would justify a different treatment between a case in which an object was destroyed and the one in which it was only damaged. In both cases the only relevant factor is that there is a *real* increase in assets.[56]

To summarize, the following conditions have to be fulfilled in order to lead to a reduction of the damages award in cases of new for old:

a) There must be a measurable increase in the value of the plaintiff's estate, which is not the case if the old parts would have done the job just as well and would have lasted as long as the repaired ones; [57]

b) There must also be an economic advantage.[58] Although it is not quite clear what this adds to what was said in a), it probably means a possibility of realising the advantage. If the farmer can not sell the barn and planned to destroy it in 10 years anyway, there is no real advantage;

c) As in all cases of accounting for benefits, the disgorgement must be equitable in the sense that it should not put extreme burdens on the plaintiff. In particular, this is the locus where general evaluations of a given legal system find their way into the decision-making process. Accounting ceases to be equitable if it levies a burden on the plaintiff that, according to other areas of law, he is not supposed to carry. An example is the case of a contractor who performs his obligation to repair defects with considerable delay.[59] The object thus repaired or replaced will undoubtedly last longer than if the builder had installed it correctly in the first place. A reduction "new for old" would lead to an inducement to perform

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[56] BGHZ 30, 29, 30 ff.

[57] Cf. car parts that generally last as long as the car, KG NJW 1971, 144 and Mr. Hollebone's floors and rafters in *Hollebone v. Midhurst and Fernhurst Builders*, *supra*, note 9 at 41 last para.

[58] BGHZ 30, 34.

[59] This example is inspired by BauR 78, 410.

late that contravenes the basic evaluation that nobody should benefit from his wrongdoing, i.e. his late performance.

This last point shows that this, like all other legal problems, should not be solved in a vacuum of evaluations. We have to find consistent results with closely connected areas of law where similar interests are at stake.

Another corrective is the acceptance of the fact that if the investment was not asked for, the rule can be tempered (*Milderungen*). Some suggest that if the plaintiff can not pay at once, the claim only becomes due and payable once the advantage is realized through the sale of the thing or through prolonged life.[60] Some go even further and say that from the outset, the amount to be accounted for has to be reduced according to the individual degree of use for the benefit.[61] This is basically the same test as that which is normally used in cases of unjust enrichment where the focus is on what was gained by the enriched party instead of on what was lost by the "impoverished" party.[62] In some cases, this idea is also used in the law of damages when there is no reduction if a nearly new car is damaged and replaced by a new one, even if it could well be repaired.[63] This is done on the basis that the owner of the new car has the benefit of advantages of proof in cases of defects. In addition, however, it has been held by the BGH that in rare cases, a "subjectified" notion of loss can apply. According to the BGH, "esthetic judgments or even

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[60] Medicus in *Staudinger*, *supra*, note 42 at 176.

[61] *Idem.*

[62] Medicus in *Staudinger*, *supra*, note 42 s. 249 BGB para. 10 and Werner Lorenz in *Staudinger*, *supra* note 42 (Berlin: J. Schweitzer Walter de Gruyter, 1986) s. 812 BGB preliminary notes 24 ff.

[63] When dealing with used cars, the amount that is deducted when damages are paid on the basis of replacement with a new car are about 1% per 1000 driven km; cf. KG NJW 1972, 769; Lange, *supra*, note 2 at 171. and BGH NJW 1976, 1202.

irrational prejudices" can also affect the compensation.[64] The BGH stated that this was done because prejudices against repaired cars are so widespread and therefore affect the economic value. In fact, the remedy given by the BGH reveals that it is not only the affected economic value that played a role in its decision, since that could be compensated for by a money award equal to the decrease in value according to s. 251 BGB.

The same result is reached if a prolongation of use can not be shown. The individual character of this test is made clear by the OLG Saarbrücken[65] decision which required a disgorgement of the increase in the sales price only if the party who allegedly benefited actually sold the object.

4.3. Attempt to Explain the Differences in Apprach - New for Old and the Unsolicited Intermeddler.

As was the case in chapter 3, we again find ourselves with a situation in which the two systems under scrutiny solve the same fact pattern in considerably different ways.

While in chapter 3 we could discern a bias on the part of the German law for the injured party and his interests, this bias seems to be shifted to common law in the context of the new for old problem.

Prima facie, this seems to indicate that other issues and evaluations are at play. Let us therefore try to isolate factors that are connected to the change in attitude and to the solutions found for the fact patterns.

Consistency of the law and its predictability are important aims that we try to attain. Once we adopt the view that it is not automatically the wrongdoer

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[64] BGH NJW 1976, 1202 at 1203.

[65] VersR 1975, 189.

who has to take the burden of all losses (and will enjoy all benefits) simply because he is at fault, we have to try and bring the solution of the problem at hand in line with the rest of the legal system.

The premise seems clear. The defendant has to take the plaintiff as he finds him. But a closer look reveals that this "maxim" never seems to have exerted too much influence on the "new for old" problem.

In order to explain the solutions, we have to find related cases with comparable issues involved and test whether the law reaches the given results in order to attain consistency.

It is suggested here that the "new for old" problem, because it involves the forcing of benefits upon someone who is subsequently asked to pay for them, is closely related to the situation in which a party, in order to help or to prevent damage, interferes with another's legal sphere, or in more practical terms, manages his business.[66]

The "neighbour" who wants to "help" and improves the defendant's property can not be treated differently, or at least not worse, than the person who compensates for a loss that he inflicted on the plaintiff. It would indeed seem strange if we gave the cold shoulder to one conferring "unsolicited benefits" but embraced the arsonist who is held to leave his plaintiff with a little more than he had before. Was not the benefit as unwanted as the one from the uninvited neighbor?

Let us therefore test the conclusions adopted in these cases against the treatment of the "new for old" issue in the respective jurisdictions and discover if the differences in treatment isolated in section 4.2. are mirrored in these fields of law too.

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[66] This is the expression used in art. 1043 of the Civil Code of Lower Canada as a synonym for "*negotiorum gestio*".

4.3.1. Consistency of the Law and its Evaluations

What a legal system has to strive for to be worthy of the name "system" is not only to find the most equitable result in any single and particular case. This itself is not attainable and definable without taking into consideration the values that are prevalent and the ends we want to reach. The "right" and "equitable" decision derives these qualities from the whole of the legal system. A sum of what we are prepared to accept in a given community is worth striving for. In this sense, Lord Wilberforce's statement, albeit in a slightly different context, to the effect that:

> "[This particular decision[67]] is part of a complex of law which has developed piecemeal and which is neither logical nor consistent"[68]

is perhaps the worst judgment one can make about a legal system in that it admits that there is a deviation into arbitrariness.

One of these values is that we believe that a legal system should treat us equally. Therefore, a system that wants to be accepted by the people subjected to it has to be consistent in the values behind the rules that it is made of. This is not only required by the value of equality but also by a certain degree of foreseeability which we accept as an important element of both law and justice. This belief lies at the basis of both the justification for a legal analogy and the rule of *stare decisis*[69] in common law. The individual of today has grown out of being a mere "subject", and into the role of being a person who has a right against the state, of which the

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[67] He was talking about *Oliver v. Ashman*, [1962] 2 Q.B. 210 (C.A.).

[68] *Pickett v. British Rail Engineering, Ltd.*, [1980] A.C. 136, 146 (H.L.).

[69] *Infra*, note 74.

administration is just a part[70], to a consistent, non-arbitrary and predictable treatment by the law.

Problems which tend to be dealt with in the context of public law and which seem to be forgotten in private law, such as equality, clearness of legal rules, vagueness, and freedom, have to govern the system of private law as much as other fields.

In Germany, albeit only since 1949, this is provided by the fact that the Constitution and in particular human rights are binding on all public authorities (Art. 20 (3) of the GG[71]). The Courts are also bound by Art. 20 (3) and therefore their decisions, not only the law, have to comply with the basic rights given by the constitution.[72]

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[70] Cf. BVerfGE 27, 1, 6 (*Mikrozensus*); 45, 187, 228 (*Lebenslange Freiheitsstrafe*); 1, 144, 161 (*Fürsorge*). Cf. in general Ingo v. Münch in v. Münch ed., *Grundgesetzkommentar*, vol. 1, 2nd edition (München: C.H. Beck, 1981). Art. 1 GG para. 15 ff. The opposite view of McIntyre, J. in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 592 is not relevant here because it is only concerned with the interpretation of Art. 32 of the Constitution Act, 1982 and not with a more general concept of government.

[71] *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law which serves as Constitution). A translation and a short introduction can be found in Gisbert H. Flanz in Albert P. Blaunstein, Gisbert H. Flanz ed., *Constitutions of the Countries of the World*, vol. VI (Dobbs Ferry, N.Y.: Oceana Publications, looseleaf issued 1985) under "Germany, Federal Republic of".

[72] Generally as to the importance of Art. 20 GG and its application see BVerfGE 6, 32 and 20, 150. As to the binding force and application of the provisions of the GG on private law courts, see BVerfGE 35, 202, 219 (Lebach); 18, 85, 92 ff; 30, 173, 188 (Mephisto (Klaus Mann); 32, 311, 316 (ads for tomb stones). But see also BVerfG NJW 1979, 154, BVerfGE 50, 5, 14; 11, 263, 265, in which the Judicature is excluded from the term "*öffentliche Gewalt*" (public authority) in Art. 19 IV GG which guarantees a judicial reviewability of all acts of public authorities. The formula used: "Protection by, not against, the independent judge" is in my view quite weak, because again it merely restates the result without in fact giving an interpretation or construction of Art. 19 subs. IV GG.

This should be very much the same in Canada since the enactment of the Constitution Act, 1982[73]. The impact of this fundamental piece of Canadian legislation on private law and its administration is often veiled by the statement that it does not apply to the acts and relations of two private individuals.[74] While this statement based on Art. 32 of the Charter is certainly true and is even emphasized by McIntyre J.'s clear statement in *Dolphin Delivery* that judgments are acts of Courts and therefore neither acts of Parliament nor Government within the meaning of s. 32 (1) of the Charter[75], it does not mean that the impact of higher ranking consitutional rules can not touch the substantive common law which is, as all laws, subject to the paramountcy provision of Art. 52 of the Constitution Act, 1982. What this means is expressed in one of the rare clear portions of McIntyre, J's judgment in *Dolphin Delivery*:

> "[The answer to] the question whether the judiciary ought to apply and develop the principles of common law in a manner consistent with the fundamental values enshrined in the Constitution [...] must be in the affirmative."[76]

This will certainly have to lead to a reevaluation of many rules and might have an important impact on the application of private law in Canada.[77]

Private individuals can opt out of the application of the Charter by structuring their relationships accordingly but if they do not and rely on the rules

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[73] Schedule B to Canada Act 1982 (U.K.), c. 11.

[74] This is of course different than the human rights codes which, being on the same level as normal laws are also binding on private individuals See the discussion and references in Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 632 ff.

[75] *Supra*, note 70.

[76] *Id.* at 603b.

[77] Cf. e.g. a recent case which shows as an example how the Charter is dealt with in the interpretation of common law in an action for *consortium* and section 15 (1) of the Charter *Shkwarshnik v. Hansen* (1984), 30 C.C.L.T. 121, 34 Sask. R. 211, 12 C.R.R. (Q.B.) in interesting contrast with *Perdicaris v. Kuntz* (1985), 45 Sask. R. 78 (Q.B.).

offered by the common law, these rules have to and will be applied in a way that corresponds and tries to further the values set out by the Charter.

One of these values is laid down in Art. 15 which provides that substantially the same situations have to be treated equally. It might well be that this was already one part of the justification for the rule of *stare decisis*[78], but through the new rights that are considered to be paramount, the requirements of clearness and consistency have been greatly enhanced.[79]

Predictability and consistency, apart from furthering the acceptance of a legal system, also reduce costly and lengthy procedures. I would go so far as to say that only a predictable legal system can fulfill the task of laying down what law is designed to do. If both parties know what the decision will be, they are less prone to take legal action (or so the theory goes[80]).

These ideas force us to test the result found in one area and in one group of cases against the results and the treatment of other cases that involve the same sets of values and interests. Not only the same facts have to be decided in the same way, which is what the theory of *stare decisis* sets out, but also parallel i.e. comparable fact patterns have to be decided similarly.

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[78] Cf. with respect to the development and the justification of the rule, William Holdsworth, *A History of English Law* vol XII (London: Methuen, 1938) at 146 ff and in particular with respect to foreseeability at 159.

[79] A parallel development started in Germany after the enactment of the *Grundgesetz*. It began an infiltaration of its human rights articles into private law, especially into general clauses such as s. 242 BGB.

[80] In a system which, like the common law, refuses to include in the damage award or otherwise compensate for the full costs incurred by the action (lawyer's fees etc.), this statement might not be entirely true because litigation also serves as an intimidation device to force a compromise. Cf. on the situation in general, recently John Leubsdorf, "Recovering Attorney Fees as Damages" 38 Rutgers L. Rev. 439 (1986) who deals with the American situation and some comparative aspects. He also stresses the fact that the focus is in fact not on what the plaintiff lost but what the defendant has to pay, quite a departure from the principle of compensation indeed.

4.3.2. Comparability of "New for Old" Situations with those of Unsolicited Benefits

On this background, however, we can only derive an argument for the treatment of one group of cases from a solution found in another area of law if the areas involve generally the same issues. Law, and in particular the adjudication of law, is a process of discovering the countervailing rights, duties and interests, working out the parties' interests, values and beliefs and those of society and deciding the extent to which they appertain to two individuals. Analogies, as well as inconsistencies, can only be worked out in cases that are similar in terms of the interests involved.

To my mind, the interests in the new for old cases and in those involving unsolicited benefits, as represented by the arguments adduced by the parties, are quite comparable.

Compare our fact pattern stated at the beginning of this chapter and dealing with the burning of the barn with the following:

> Hypothetical Case 2
> in which D_2 is a person who, without consent and knowledge, (without contractual ties) repaired the barn knowing that it was not his.

The party benefited (A) will in both cases argue that he has an interest not to be forced to invest in a barn against his will. He might further assert the view that the barn might objectively be better than before. Therefore, economically it might well be more valuable, but for him (that is the subjective view) it is and was just a barn. All he wanted, or so his answer might be, was a place to store his old tools and for this purpose the building would not have to be nice, staunch or new. The last thing that he intended to do was to sell his land because he was convinced that it would rise in value within the next 30 years, although there is presently no sign of such future increase.

To sum up, the interests involved are:

- freedom to decide when and where to invest money;
- freedom to choose the people one is indebted to;[81]
- freedom to determine autonomously what is good for oneself;
- freedom to be free from benefits or so called benefits that are conferred by third persons, much as in cases of gifts.

On the other hand D_1 as well as D_2 will argue that of course they interfered with the things of A without being asked but this is not enough to outweigh their interests, namely:

- the interest not to allow anyone to keep a benefit that he (D) has paid for.

In both cases this latter contention is the classical unjust enrichment argument. Assets and value flow from one party to the other without the latter having a right to claim the benefit in the first place. Much as D_1 argues that the claim in damages can not constitute the justification for allowing A to keep the benefit, D_2 argues that the mere fact that he conferred a benefit without A's consent is not enough to deprive him of the money invested by cutting off the remedy to recover the benefit.

The preceding discussion was designed to determine the comparability of the two situtations. In my mind the interests involved are, at least in the cases in which the intermeddler knew that he had no right to act, so similar that the result in law should be the same.

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[81] This may not be an argument in common law since in the new for old cases an indebtedness is not created because the benefit is subtracted from the award. In German law, on the other hand, this is obviously an issue in the case of s. 249 subs. 1, in which the wrongdoer has to carry out the repairs or have the thing repaired. The benefit is then accounted for by a cross payment in much the same way as in normal unjust enrichment cases.

4.3.3. Treatment of the Unsolicited Helper

4.3.3.1. Common law

In the famous *Falcke* case[82], it was laid down as a general principle that improvements on someone else's property are legally irrelevant and do not as of themselves create any rights or obligations.

Bowen L.J. was quite clear on that point:

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure"[83]

And he continues:

> "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."[84]

Strangely enough, most legal systems seem to agree on the second part of the last sentence. For example, in the case of gifts many require a contract which provides the donee's acquiescence. We do not automatically presume the consent of

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[82] *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234. See for a treatment of the issues and further references:

in the U.K.: Robert Goff and Gareth Jones, *The Law of Restitution*, 2nd ed. (London: Sweet and Maxwell, 1978), chapter 15 and 16, p. 263 ff;

in Canada: George B. Klippert, *Unjust Enrichment* (Toronto: Butterworth, 1983) at 107 ff. and J.E. Bickenbach, "Unsolicited Benefits" 1981 U.W.O.L.Rev. 203.

in the US: George E. Palmer, *The Law of Restitution*, (Boston: Little, Brown , 1978) para. 10.

[83] *Id.*, at 248.

[84] *ibid.*

the donee.[85] But this unanimity does not apply to the first part of the above statement at all. Even under common law, which is quite orthodox and strict in not having a general theory of *negotiorum gestio*[86] and for a long time had none of unjust enrichment[87], the general application of the principle that "liabilities are not to be forced upon people behind their backs" is doubtful. We do find, however, in quite a number of instances a well-established tradition of recompensing helpers, as I want to call them, by stripping them of the stigma of being "intermeddlers" and "officious". There is nonetheless a long line of cases which, based on different grounds and on different fact patterns, treated intermeddlers less generously.[88]

The solution of the problem hinges on the reconciliation of a set of competing principles[89] and on answers to the following questions:

a) how does one determine what a benefit is;

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[85] Cf. ss. 516 to 534 BGB - although some special rules are to be found that can be accounted for on the basis that the donee is not to be protected too strictly because he is after all not losing anything and is not subject to any obligation.

[86] Although some writers try to make us believe that this is entirely civilian, common law jurisdictions know quite a few institutions that resemble it closely, for example *quantum meruit*, agency of necessity, in Admiralty the law of salvage, or even the general avarage. With their enactment in statutes these principles do not necessarily cease to be part of common law.

[87] I am well aware that restitution exists and that unjust enrichment is a term used in doctrine as well as by the courts to denote an independent basis of liability; cf. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 33 (H.L.), and in Canada in a situtation that is quite close to *negotiorum gestio*, *Deglman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725.

[88] *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers*, [1937] 1 K.B. 534 and see J.D. McCamus, "The Self-Serving Intermeddler and the Law of Restitution" (1976), 16 Osgoode Hall Law J. 515 for the law up to 1976.

[89] Cf. Bickenbach, *supra*, note 52 looks at these issues in the context of the related problem of unsolicited benefits and John Dawson, "The Self-Serving Intermeddler" (1974), 87 Harv. L. Rev. 1409 and John D. McCamus *supra*, note 88.

b) does one recognize the freedom to determine how, when and where to invest one's money;

c) How does one deal with the issue of unjust enrichment?

The answer to the first question hinges on the issue of how subjective we can or are prepared to be. It is closely linked to c) because it determines the factor of "enrichment", leaving only the issue of justification to be decided.

An oft-cited passage on the point reads:

"One cleans another's shoes. What can the other do but put them on?"[90]

It makes no difference whether the owner was sloppy or clean, a banker or a miner. Of course, one is inclined to say; "Too bad for the cleaner." Does he not also have to take his counterpart as he found him? I do not quite see what would be so "uncivilized"[91] about a legal system that treated such a case in this manner.

4.3.3.2. German law

In German law, the law of quasi-contract deals with the unsolicited helper in quite a detailed way. As lex specialis we find primary obligations arising out of the relationship that the possessor who improved the thing has against the owner (s. 926 ff, in particular s. 994 BGB). These prevent the *bona fide* possessor from claiming more than "necessary" expenses. In the same way, ss. 677 ff regulate the "management without mandate" (*Geschäftsführung ohne Auftrag*), which is the German translation of *negotiorum gestio* used in the BGB.

Both these sets of provisions lever out the general law of unjust enrichment, leaving us with the problem of interpreting what the factual

[90] Pollock, C.B. in *Taylor v. Laird* (1856), 25 L.J.Ex. 329 at 332.

[91] Bickenbach, *supra*, note 52 at 210 at the end and 211 at the beginning.

prerequisites are which lead to the operation of the provision and which part of the law of unjust enrichment it refers to.[92]

The term "benefit", as much as the term "damage" or "loss", is not at all onthological, i.e. not a reality outside the law. Although most lawyers feel uneasy about this and flee to economic analyses that permit them to retreat to the comforting illusion of mathematically determinable results, such an approach does not belong to the field of law but rather to the field of science. The issue is further complicated by the fact that the term "benefit", like many legal terms, has a "normal" or "natural" use. It has a core of meaning shared by everybody. While everybody agrees that smashing another's window creates a loss for the owner, and the receipt of $ 500 a gain, positions are not as clear cut for borderline cases. Even the question of how much of a loss the smashed window is becomes a major problem of evaluation. Is the loss the price of a new window or the loss in value of the house? This straightforward and somewhat mundane example permits us to evaluate and compare and then decide which policy is to be pursued.

The determination of which of the two persons should be preferred by being the subject of the initial focus, is elaborately shown in the German law of unjust enrichment and in the law of management without mandate. It clearly reveals its bias for the enriched party who does not know that he has no legal right to keep the benefit. If the enrichment has fallen away, or has been subsequently erased, then there is no duty to disgorge any benefits. This is not the only feature of the law which concentrates directly on the person who seems more worthy of protection. The person who could not know that he was enriched is undoubtedly, at least if we adopt the priorities given by German law, more worthy of protection than the one who caused the enrichment after it is erased without remains.

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[92] Lorenz in *Staudinger*, *supra*, note 62 s. 812 BGB preliminary note 25.

On the other hand, the German law, as do all civil law systems, provides for remedies for a helper who could *bona fide* think that what he did was in the interest of a third person. The foregoing is a clear evaluation contained in the German BGB. The subjective situation is made the measure of the award. The idea also surfaces in other provisions of the Code. For example improvements to things (land and chattels) are subject to the special rules found in ss. 985 ff and some cases are covered by the general rules of ss. 812 ff dealing with unjust enrichment. In Quebec, Art. 1043 ff C.c., and in particular Art. 1046 C.c., provide a more rudimentary regulation since they require that the business has to have been "*bien administré*"[93]. This is similar to the requirement of success in maritime salvage law which in turn has civil law roots.[94] Additional rules are found in the parts of the BGB dealing with the relationship between owners and the different forms of (*bona/mala fide*) possessors.

Without going into details, it suffices to state that traditionally, German law and all other civil law systems allow the manager of someone's affairs to recoup at least expenses.

The example with the cleaned shoe is not solved by merely stressing that there is no choice for the owner. Civil law systems generally adopt an attitude favourable to the intermeddler and allow the recouping of money for a benefit which is objectively held to be useful.

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[93] "He whose business has been well managed is bound [...] to indemnify [...]."

[94] Cf. Reginald G. Marsden, *The Law of Collision at Sea*, 11th ed. Kenneth C. McGuffie (London: Stevens, 1961, pocket supplement 1973) at 522 ff.

4.3.4. Differences in Basic Legal Traditions

An analysis of the situation of the intermeddler reveals that, traditionally, the person who intervened in another's affair was shown more hostility by common law than by civil law.

Following and developing remedies offered by Roman law, all civil law countries traditionally retained or adopted, in one form or another, the idea that someone who, without having received a request, managed the affairs of another should, if he reasonably thought that his actions were in the interest of the "principal", have a right to do so and in addition be entitled to compensation for his effort. In most cases this boils down to compensation for his expenses. This idea of *negotiorum gestio*[95] seems to be so deeply rooted in the minds of people living in this tradition that in certain cases, the sense of community goes so far as to impose an obligation on everybody to help in cases of emergency. This "duty to intermeddle" is often enforced through criminal sanctions.[96]

In common law, however, Bowen L.J's. words, cited above in the *Falcke* case,[97] were always taken quite seriously. Occasional attempts to help the

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[95] This term will be retained because it is most widely used although the term *negotia gesta* is used in D.3, 5; C.2, 18 sometimes it is *negotium gestum*; cf. a general description in Max Kaser, *Das Römische Privatrecht, Erster Abschnitt* (München: C.H. Beck, 1971) p. 586 ff.

[96] This is the case in Germany, see 330c StGB (*Strafgesetzbuch* = Criminal Code). See for a quite superficial analysis which is restricted to the cases of saving someone's life, which are dealt with diffferently even in common law, John P. Dawson, "Rewards for the Rescue of Human Life" in *XXth Century Comparative and Conflicts of Law*, Legal Essays in Honor of Hessel E. Yntema, (Leyden: A.W. Sythoff, 1961), 142.

[97] *Supra*, note 84.

intermeddler in certain circumstances, such as in the rare cases of agency of necessity[98], can be observed.

In these cases of agency of necessity, a preexisting relationship (originally one of master of the ship and her owner) is expanded to enable someone to act as an agent in cases of emergency. Originally restricted to the carriage of goods by sea, where the agent was able to recoup reasonable expenses[99], the doctrine crossed the boundaries and became one generally applicable in common law.[100]

Although it is very much akin to *negotiorum gestio* and serves to close a gap in the system between contract and tort, the ambit of its application as well as the construction of the rights involved are quite different. The preexisting relationship that is required comes very close to a mandatory rule of interpretation of an existing agency relationship, a kind of *prima facie* rule that an agent in cases of emergency will generally be allowed to go further than his agency expressly or impliedly permits him normally to do, in a way that is legally binding for his principal. The legal basis would then still be consensual as is expressed by Atkin L.J. in *Poland v. John Parr & Sons*:

> "[...] a servant may be impliedly authorized in an emergency to do an act different in kind from the class of acts which he is expressly authorized to do" (emphasis added)"[101]

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[98] Walter B. Williston, "Agency of Necessity" (1945), 22 Can. Bar. Rev. 492.

[99] *Tetley v. British Trade Corporation* (1922), 10 Lloyd's Rep. 678, Pollock, B. in *Great Northern Railway v. Swaffield*, (1874) L.R. 9 Ex 132.

[100] Scrutton, L.J. in *Jebara v. Ottoman Bank*, [1927] 2 K.B. 254, *Sachs v. Miklos*, [1948] 2 K.B. 23.

[101] *Poland v. John Parr & Sons*, [1927] 1 K.B. 236, 244 although it can be argued that this qualification is the result and effect of the fear expressed by Scrutton, L.J. in the *Ottman* case, *supra*, note 100 at 270 that the principles might be applied beyond the limits.

In this case, an employee on his way home thought that a boy wanted to steal from his employer's wagon which was laden with sugar bags. The employee gave the boy a blow with his hand. The boy fell and was injured by the wheel of the wagon. This is arguably quite a different situation from the ones in which the agency of necessity was originally used. Here it was used to shift the burden for wrongful acts committed in connection with employment and for the benefit of the employer.

It is still difficult, if not impossible, to apply this argument in cases of interventions of strangers. This shows that the actual reason for the compensation is still to be found in the relationship that was already established between the agent and the principal before the act occurred.

In quite a similar way, the law of salvage, although expanded on by the courts well beyond the scope it originally had, does not find general application in common law outside the jurisdiction of the Admiralty courts.[102]

The general aversion against granting remuneration in instances of third party intervention, as spelled out in *Falcke's* case, is therefore prevalent in common law.[103]

Clearly, common law is not willing to impose the inconveniences of recompense.[104] It thereby reveals a strong bias for the freedom to choose how and where to spend money and the freedom to choose the persons to whom one is indebted. This choice in favour of freedom is accompanied quite consistently by the recognition that it discourages the helping stranger from intervening or "intermeddling". The emphasis is on minding one's own business and this is clearly

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[102] Goff and Jones *supra*, note 82 at 269 in particular footnote 54.

[103] In the United States those jurisdictions which follow the Restatement of Restitution s. 117 have overcome this view.

[104] Goff and Jones *supra*, note 82 at 270.

another policy decision behind the law. This decision can be linked to a traditionally more absolute protection of property as the basis of economic freedom in common law.

The foregoing idea can be traced through common law as easily as the attempt to encourage help and a sense of community is apparent in German law as well as in the civil law of most western societies. The most extreme example is a duty to help a stranger in distress. This duty is enacted in s. 323 c (formerly s. 330a) of the German penal code (*Strafgesetzbuch*) which reads:

> **Paragraph 323c StGB Unterlassene Hilfeleistung**
> *Wer bei Unglücksfällen oder gemeiner Gefahr oder Not nicht Hilfe leistet, obwohl dies erforderlich und ihm den Umständen nach zuzumuten, insbesondere ohne erhebliche eigene Gefahr und ohne Verletzung anderer wichtiger Pflichten möglich ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.*[105]
> **[Section 323c Penal Code Omission to offer help**
> Whoever, in a case of an accident or a general emergency or danger, does not render help, although this was required and reasonably to be expected of him, in particular when to do so would not place him in any considerable danger and is possible without neglecting other important duties, is punishable with up to one year in jail or with a fine.]

Any equivalent rule to that cited above is absent from the common law and from the Canadian Criminal Code.[106]

The Province of Quebec can be cited in support of my suggestion concerning the differences in legal culture. Undoubtedly a civil law jurisdiction, at least in the area of private law, Article 2 of the *Charte des Droits et libertés de la personne* of Quebec contains the precise provision that is missing in common law Canada:

> *"Tout être humain dont la vie est en péril a droit au secours. Toute personne doit porter secours à celui dont la vie est en péril, personnellement ou en obtenant du secours, en lui apportant l'aide physique nécessaire et immédiate,*

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[105] Cf. in English Dawson, *supra*, note 96. In German see, Eduard Dreher and Herbert Tröndle, *Strafgesetzbuch und Nebengesetze*,, 40th ed. (München: C.H. Beck, 1981) s. 323c StGB para 1ff.

[106] *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

à moins d'un risque pour elle ou pour les tiers ou d'un autre motif raisonnable."[107]

Only in extreme cases in which health or life are endangered does common law start to be more lenient and permit compensation for third parties who have intervened. Goff and Jones[108] suggest that under these circumstances, we should follow the civil law rule which allows recovery, even if the intervention was without success. This view was in fact taken by the Manitoba Court of Appeal in *Matheson v. Smiley*[109], in which the estate of a deceased who had committed suicide was required to compensate a doctor for his unsuccessful attempts to rescue the deceased. Their adoption of a civil law principle goes so far that they even follow Ulpian in D. 3.5.4 (*nisi donandi animo fideiussit* [unless he intended to make a gift (of his services)]) in that the onus of proof of the intent of gratuitousness is placed on the "principal".

Although there are some rare and singular cases in which common law courts have tried to help the "intermeddler" in a way analogous to civil law, there is no general movement to depart from *Falcke's* case. Goff and Jones may regret this situation [110] but the fact remains, as they admit, that no such doctrine is on the verge of developing.

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[107] L.R.Q., chap. C-12; 1978, chap. 7; 1978, chap 63; 1980, chap. 11 et 39; 1982, chap 17 et 61. This provision can lead to quite interesting results in that it may change the uniformity aimed at in criminal law if the interpretation given by the Court of Appeal of Quebec to the term "law" in art. 202(2) C.Cr. in *St-Germain, v. R.*, [1976] C.A. 185 (Que.C.A.) is followed.

[108] *Supra*, note 82 at 272 f.

[109] (1932), 40 Man. R. 247, [1932] 2 D.L.R. 787. Cf. *Soldiers' Memorial Hospital v. Sanford*, [1934] 2 D.L.R. 334 (N.S.C.A.).

[110] *Supra*, note 82 at 278 and 279.

4.4. Conclusion

In concluding this chapter which dealt with the differences in treatment of the deductions for "new for old", it is submitted that this difference can be attributed to different basic evaluations and priorities in the two legal systems. The difference we witnessed in the treatment of the "intermeddler" and of the "new for old" problem are actually two sides of the same coin.

The evaluation of different interests and the giving of priority to one or the other is part of a legal tradition. Legal tradition is to my mind heavily underestimated as the reason for differences in legal systems. What is meant by the term "legal tradition" is a shared set of basically common priorities and intuitive solutions in the relevant circles. These circles consist mainly, but not exclusively, of lawyers. In areas which are more loaded with moral or ethical content such as family law, divorce law, criminal law and probably constitutional law, this is much more obvious. I think, however, that even in areas which at first glance appear quite "objective" or value neutral, legal tradition has an extensive, although probably often subconscious, impact on our thinking.

This impact surfaces in the cases presented in the last two chapters and accounts for the different roads taken by the judiciary. The differences in bias and the emphasizing of opposing aspects in the area of the intermeddler are part of this legal tradition. A consistent application of the bias will and should logically lead to similar results on the new for old level.

The different concept of freedom prevalent in the common law resulted not only in differences readily observable in the treatment of property by the constitutional law of common law countries, but also inevitably leads to differences in the treatment of that same concept in the domain of private law. Some of the aspects of this treatment were discussed above. Consistency of evaluation in

accordance with the prevailing legal tradition is probably generally what turns a set of rules into a legal system or a legal order. In that respect, the differences seem understandable and even inevitable.

The new for old and the intermeddler cases involve the same clashing interests. What we saw in chapter 3 and 4 is in fact the expression of the fact that in both systems, values are applied consistently, this consistency being, as I have said before, the cornerstone of a notion of justice.

Comparative law is a tool enabling us to detect such links and traditions and to empirically test the validity of the connections found.

If we accept this view we will also have to accept that changes in the legal tradition, judicially triggered or generated by changes in the value system as determined by the legislature and the convictions of society, can and should lead to the change of all the areas connected by the relevant set of evaluations. In our case this could mean that a change in the law of the "intermeddler" would have repercussions on the treatment of the new for old problem. A change in the concept of private law freedom through the development of the remedy of restitution or a mechanism similar to *negotiorum gestio* would, in the process of becoming part of the legal culture and tradition of common law, eventually exert pressure for changes in the treatment of the new for old problem.

Chapter 5

CONCLUSION

5. Chapter 5: Conclusion

In preparing a comparative study we inevitably come to a point where we question ourselves about the reasons for the exercise and the method we are using. Therefore, instead of repeating the summaries already given, let me devote the conclusion to some remarks concerning the comparative method.

The classic use of comparative law and probably the one that gave rise to a more widespread interest in other legal systems was legislative comparative law. The idea of using examples given by other legal systems for the enactment of one's own legislation is illustrated and reflected by names like the "*Revue de Droit International et de Législation Comparé*" in Belgium, Foelix's "*Revue étrangère de législation*" or "*Société de législation comparée*".[1]

It is hard to rid ourselves from the impression that this use of comparative law comes quite close to the public acknowledgement of one's own lack of imagination. Still, we can probably acknowledge that it at least facilitates the finding of new and unusual solutions and that it is a normal reaction to the fact that legal research has as a result of its nature and of its object very little opportunity for clinical testing or empirical research by way of experiments. This would still not justify the use of the comparative method in a purely academic environment without a view to the enactment of new laws.

What then is the use of comparative law?

In German, the term comparative law is "*Rechtsvergleichung*". This means "comparison of laws" - and therefore denotes more a method or action than a discipline or branch of law. The expression "comparative law", on the other hand suggests that we are dealing with a discipline or field of law much like

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[1] This list is not exhaustive cf. also the "*Office de législation étrangère et de droit international*" which was founded in 1867 in Paris.

administrative law, private law or labour law to name a few which are all well defined by the subject matter involved.[2]

I may be influenced by my German legal upbringing, but the conclusion I draw from the foregoing chapters is that the concept of comparative law as expressed in the term comparative law is actually a misnomer.

Once we agree to reject a naturalist view that there is law out there which may be found by a comparative extrapolation of existing legal orders, we end up in a vacuum. It would then appear that the comparing of laws is superficial or at best academic, in the sense that it is not done with a view to achieve a further objective.

I tend to believe that this is what German comparative law, and maybe less obviously the discipline at large, has been suffering from for quite some time and more extremely so in the last years. Although the interest in other legal systems is rising and the number of publications with a comparative content is increasing it seems that most of them satisfy themselves with an "accountant's approach" towards comparative law. The attitude is the one of collectors of rare species of butterflies who are more concerned about the size of their collection than about studying the animals while in their natural environment. Many comparative law institutes turn out huge compilations containing quite superficial overviews of tiny areas of law as well as of the law in general. The development of a coherent overview (or "*Zusammenschau*") too often degenerates into a bird's eye view of the legal map, often because the writer is not acquainted enough with or willing to dive into the legal systems and institutions compiled by others which he is supposed to compare. Much like butterflies, the legal systems in the compilations seem safely stored under glass tucked away with a pin through their hearts.

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[2] The idea behind the German term is also expressed by the name chosen for "*L'Association Québecoise pour l'étude comparative du droit*".

I believe this is nothing more than complacent, self-centered *l'art pour l'art*.

There must be an underlying purpose to justify the writing on a subject as well as the use of a method. The exercise of writing might be an end in itself (for example to acquire an academic degree) but other than in these instances, in my view there is only one other purpose which justifies the comparative method. This justification is the teaching of law.

As a pedagogical device which includes the use of the method in order to facilitate the discussion of problematic parts in a legal system, comparative law has its place. As a matter of fact, it has always been used for this purpose. Arguments *de lege ferenda*, constantly used in legal writing as well as in the classrooms, is only another guise for a comparative analysis. If we substitute the foreign law with the solution found *de lege ferenda*, we have the paradigm of a comparative argument.

This study and its use of the comparative method should be understood against this background. It is hoped that this comparison has helped both author and reader to learn about connections we subconsciously make, but do not account for consciously. It was not intended to evaluate the quality of solutions offered by either legal system. Comparative law was therefore understood more as a pedagogical device than as a legal discipline.

I therefore find it appropriate that this thesis be submitted to an Institute which was originally designed to be the "midwife" for a Canadian National Program in law, a program which was also created to further comparative law as a teaching method in a jurisdiction so marked by often inadvertent and unconscious undercurrents from different directions.