A BALANCING OF INTERESTS
THE PROBLEM OF RES INTER ALIOS ACTA.

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A question which is becoming increasingly important in the realm of the law relating to damages, involves the effect on the award of damages in personal injuries cases, of collateral source payments made to the plaintiff by some third party such as the plaintiff's employer, relatives, patron (if he has one), or even some complete stranger guided by charitable or philanthropic motives. Such persons may meet the medical or other expenses incurred by the injured plaintiff, and the question then arises whether or not the plaintiff is debarred from recovering the self-same expenses from the wrongdoer. When the defendant points to the collateral payment already made to the plaintiff, is it open to the latter to plead that the payment is res inter alios acta (a private matter purely between himself and the third party), and accordingly irrelevant in the assessment of damages ? The importance of the problem is noticeable when one considers the wide range of insurance coverage (some compulsory), and the institution by certain concerns of compensatory schemes for the benefit of injured employees.

It is also proposed, in this essay, to deal with the problem of set-off, which is closely allied to collatoral source payments. The same principles may be applicable to both problems in analysing their effect on the award of damages, but, for the purposes of clarity, they will be dealt with seperately.

The question of the effect of collateral source payments is a moral as well as a legal one, as it necessarily involves matters of principle as well as logic. It is suggested, as a general rule, (for use as a starting-point), that where a plaintiff has had medical treatment or other service rendered to him by third parties, he should (with the exception of national insurance or health service assistance) be able to recover these expenses from the wrongdoer in full. The generosity of others, being a personal matter between them and the plaintiff, is not something from which the wrongdoer should reap the benefit, and, on principle, it would seem unsound to divert such gifts to him. The benefactor's action does not make the natural loss suffered by the plaintiff and attributable to the-defendant, any the less.

Admittedly, damages for financial loss are assessed on an indemnity basis, with the object of giving compensation in money for the actual loss which the plaintiff has sustained or will sustain. It appears from British Transport Commission v. Gourley (1) that the Courts will try to place the injured person in the same financial position as he would have been, had the accident not occurred. If one is to take the ultimate net loss as the measure of damages, gratuitous payments to the plaintiff should be taken into account. But it must be remembered that in most of the cases where the plaintiff's expenses are met by third parties, the plaintiff will generally be under a moral, and sometimes even a legal, obligation to repay them. In Gourley's case, the House of Lords felt the important question to be whether the

(1) [1956] A.C. 185.

benefit that might accrue indirectly to the plaintiff as a result of the accident was a matter too remote to be taken into consideration. Lord Reid felt it was impossible to formulate any general principle on which it could be decided what was and what was not too remote (2). He did, however, favour as a general description that given in Mayne on Damages (11th ed.) at p. 151: "a matter completely collateral".

In view, of the absence, as yet, of any authorative judicial pronouncement setting out the principles applicable to collateral source payments, it may be useful to consider the mere common fact situations in which the question can arise.

Possibly the most likely type of case is where assistance is given by relatives, and on the authorities there seems to be no reason why tortfeasor should benefit from the services rendered by them. Furthermore if the plaintiff did recover damages, he would be morally obliged to repay the relatives. As was said by Greer L. J. in Roach v. Yates (3) "he would naturally feel that he ought to compensate them for their extra work". In that case the plaintiff, who had become a helpless invalid as a result of the injury, recovered substantial damages for the prospective cost of nursing attendance, although he was already receiving this gratuitously from his wife and sister-in-law who had given up paid work to care for him. (This last point strengthened the plaintiff's moral obligation to repay.)

In Schneider v. Eisovitch (4) the relatives of the plaintiff had incurred considerable expense in assisting her back home from France. Paull J. stated as a condition for the recovery of such expenses, that the plaintiff must undertake to pay to the friend or friends, the sum awarded as damages. This condition could be satisfied by virtue of the decisions in Allen v. Waters (5) and Dennis v. London Passenger Transport Board (6) to the effect that the Court has power to direct that the amount awarded, when received by the plaintiff, must be handed over to the benefactor. In Gage v. King (7) Diplock J. refused recovery of the plaintiff wife's medical expenses where these had been paid by her husband. The case, however, is a special one turning on a husband-wife relationship. It is distinguishable from Schneider v. Eisovitch (supra.) in that the benefactor, as the plaintiff's husband, was himself under a legal obligation to pay the expenses.

In Liffen v. Watson (8) the plaintiff, a domestic servant, was unable, after the accident, to continue her employment in which she had received £1 per week as wages, plus board and lodging. After the accident she went to live with her father, to whom she made no payment for the board and lodging he supplied. The Court of Appeal held that she had actually suffered the loss of board and lodging and was entitled to recover for it. It was irrelevant that she was receiving free board from her father. A different approach was taken by Sholl J. in Johns v. Prunnell (9) but it is submitted that the case is distinguishable from Liffen v. Watson. The plaintiff was injured, by the negligence of the defendant, whilst in the employment of

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(2) Ibid. at pp. 212-5.
(3) [1938] 1 K.B. 256, 263.
(4) [1962] 2 Q.B. 430
(5) [1935] 1 K.B. 200
(6) [1948] 1 All. E.R. 779
(7) [1960] 3 W.L.R. 460
(8) [1940] 1 K.B. 556
(9) [1960] V.R. 208

his father with whom he had an agreement that he would work for £10 per week with his keep. During his period of incapacity, the plaintiff continued to live with his father who continued to provide him with his keep. It was held that the plaintiff had not suffered any loss in respect of his keep, and was thus not entitled to any compensation under this head. Sholl J. felt that the law, in deciding which items the plaintiff is to be debited with, "... has declined to mitigate the burden on the wrongdoer by crediting him and debiting the plaintiff with matter completely collateral and merely res inter alios acta". However, he distinguished the case from Liffen v. Watson. There, the plaintiff undoubtedly failed to earn and receive keep from her employer. Here, however, the father never ceased to provide keep either before or after the accident.

A further relevant case is Cusack v. Heath (10) where the plaintiff's motor car was damaged in an accident, and her parents voluntarily paid the cost of repairing it. She was nevertheless held entitled to recover the cost of the repairs as damages against the person responsible for the accident.

The authorities would thus seem to support some degree of recovery by the plaintiff, even where the expenses have been met by collateral payments from relatives. It must be remembered that there will, in the great majority of these cases, be a strong degree of connection and dependance between the plaintiff and the third party. Furthermore, it is by no means an unreasonable assumption that the plaintiff, especially if his original injuries are likely to affect him for a long period of time, would be anxious to fulfil any obligation he may have to reimburse relatives or friends, not merely as an expression of gratitude, but also for the purposes of ensuring their continued support in the future.

The second type of situation in which one if faced with the problem of collateral source payments, is where the plaintiff's expenses are paid by his employer. Here again, there seems to be no reason why a tortfeasor should benefit from the generosity or contractual obligation (as the case may be) of this third party.

Support for the plaintiff's right to recover in such cases, lies in the fact that the Courts have negatived the right of the employer to recover directly from the tortfeasor in quasi-contract. (Monmouthshire County Council v. Smith (11) and Metropolitan Police Receiver v. Croydon Corporation (12).) This strengthens the presumption that the plaintiff will be morally obliged to reimburse the employer. In Dennis v. London Passenger Transport Board (supra.), the plaintiff, while disabled, had received a pension and sick pay from the Ministry of Pensions and his employers, amounts which equalled his wages. Both payers expected the plaintiff to be morally bound to refund the amount to them if he recovered compensation from the defendant, but he was under no obligation to do so. Denning J. (as he then was) held that there should be no reduction in damages, but he directed that the plaintiff should refund the amounts out of the damages he had recovered. However, even if the benefactors had not expected any repayment, so as not to allow such Court direction, it would seem that on principle there should still be no reduction in damages. Recompense

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(10) (1950) 44 Q.J.P.R. 88
(11) [1957] 2 Q.B. 154
(12) [1957] 2 Q.B. 154

to employers should depend on the plaintiff's conscience.

In Wolland v. Majorhazi (13) the plaintiff's employers continued to pay him his wages during his incapacity, but required him to undertake to refund the money, upon recovering compensation from the defendant. The Supreme Court held that the defendant's liability for the plaintiff's loss of wages, was unaffected by the payments made by his employers. The plaintiff, there, was under a legal obligation to repay his benefactors.

The position has been clarified, to some extent, by the recent Court of Appeal decision in Browning v. War Office (14). Lord Denning M.R. took it as established that where the plaintiff is paid his wages, as of right, by his employer during his incapacity, he cannot claim the self-same wages again from the tortfeasor. A reduction must be made in the damages. Nevertheless, there would still appear to remain the distinction in the cases where payment, whether by an employer or by some third party, is made to the plaintiff not under any contractual or statutory obligation, but gratuitously. Also, in Browning's case, all three members of the Court held that the damages will not be reduced by reason of charitable gifts made to the plaintiff.

The distinction in Browning's case between a moral and a legal obligation to repay, appears to apply also to disability pensions, following the decision in Carroll v. Hooper (15). The amount of the pension must be taken into account in assessing damages if the payment of it is obligatory, but may be disregarded if it is discretionary. Thus, on the authorities concerning collateral payments by employers, the position would appear to be that where there can be inferred a legal or moral obligation to repay the employer on the part of the plaintiff, the latter can still recover the expenses from the defendant. The problem of inference could hardly be met by any general principles, and it would seem that each case must necessarily turn on its own facts, in determining whether an inference has been established.

Expenses which have been paid for the plaintiff by a charitable fund raised to assist the victims of an accident, have also been held recoverable by him from the defendant, even though here, there may be no moral obligation to refund them. In Redpath v. Belfast and County Down Railway (16), Andrews L.C.J. felt that the generosity of the public or other donor is an independent factor which has arisen subsequently, and that in such a case, it would be wrong to allow such generosity to relieve the wrongdoer. He said at P.175 : "The possibility of such a fund being formed is a contingency altogether too remote to enter into the calculation and assessment of damages".

At this point, it may be possible to submit a test of expectation, in deciding whether or not a collateral payment is too remote. Without becoming inextricably en entangled in a web of psychology, one might consider the state of the plaintiff's mind, and ask whether he could reasonably be expected to have foreseen the possibility of voluntary assistances being rendered to him. If he could have foreseen it, a court

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(13) [1959] N.Z.L.R. 433
(14) [1963] 1 Q.B. 750
(15) [1964] 1 All E.R. 845
(16) [1947] N.I. 167

may be more reluctant to regard the payment as too remote a contingency. On the facts, this consideration could well have been at the root of the different results reached in Liffen v. Watson (supra.) and Johns v. Prunnell (supra.).

In view of the lack of relevant English or New Zealand decisions on voluntary collateral source payments, it may be of assistance to consider the American Courts' approach to the problem. In Corpus Juris Secundum (Vol. 25), the general rule is stated that compensation or indemnity for the law, received by the plaintiff, from a collateral source, wholly independent of the wrongdoer, cannot be set by the latter in mitigation or reduction of the damages. Sprinkle v. Davis (17) is cited as authority. According to some authorities, the rule applies to payment of salary and expenses. The wrongdoer cannot set up the plaintiff's insurance in mitigation of the loss. Also, damages cannot be reduced where the plaintiff has received or is entitled to compensation or benefits under the Workmen's Compensation Act, the Federal Vocational Rehabilitation Act, or the Federal Employees Compensation Act; nor where he is entitled to or receives compensation out of a pension fund.

In Donoghue v. Holyoke St. Railway Co. (18) a fireman brought an action for injuries suffered. Evidence that he had been paid by the city while disabled was excluded. There was no indication that the payments were made as of right, and not under some rule or regulation by which payment was discretionary. It could not be assumed that the plaintiff had a right to demand payment.

In Hayes v. Morris and Co. (19) a traffic policeman brought an action for injuries received when the defendant's horse fell on him. It was held that the fact that the city paid his wages, or an equal amount, as a gratuity, during his incapacity, was not available to the defendant in mitigation of damages as a partial compensation for the injury.

The American Courts' attitude to collateral source payments, would thus appear to be similar to that of the English Courts. Less emphasis, however, seems to be placed on the test of a legal or moral obligation on the plaintiff to repay, and it is open to argument that a test of remoteness might be preferred. As the latter test is of more general application, there would be a greater burden on the wrongdoer. It would be easier for a plaintiff to show that a certain matter was too remote, than to prove that he had a legal or moral obligation to repay. A wrongdoer would probably be likely to be debited with more items than he would be under the English system.

It would thus seem that where a plaintiff elects to raise a plea of res inter alios acta, there are two courses open to him. Either, he can argue that the collateral source payment is a private matter between himself and the third party, and too remote to be used by the defendant in the reduction of damages, or alternatively, that he is under a legal or moral obligation to reimburse the benefactor. It is submitted that, in the present state of the English authorities, the defendant would

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(17) C.C.A. Va. 111 F 2d 925, 128 A.L.R. 1101
(18) 141 N.E. 278
(19) 119 A. 901

be more likely to succeed on the second method, the difficulty being, though, to overcome any problems of inference which may arise. The first method would appear to depend largely on the circumstances in each individual case. Considerations, it is submitted, to which a Court would be likely to attach weight are :

(i) The particular relationship between the plaintiff and the third party,

(ii) The plaintiff's physical and material position at the time of the action. (he may be depending on further assistance from the third party and desire to ensure this by recompensing him),

(iii) Any element of foreseeability in the plaintiff's mind, of the possibility of collateral aid.

The second matter involves considering whether the defendant can raise the plea that there should be set off against the award of damages, profits which the plaintiff may have made indirectly as a consequence of the defendant's wrongful act. This recoupment of the plaintiff's loss may have been a completely unexpected happening, or it may have occurred as a result of the plaintiff's own ingenuity or thrift. The indirect effect of the defendant's wrongful act may have been such as to bring about a state of affairs that neither party could have anticipated beforehand, so that the end result is to place the plaintiff in just as good as, if not a better position then he was in before. For instance, A, the manufacturer of a certain product which was enjoying limited success on the market, chiefly through lack of publicity, is seriously injured by the negligence of the defendant, B. A has to undergo considerable medical treatment, the success of which represents a major advance in medicine. The consequent publicity of this event, and the association of A's name with it, have the effect of producing a phenomenal increase in the sale of A's product, the profits from which are more than enough to cover the cost of his medical treatment. The question which then arises is, to what extent can B use this to his advantage. Should A be debarred from recovering his medical expenses from B ? Once again legal and moral principle are entwined in the issue.

The Courts have generally been guided by practical considerations in determining which matters are or are not too collateral to be used in the reduction of damages. Lord Denning M.R. in Browning v. War Office (20) said at p. 1091 : "The award of damages is made to compensate (the plaintiff), not to punish the wrongdoer. That is now settled by British Transport Commission v. Gourley. He should therefore give credit for all sums which he receives in dimunitica of his loss, save in so far as it would not be fair or just to require him to do so". The difficulty is thus to know when it would be 'fair or just' to require him to credit the defendant with moneys he has received by allowing the defendant a set-off against damages in respect of them.

(The American position here, is that nominal damages may be recovered even though the wrong has resulted in a benefit to the plaintiff. Ordinarily, in such a case, the plaintiff is limited to such a recovery : Kimble v. Laguarde (21).)

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(20) [1962] 3 All E.R. 1089
(21) L.A. App. 396

On the authorities and as a matter of principle it would seem that the wrongdoer is not entitled to have his damages reduced where the benefit accruing to the plaintiff, is the result of the latter's own thrift, such as an insurance policy.

In Johns v. Prunell (22) Sholl J. said at P.211 : "In general the law seems to have endeavoured to form a kind of moral judgement as to whether it is fair and reasonable that the defendant should have the advantage of something which has accrued to the plaintiff by way of recoupement or other benefit, as a result of the defendant's infringement of the plaintiff's right".

Thus, accident insurance moneys payable to the plaintiff, cannot be used as a set-off by the defendant, as this would give him the benefit of an indemnity for which the plaintiff, and not he, had paid. In Bradburn v. Great Western Railway Co. (23) Pigott B. said : "There is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons by which he has bargained for the payment of a sum of money in the event of an accident happening to him". It is because of the contract, not the accident, that the benefit has accrued to him.

A useful illustration of the Court's reluctance to allow damages to be off-set by matters which are too collateral, is provided by the Court of Appeal in Shearman v. Folland (24). Ordinary living expenses can generally be set-off against damages; in this case, however, the plaintiff was required to live in a nursing-home, thereby ceasing to incur her own particular living expenses, which, in the circumstances, were well above the average cost of living. The Court refused to allow the seven guineas a week, the plaintiff would normally have spent in expensive accommodation, to be set-off against the twelve guineas a week nursing-home fees. Asquith L. J. said at P. 50 : "The precise style in which she would probably or might well have lived, is, in our view, a collateral matter, and the two payments are not in pari materia".

On the defendant's argument there, a millionaire accustomed to live in regal luxury could recover no such special damages, as he could be said to have benefited by living more economically in a nursing-home. Thus, in deciding what is fair and just to credit the defendant with, the Courts will not go to such an extent as to reach an incongruous result.

In Philips v. London and S. W. Railway (25) the plaintiff brought an action against the railway company for personal injuries sustained, including in his claim the loss he had suffered through his inability to continue a lucrative professional practice. The Court refused to uphold the defendant's contention that, in estimating the plaintiff's pecuniary loss, his independent income ought to be taken into account. Cotton L. J. said at P. 294 : "I cannot agree to that. The fact that he has an independent income does not make the plaintiff's pecuniary loss less.... I need only say as to the present case that in estimating the pecuniary loss, the independent income of the plaintiff is not to be taken as a kind of set-off so as to reduce the amount the jury would otherwise award".

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(22) [1960] V.R. 208
(23) (1874) L.R. 10 Ex., 1.
(24) [1950] 2 K.B. 43
(25) (1879) 5 C.P.D. 280

Similarly in Shiels v. Cruickshank (26) where a widow brought an action in respect of her husband's death, due to the defendents negligence; it was held not permissible to inquire into the amount of the widow's estate, and consider whether her own private income, which she enjoyed before her husband's death, and continued to enjoy after it, will enable her to maintain herself in future. The defendant argued that, in assessing damages, the Court should take into account that the widow had "a substantial private fortune available for her support". The Court held it was quite irrelevant.

A further useful illustration of this tendency, is shown in the practice relating to the award of damages in divorce cases. In Butterworth v. Butterworth (27) where the husband's petition was based on his wife's adultery, it was held that the financial means of the co-respondent were irrelevant in the assessment of damages. McCardie J. said at P. 147 : "In such a case the damages, as a matter of strict law, should be neither greater nor less as the co-respondent happens to be a rich man or a poor man. A poor man cannot, by the plea of poverty escape for the actual injury he has caused. A rich man should not, merely because he is a rich man, be compelled to pay more than proper compensation to a husband".

In pleading a set-off, the defendant is, in effect, saying that the damages he pays should be less, as the plaintiff has already privately compensated himself, by means of some unexpected contingency. However it is submitted that it is a strained conclusion to contend that de facto recoupement of the plaintiff's loss whether accidental or charitable, should be used to the defendant's advantage by debiting the plaintiff with it. As a matter of principle it would appear unsound that he should profit from some contingency which unexpectedly arises.

Thus, in Liffen v. Liffen v. Watson (supra.) where the plaintiff's father happened to provide free board, the defendant was nevertheless not entitled to have the plaintiff's free board and lodging set-off against the board and lodging she had lost.

In Jebsen and others v. East and West India Dock Co. (28) the plaintiffs sued the defendants, who had detained the plaintiffs' ship in their dock, for the loss of the use of the ship, and the loss of passage-moneys payable by certain immigrants who were to have travelled in her. It was held that the shipowners who had lost money by the delaying of their ship, were not obliged to give credit to the defendants, for the profit made by several of them, when some of the passengers who had cancelled their passages in the delayed ship, booked on another ship in which several of the plaintiff shipowners also held shares. The defendants contended that these profits recouped should be set-off against damages, on the ground that the amount which the plaintiffs were collectively entitled to recover, should be the aggregate of the damage which each had sustained individually. The Court refused to allow a set-off against damages, and expressed the opinion that the absence of any authority supporting such a claim, was a strong presumption against its having any legal foundation.

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(26) [1953] 1 W.L.R. 553
(27) [1920] P. 126
(28) (1875) L.R. 10 C.P. 300

In Edmund Hancock (1929) Ltd. v. 'Ernesto' (Owners) (29) the plaintiff's tug was damaged while towing the defendant's steamship. The defendants were liable under the conditions of towage but disputed the quantum of damages. The repairs to the tug occupied three days, during which time the crews wages were paid, and the boiler furnace kept burning. The plaintiffs admitted that such expenses would have been incurred whether or not the tug had been detained in the dock, and that there would have been no work for the tug even it it had been available. Nevertheless, the defendant could not set-off the expenses incurred by the plaintiffs, against the damages. It was held that a tug was a vessel which, in order to earn profits, was kept available and manned, ready for use at short notice. It did not matter that the maintenance expenses would have had to have been incurred in any event. The tug was not available and the plaintiffs had been deprived of her use.

The most important issue in cases where a plea of set-off is raised by the defendant must be able to show that the profits in question accrued to the plaintiff as a result of the defendant's wrong. There must be some nexus established between the two events. The importance of this is shown in 'Liesboch (Owners) v. 'Edison' (Owners) (30) where the defendants negligence was responsible for the sinking of the plaintiff's dredger. The causation requirement here actually worked against the plaintiffs. They suffered a greater loss than they would have normally, as they were unable to replace the dredger, they being heavily committed financially at the time. The House of Lords refused to allow them to claim for this additional loss. That was due to their own impecuniousity, and the latter was extraneous, and not attributable to the defendant's wrongful act. Applying this argument to the problem of set-off, there must be a causal relationship between the advantages enjoyed by the plaintiff and the defendant's wrongful act.

In conclusion it is submitted that where the defendant raises a plea of set-off of profits, there are three possible strategies open to the plaintiff. In the first place, he could argue along the lines of causation, contending that the profits made were not in fact attributable in any way at all to the defendant's wrongful act, but instead to some completely extraneous cause. Such an argument would rest on the facts of each particular case. It would seem though, that the defendant would be hardly likely to have raised a plea of set-off unless there were some relationship between the profits and the wrong committed. Secondly (and possibly more successfully), the plaintiff could place his argument on the element of foreseeability, contending that the profits were a wholly unexpected contingency and altogether too remote to be taken into account in the assessment of damages. Thirdly, the plaintiff could well place emphasis on his own ingenuity and labour, arguing that although the defendant's wrong did set the stage for making the profits, from that point on, his own resources took over and that it was primarily due to these that he was able to recoup his loss.

However, as regards both cases of res inter alios acta, and set-off, one is restricted in attempting to enunciate general principles or forecast results. Unique fact-situations which can and do arise, make it inevitable that each case will, to a certain extent have to be considered on its merits. In such cases, where matters of

(29) [1952] 1 Lloyds Rep. 467
(30) [1933] A.C. 449

principle are involved, a Court, in the absence of an authorative precedent, would attempt to arrive at a fair result as between plaintiff and defendant, on the justice of the case. Reason and logic must prevail 'when the colours do not match'. (31)

(31) Cardozo - The Nature of the Judicial Process (1921).