



A Comparative Assessment of Personal Injuries Compensation Schemes: Lessons for Tort Reform?

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Introduction

Personal injuries litigation is one of the most common points of contact which the general public has with the legal system and is integral to the public's perception of that system. It also affects society in general in relation to issues such as the system for the organisation of labour, social security and the measures taken to prevent accidents. Thus, it can be beneficial to compare the approaches taken in different jurisdictions to attaining the common goal of restoring the victim to the position s/he would have been in had the event not occurred (*restitutio in integrum*). Thus, a comparative assessment of the approaches taken to several personal injuries-related issues will be undertaken with a view to demonstrating that none of the current approaches serve all the aims of accident compensation systems. Instead legislatures (and courts) must decide on which aims they wish to focus on as no one approach will serve all aims and trade-offs will always have to be made.

Method of Payment of Awards

The first issue that will be considered is the method of payment of damages awards. The issue of by what means an award is paid may appear to be a purely administrative matter but in fact it can determine the effectiveness of the award to a large degree in cases where the injured person is permanently incapacitated. It also determines the principles and approach taken to calculating the award. This issue arises only in relation to future economic losses as opposed to past losses or damages for pain and suffering.

The common law practice involves paying the plaintiff his damages in a once-off lump sum. This means the assessment of losses, both past and future, must be carried out at the date of the trial. This can prove unsatisfactory as it offers the plaintiff no recourse if his condition deteriorates after the trial or if something unforeseen at the time of trial occurs which drastically alters his position. The lump sum is calculated by the use of two figures – the multiplier and the multiplicand. The multiplicand is the annual sum that represents the plaintiff's loss or earnings or expenses at the time of trial. This figure is then multiplied by the multiplier to calculate the total award. The multiplier must reflect not only the number of years for which the loss will last but also the elements of uncertainty contained in that

prediction and the fact that the plaintiff will receive immediately a lump sum which he is expected to invest. Thus, inevitably the calculation will be 'rough and ready'.

At the other end of the spectrum to lump sum awards is the annuity system which is adopted in theory (though not rigidly in practice) by a number of European systems such as the French, the German and the Italian.¹ For example, German law distinguishes between single losses and continuing losses. Single losses are to be compensated by a single sum of money, while for continuing losses periodic payments are the statutorily prescribed rule under § 843 I BGB. However, under § 843 III BGB these payments may be capitalised if there is a serious reason for doing so. In practice periodic payments have become the exception and it is estimated that 99 per cent of awards in Germany take the form of a lump sum award. While the principal advantage of the annuity is the ability to adapt the award downwards or upwards depending on whether the victim's condition and other circumstances become better or worse, it also has the disadvantage of keeping the case open. Insurance companies, if they have to pay out, prefer to pay the whole sum upfront and studies have shown that victims tend to prefer to receive their compensation in one large amount (even though this may not be financially prudent).

In light of the problems with both lump sum awards and annuity payments, attempts have been made to find a 'third way' between the lump sum and the annuity payment. In England, for example, three measures have been introduced which signal a move away from the pure lump sum payment system. Under *s. 32 of the Supreme Court Act 1981*, the court has the power to order an interim payment of damages if liability is admitted and the defendant is a public authority or is covered by insurance or has other sufficient resources. Practice has shown this procedure to be of limited use to plaintiffs however. The second measure was introduced by *s. 6 of the Administration of Justice Act 1982* and it allows the court to make a provisional award in cases where the medical prognosis is particularly uncertain and where there is a chance, falling short of probability, that some serious disease or serious deterioration in the plaintiff's condition will accrue at a later date. The typical case where this power could be used is epilepsy which may manifest itself several years after a head injury. However, the courts have interpreted this power quite restrictively. Two of the primary limiting factors are that the feared event must be specified by the claimant's lawyers in the original action in considerable detail (which is obviously quite difficult) and that the right to return to court and have the award adjusted arises only once. Due to these restrictions the provisional damages provision has not been used frequently to date.

These reforms did not solve the problems associated with lump sum awards and so the structured settlement was introduced in 1996. Under *s. 2 of the Damages Act 1996*, as originally enacted, the parties had to agree to enter into a 'structured settlement' but the *Courts Act 2003* gives the court power, independently of the parties' consent, to order a structured settlement. Awarding a structured settlement means that the injured person receives a guaranteed income or pension derived from an annuity bought by the insurer and held for the benefit of the injured person. The income payments can be varied or 'structured' over a period of time. The structured settlement offers two primary advantages to the plaintiff – the income generated can be guaranteed against erosion by inflation and it is paid free of tax into the plaintiff's hands. If the plaintiff received a lump sum award s/he would not have to pay

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¹ The no-fault compensation scheme in New Zealand and other no-fault compensation schemes (e.g. in Australia) also allow for periodic and adjustable payments.

tax on the award itself but (usually) would have to pay tax on income from investment of that sum. Therefore, the structured settlement is fiscally attractive for plaintiffs and also for defendant insurers as they can write off the payments made to the plaintiff and reduce their tax liability. However, the disadvantage of the structured settlement for the plaintiff is that s/he has no access to the capital which has been used for the purchase of the annuity and does not, therefore, have lump sums available to deal with major emergencies.² In the US it has also been argued that certain structured settlement provisions result in a pro-plaintiff bias to damage awards and that the complexity of the statutes result in differing assessments of expected damage awards that discourage pre-trial settlements and lengthen post-verdict negotiations.³

Thus, in relation to the method of payment of award question, legislatures must decide whether to take a laissez-faire approach and allow seriously injured plaintiffs to independently manage their (lump sum) awards, thereby according with the wishes of many plaintiffs and of insurance companies or to take a more pro-active (and arguably more paternalistic) approach and make provision for annuity payments and/or structured settlements. In making this decision, the additional costs that structured settlements or annuity payments could give rise to, in terms of potential for delay, increased administrative cost and loss of tax revenue must be balanced against the prospect of injured plaintiffs relying on social welfare because of the inadequacy of their lump sum awards.

The Calculation of Future Financial Loss in Relation to Children

The second issue to be considered is the calculation of future financial loss where the plaintiff is a (seriously injured) child. Cases which involve such a calculation are fortunately few as it is estimated that only 10 per cent of injuries are serious and only a percentage of these cases involve children. Serious injuries may be defined as those in which the victim is disabled for more than 6 months, permanently impaired or seriously disfigured. However, in the cases which do arise, the manner in which future financial loss is calculated has a profound effect on the effectiveness of the awards rendered. In jurisdictions where a lump sum award system is in operation, the calculation of future financial loss even for a working adult will be a guessing game as an attempt must be made to take all contingencies into account. These include factors such as illness, unemployment, promotion and residual earning capacity as well as wider economic factors such as inflation and taxation. When the plaintiff is a seriously injured child, the uncertainty is multiplied as one does not even have a relevant pre-injury salary to use as a starting point to estimate future loss of income (or more correctly loss of earning capacity). Therefore, in some English cases the view has been expressed that damages for the loss of future earnings of young children should not be awarded at all or should be assessed at a low value.⁴ However, in most countries, attempts are made to compute the child's future loss of income with a multiplier and a multiplicand.⁵ In Ireland, England and

² Basil S. Markesinis, Michael Coester, Guido Alpa & Augustus Ullstein, *Compensation for Personal Injury in English, German & Italian Law: A Comparative Outline* (Cambridge, 2005) at pp. 179-181.

³ Lawrence M. Spizman & Elizabeth Dunne Schmitt, 'Unintended Consequences of Tort Reform: Rent Seeking in New York State's Structured Settlements Statutes' 13 *Journal of Forensic Economics* 29

⁴ See the speeches of Lords Wilberforce and Salmon in *Pickett v British Railways Board* [1980] AC 136, at 156 and 169.

⁵ See Benedikt Buchner, 'Schadenausgleich in europäischen Vergleich' in Arbeitsgemeinschaft Rechtsanwalte im Medizinrecht e.V., *Arzthaftung Mangel in Schadenausgleich?* (Springer, 2008) for an overview of how future financial loss in relation to children is calculated in several European countries.

other European countries such as Germany, Austria and the Netherlands, the child's background, his family members' professions, his educational attainment and his stated preferences as to future employment (if any) have been used in calculating the multiplicand. For example, in the Irish case of *McNamara v Electricity Supply Board*⁶ the plaintiff was 11 at the date of the accident and 17 at the time of trial. The plaintiff stated in evidence that he would have liked to have been a chef. One of the plaintiff's brothers was, at the time of the trial, a trainee chef. The plaintiff's damages were calculated on the basis that he would have trained for and become a chef were it not for the accident. This calculation is based on many assumptions and the classification of the plaintiff as having the same prospects as either his family or members of his class.

However, the issue of compensating children and other non-earners has proved no less problematic under the no-fault compensation scheme in New Zealand. The *Accident Rehabilitation and Compensation Act 1992* abolished lump-sum payments for pain and suffering. This had a particularly harsh effect on children and other non-earners, as this lump sum had been the only financial recognition of their loss. No lump-sum payment is made to a compromised infant to reflect his/her loss of earning potential over the course of their lifetime. Once an injured child reaches the age of 18 and is still incapacitated then as a "potential income earner" he is entitled to a fixed weekly payment. However, these payments only amount to basic subsistence support and do not vary depending upon any real assessment of a person's potential income earning ability. Moreover, the payments are not made till a person turns 18, denying both the injured person and his/her family of some economic assistance during the childhood period.⁷

Thus, the calculation of future financial loss for seriously injured children is a thorny issue. Courts and legislatures have to decide whether to participate in a guessing game on the basis of (dubious) assumptions or not to do so and to award children either an amount based on the average industrial wage or basic subsistence support. Reliance on an assumption that a child will follow a similar career path to his family members is inequitable and perpetuates class differences. However, in relation to the calculation of future financial loss for adults similar assumptions have been made especially in relation to female plaintiffs.⁸ Therefore, it is for courts and legislatures to decide whether it is better for seriously injured children to be treated equitably by awarding them all a small amount or for another contingency to be added to the list of contingencies already taken into account in calculating the future financial loss of injured adults.

The Deductibility of Collateral Benefits from Awards of Damages

Another factor which impacts considerably on the effectiveness of damages awards is the question of whether collateral benefits are deductible from the award. Collateral benefits are payments which meet two criteria (i) they arise as a consequence of the accident and (ii) they compensate for the same loss as a head of damages. Examples include payments under an insurance policy or pension scheme, sick pay, social welfare payments and charitable

⁶ [1975] IR 1 (S.C.).

⁷ See Colleen M. Flood, 'New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea?' 8(3) *Health Law Review* 5.

⁸ See for example *Moriarty v McCarthy* [1978] 1 WLR 155 in which points were deducted from the multiplier to allow for the years when the court considered that the young woman would have given up work to get married and bring up her family.

benefactions. The questions of whether such benefits should be deductible from the plaintiff's award and of which type of benefits should be deducted have met with different responses in different jurisdictions, though under the New Zealand no-fault compensation scheme this issue does not arise as the focus for liability is society rather than a defendant who must compensate for actual loss. In favour of non-deductibility is the argument that the defendant would be let off lightly if collateral benefits were to form part of the compensation for actual loss. It is also argued that public policy supports the non-deductibility of certain benefits such as insurance and charitable gifts. In relation to insurance it is argued that people should be encouraged to prepare for future contingencies and defendants should not be allowed to benefit from plaintiffs' foresight and prudence. In relation to charitable gifts, the need to encourage public giving has been emphasized along with a desire not to allow defendants to escape with a reduced amount of liability because of such gifts. On the other hand however, non-deductibility leads to the plaintiff receiving double compensation for his loss and it is argued that deductibility would not in fact benefit the tortfeasor as in most cases it is his insurer that pays.

In Ireland, *section 2 of the Civil Liability (Amendment) Act 1964* sets out a general principle of non-deductibility.⁹ Under the terms of section 2 and subsequent case law the term 'collateral benefit' includes payments received under private insurance policies, charitable benefits, payments received under pension schemes (both statutory and non-statutory), sick pay and social welfare benefits.¹⁰ However, other statutory provisions have made inroads into the general principle of non-deductibility in section 2. *Section 75 of the Social Welfare (Consolidation) Act 1993* and section 237 of that Act provide for the deductibility of certain social welfare benefits.¹¹ In addition, *section 27 of the Civil Liability and Courts Act 2004* amends section 2 in cases where the defendant is the donor of a charitable gift and where certain other conditions are fulfilled. This provision would appear only to have practical application where the defendant is the victim's employer.¹² Thus, notwithstanding the provisions of the 1993 Act and the 2004 Act, Irish law allows considerable opportunity for double compensation.

⁹ Section 2 of the *Civil Liability (Amendment) Act 1964* provides:

In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of—

- (a) any sum payable in respect of the injury under any contract of insurance,
- (b) any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury.

¹⁰ See Law Reform Commission of Ireland, 'Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages' (LRC – CP15 – 1999), Chapter 7.

¹¹ Section 75 of the *Social Welfare (Consolidation) Act 1993* provides that, notwithstanding section 2 of the 1964 Act, the value of any rights which have accrued or will probably accrue to the injured person therefrom in respect of injury benefit or disablement benefit for the 5 years beginning with the time when the cause of action accrued will be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries. Similarly, section 237 of the 1993 Act provides for the deduction of any payments payable for a period of five years from the date of an accident from the award of damages in the case of personal injury relating to a mechanically propelled vehicle.

¹² See Neville Cox, 'The New Rules Relating to Collateral Benefits & Undeclared Income' in Ciaran Craven & William Binchy (eds.) *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (Firstlaw, Dublin, 2005) at pp. 84-102.

In England, the common law position is that insurance payments and charitable gifts are considered the two “classic heads” of exception to the general principle of deductibility.¹³ In relation to other benefits no universal rule applies and whether such benefits can be analogised with the two “classic heads” determines whether they are considered deductible or not. While the deductibility of most social security benefits is governed by statute,¹⁴ the *ad hoc* approach taken in relation to other benefits makes the law somewhat unpredictable.¹⁵

In the US a general rule of non-deductibility (the ‘collateral source’ rule) applies. This rule encompasses any benefit from a collateral source which is ‘wholly independent of the wrongdoer’. The view taken is that if someone is to receive a windfall it should be the injured person rather than the wrongdoer.¹⁶ However, the collateral source rule is not applied uniformly throughout the US. Its application in different states varies. In some states the rule has been abrogated entirely and in others it has been restricted in its application to certain types of lawsuit and/or collateral benefit. Thus, American practice has moved away from application of the rule in many cases and so collateral benefits are deducted more often than the letter of the law would suggest.¹⁷

In the US therefore, there is a move against allowing the victim to reap the benefits of double compensation. In Germany this is the primary objective.¹⁸ First, the court considers if the benefits were received for the benefit of the victim or whether they were intended to relieve the tortfeasor of his duty to compensate the victim. If the benefits were intended to benefit the victim, then they are considered non-deductible. Under this rationale, the exceptions to the rule of deductibility are non-indemnity insurance and charitable payments. If the victim is compensated by a third party such as an insurance company or a social security carrier, German law often provides for statutory subrogation rights. Where statutory subrogation is not provided for, the victim may be contractually obliged to confer his claim against the tortfeasor on the insurer or another institution which has already compensated him for his loss. In practice, subrogation rights are exercised via extensive loss-sharing and bulk recoupment agreements between social security providers and liability insurers, usually in the case of small claims on a standard percentage basis and individually in the case of larger claims.¹⁹ The extensive use of subrogation in Germany and other jurisdictions is made possible by the existence of a comprehensive social security network supported by both

¹³ See *Parry v Cleaver* [1970] AC 1.

¹⁴ See the *Social Security Administration Act 1992* and the *Social Security (Recovery of Benefits) Act 1997*. Under the 1997 Act recoupment of certain social security benefits is provided for.

¹⁵ For example, even in relation to insurance payments, there is conflicting authority on whether such payments should be considered non-deductible where the plaintiff did not make the contributions himself: See *Cunningham v Harrison* [1973] 3 All ER 463 & *Hussain v New Taplow Paper Mills Limited* [1988] AC 514. Furthermore, the English Law Commission has noted the anomaly that sick pay is considered deductible whereas a disablement pension is not, even though both compensate for the same loss: See Law Commission, ‘Damages for Personal Injury: Collateral Benefits’ (Consultation Paper No. 147).

¹⁶ Another possible motivation for the rule in an American context is the contingent fees arrangement between plaintiffs and their attorneys in personal injuries actions, the theory being that after the attorney’s fees are paid, the plaintiff is left undercompensated.

¹⁷ See Daena A. Goldsmith, ‘Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation’ (1988) 53 J. Air Law & Commerce 799 at p. 807.

¹⁸ See Basil S. Markesinis, Michael Coester, Guido Alpa & Augustus Ullstein, *Compensation for Personal Injury in English, German & Italian Law: A Comparative Outline* (Cambridge, 2005) at pp. 181-190.

¹⁹ See Law Reform Commission of Ireland, ‘Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages’ (LRC – CP15 – 1999), paragraph 6.46.

public and private insurance which caters for most of the victim's needs before any tort action.²⁰

Thus, in relation to collateral benefits, legislatures or courts must decide, in relation to each type of collateral benefit, whether the aim of reducing the societal cost of accidents (by providing for the deductibility of the benefit) outweighs the aim of deterring future wrongdoers and punishing current wrongdoers (by providing that the benefit is non-deductible). What must be considered are the importance of such aims within the overall tort system and the efficacy of deductibility or non-deductibility in achieving them.

The Impact of Contributory Negligence on Awards

In personal injuries actions, the defence of contributory negligence is one of the most frequently pleaded and so the impact which a finding of contributory negligence has on the damages award is significant. The rationale behind the doctrine is that by denying recovery, in whole or in part, to a victim who has been contributorily negligent, the law can discourage people from engaging in conduct which involves an unreasonable risk to their own safety. Originally at common law, contributory negligence operated as an absolute defence, meaning that plaintiff's recovery was barred if his/her negligence contributed, even minimally, to causing the injury. However, this harsh rule has been departed from in most jurisdictions and more flexible approaches adopted.²¹ In Ireland, England, some US states & many other jurisdictions²² a pure comparative negligence approach has been adopted. This means that the basis upon which damages are to be reduced is the comparative blameworthiness of the parties' respective causative contributions to the damage. In some US states a modified comparative negligence approach was introduced. Under this approach the damaged party is barred from recovery if he is, in one variation of the rule, more than 50 per cent at fault and, in the other variation, 50 per cent or more at fault.

In assessing these approaches, it seems as if the pure comparative negligence approach is fairest and accords best with the principle of *restitutio in integrum* since it treats both parties equally and compensates the damaged party proportionally to the harm caused to him by the other party. In addition, it accords best with the concept of corrective justice. The essence of corrective justice is that the party who injures another must correct the wrong to restore the moral balance between them. Since the pure comparative negligence approach allows the defendant to compensate the plaintiff to the extent of his/her blameworthiness, thereby restoring the moral balance between the parties, it best serves this goal. On the other hand however, opinion is divided as to whether contributory negligence or comparative negligence has a greater deterrent effect. In claiming that contributory negligence has the greater deterrent effect, the argument has been made that, if liability costs are divided, neither party may have a sufficiently strong incentive to take precautionary measures, which leads to more accidents.²³ While there are several counterarguments to this hypothesis²⁴ as well as a lack

²⁰ Basil S. Markesinis, *The German Law of Torts: A Comparative Introduction* (3rd Edition)(Oxford,1994) at p. 909.

²¹ However, Alabama, District of Columbia, Maryland, North Carolina and Virginia bar recovery if the plaintiff is one per cent or more at fault.

²² These jurisdictions include Austria, Germany, Canada, France, Japan, New Zealand, the Philippines, Poland, Portugal, Russia, Spain, Switzerland and Turkey.

²³ Similarly, if liability costs are divided, it is argued that both parties may take duplicative precautionary measures. This may lead to accident prevention but such aim could be achieved in a more efficient

of empirical data to support it, the deterrent effect of the pure comparative negligence approach remains unclear. Moreover, it has been argued that, while the pure comparative negligence approach alleviates some of the hardship caused to the plaintiff by the original rule, it still perpetuates too much of the inefficient administration and inadequate compensation characteristic of the traditional torts system. Thus, it is argued that reducing the plaintiff's award of damages creates further societal costs by "externalizing" the cost of the accident rather than allowing it to fall on the defendant, as the plaintiff will only claim against the defendant if he is insured and therefore the defendant is the better risk bearer. Thus, a move towards a no-fault based compensation system or at least a system in which the plaintiff's fault plays a minimal role is advocated. However, under the comprehensive no-fault compensation scheme in New Zealand it is doubtful whether the societal cost of accidents has in fact lessened as the scheme has proved expensive to run.²⁵ This is due in part to the fact that the advent of the compensation scheme led to unexpected side-effects such as pressure on the government to increase substantially other income maintenance programs. Moreover, the concept of corrective justice is foreign to such schemes and in practice the deterrence function may not be served as well as under fault-based systems,²⁶ though it is difficult to state this conclusively since the deterrent effect of any legal measure is difficult to measure. Thus, in relation to the contributory negligence defence, the pure comparative negligence approach would seem to accord best with the main underlying aims of the tort system. However, it is for legislatures to choose the goals they wish to prioritize in relation to each individual type of accident. For example, it may be decided that the corrective justice concept is important in cases of injuries caused by medical negligence but assumes less significance in relation to road traffic accidents.

Conclusion

Having examined these four problematic issues, it is clear that legislatures and courts must take a realistic approach to tort reform and realise that each approach will prioritize certain goals at the expense of others. While it would be naïve to expect the tort reform process to be totally uninfluenced by commercial and economic pressures, such influences should not be given undue weight. Moreover, the practical implications of reform proposals should be worked through as much as possible. While the idea of introducing a comprehensive no-fault

manner. See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, New Haven, 1970); Richard A. Posner, *Economic Analysis of the Law* (2nd ed. 1977); John Prather Brown, 'Towards an Economic Theory of Liability' (1973) 2 J. Legal Stud. 323; George L. Priest, 'Modern Tort Law and its Reform' (1987) 2 Val. U. L. Rev. 1.

²⁴ See Robert D. Cooter & Thomas S. Ulen, 'An Economic Case for Comparative Negligence' (1986) 61 N.Y.U. L. Rev. 1067 & Daniel Orr, 'The Superiority of Comparative Negligence: Another Vote' (1991) 20 J. Legal Stud. 119.

²⁵ There has been a dramatic rise in the cost of the scheme's claims during the past eight years, from \$1.4 billion a year to \$3.2 billion a year. In addition, the costs of providing certain services were grossly underestimated. For example, in relation to physiotherapy officials budgeted for an annual bill of just \$8.9 million, but the expense will be \$139m this year and is expected to reach \$225m in three years: See The Press, 'Escalating cost of accident compensation must be tackled' (Available at: <http://www.stuff.co.nz/the-press/opinion/editorials/2031511/Escalating-cost-of-accident-compensation-must-be-tackled>).

²⁶ The Nordmeyer Report set up by the Accident Compensation Commission in New Zealand following complaints by the freezing industry revealed that lost time injuries in that sector increased by 92 per cent in the first two years of the scheme, the accident rate in some works doubled, and the scheme was subject to some abuse: See Lewis N. Klar, 'New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective' (1983) 33 U. Toronto L. J. 80.

compensation scheme in New Zealand on paper seemed like the ideal remedy for the many faults of the common law system, in practice the scheme has created its own set of problems. In the final analysis, all that we can ask from legislatures is that they take a clear-headed, practical approach to tort reform and that they try to learn from past mistakes.

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