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Deduction of Collateral Benefits in European Tort Law

Vyrovnání újmy prospěchem v evropském deliktním právu

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Abstract: The question of whether collateral benefits a victim receives through a harmful act must be deducted from her claim in damages is beset by riddles. This paper aims to give an overview on the state of discussion in Europe.

Key words: deduction – collateral benefits – Europe – tort law

Anotace: Otázka, zda je třeba od nároku na náhradu škody odečíst výhody, které poškozený získá v důsledku škodného činu, je plná záhad. Cílem tohoto článku je podat přehled o stavu diskuse v Evropě.

Klíčová slova: vyrovnání újmy prospěchem – výhody – Evropa – deliktní právo

A FEW CASES AS INTRODUCTION*

The question of whether collateral benefits received by the victim must be deducted from a claim in damages is beset by riddles,[1] but only at second glance. At first glance, it may instead seem evident that each and every such benefit must be deducted: for, is it not a principle of European legal thought that the aim of compensation is to place the victim exactly in the position she would have been in if the tortfeasor had not harmed her, but not any richer?

Imagine for instance that someone receives the negligent financial advice to invest in some particularly risky shares and later has a claim in damages for the losses from this investment. If the harmed investor manages to cut her losses by selling the shares off for about half of the money spent, most would not doubt that her claim against the advisor will be reduced by the price she received by reselling the shares. For it would seem odd if she would come out richer and claim more money than she actually lost in the episode.[2]

That benefits must be deducted is not so clear in a second case. An arsonist burns down a historical house, but the owner soon discovers that the destruction is a financial advantage, because the land is more valuable without the house and she does not need to spend anything on demolition. We can even imagine that there were administrative rules protecting historical patrimony that are lifted as a result of the destruction, which also adds value to the land. So, the owner sells the land for a profit. Afterwards, may she still successfully claim damages for the house from the arsonist? Perhaps there may already be some reasonable disagreement on this question, although I suggest the majority of European courts and lawyers would still deny the house owner's claim, reasoning that, ultimately, she suffered no loss.

And now consider a final case: a driver negligently injures a person, who will not be able to continue his career. Fortunately, his wealthy and generous aunt is also grieved by the event and awards him an allowance, beyond what the victim was ever likely to earn in his career. Financially, this last victim appears to be just as lucky as the investor or the house owner; from an accountant's point of view, all three gained a benefit rather than suffered a loss from the accident. And yet, all European jurisdictions seem to assume it is fairer to still allow the accident victim to claim lost earnings from the negligent driver, as if he had never received any compensation from his aunt.

These cases present us with a puzzle: why does it sometimes appear fair that a victim receives compensation in spite of her benefit? My aim here is not to solve this problem, but to highlight that

* Written version of a presentation at the Czech Academy of Sciences in Prague, updated April 2024 and with the necessary references inserted. The author would like to thank all participants in the workshop, in particular the organiser Dr. Tomáš Doležal, for their valuable input and questions.

[1] Compare the title of SCHIEMANN, G. Das Rätsel Vorteilsausgleichung. In LOBINGER, T., RICHARDI, R., WILHELM, J. (eds.). *Festschrift für Eduard Picker zum 70. Geburtstag*. Tübingen: Mohr Siebeck, 2010. ISBN 9783161506161, p. 695.

[2] Intuitive as this may seem, it is not necessarily true under a market value approach to assessment, where it would be conceivable to construct a claim for the difference in market value at the time of purchase. On the market value approach found in some legal systems, see below at heading Revisiting means of assessing damages.

this question of 'deduction of benefits' or '*Vorteilsausgleich*' or 'compensatio lucri cum damno' is a topic that merits general debate. As a member of the German legal family, it is easy to think so, not only because innumerous decisions on it have been published but also because influential academics have treated it as a key issue in the law of damages.[3] Moreover, the recent litigation against vehicle manufacturers in the 'Diesel Emission Scandal' sparked renewed interest in the subject.[4] Assuming that the consumer who bought a 'problem car' may reclaim the purchasing price or loss of value of the car, is it necessary to reduce this claim, because she benefitted from the use of the car for some years?

It is not much harder to find good evidence that collateral benefits are significant on the European level as well. Remaining with the Diesel Emission Scandal for a moment, the Court of Justice of the EU (CJEU) added to the European debate in *QB v Mercedes Benz Group AG*[5]. The highest EU court acknowledges that benefits may be deducted from claims based in the violation of EU regulatory law, as long as the remedy remains 'effective, proportionate and dissuasive'. While the CJEU's engagement with the concept of deduction remains rather limited, other participants in the European debate have noticed the relevance of deduction much earlier and more fully. Projects for the harmonisation of tort law in Europe, in particular the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference (DCFR), included their own rules on deduction, which I will discuss later. The Yearbook of European Tort Law[6] reports about one or two cases per year, and the Eurotort Database operated by the European Centre of Tort and Insurance Law[7] counts around 30 selected cases in the last 20 years.

[3] To cite just a few: OERTMANN, P. *Die Vorteilsausgleichung beim Schadensersatzanspruch im römischen und deutschen bürgerlichen Rechte*. Reprint 2018 (1. April 1901). Berlin: De Gruyter, 2018. ISBN 9783111173818; WILBURG, W. Zur Lehre von der Vorteilsausgleichung. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts.* 1932, Vol. 82, 51-148; but also more recently WENDEHORST, Ch. *Anspruch und Ausgleich: Theorie einer Vorteils- und Nachteilsaugleichung im Schuldrecht.* Tübingen: Mohr Siebeck, 1999. ISBN: 9783161471431, p. 118 ff; SCHIEMANN, G. Das Rätsel Vorteilsausgleichung. In LOBINGER, T., RICHARDI, R., WILHELM, J. (eds.). *Festschrift für Eduard Picker zum 70. Geburtstag*. Tübingen: Mohr Siebeck, 2010. ISBN 9783161506161 and KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, no D 2 no 48 ff. Among monographies, G. Thüsing's comparative thesis THÜSING, G. *Wertende Schadensberechnung*. München: C. H. Beck, 2001. ISBN 9783406478406 deservers mention.

[4] See for *Germany* FERVERS, M., GSELL, B. Vorteilsausgleich und Nutzungsvorteil bei manipulierten Dieselfahrzeugen. *Neue Juristische Wochenschrift.* 2020, Vol. 73, No. 20, p. 1393-1397. ISSN 0341-1915, p. 1395; for *Austria* FRANZ, R. Die Haftung des Herstellers im „Diesel-Skandal" aus der Perspektive des österreichischen Schadenersatzrechts. *Zeitschrift für Verkehrsrecht.* 2021, Vol. 60, No. 4, p. 129-136. ISSN 0044-3662; HUBER, Ch. Viel Lärm um nichts oder doch wenig? *Juristische Blätter*. 2023, Vol. 145, No. 4, p. 205-213. ISSN 0022-6912, p. 208 ff.

[5] C-100/21 ECLI:EU:C:2023:229.

[6] KOZIOL, H., STEININGER, B. C. (eds.) (until 2010)/ OLIPHANT, K., STEININGER, B. C. (eds.) (2011-2012)/ KARNER, E., STEININGER, B. C. (eds.) (from 2013-present). *European Tort Law Yearbook*. Berlin: De Gruyter, 2009-present. ISSN 2190-7781. In the following, European case law will be cited: [Court] from [Date], [Regional Case Identifier], ETL [Year], [Marginal number] comment [Reporter]. National-level case reports will only be cited where a case is not reported in the Yearbook.

[7] http://eurotort.org/.

Four recent decisions by the Plenary Session of the Italian Corte di Cassazione received much interest abroad, and were themselves based on comparative observations.[8]

Of course, these brief remarks already show that the most prevalent cases of deduction are not about arsonists or benevolent aunts. In fact, the most important group of cases concerns tortfeasors who seek a deduction in the amount of benefits the victim received from an *insurance*, an *employer* or *social security institution*.[9] But since cases of the latter kind are technically somewhat more demanding, I shall discuss them in detail only at a later point.

1. IN SEARCH FOR A UNIVERSAL FORMULA

Let me begin with efforts to create general, abstract principles to deal with collateral benefits. The first problem such projects must solve is the relationship between deduction of benefits and the general *rules of assessing harm*. Why is it necessary to have a specific rule on collateral benefits? Is it not by definition necessary to deduct benefits, because a surplus reduces a loss by virtue of mathematical logic? Whether this is (always) true first depends on what the general rules of assessing harm are, and these in turn on the notion of harm they are based on. Jurisdictions differ on this question quite substantially, even if we leave the difficult question of non-pecuniary harm aside. For instance, Austria and the Czech Republic use a so-called abstract or market value approach with regard to some problems,[10] but these are usually considered special cases and I do not want to get into them

[8] Corte di Cassazione, Sez Unit, 22 May 2018, 12564, 12565, 12566, 12567, Responsabilità civile e previdenza, 2018, 1148. No 12566 is also reported in ETL 2018, 330 comment E. Bargelli. See SPADA, C. The Equalisation of Benefits (Compensatio Lucri Cum Damno) in the Italian Law. A Possible Inspiration for Other European Member States? *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 665-682. ISSN 0928-9801; VENCHIARUTTI, A., Compensatio lucri cum damno: The Decisions of the Sezioni Unite of Italian Court of Cassation, *European Review of Private Law.* 2020, Vol. 28, No. 3, p. 687-699. ISSN 0928-9801.

[9] A selection of such cases with reflections on the doctrine: *Belgium:* Cour de Cassation/Hof van Cassatie, 07.09.2004, P.04.0315.N, ETL 2004, 185 comment I. C. Durant (no deduction of survivor's pension if it has no 'compensatory' aim); *Bulgaria:* Supreme Court of Cassation, 25.10.2016, Decision no 227/25.10.2016 on Civil Case no 1405/2016, ETL 2016, 71 comment V. Tokushev (deduction of compulsory accident insurance benefits from non-pecuniary loss); *Croatia*: Županijski suda u Dubrovniku, 03.02.2016, Gž-171/13 ETL 2016, 86 comment M. Baretić (no deduction of payment to injured police officer under 'regulation for financial support'); *Greece*: Areios Pagos, 05.03.2013, 384/2013, ETL 2013, 288 comment E. G. Dacoronia (no deduction of employer's hypothetical pension payments in subrogated claim of a police officer); *Italy*: Corte di Cassatione, 22.06.2017, no 15536, ETL 2017 comment E. Bargelli (deduction of survivor's pension?); *Malta***:** Court of Appeal, 24.04.2015, Writ no 817/1999, ETL 2015, 385 comment G. Caruna Demajo, L. Quintano and D. Zammit (no deduction of payment by plaintiff-financed social security scheme, but deduction of payment by employer-financed and subrogation-entitled pension and contingency scheme to person injured in a duck hunt); *Netherlands*: Hoge Raad, 12.06.2009, LJN: BH 6553, ETL 2009, 444 comment I. Giesen and A. L. M. Keirse (deduction of life insurance from relative's loss of household aid claim); 1.10.2010, BM 7808, ETL 2010, 420 comment I. Giesen and A. L. M. Keirse (developing elaborated principles on deduction; deduction of tortfeasor-paid work accident insurance in principle but must be balanced against fact that tortfeasor also has liability insurance); *Poland:* Sąd Najwyższy 15 May 2009, III CZP 140/08, ETL 2009, 477 comment E. Baginska (no deduction of public funeral benefits from relative's claim).

[10] For Austria, see KOZIOL, H. *Basic questions of tort law from a Germanic perspective*. Wien: Jan Sramek Verlag, 2012. ISBN 9783902638854, no 8/10 and in more detail KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, B 1 no 72 ff; for the Czech Republic, HRÁDEK, J. and TICHÝ,

yet. For present purposes, it seems better to first develop a solid overview on the basis of the most influential model for assessing pecuniary losses. In most jurisdictions it appears that just one way of assessment is dominant, namely the 'difference hypothesis' in line with Mommsen's famous definition from 1855.[11] It claims that the award of damages should precisely represent the difference between the *value of the estate* of a person, as it is at a certain point in time, and the value this estate would have had without the intervention of the tortfeasor's act at the same point in time. While it is commonplace that this hypothesis does not give the whole story of how damages are assessed, it still seems to be the most influential starting point for an assessment of pecuniary loss.

Once we start from the point that compensation should represent a difference in the value of an estate, it seems like a truism that all benefits must be deducted from harm.[12] After all, it goes without saying that, for a calculation of a difference, it is necessary to count losses as well as gains. For instance, when purely applying the difference principle, it appears entirely clear that the house owner in my opening example, whose historical building burned down, is not entitled to damages if it is clear that the value of her land actually increased.

In fact, the difference principle is so well established and its answer that benefits must be deducted seems so simple that it is easy to become sceptical whether it is worth distinguishing between assessment of damages and deduction of benefits at all. As a result, some academics have even called deduction of benefits a 'questionable doctrine'[13] and such doubts may be a relevant reason why some jurisdictions do not accept the doctrine at all. By contrast, some courts try to maintain a strict line between assessing harm on the one hand and collateral benefits on the other.

It is in particular German case law that provides a nice illustration for this. To distinguish assessment of damages in the narrow sense and deduction of benefits, the Bundesgerichtshof uses the metaphor that benefits 'necessarily ' combined with the harm caused by the wrongful act – their 'mirror image' – are already an integral part of assessing damages, while benefits that are not directly

L. In WINIGER, B., KOZIOL, H., KOCH, B., ZIMMERMANN, R. (eds.). *Digest of European Tort Law. Volume 2: Essential cases on Damage.* Berlin, Boston: De Gruyter, 2012. ISBN 9783110248487, 2/23 no 1 ff.

[11] MOMMSEN, F. *Zur Lehre von dem Interesse*. Braunschweig: Schwetschke und Sohn, 1855, p. 3.

[12] For the prevalence of similar points of departure beyond Germany, see, eg, for *France* KNETSCH, J. La déduction des avantages nés d'un fait dommageable (compensatio lucri cum damno). In LECOURT, B., VINEY, G., MATSOPOULOU, H., JOURDAIN, P. (eds.). *Mélanges en l'honneur du Professeur Suzanne Carval*. Paris: IRJS, 2021. ISBN 9782850020452, p. 475 with reference to Cour de cassation civ, 28 October 1954, JCP G 1955, II, 8765, and for *England British Transport Commission v Gourly* [1956] AC 185; for *Italy* SPADA, C. The Equalisation of Benefits (Compensatio Lucri Cum Damno) in the Italian Law. A Possible Inspiration for Other European Member States? *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 665-682. ISSN 0928-9801, p. 667 f. For a critical discussion, JANSEN, N. *The Structure of Tort Law*. Oxford: Oxford University Press, 2020. ISBN 9780198705055, p. 278 ff, 377 ff; FLUME, J. W. In HAU, W., POSECK, R. (Hrsg.). *Beck'scher Online-Kommentar zum BGB*. 69. Edition. München: C.H. Beck, 2024, § 249 no 39 ff.

[13] See, eg, SONNENBERGER, H. J. Der Vorteilsausgleich: Rechtsvergleichende Anmerkungen zu einer fragwürdigen Rechtsfigur. In GRAF VON WESTPHALEN, F., SANDROCK, O. (Hrsg.). *Lebendiges Recht: von den Sumerern bis zur Gegenwart; Festschrift für Reinhold Trinkner zum 65. Geburtstag*. Heidelberg: Verlag Recht und Wirtschaft GmbH, 1995. ISBN 9783800511479, p. 725; on other grounds: FLUME, J. W. In HAU, W., POSECK, R. (Hrsg.). *Beck'scher Online-Kommentar zum BGB*. 69. Edition. München: C.H. Beck, 2024, § 249 no 331 f.

connected to the loss, in particular because they came into existence only later or somehow do not correspond to the harm, are collateral benefits.[14] I will give you an example of this distinction in action from the recent case law regarding the Diesel Emissions Scandal. The facts are probably known, but to remind, the problem is that consumers have bought cars that had much better emission results in testing than on the street. Now they allege that they would not have bought the vehicles at all or at a much lower price and claim damages from the producers. Following the CJEU decision in *Mercedes Benz Group AG*,[15] they have a cause of action, no matter whether their decision was influenced due to active manipulation, as in the Volkswagen cases, or merely because producers negligently relied on exceptions in the regulatory framework.[16] However, the problem of deducting collateral benefits remains even now: What to do if they had already made considerable use of the cars[17] or had even sold them to a third party[18]? According to German case law, such advantages play no role in the assessment of harm proper, but they are collateral benefits that may be deducted from the claim. Why are they not a part of assessment of damages in the narrow sense? Apparently, the courts assume that there is no necessary correspondence between the obligation to pay the price of the car (harm) and making use of the car (benefit). They must have thought that harm and benefit are not 'mirror images'. But metaphors aside, it is very difficult to rationalize why this should be so.

One may suspect that, as is sometimes the case with legal doctrines in substantive law, the Bundesgerichtshof only insists on a formal distinction between assessment of losses and deduction of benefits to place the *burden of proof* on the defendant. After all, the general idea usually is that the claimant has to prove the factual bases of the doctrines she summons in her favour (and thus, it is the claimant's risk to prove harm), while the defendant has to prove the basis for the doctrines in his own favour (and thus, it is the defendant's risk to prove collateral benefits).[19] The Court itself emphasises this effect.[20] But regardless of where we think the burden of proof should lie, it is never very convincing if the courts construct or extend legal concepts just for the sake of getting the burden of proof right. It

[14] For a recent summary, see eg Bundesgerichtshof 21 October 2021, IX ZR 9/21 in LMK 2022, 805141 comment J. W. Flume.
[15] C-100/21 ECLI:EU:C:2023:229.
[16] See the follow-up decision of the Bundesgerichtshof,
[17] Bundesgerichtshof 25 Mai 2020, VI ZR 252/19, in ETL 2020, 220 comment J. Kleinschmidt.
[18] Bundesgerichtshof 20 July 2021, VI ZR 533/20 Neue Juristische Wochenschrift (NJW) 2021, 3594 Versicherungsrecht (VersR) 2021, 1443.
[19] See the helpful comparative introduction by KARNER, E. The Function of the Burden of Proof in Tort Law. In KOZIOL, H., STEININGER, B. C. (eds.) *European Tort Law 2008*. Wien, New York: Springer, 2009. ISSN 1616-8623, p. 68.
[20] Bundesgerichtshof 21 October 2021, IX ZR 9/21 in LMK 2022, 805141 comment J. W. Flume, at no 17. On similar tendencies in Austrian case law, see LOIBL, S. Folgeprovisionen: Schadensberechnung oder Vorteilsausgleich? Anmerkung zu OGH 24. 6. 2021. *Österreichische Juristenzeitung.* 2022, Vol. 13, No. 5, p. 299-300. ISSN 0029-9251, p. 299.

is also noteworthy that other European courts rejected assigning a burden of proof function to the doctrine.[21]

Other statements refer to correlation (the same loss, *Kongruenz*, *concordance*) not to draw a conceptual line between negative items in assessing harm and benefits (as the Bundesgerichtshof sometimes does), but between deductible and non-deductible benefits, sometimes in combination with other criteria.[22] The idea is to single out benefits that apparently have nothing to do with the harm in question. But it is not clear whether any successful interpretation of this kind of correlation has so far been developed.

Like others,[23] I believe that one must be very cautious in in making the case for a categorical distinction between harm and benefits. Walter Wilburg already underlined this in 1932 when he observed that the distinction may often be based on mere psychological appearances[24] and suggested that the argument too often relies on dubious metaphysical ideas about the nature of harm and benefit[25].

What I have said so far only implies that we should not strictly separate deduction of benefits from the assessment of damages but treat both as a coherent whole; this does not mean that no principles are required to deal with the problem. Yet it does mean that there is no categorical argument to exclude benefits from assessment under the difference principle (and therefore deduction) *a priori*, and thus we need specific reasons to exclude those collateral benefits that should not be deducted.

According to one important line of argument, there must be a sufficient connection between the harm done and benefits received for the latter to be relevant. This is not merely intended to state that the wrongful act must have *caused* both harm and benefits in the sense of a necessary condition (*conditio sine qua non*), because this much is self-evident. But the idea of some courts and academics is to go further and add that, like the attribution of harm, the attribution of benefits must be subject

[21] Hoge Raad 8 July 2016, ETL 2016, 403 comment J. M. Emaus and A. M. Keirse (cartel damage); Corte di Cassazione Sez III, 30 October 2021, n 24177 (potential increase of survivor's earnings because deceased worked in same partnership).

[22] See, generally sympathetic to this approach, THÜSING, G. *Wertende Schadensberechnung*. München: C. H. Beck, 2001. ISBN 9783406478406, p. 55 ff, 437 ff (distinguishing between congruence and correspondence); KNETSCH, J. La déduction des avantages nés d'un fait dommageable (compensatio lucri cum damno). In LECOURT, B., VINEY, G., MATSOPOULOU, H., JOURDAIN, P. (eds.). *Mélanges en l'honneur du Professeur Suzanne Carval*. Paris: IRJS, 2021. ISBN 9782850020452, p. 483 f.

[23] See BÜDENBENDER, U. *Vorteilsausgleichung und Drittschadensliquidation bei obligatorischer Gefahrentlastung.* Tübingen: Mohr (Paul Siebeck), 1996. ISBN 9783161464874, p. 19 ff; KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, D 2 no 49; FLUME, J. W. In HAU, W., POSECK, R. (Hrsg.). *Beck'scher Online-Kommentar zum BGB*. 69. Edition. München: C.H. Beck, 2024, § 249 no 331 f.

[24] WILBURG, W. Zur Lehre von der Vorteilsausgleichung. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*. 1932, Vol. 82, 51-148, p. 77.

[25] WILBURG, W. Zur Lehre von der Vorteilsausgleichung. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts.* 1932, Vol. 82, 51-148, p. 54.

to general limits beyond actual causation.[26] Often, there is an intuition that the benefit was too unlikely, or that the harmful act did not cause the benefits in a strong, thick sense.[27] Some also speak of a lack of 'congruence' between harm and benefit.[28] Consider, for instance, the somewhat far-fetched textbook case that my neighbour wrongfully cuts down my tree whereby I find a treasure in it.[29] This windfall was without doubt caused by the event in terms of actual causation but the gain arose due to pure chance and so it does not seem very necessary or intuitively right to deduct it from whatever harm I suffered by the illegal felling of my tree. This is why many legal systems use ideas such as the harm and benefit must have been caused by 'one and the same event', the tortious act must have been an adequate or proximate cause for the benefit or that the causation of the benefit must have been in some way foreseeable.

Several problems arise with criteria such as these. The main problem is that these formulas might solve the very unlikely treasure case I just mentioned, but they have a less impressive record in solving actual cases, such as those concerned with collateral benefits from an insurance or social security system. Let me give you an example. In 2017, the Italian *Corte di Cassatione* had to decide whether to reduce a widow's claim for lost maintenance from the fatal accident of her husband by the benefits she had received from a survivor's pension.[30] The court delivered an in-depth analysis of deduction of benefits. It and emphasised, among others, that benefits too remote from the origin of harm should not be deducted. But did it really ask how likely killing a person will trigger a survivor's pension, or how close this event intuitively seems to the tortious act? Despite its language, the *Corte di Cassatione* did not offer such an analysis.[31] It referred the case to the plenary session (*Sezzione Unite)* of the court,[32] which abandoned the approach for other criteria that I shall discuss later. This is not a coincidence.

[26] See generally, and with a defence of this approach, VON BAR, Ch. *The Common European Law of Torts.* Volume Two. Oxford: Oxford University Press, 2000. ISBN 9780198298397, no 427 ff.

[27] For a classic analysis of stronger meanings of causations in language than conditio sine qua non, see HART, H. L. A., HONORE, T. *Causation in the law.* 2nd Edition. New York: Oxford University Press, 1985. ISBN 9780198254744, p. 109 ff. For instance, P. Oertman's famous monography (OERTMANN, P. *Die Vorteilsausgleichung beim Schadensersatzanspruch im römischen und deutschen bürgerlichen Rechte*. Reprint 2018 (1. April 1901). Berlin: De Gruyter, 2018. ISBN 9783111173818, p. 132 ff) distinguishes between root cause (*Ursache*) and mere condition (*Bedingung*).

[28] See, eg, THÜSING, G. *Wertende Schadensberechnung*. München: C. H. Beck, 2001. ISBN 9783406478406, p. 55, 439 ff (with criticism).

[29] The original source appears to be HECK, P. *Grundriss des Schuldrechts*. Tübingen: Mohr (Paul Siebeck), 1929, p. 49 f.

[30] Corte di Cassazione, Sez III, 22 June 2017, n 15536, ETL 2017 comment E. Bargelli; on the (former) position of Italian law expressed herin, see further SPADA, C. The Equalisation of Benefits (Compensatio Lucri Cum Damno) in the Italian Law. A Possible Inspiration for Other European Member States? *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 665-682. ISSN 0928-9801, p. 671 f.

[31] Similar things can be said for German case law, which demands adequate causation of the benefit but does not seem to actually apply the criterion in any relevant sense. See, for instance, Bundesgerichtshof 25 Mai 2020, VI ZR 252/19, in ETL 2020, 220 comment J. Kleinschmidt (advantageous use of cars in emissions scandal). This critique is not new, see CANTZLER, K. Die Vorteilsausgleichung beim Schadensersatzanspruch. *Archiv für die civilistische Praxis*. 1957, Vol. 156, No. 1, p. 29-59. ISSN 0003-8997, p. 29, 45, 49 ff.

[32] Corte di Cassazione, Sez Unit, 22 May 2018, 12564, 12565, 12566, 12567, Responsabilità civile e previdenza, 2018, 1148.

Many years of theoretical discourse on the attribution of harm have shown it is very difficult to fill ideas of remoteness and causal chains with a precise and convincing meaning, and for benefits, this is no different.

Once it is accepted that concepts of proximity or adequate causation cannot deliver one unique formula for dealing with collateral benefits, it is a secondary question whether deduction of benefits resulting from extreme cases of luck is nonetheless necessary. This problem should be set into the context of an interesting debate on 'pure chance' or 'moral luck',[33] but it remains rather theoretical, and it is not my task here to go into more detail. In any case, at least in the German discourse, the general view is that limiting deduction by way of a general formula was too ambitious, and discussion has turned its attention to specific sets of cases.

2. THIRD PARTY PAYMENTS AND THE TELEOLOGICAL APPROACH

As an Austrian academic, I cannot but mention that a decisive suggestion came from Walter Wilburg's 1932 article on deduction. As already noted, Wilburg underlined the weakness of general formulas[34] and that the problem of deducting benefits in many cases really is a problem of transmission of harm to a third party, which should not relieve the tortfeasor.[35]

To walk you through this idea in more detail, let me return to the case from my introduction where a person was injured, but his aunt amply compensated him for all financial losses. All jurisdictions seem to agree that such gratuitous payments by relatives are not deductible. Indeed, some jurisdictions place a near exclusive focus on cases of this kind, rather than deduction of benefits generally, as one can see in French and English standard treatises.[36] As mentioned, the practically

[33] It is still worth reading CANTZLER, K. Die Vorteilsausgleichung beim Schadensersatzanspruch. *Archiv für die civilistische Praxis*. 1957, Vol. 156, No. 1, p. 29-59. ISSN 0003-8997, p. 29, 46 ff. In the direction of loss, it is clear that fate and fortune can result in entirely different awards, and thus ' moments of carelessness' can produce a duty to compensate 'monumental loss' (thus, with criticism on tort liability as an institution, WALDRON, J. Moments of Carelessness and Massive Loss. In OWEN, D. G. (ed.). *The Philosophical Foundations of Tort Law*. Oxford: Clarendon Press, 1996. ISBN 9780198258476, p. 387. The German discussion regards it necessary to at least eliminate entirely inadequate results from the domain of compensatory rules because they bear no meaningful connection to responsibility (and offer no deterrent effect). Whether this reasoning also applies in the opposite direction of benefits is disputed even among the proponents of the aforementioned idea, on which see (against) CANTZLER, K. Die Vorteilsausgleichung beim Schadensersatzanspruch. *Archiv für die civilistische Praxis*. 1957, Vol. 156, No. 1, p. 29-59. ISSN 0003-8997. SCHIEMANN, G. Das Rätsel Vorteilsausgleichung. In LOBINGER, T., RICHARDI, R., WILHELM, J. (eds.). *Festschrift für Eduard Picker zum 70. Geburtstag*. Tübingen: Mohr Siebeck, 2010. ISBN 9783161506161, p. 697, (in favour) WENDEHORST, Ch. *Anspruch und Ausgleich: Theorie einer Vorteils- und Nachteilsaugleichung im Schuldrecht.* Tübingen: Mohr Siebeck, 1999. ISBN: 9783161471431, p. 120 f; THÜSING, G. *Wertende Schadensberechnung*. München: C. H. Beck, 2001. ISBN 9783406478406, p. 470 ff.

[34] WILBURG, W. Zur Lehre von der Vorteilsausgleichung. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*. 1932, Vol. 82, 51-148, p. 51 ff.

[35] WILBURG, W. Zur Lehre von der Vorteilsausgleichung. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts.* 1932, Vol. 82, 51-148, p. 55 ff.

[36] See VINEY, G., JOURDAIN, P. *Les effets de la responsabilité*. 3e édition. Paris: LGDJ, 2011. ISBN 9782275033990, no 153 ff; BACACHE-GIBEILI, M. *Traité de droit civil. Les obligations. La responsabilité civile extracontractuelle.* Tome 5. 4e édition. Paris: Economica, 2021. ISBN 9782717872309, no 607 ff (discussion under 'nothing but the damage', but with a strong focus on third party cases); EDELMAN, J., VARUHAS, J., COLTON, S. *McGregor on*

relevant scenario is payment from insurance or social security, so I will talk a bit more about these cases now.

When the question of insurance as a deductible benefit is raised, sometimes lawyers with positivist or textualist instincts say that the answer is easy and does not deserve much attention, because this or that code, statute or case law gives the insurance company or social security institution a *right of subrogation*. That means that the law permits the insurer or institution to bring the victim's claim against the tortfeasor either from the time of injury or from the time of payment. And it is true that if the legislators or the courts allow subrogation, they implicitly solve the problem of collateral benefits. From the perspective of the victim, the benefit is deducted, because they may not bring a claim. But from an overall perspective, the benefit is not deducted, because the cause of action continues to exist and the insurance company or social security institution may still bring the claim in full. Nonetheless, there are good reasons for trying to understand *why* black-letter law order subrogation and therefore – in an overall perspective – no deduction. First, an explicit subrogation rule may be lacking, as in the Italian decision from 2017, and also in a Czech decision from 2018.[37] Second, there are enough borderline cases where the courts are unsure as to whether a claim falls under the subrogation rule and therefore also whether deduction should be allowed.[38]

One influential idea for making sense of third party payment cases is that the autonomy of third parties allows them to choose for themselves whether or not they wish to relieve the tortfeasor with their funds.[39] This is very plausible because persons are allowed, as far as feasible, to interact as they

Damages. 21st Edition. London: Sweet & Maxwell, 2020. ISBN 9780414081482, no 40-151, 225 ff; CAPPELLETTI, M. Compensatio Lucri cum Damno in Tort Law: An English Perspective on the Italian Four Judgments. *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 701-712. ISSN 1875-8371, p. 701. But see recently, for France, Cour de cassation civ 1, 28 September 2016, 15-18.904, Dalloz 2016, 2061 (observations S. Carval) = La Semaine juridique - Édition générale (JCP G) 2017, 257 no 4 (observations P. Stoffl-Munck) and further KNETSCH, J. La déduction des avantages nés d'un fait dommageable (compensatio lucri cum damno). In LECOURT, B., VINEY, G., MATSOPOULOU, H., JOURDAIN, P. (eds.). *Mélanges en l'honneur du Professeur Suzanne Carval*. Paris: IRJS, 2021. ISBN 9782850020452, on the potential of a general discussion under French law.

[37] 14. May 2018, No 25 Cdo 5551/2017, ETL 2017, no 36 ff (comment J. Hrádek), applying a general resource procedure under sec 2917 Czech Civil Code.

[38] This clearly shows in France in spite of rather detailed provisions on subrogation, VINEY, G., JOURDAIN, P. *Les effets de la responsabilité*. 3e édition. Paris: LGDJ, 2011. ISBN 9782275033990, no 154, 159, 164 ff.

[39] See, among others, SCHIEMANN, G. Das Rätsel Vorteilsausgleichung. In LOBINGER, T., RICHARDI, R., WILHELM, J. (eds.). *Festschrift für Eduard Picker zum 70. Geburtstag*. Tübingen: Mohr Siebeck, 2010. ISBN 9783161506161, p. 703 f; VON BAR, Ch. *The Common European Law of Torts.* Volume Two. Oxford: Oxford University Press, 2000. ISBN 9780198298397, no 432. WENDEHORST, Ch. *Anspruch und Ausgleich: Theorie einer Vorteils- und Nachteilsaugleichung im Schuldrecht.* Tübingen: Mohr Siebeck, 1999. ISBN: 9783161471431, no 125. As so often, one can discuss whether it makes a difference to remould this autonomy-based reasoning into an instrumental version, namely that "the springs of private charity would be found to be largely if not entirely dried up" if such payments were deducted (Northern Ireland Court of Appeal, *Redpath v Belfast and County Down Railway* [1947] NI 167). Why would charity cease? Because it would be "revolting to the man's person's sense of justice" to relieve the tortfeasor against their will; House of Lords 5 Feburary 1969, *Parry v Cleaver*, [1970] AC 1 per Lord Reid. And thus, the idea of autonomy resurfaces. Similar things may be said on the reference to *statutory purposes* popular in Germany (in this case again going back to WILBURG, W. Zur Lehre von der Vorteilsausgleichung. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*. 1932, Vol. 82, 51-148, p. 76 f). Where the lawmaker's

see fit, and if, for instance, a victim's aunt gives him something in order to support him, the law respects that the aunt does not intend to relieve the tortfeasor. And why should a potential victim also not have the power to agree with his insurer in advance that their agreement does not affect the policyholder's claim in damages, or even that he receives a double indemnity if he is willing to pay for it?[40] The intentions of the parties therefore become decisive. For instance, first party insurance does not relieve the tortfeasor – with the possible exception of family members – but whether the victim or the insurance may pursue the compensation claim depends on the type of insurance. By contrast, third-party insurance may more often aim at protecting the tortfeasor, for instance if an employer takes out private accident insurance for a vehicle or for employees. In this case, the tortfeasor might benefit from the payment if he is a close relative[41] or, more evidently, if the policyholder herself happens to be responsible for the work accident.[42] The idea has a lot of force in Europe: For instance, the already mentioned decisions of the Plenary Session of the Corte di Cassazione adopted it in 2018, moving away from the former causation-based theories.[43] The thought is sometimes expressed in other terminology. For instance, French law on the subject is casuistic, but questions often turn on whether payments are 'compensatory' and therefore deducted while 'non-compensatory' payments are not.[44] But to find out what 'compensatory' is, the 'modalities of calculation' of the indemnity are relevant,[45] and whether the tortfeasor should be relieved,[46] which obviously correlate with the purpose of the insurance.

Social security systems are somewhat different from private payers, because here one can only refer to the purpose of an institution rather than private intentions to decide hard cases. This is especially important since the legislative intention more often includes relieving even the tortfeasor given certain conditions, which means in effect that there is a deduction of benefits and no subrogation. For instance, Scandinavian and Polish social security institutions usually have no right of subrogation

intentions are not clear, this purpose itself must be constructed by arguments that necessarily go beyond what is contained in the statute and its history, though the overall structure may at least give a decisive hint as to what it is.

[40] Compare GOUDKAMP, J., NOLAN, D. *Winfield and Jolowicz on Tort.* 20th Edition. London: Sweet & Maxwell, 2020. ISBN 9780414066212, no 23-094.

[41] Bundesgerichtshof 13 January 1981, VI ZR 180/79, BGHZ 80, 8.

[42] See, eg, the *English* case Court of Appeal, 26 March 2004, *Pirelli General PLC and others v Gaca* [2004] WLR 2683.

[43] Corte di Cassazione, Sez Unit, 22 May 2018, 12564, 12565, 12566, 12567 Responsabilità civile e previdenza 2018, 1148 (see already above fn 8).

[44] For the general idea, see BACACHE-GIBEILI, M. *Traité de droit civil. Les obligations. La responsabilité civile extracontractuelle.* Tome 5. 4e édition. Paris: Economica, 2021. ISBN 9782717872309, no 611 ff; VINEY, G., JOURDAIN, P. *Les effets de la responsabilité*. 3e édition. Paris: LGDJ, 2011. ISBN 9782275033990, no 154 ff. Similarly for *Belgium* Cour de Cassation/Hof van Cassatie, 07.09.2004, P.04.0315.N, ETL 2004, 185 comment I. C. Durant (no deduction of survivor's pension).

[45] Cass Ass plén, 19 December 2003, n 01-10670 (no deduction/compensatory nature of group salary insurance triggered by road traffic accident); and even clearer in social security payments, eg Cass civ 1, 24 October 2019, n 18-21339 (compensatory nature/deduction of allocation personnalisée d'autonomie).

[46] Thus, CHAUVIRE, P. Créance de réparation et prestations versées par des tiers. Le principe de réparation intégrale à l'épreuve. *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 713-720. ISSN 1875-8371, p. 713, 714 ff observes a convergence between the Italian and French approach to deduction.

against tortfeasors.[47] The question whether there should be subrogation is often casuistically decided by statute;[48] in cases of doubt, the discussion often turns to notions of 'congruence'. I would suggest these considerations often lead back to the purpose of the institution.

In the teleological view, who has standing to bring the claim becomes a secondary question. The hidden primary significance of subrogation rules is to clarify that there is no deduction of benefits in case a third party pays.[49] And, to some extent, the relevance of purpose also explains why European jurisdictions provided such different answers as to which claims can be subrogated. For instance, where the third party is a private insurer, much depends on what type of arrangement is usual in a jurisdiction. The English system makes a rather broad assumption that the victim is entitled to double compensation where the personal injury scheme was funded by their payments,[50] although it is rooted in tradition that property insurance is an 'indemnity insurance' that is generally deducted from damages.[51] The French system allows subrogation in a purportedly exhaustive list of circumstances and double compensation otherwise, although this is again limited to personal injury cases.[52] In the German systems, insurance contract law generally treats subrogation as the basic rule and the parties must actively seek a '*Summenversicherung'* – insurance on a fixed sum basis – in order to actively isolate the payment from subrogation and allow the victim double recovery.[53]

Thus, I might summarise that, in the case of benefits received from a third party, the purposes informing the relation of the third party to the parties involved in the tort become relevant: first, in

[47] For a discussion, see eg the remarks by ASKELAND, B. Social Security Systems, Risk-Spreading and the Compensation of Damage in the Case of Personal Injury. In KOZIOL, H. (ed.). *Comparative Stimulations for Developing Tort Law.* Wien: Jan Sramek Verlag, 2015. ISBN 9783709700600, p. 3, 15 ff. And LUDWICHOWSKA-REDO, K. Social Security Systems, Risk-Spreading and the Compensation of Damage in the Case of Personal Injury. In KOZIOL, H. (ed.). *Comparative Stimulations for Developing Tort Law.* Wien: Jan Sramek Verlag, 2015. ISBN 9783709700600, p. 19 ff.

[48] For a succinct summary, see MAGNUS, U. Comparative Report. In MAGNUS, U. (ed.). *The Impact of Social Security Law on Tort Law.* Wien: Springer, 2003. ISBN 9783211837955, no 56 ff.

[49] See, eg, SCHIEMANN, G. Das Rätsel Vorteilsausgleichung. In LOBINGER, T., RICHARDI, R., WILHELM, J. (eds.). *Festschrift für Eduard Picker zum 70. Geburtstag*. Tübingen: Mohr Siebeck, 2010. ISBN 9783161506161, p. 706.

[50] *Parry v. Cleaver* [1970] AC 1, see further EDELMAN, J., VARUHAS, J., COLTON, S. *McGregor on Damages*. 21st Edition. London: Sweet & Maxwell, 2020. ISBN 9780414081482, no 40-151 ff, CAPPELLETTI, M. Compensatio Lucri cum Damno in Tort Law: An English Perspective on the Italian Four Judgments. *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 701-712. ISSN 1875-8371, p. 704 ff. It is noteworthy that *property* insurance is compensatory, with the conclusion that property insurance benefits are generally deductible.

[51] See CAPPELLETTI, M. Compensatio Lucri cum Damno in Tort Law: An English Perspective on the Italian Four Judgments. *European Review of Private Law*. 2020, Vol. 28, No. 3, p. 701-712. ISSN 1875-8371, p. 705 f.

[52] Loi n° 85-677 de 5 julliet 1985 arts 29 ff; BACACHE-GIBEILI, M. *Traité de droit civil. Les obligations. La responsabilité civile extracontractuelle.* Tome 5. 4e édition. Paris: Economica, 2021. ISBN 9782717872309, no 613; see on remaining cases VINEY, G., JOURDAIN, P. *Les effets de la responsabilité*. 3e édition. Paris: LGDJ, 2011. ISBN 9782275033990, no 160-1. Where subrogation applies, victims may negotiate more favourable rules with their insurers (art 33 paragraph 2 Loi n° 85-677).

[53] Bundesgerichtshof 20 December 1972, IV ZR 171/71, VersR 1973, 224; Oberster Gerichtshof, 11 September 1986, 7 Ob 39/86, Sammlung für Zivilrecht 59/149.

determining whether the tortfeasor should be relieved, and second, if he should not be relieved, in determining whether the victim should be enriched or whether the insurer may recover instead.

This is also the state of the art codified by the PETL. Art 10:103[54] states that benefits of the injured party must be taken into account unless this cannot be reconciled with the 'purpose' of the benefit. However, it is interesting to note that although the PETL clearly have third party payments in mind, they seem to suggest that the benefit's purpose is relevant even beyond such cases, even in purely bilateral scenarios such as windfall gains from incinerated mansions or the tree trunk treasure case, or other cases I will turn to shortly. I am not so sure this is justified. A commonsensical way of understanding purposes is that they are something connected to the activity of persons, their intentions or their goals. [55] On this reading there is no purpose in mere good fortune, such as finding a hidden treasure. Helmut Koziol suggests that the relevant purpose in that case could arguably be the function underlying the relevant statutory law on acquiring treasures.[56] This seems quite true, because of the general relevance of a statute's purpose, but it may often be a problem that such statutes and their history will not have much to say about the fate of potential tortfeasors.

In its Art VI 6:103[57] (1), the DCFR expressly limits the purpose criterion to third party payments. In other aspects, the DCFR rule is more problematic. The drafters rightly observe that denying a deduction of benefits is the general rule in third party payment cases,[58] but for some reason they decided to make denial of deduction the general default rule, even for cases besides third party payments. I disagree, and as far as I can see, so does the majority of European jurisdictions. As the substantive criterion for assessing deduction, the DCFR refers to the kind of damage sustained and the nature of the accountability of the person causing the damage. Again, the general idea of giving the judge several principles for a decision seems sound, but the draft is not clear on why these principles should be relevant for deduction of benefits rather than assessment more generally.

[54] Art 10:103 PETL reads:
"Benefits gained through the damaging event.
When determining the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit."
[55] Of course, the extent intentions matter is in itself debatable – Aristotelian, Hegelian or Heideggerian views may disagree, and this is a point that could be debated much further – but the point here is merely that legal doctrine shies away from assuming purposes entirely unrelated to human action.
[56] KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, vol I D 2 no 72.
[57] Art VI 6:103 DCFR reads:
"Equalisation of benefits
(1) Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account.
(2) In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the nature of the accountability of the person causing the damage and, where the benefits are conferred by a third person, the purpose of conferring those benefits."
[58] VON BAR, Ch. (ed.). *Principles of European Law. Study Group on a European Civil Code. Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab. Dam.).* Oxford: Oxford University Press, 2009. ISBN 9780199229413, Art 6:103, Comment 1 f (p. 932 f).

3. CASES BEYOND THIRD PARTY PAYMENTS?

Although third party payments are clearly the most relevant case of deduction, many cases already mentioned seem to suggest that the problem of deduction is not limited to them. Both the PETL and the DCFR seem to suggest so as well, even if their proposed solutions for such cases remain incomplete.

For a first potentially relevant scenario, allow me to return to the arsonist case. This time, he just burns down an ordinary house and so this time the land objectively lost value. But the owner is a do-it-yourself enthusiast and just rebuilds it for next to no cost although – and this is crucial – he was not under an obligation to mitigate his loss in this way. Again, some find it unfair to say that the owner suffered no loss, just because he resolved the harm by efforts that went well beyond any obligation to mitigate the loss and although he certainly did not want to relieve the tortfeasor.[59] Germanic jurisdictions in such cases therefore tend to deny deduction of the benefit insofar as it was produced by the victim. Thus, as far as this case really belongs to deduction[60] it may suggest that harm need not be transferred to a third party in all cases to justify a denial of deduction.

Similar rules could apply where the victim does not reconstruct the house herself but is an able businessperson who struck a deal with a buyer that left her with an unlikely net plus.[61] This may seem like just another case of a third party payment, but – and this is again crucial – the third party has no relevant intentions regarding the victim's harm. This is what is sometimes referred to as a 'passing on case', where the buyer manages to shake off her loss by a contract with another person. German doctrine assumes that she can still claim damages where only her exceptional efforts lead to the net plus. Here many will also think of the EU cartel directive,[62] which in its Art 13 *does* allow a deduction of benefits – the so-called passing on defence – in the case of damage suffered by a cartel. There is an

[59] See THÜSING, G. *Wertende Schadensberechnung*. München: C. H. Beck, 2001. ISBN 9783406478406, p. 447 f; OETKER, H. In SÄCKER, F. J., RIXECKER, R., OETKER, H., LIMPERG, B. (eds.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2: Schuldrecht. Allgemeiner Teil I. §§ 241-310.* 9. Auflage. München: C.H. Beck, 2022. ISBN 9783406766725, § 249 no 273; SONNENBERGER, H. J. Der Vorteilsausgleich: Rechtsvergleichende Anmerkungen zu einer fragwürdigen Rechtsfigur. In GRAF VON WESTPHALEN, F., SANDROCK, O. (Hrsg.). *Lebendiges Recht: von den Sumerern bis zur Gegenwart; Festschrift für Reinhold Trinkner zum 65. Geburtstag*. Heidelberg: Verlag Recht und Wirtschaft GmbH, 1995. ISBN 9783800511479, p. 735 with reference to Cass civ 19 November 1975, DS 1976 J 137.

[60] But see THÜSING, G. *Wertende Schadensberechnung*. München: C. H. Beck, 2001. ISBN 9783406478406, p. 447-8; KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, I D 2 no 76, who argue that what seems like a denial of deduction might also be understood as a cross-claim in restitution (in continental law, negotiorum gestio) of the victim.

[61] See Bundesgerichtshof 6 June 1997, VI ZR 115/96, BGHZ 136, 52 NJW 1997, 2387; SCHIEMANN, G. Das Rätsel Vorteilsausgleichung. In LOBINGER, T., RICHARDI, R., WILHELM, J. (eds.). *Festschrift für Eduard Picker zum 70. Geburtstag*. Tübingen: Mohr Siebeck, 2010. ISBN 9783161506161, p. 702 f; OETKER, H. In SÄCKER, F. J., RIXECKER, R., OETKER, H., LIMPERG, B. (eds.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 2: Schuldrecht. Allgemeiner Teil I. §§ 241-310.* 9. Auflage. München: C.H. Beck, 2022. ISBN 9783406766725, no 274.

[62] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.

uneasy relationship between the directive and the general principles for collateral benefits.[63] But it should not be overestimated because cartel damage is a special case. Under the directive, if the third party suffered harm itself, then it has a direct claim against the tortfeasor (art 12 [1]). This is exceptional and changes the equation; it is rather similar in result to a subrogation rule. And if the third party is unlikely to bring the claim, it is still open for debate whether a Member State's transposition of the directive may deny the passing on defence,[64] and therefore deduction of benefits. So the actual position of the directive is not *really* that passing on benefits should always be deductible. Therefore, outside cartel law, where the third party usually has *no claim* of their own, either because they suffer no harm or because of the 'relativity' or 'privity' of contracts, it is still possible to argue that deduction should sometimes be denied.

The ongoing litigation in the Diesel Emission Scandal is further proof that deduction of benefits can be relevant beyond third party payments, especially if there are specific arguments against a full deduction. To remind, the already mentioned CJEU decision in *Mercedes Benz Group AG* suggests that a mechanical deduction of all benefits may run against the instrumental concerns of deterrence envisaged by EU law (the Court). Thus, it appears a cautious approach is necessary for deducting benefits where the cause of action is a breach of EU regulatory law.

4. REVISITING MEANS OF ASSESSING DAMAGES

I come to a final and rather fundamental point particularly important from an Austrian perspective, namely the relevance of concepts of loss and means of assessment for deduction. I said in the beginning that I will work under the assumption that pecuniary loss is the difference between the victim's current *assets* and the assets the victim would have had without the harmful act. Now, the difference hypothesis is, without doubt, widely embraced, but it is not without alternatives, and it is uncertain how far it is really implemented in European practice. Awarding damages, after all, depends on normative judgements. There is nothing that keeps the relevant authority or legal reasoning from using a different method – or even a different concept of harm – whether because the difference in *estates* does not accurately reflect the true value or function of an entitlement, or for pragmatic reasons.[65] The final point I want to make therefore is that the meaning of deducting benefits changes significantly if the method of assessing damages is changed.

Norwegian law provides a nice illustration of a rather reductive method. Where a minor is disabled and will never be able to work, the judges do not try to estimate what assets she will lose but award her a fixed sum as lost earnings.[66] Now, what role do benefits play in such a scenario, eg if the

[63] On which, see eg WEBER, F. *Der Kartellschaden*. Tübingen: Mohr Siebeck, 2021. ISBN 9783161607066, p. 238 ff.

[64] WEBER, F. *Der Kartellschaden*. Tübingen: Mohr Siebeck, 2021. ISBN 9783161607066, p. 132; see also the position of the first instance court in Hoge Raad 8 July 2016, ETL 2016, 403 comment J. M. Emaus and A. M. Keirse, at no 38.

[65] See, among others, the critical discussions of the hypothesis cited in fn **Chyba! Záložka není definována.**.

[66] § 3-2a Compensatory Damages Act 13 June 1969, no 26, translated by A. M. Frøseth and B. Askeland in KARNER, E., OLIPHANT, K., STEININGER, B. C. (eds.). *European Tort Law. Basic Texts.* 2nd Edition. Wien: Jan Sramek Verlag,

child manages to use the coverage of that accident to become a wealthy influencer? A Norwegian lawyer would probably not have to reason much to deny deduction, because one of the reasons why this sum is imposed is to end all quarrel about what will or would have happened in the victim's life. While lump sum assessments of the Norwegian kind are exceptional, personal injury often necessitates simplifications, such as rough assessments of future lost earnings that are not necessarily subject to later revision. Insofar they exclude both a later aggravation (harm) and a later improvement of the claimant's situation (benefit), simply because this harm and benefit is outside the assessment employed.[67]

Recent case law of the German Bundesgerichtshof[68] and the Austrian Oberster Gerichtshof[69] seems to be based on a similar logic, although its legitimacy is more doubtful. Both courts reacted rather dramatically the CJEU decision in *Mercedes Benz* and now allow vehicle owners to mechanically claim between 5-15 % of the original purchasing price they paid to the seller from the producer, without offering (and indeed, without being permitted to offer) any evidence on their lost wealth. This rather problematic solution is similar to the Norwegian lump sum assessment. Should it remain in place in litigation based on EU regulatory law despite the heavy criticism it received, it also becomes relevant whether benefits can be deduced from these 5-15 % or not. I would argue that no deduction of benefits should then be allowed, simply because narrowing down the relevant loss also means, in principle, that the relevant benefits must be narrowed down as well.[70]

This observation leads to a broader point. Austrian (and similarly, Czech) law employs a second way of assessing pecuniary damages not just in the face of specific cases but more generally: where entitlements such as property or working capacity suffer harm, victims may – and in the case of slight negligence they even must – demand an 'abstract assessment' of damages under § 1332 Austrian Civil Code, which in essence means that Austrian courts award the ordinary value for a comparable entitlement on the market without regard to the specific situation of the victim.[71] Austrian lawyers

2018. ISBN 9783709701706, p. 255 f. For a case, see Høyesterett 1 April 2009, Rt 2009 s 425, ETL 2009, 462 comment A. Anfinsen and B. Askeland.

[67] On simplified assessment in light of future and modal uncertainty, see further MESSNER-KREUZBAUER, D. Quantifying or Avoiding the Unknown? Damages for future lost earnings in tortious personal injury cases. In BELL, A., MCCUNN, J. *Known Unknowns: Legal Responses to Intractable Uncertainties in Comparative and Historical Perspective* (in preparation).

[68] Bundesgerichtshof 26 June 2023, VIa ZR 335/21 *Juristenzeitung* 2023, 769 comment T. Lobinger NJW 2023, 2236 comment R. Schaub VersR 2023, 1117 comment M. Birkholz.

[69] Oberster Gerichtshof 28 September 2023, 10 Ob 27/23b, ETL 2023 (to be published autumn 2024) comment D. Messner-Kreuzbauer/B. C. Steininger.

[70] Similarly LUTSCHONIG, M. Neue Haftungs- und Beweisfragen in Dieselmassenverfahren. *Zeitschrift für Verkehrsrecht.* 2024, Vol. 69, No. 2, p. 103-110. ISSN 0044-3662, p. 103, 106 f. The German Bundesgerichtshof allows deduction where benefits exceed the purchasing price, see 26 June 2023, VIa ZR 335/21.

[71] § 1332 Austrian Civil Code reads: "Damage which has been caused through a lower degree of negligence or carelessness is compensated according to the ordinary value of the thing at the time of the damage." STEININGER, B. C. in KARNER, E., OLIPHANT, K., STEININGER, B. C. (eds.). *European Tort Law. Basic Texts.* 2nd Edition. Wien: Jan Sramek Verlag, 2018. ISBN 9783709701706.

generally assume that deduction of benefits is very limited under this regime,[72] because one aim of this assessment method is to insulate the claim from all particular circumstances of the victim. And this makes some cases very simple, such as the case where the victim rebuilt the house herself – this simply does not matter because only the loss in market value at the time of the tort is relevant. But it is important to note that deduction of benefits does not cease to exist; rather it just narrows down as far as the method of assessment is changed. And thus as the Supreme Court underlined in an actual case about a burned house,[73] benefits produced in the thing itself – or perhaps more plausibly, benefits reflected in its ordinary market value – must still be considered.

Similar considerations appear to be relevant for the problem whether non-pecuniary gains may be deducted from pecuniary gains, pecuniary gains from non-pecuniary losses, or non-pecuniary gains from non-pecuniary losses of a different kind.[74] In all of these cases, it appears to be the general rule that a deduction is in principle not possible across different categories of loss. But the general rules for such cross-category deductions have not yet received sufficient attention in the mainstream debate.

There may be exceptional cases where benefits must be deducted although they are not relevant for the category of loss in question. For a potential example, consider that many European jurisdictions allow restitution in kind. It is not entirely clear whether restitution in kind is based on a different method of assessing harm or an entirely different concept of harm, and this makes matters difficult. In any case, if a destroyed thing was old and the tortfeasor nonetheless has to compensate the victim with a new object, some suggest that he may claim the benefit of having a new thing from the victim. Some academics see this as a close relative of a collateral benefit.[75]

Thus, where the assessment or relevant mode of compensation changes, 'deduction of benefits' changes with it, and it usually becomes the exception.

CONCLUSION

I arrive at the end of my presentation. Allow me to summarize. It is certain that the deduction of benefits plays a considerable role in European tort law. General formulas as to which benefits must or must not be deducted, relying on concepts such as correlation, proximity or adequacy have so far not been successful in describing which benefits may or may not be deducted. Rather unanimous solutions

[72] See KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, vol I D 2 no 33.

[73] Oberster Gerichtshof, 29 May 2008, 2 Ob 176/07g, ETL 2008, 118 comment B. C. Steininger.

[74] See PLETZER, R. Vorteilsausgleich beim Schmerzengeld? *Juristische Blätter*. 2007, Vol. 129, No. 7, p. 409-433. ISSN 0022-6912; ERM, D. *Vorteilsanrechnung beim Schmerzensgeld - ein Beitrag zur Fortentwicklung des Schadens(ersatz)rechts*. Karlsruhe: Verlag Versicherungswirtschaft GmbH, 2013. ISBN 9783899527254; Oberster Gerichtshof, 18 July 2002, 10 Ob 209/02m, ETL 2002, 76 comment B. C. Steininger.

[75] See WENDEHORST, Ch. *Anspruch und Ausgleich: Theorie einer Vorteils- und Nachteilsaugleichung im Schuldrecht.* Tübingen: Mohr Siebeck, 1999. ISBN: 9783161471431, p. 103 f; KNETSCH, J. La déduction des avantages nés d'un fait dommageable (compensatio lucri cum damno). In LECOURT, B., VINEY, G., MATSOPOULOU, H., JOURDAIN, P. (eds.). *Mélanges en l'honneur du Professeur Suzanne Carval*. Paris: IRJS, 2021. ISBN 9782850020452, p. 477, 483; but against the idea as such, KOZIOL, H. *Österreichisches Haftpflichtrecht*. 4. Auflage. Wien: Jan Sramek Verlag, 2020. ISBN 9783709702253, vol I D 1 no 50 ff.

have been found for third party payments, such as, in particular, by insurers and social security institutions. In these cases, it is the purpose followed by the third party or institution that is relevant for the effect. But I also discussed the fact that the problem is not limited to this, that there may be other cases such as passing on harm by contract, extraordinary efforts by the victim and perhaps even cases of extreme fortune. Finally, I suggested that the problem transforms significantly if we take an alternative approach to damages instead of the difference principle.

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